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8  
9 UNITED STATES BANKRUPTCY COURT

10 CENTRAL DISTRICT OF CALIFORNIA – SAN FERNANDO VALLEY DIVISION

11 In Re:

12 MERUELO MADDUX PROPERTIES,  
13 INC., et al.,

14 Debtors-in-Possession.

Case No.: 1:09-bk-13356-KT

Jointly Administered

Chapter 11

**BANK OF AMERICA, N.A.'S OBJECTION  
TO DEBTORS' SECOND AMENDED  
DISCLOSURE STATEMENT**

Date: June 14, 2010

Time: 9:30 a.m.

Place: 21041 Burbank Blvd., Courtroom 301  
Woodland Hills, CA

18  
19 Bank of America, N.A. ("Bank"), a secured creditor of Meruelo Maddux Properties  
20 — 760 Hill Street, LLC ("760 S. Hill LLC") and Merco Group — Southpark LLC  
21 ("Southpark LLC"), and an unsecured creditor of Meruelo Maddux Properties, Inc.  
22 ("MMPI"), by and through undersigned counsel, hereby objects (the "Objection") to the  
23 Debtors'<sup>1</sup> "*Second Amended Disclosure Statement*" (the "Second Amended Disclosure  
24 Statement") describing the "*Second Amended Joint Chapter 11 Plan of Meruelo Maddux  
25 Properties, Inc., et al.*" (the "Second Amended Plan").

26  
27 <sup>1</sup> "Debtors" refers to MMPI and the 53 jointly administered chapter 11 cases referenced in  
28 footnote 1 of the Second Amended Disclosure Statement.

1 This Objection is supported by the attached Memorandum of Points and  
2 Authorities, the previously filed *Bank of America's Objection to Debtors' Disclosure*  
3 *Statement Pursuant to Section 1125 of the Bankruptcy Code Accompanying Joint Plan*  
4 *and Consolidated Plan of Reorganization*, the previously filed *Bank of America's*  
5 *Objection to Debtors' First Amended Disclosure Statement Pursuant to Section 1125 of*  
6 *the Bankruptcy Court Accompanying First Amended Joint Plan of Reorganization* and all  
7 other papers and documents of record in this case.

8  
9 Dated: May 17, 2010

SNELL & WILMER, L.L.P.

10  
11 By: /s/ Eric S. Pezold (#255657)

12 Donald L. Gaffney  
13 Eric S. Pezold  
14 Jasmin Yang  
15 Counsel for Bank of America, N.A.  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The Debtors have failed to remedy the informational defects in the earlier two  
5 iterations of their disclosure statement. The Second Amended Disclosure Statement  
6 cannot be approved because it fails to provide adequate information concerning the  
7 Debtors' Second Amended Plan as required under Bankruptcy Code § 1125(a). The  
8 Second Amended Disclosure Statement: (1) fails to set forth a feasible claims objection  
9 process; (2) fails to contain information concerning the mechanics of voting; (3) contains  
10 liquidation analyses hampered by unreasonable assumptions; (4) fails to describe the  
11 radical modifications the Debtors seek to achieve through the Loan Modification  
12 Agreements they intend to impose upon their lenders; (5) fails to disclose that the Debtors  
13 are funding their principal's guaranty litigation and fails to disclose the extent of any  
14 corresponding indemnification or reimbursement obligations. Additionally, as in the prior  
15 versions of the disclosure statement, the Second Amended Disclosure Statement and the  
16 financial projections appended thereto are also premised on speculative assumptions that  
17 have no basis in fact or in the Debtors' historical performance.

18 Moreover, the Second Amended Disclosure Statement cannot be approved because  
19 it describes a Second Amended Plan that is unconfirmable on its face because it  
20 improperly classifies unsecured claims in an attempt to manufacture impaired consenting  
21 classes. The attempted manipulation of voting classes is indicative of the Second  
22 Amended Plan not being proposed in good faith. The Second Amended Plan is also  
23 patently unconfirmable because it: (1) impermissibly violates the absolute priority rule by  
24 describing an equity contribution scheme in which only current equity holders of the  
25 Debtors or only parties selected by the Debtors may take part, an approach that has  
26 specifically been disapproved by the Supreme Court; (2) includes impermissible non-  
27 debtor releases, discharges and injunctive relief; (3) proposes a cramdown rate of interest  
28 that is unsupported by law; (4) relies on a class of creditors that cannot count as an

1 impaired consenting class for cramdown confirmation purposes; and (5) improperly  
2 interferes with BofA's independent right to oppose creditor claims.

3 Finally, several of the defects present in the Debtors' prior versions of the  
4 disclosure statement have not been remedied in the Second Amended Disclosure  
5 Statement. The Second Amended Disclosure Statement is similar to the Debtors' original  
6 disclosure statement in that it: (1) lacks information concerning guarantor claims;  
7 (2) lacks adequate information concerning the Debtors' ability to make the payments  
8 proposed in its Plan; (3) lacks adequate information concerning accounts receivable, the  
9 extent and nature of avoidance actions and claims against creditors; (4) lacks adequate  
10 information concerning the accounting and valuation methods used in the preparation of  
11 the Second Amended Disclosure Statement; (5) lacks adequate information concerning the  
12 nature, likelihood of success and impact on creditors of non-bankruptcy court litigation;  
13 and (6) lacks adequate information concerning the Debtors' officers' compensation.

14 In short, creditors of the Debtors' estates have no intelligible information upon  
15 which to base their voting decisions. For all of these reasons, the Second Amended  
16 Disclosure Statement cannot be approved.

## 17 II.

### 18 THE SECOND AMENDED DISCLOSURE STATEMENT CANNOT 19 BE APPROVED BECAUSE IT DOES NOT PROVIDE CREDITORS 20 ADEQUATE INFORMATION AS REQUIRED BY 11 U.S.C. § 1125

#### 21 A. Standard for Approval of Disclosure Statements

22 The legal standard for the approval of a disclosure statement is whether the  
23 statement provides "adequate information," defined in Bankruptcy Code § 1125(a)(1) as:

24 Information of a kind, and in sufficient detail, as far as is  
25 reasonably practical in light of the nature and history of the  
26 debtor and the condition of the debtor's books and records,  
27 including a discussion of the potential material Federal tax  
28 consequences of the plan to the debtor, any successor to the  
debtor, and a hypothetical investor typical of the holders of  
claims or interests in the case, that would enable such a  
hypothetical investor of the relevant class to make an informed  
judgment about the plan ... and in determining whether a

1 disclosure statement provides adequate information, the court  
2 shall consider the complexity of the case, the benefit or  
3 additional information to creditors and other parties in  
4 interests and the cost of providing additional information....

5 11 U.S.C. § 1125(a)(1) (2010).

6 The disclosure requirements set forth in Section 1125 are “crucial to the effective  
7 functioning of the federal bankruptcy system . . . [and] the importance of full and honest  
8 disclosure cannot be overstated.” *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*,  
9 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank*  
10 (*In re Oneida Motor Freight, Inc.*), 848 F.2d 414, 417-18 (3d Cir. 1988), cert denied, 488  
11 U.S. 967 (1988)). The debtors’ compliance with Section 1125 assists creditors in  
12 negotiating with debtors over the terms of a plan. See *Century Glove, Inc. v. First*  
13 *American Bank of New York*, 860 F.2d 94, 101-02 (3d Cir. 1988). Approval of a  
14 disclosure statement should be denied when it does not contain adequate information. See  
15 *Menard Sanford v. Mebey (In re A.H. Robins Co.)*, 880 F.2d 694, 696 (4th Cir. 1989).  
16 The disclosure statement must describe all factors known to the plan proponent that may  
17 impact the success or failure of the proposals contained in the plan. See, e.g., *In re*  
18 *Beltrami Enters., Inc.*, 191 B.R. 303, 304 (Bankr. M.D. Pa. 1995); *In re Cardinal*  
19 *Congregate I*, 121 B.R. 760, 765 (Bankr. S.D. Ohio 1990); *In re Stanley Hotel, Inc.*, 13  
20 B.R. 926, 929 (Bankr. D. Colo. 1981). Indeed, Section 1125(a) was amended by the  
21 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to increase the  
22 required disclosure necessary for a disclosure statement to contain “Adequate  
23 Information.” “The importance of full disclosure is underlaid by the reliance placed upon  
24 the disclosure statement by the creditors and court. Given this reliance, “we cannot  
25 overemphasize the debtor’s obligation to provide sufficient data to satisfy the Code  
26 standard of ‘adequate information.’” *Kunica v. St. Jean Fin. Inc.*, 233 B.R. 46, 54  
27 (S.D.N.Y. 1999) (citing *Oneida*, 848 F.2d at 417).  
28

1           **B. The Second Amended Disclosure Statement Does Not Provide Adequate**  
2           **Information Concerning Voting Mechanics**

3           Since the Debtors' *Motion to Deem Certain Claims to be Filed Against the Proper*  
4           *Debtor* (the "Claims Reallocation Motion") has not been decided, there is uncertainty  
5           concerning what claims belong to which estate and, accordingly, in which bankruptcy  
6           cases holders of those claims may cast votes.<sup>2</sup> Do the Debtors intend for claimants to be  
7           able to cast ballots in the cases in which the proofs of claims were filed?

8           In addition, the Debtors have indicated that they intend to object to certain of the  
9           secured creditors' claims, such as BofA's claims against 760 S. Hill Street LLC and  
10          Southpark, LLC. A claims estimation procedure, therefore, needs to be established and  
11          completed prior to ballots being cast. That procedure also needs to be fully disclosed.

12           **C. The Disclosure Statement Should Describe the Amounts the Debtors**  
13           **Are Paying to Attorneys to Defend Guaranty Litigation Involving**  
14           **Richard Meruelo in his Individual Capacity**

15          The Debtors have failed to include any discussion in the Second Amended  
16          Disclosure statement concerning the guaranty litigation currently pending against Richard  
17          Meruelo. One of the Debtors' ordinary course professionals, the Neufield Law Group has  
18          been paid \$30,000 during the first quarter of this year to defend Richard Meruelo, in his  
19          individual capacity, in a guarantor suit. *See Notice with Respect to Payments to Ordinary*  
20          *Course Professionals for the First Quarter of 2010, 2:17-20*, filed on April 10, 2010 at  
21          docket entry no. 1296. It is unclear whether: (1) defending a guaranty lawsuit against  
22          Richard Meruelo is an expense that should be borne by the estates; or (2) whether

23 \_\_\_\_\_  
24 <sup>2</sup> The Debtors' counsel's "Notice of Filing Eleventh Monthly Statement of Danning, Gill, Diamond  
25 & Kollitz LLP for Payment of Fees and Reimbursement of Expenses Incurred from April 1, 2010 through  
26 April, 30, 2010" (the "Fee Application") contains several time entries referring to the creation and  
27 maintenance of a claim register, a claims analysis chart, and a chart regarding assignment of claims. Fee  
28 Application, pp. 67-77. In April, 2010, Debtors' counsel spent 110.3 hours and \$43,131.00 working on  
claims administration. To the extent the claim register or claims chart is not already part of the Second  
Amended Disclosure Statement or in the Claims Reallocation Motion, the Second Amended Disclosure  
Statement should be amended to include the information in the claim register to enable creditors to  
evaluate the claims against the Debtors.

1 Mr. Meruelo has any indemnification or other reimbursement obligations towards the  
2 Debtors that would create a claim or obligation owed to the Debtors' estates. If the  
3 Debtors' collective enterprise is funding Mr. Meruelo's litigation (which ostensibly  
4 involves only one of the Debtors' lenders), it is unclear whether this expense is being  
5 allocated equally across all of the property level entities, or only against certain ones, or in  
6 differing amounts. The Debtors should be required to disclose the amounts being paid by  
7 the estates to fund Mr. Meruelo's individual defense.

8 Similarly, from a review of the billing statements from the Danning Gill firm, the  
9 Debtors appear to be incurring fees and costs related to Meruelo Maddux 845 S. Flower  
10 Street, LLC ("845 S. Flower"). 845 S. Flower is being separately administered and  
11 operated from the 54 Debtors' estates. If these Debtors believe it is appropriate — and  
12 BofA believes it is not — for these Debtors to finance 845 S. Flower's administrative  
13 costs, the Debtors need to at least disclose that position and attempt to justify it in the  
14 Second Amended Disclosure Statement.

15 **D. The Assumptions Underlying the Liquidation Analyses are Not Feasible**  
16 **or Reasonable**

17 Although the Second Amended Disclosure Statement does provide liquidation  
18 analyses on a Debtor-by-Debtor basis, the liquidation analyses contain extraordinary  
19 assumptions and are severely lacking in information. For example, the assumptions for  
20 the property level entities state that with respect to each debtor's cash on hand that "funds  
21 are assumed to be comingled between Debtors per the cash management system and  
22 streamed to the operating partnership, making the initial cash balance zero at the start of  
23 the analysis (September 1, 2010). After this date, cash is kept at the individual debtor  
24 levels unless the asset is liquidated." Exhibits to Second Amended Disclosure Statement,  
25 201. Is it proper for the property level debtors to start out with zero cash balances? Are  
26 the Debtors overlooking or failing to disclose intercompany claims between the property  
27 level debtors and the MMPLP? It is not clear whether it is proper for the liquidation  
28 analysis to start with zero cash on hand for the property level debtors.

1 Moreover, each of the liquidation analyses contain line items for Post Petition  
2 Intercompany Claims (in the case of Southpark LLC, this item is \$1,030,310 and in the  
3 case of 760 S. Hill LLC it is \$614,238). There is a dearth of information about these  
4 intercompany claims, who they are owed to (presumably MMPLP), or what the basis of  
5 these intercompany claims is. There is no ability to assess the validity of the  
6 intercompany claims or the basis of their incurrence. Given that, in each Southpark LLC  
7 and 760 S. Hill LLC's cases, these intercompany claims dwarf the general unsecured  
8 claims in each case, the Debtors should be required to provide more information about  
9 these intercompany claims so that creditors may assess their validity when evaluating the  
10 liquidation analyses.

11 With respect to the "Real Property Sales Proceeds" portion of the assumptions to  
12 the liquidation analysis, the Debtors are making the assumption that properties that  
13 generate positive net operating income will be sold nine months after the appointment of a  
14 Chapter 7 trustee and that properties that have negative net operating income will be sold  
15 three months after the appointment of a Chapter 7 trustee. Exhibits to Second Amended  
16 Disclosure, 201. There is no rationale or explanation for how the Debtors arrived at these  
17 timelines. Additionally, as discussed in BofA's previous objections to the prior iterations  
18 of the Debtors' disclosure statements, Richard Meruelo's valuation of the real properties  
19 is suspect, is colored by obvious self- interest, and largely undercut by the prices at which  
20 properties have actually been sold and by MAI-certified appraisals throughout the course  
21 of these bankruptcy proceedings.

22 The assumptions to the liquidation analyses also assume a 6% cost of sale.  
23 Exhibits to Second Amended Disclosure Statement, 202. It is unclear why the Debtors  
24 have chosen to a different percentage of cost of sale in their liquidation analysis as  
25 compared with the prior stay relief proceedings, except for the sole reason of  
26 manufacturing a liquidation analysis that favors their proposed plan of reorganization.

27 Additionally, each liquidation analysis contains a section setting forth the amount  
28 of unsecured claims for each Debtor. The Court has yet to rule on the Claims Allocation

1 Motion, so it is unclear whether the Debtors are simply assuming for purposes of the  
2 liquidation analyses that the claims will be reallocated in the manner they suggest in the  
3 Claims Allocation Motion or otherwise. Additionally, there is no discussion of the Claims  
4 Allocation and the assumption that the claims will be reallocated in the manner suggested  
5 by the Debtors.

6 The liquidation analyses have several informational defects and assumptions that  
7 require more information before creditors can make informed decisions and assess the  
8 benefits of a Chapter 7 liquidation over the Debtors proposed plan.

9 **E. The Second Amended Disclosure Does Not Contain Adequate**  
10 **Information Concerning the Loan Modification Agreements**

11 The Second Amended Disclosure Statement does not contain adequate information  
12 concerning the Loan Modification Agreements to which the Debtors purport to bind the  
13 secured creditors. There is no discussion in the Second Amended Disclosure Statement  
14 that the Debtors are seeking to eliminate or modify non-debtor third party guaranties or  
15 agreements, or of the Debtors' proposed elimination of reporting requirements, required  
16 financial ratios or other covenants in the lenders' loan documents. Instead of burying  
17 such information in the exhibits to the Second Amended Disclosure Statement, the  
18 Debtors should be required to include a detailed discussion of the radical changes they  
19 intend to make to the loans in the disclosure statement itself.

20 **F. The Second Amended Disclosure Statement Does Not Address Most of**  
21 **Bank of America's Objections to the Earlier Disclosure Statements**

22 Although this is the Debtors' third proposed disclosure statement, the Second  
23 Amended Disclosure Statement still suffers from several of the same deficiencies as its  
24 earlier iterations.

1                   **1. The Second Amended Disclosure Statement Fails to Provide Any**  
2                   **Information Concerning the Voting and Balloting Mechanisms of**  
3                   **the Second Amended Plan**

4                   The Second Amended Disclosure Statement fails to provide any information  
5 concerning the voting mechanism or structural mechanics of how the joint plan will  
6 operate across the 54 jointly administered estates. The lack of that information precludes  
7 a given creditor of any single estate, for example 760 S. Hill LLC or Southpark LLC,  
8 from making an informed judgment about the Second Amended Plan.

9                   The only information in the Second Amended Disclosure Statement that concerns  
10 the voting mechanism for the Second Amended Plan is identical to the information in the  
11 First Amended Disclosure Statement, which states:

12                   The Plan is a joint Plan and not a consolidated Plan. The  
13 Debtors are not seeking substantive consolidation in the Plan.  
14 As a result, the Claims and Interests in each of the Debtors  
15 have been classified on a Debtor by Debtor basis. Votes will  
16 be tabulated and acceptances will be determined on a Debtor  
17 by Debtor basis. The Debtors will seek confirmation of the  
18 Plan as to each Debtor on an individual basis notwithstanding  
19 that the Plan is a joint Plan.

20                   Second Amended Disclosure Statement, 4: 4-8.

21                   The Debtors have attempted to cure the informational defect in the First Amended  
22 Disclosure Statement by including a section titled “Failure to Confirm One or More of the  
23 Debtors’ Chapter 11 Plans.” Second Amended Disclosure Statement, 174. Although the  
24 Debtors finally acknowledge the possibility that not all of the Debtors will confirm their  
25 plans, this section is not illuminating in terms of describing the effect of non-confirmation  
26 of the plans and what the Debtors intend to do in the event of such an occurrence.

27                   In the event one of more Debtors’ cases are not confirmed, the  
28 affected Debtors will re-evaluate their options in light of their  
inability to confirm the plan, which options would include  
without limitation, an alternative plan of reorganization,  
conversion of the case to a chapter 7 case or dismissal of the  
case.

Second Amended Disclosure Statement, 174:25-175:2.

1 For instance, the Debtors assert that they do not think the inability to confirm the  
2 plan in one or more cases will have a material effect on the remainder of the confirming  
3 debtors' plans. The Debtors state that they will not be materially affected because they  
4 will receive funds from their New Equity Interests, from the sale of MM 845 Flower's real  
5 property, and because their real property has total equity of \$283 million. Second  
6 Amended Disclosure Statement, 175:3-22. It is difficult for creditors to evaluate the  
7 accuracy of these statements. The Debtors should identify the debtors with properties that  
8 they believe have positive cash flow. They should explain how they concluded that the  
9 elimination of these debtors would lead to the loss of \$29.4 Million over the life of the  
10 plan. In addition, they should explain whether this figure has any basis in the Debtors'  
11 historical financial performance. Additionally, given that Mr. Meruelo's self serving  
12 valuations of the Debtors' real property is unreliable and invariably higher than valuations  
13 assigned by MAI certified appraisers, creditors must take Mr. Meruelo's \$283 Million  
14 equity figure with a large figurative grain of salt, even without taking into consideration  
15 the fact that a forced-sale liquidation context may cause the properties to be sold for even  
16 less than what Mr. Meruelo's declared values are.

17 The Debtors should be required to provide more information concerning the  
18 assumptions underlying the information they have provided about how the interconnected  
19 Plans of reorganization will function in the event one or more of the Debtors fails to  
20 confirm a plan and more information about what a given Debtor intends to do in the event  
21 its plan is not confirmed.

22 **2. The Second Amended Disclosure Statement Cannot Be Approved**  
23 **Because the Financial Projections Appended to It Are Not**  
24 **Supported By the Debtors' Historical Performance**

25 Section 1123(a)(5) requires that a plan "provide adequate means for the plan's  
26 implementation." 11 U.S.C. § 1123(a)(5). Additionally, Section 1129(a)(11) mandates  
27 that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need  
28 for further financial reorganization." *Id.* § 1123(a)(11). Consequently, the Ninth Circuit

1 requires that the Second Amended Disclosure Statement contain accurate and complete  
2 historical and current financial information and reliable financial projections. *In re Pac.*  
3 *Gas & Elec. Co.*, 273 B.R. 795, 808 (Bankr. N.D. Cal. 2002), *rev'd*, 350 F.3d 932 (9<sup>th</sup> Cir.  
4 2003) (stating that disclosure statement typically sets forth a description of the debtor's  
5 business, the reasons for financial difficulties, historical and current financial information,  
6 material post-petition events, a summary of assets and liabilities, a description of the plan,  
7 and the means for effectuating the plan).

8 Courts require that disclosure statements provide information concerning how the  
9 Debtor intends to make the payments anticipated under the plan. *In re Scioto Valley*, 88  
10 B.R. 168, 172 (Bankr. E.D. Ohio 1988) (requiring that disclosure statement provide "more  
11 detailed information concerning the Debtor's ability to make payments proposed in the  
12 plan"); *In re Microwave Products of America, Inc.*, 100 B.R. 376, 378 (Bankr. W.E. Tenn.  
13 1989) (denying approval of disclosure statement when it failed to contain financial  
14 information concerning the funding of the reorganized debtor); *In re Cardinal Congregate*  
15 *I*, 121 B.R. 760, 767 (Bankr. S.D. Ohio 1990) ("Where, as here, the satisfaction of claims  
16 and interests is dependent upon the debtor's ability to improve its financial performance  
17 or to consummate contemplated transactions, it is not overly demanding for the Court to  
18 require detailed disclosure of the facts and assumptions underlying the debtor's belief that  
19 it will accomplish its reorganization effort"); *In re Unichem Corp.*, 72 B.R. 95, 97-98  
20 (Bankr. N.D. Ill. 1987) (finding disclosure statement did not contain adequate information  
21 when it was unclear whether or under what conditions debtor principal would be required  
22 to make equity infusion to fund plan).

23 Here, the financial projections appended to the Second Amended Disclosure  
24 Statement are based on highly speculative assumptions and are not grounded in the  
25 Debtors' historical performance. With respect to the Union Lofts property, the Debtors'  
26 financial projections assume that the "Union Lofts is projected to be stabilized prior to the  
27 Effective Date." Exhibits to Second Amended Disclosure Statement, 124. Yet, Union  
28 Lofts has been in lease up mode for nearly two years and has never approached full

1 occupancy. This is borne out in the Debtors' monthly operating reports. Since the  
2 inception of the case, the Union Lofts has been approximately 50% leased, with no  
3 significant increase in the rental revenue over the course of almost a year. The Debtors'  
4 most recent monthly operating report indicates that rental income from the Union Lofts is  
5 \$108,175, still far below the \$156,083.33 assumed in the Debtors' projections.

6 Even if Union Lofts continues to generate \$108,175 per month, or \$1,298,100 per  
7 year, the Debtors will not be able to meet the \$1,873,000 Year 1 income requirement for  
8 the Second Amended Plan to be feasible. Exhibits to Second Amended Disclosure  
9 Statement, 20.

10 Furthermore, the Debtors' projections are premised on the assumptions that the  
11 interest rate on the Debtors' amended and non-amended loans is 4.0%. As discussed  
12 below, the Debtors' application of a 4% cramdown interest rate is not supported by legal  
13 authority.

14 Additionally, the projections appended to the Second Amended Disclosure  
15 Statement do not take into account the Debtor's pending settlement agreement with  
16 Cathay Bank whereby the Debtors will be accruing interest to Cathay Bank at 4% per year  
17 for the first year of the plan, 4.5% for the second year of the plan, and 5% for the third and  
18 fourth years of the plan but paying interest at 4% per year through the life of the plan,  
19 with the interest arrearages being swept into the balloon payment due to Cathay at the end  
20 of the plan. There is no information in the Second Amended Disclosure Statement to  
21 enable creditors to assess whether the Debtors projections or feasibility analysis will be  
22 affected by the accrual of interest above the 4% rate assumed by the plan and now altered  
23 by the terms of the Debtors' settlement with Cathay Bank.

24 In sum, there are serious flaws in the methodology used in the Debtors' financial  
25 projections. The financial projections are heavily based on assumptions that are either  
26 highly speculative or that have no basis in fact or in the Debtors' historical performance.  
27 The financial projections are simply not credible. The Debtors have not been able to  
28 make debt service payments during the pre-petition period and have incurred a

1 \$28 Million cash shortfall during 2009 (without even taking into account their debt  
2 service payments).

3 The Debtors should be required to amend their financial projections before a  
4 disclosure statement can be approved.

5 **3. The Second Amended Disclosure Statement Lacks Adequate**  
6 **Information Concerning Treatment of Guarantor Claims**

7 As in the original disclosure statement, the Second Amended Disclosure Statement  
8 fails to provide adequate information concerning the guaranty claims against MMPI and  
9 MMPLP.<sup>3</sup> The Second Amended Disclosure Statement provides that

10 As of the Effective Date, all provisions of all guaranties giving  
11 rise to such Guaranty Claims shall be canceled or  
12 extinguished, including any and all waivers of suretyship  
13 rights and defenses under California Civil Code § 2856, and  
14 all Claims arising under such guaranties shall be released  
15 except as provided in this Plan. Guaranty Claims shall be  
16 deemed contingent as of the Effected Date and shall be  
deemed to be guarantees of the amended obligations of the  
respective Principal Obligors under the Plan. The Holder of  
Guaranty Claim in this Class shall not receive any distribution  
on account of its Guaranty Claim; unless and until the  
Principal Obligor defaults under the terms of this Plan.

17 Second Amended Disclosure Statement, 73:3-11.

18 Curiously, despite their impaired treatment, the Guaranty claim holders are not  
19 identified as classes of creditors entitled to vote on the Second Amended Plan in the  
20 Second Amended Disclosure Statement, 7-8. Although other parts of the Second  
21 Amended Disclosure Statement identify the guaranty claims as being impaired, there is no  
22 information concerning whether these claims will be estimated or allowed in a certain  
23 amount for voting purposes or whether claimants holding these claims are allowed to vote  
24 on the Second Amended Plan.

25 ///

26 ///

27 <sup>3</sup> The Court discussed this informational shortcoming at the previous disclosure statement hearing.  
28 Transcript, 15:1-3, 82-83.

1                   **4. The Second Amended Disclosure Statement Contains Inadequate**  
2                   **Information Regarding Insider Compensation**

3                   Additionally, the Second Amended Disclosure Statement does not provide  
4                   adequate information concerning the Debtors’ officers’ compensation, as required by *In re*  
5                   *Scioto Valley*. 88 B.R. 168, 171-72. Although page 155 of the Second Amended  
6                   Disclosure Statement sets forth the apparent base salaries of the Debtors’ officers and  
7                   directors, there is no information concerning other sources of compensation such as LTIP  
8                   or stock interests in the reorganized Debtors, pension or retirement plan contributions, and  
9                   other sources of contribution (such as the details of automobile reimbursements or other  
10                  items of reimbursement).<sup>4</sup> After reviewing the Amended Disclosure Statement and its  
11                  accompanying exhibits, there is no discussion concerning the car, medical, or other  
12                  benefits that the Debtors’ officers will be receiving, or of what those amounts are.<sup>5</sup>  
13                  Additionally, although the Second Amended Disclosure Statement indicates that the  
14                  Debtors’ officers were not paid bonuses in 2009, it does state “The Debtors may pay  
15                  bonuses to the officers during the Plan term as determined by the Board of Directors.”  
16                  Second Amended Disclosure Statement, 156: 6-7. There is no discussion concerning the  
17                  prerequisites for bonuses, whether any performance benchmarks are appropriate, or  
18                  whether such a bonus and the amount of the bonus is at the Debtors’ board of directors’  
19                  sole and absolute discretion. As such, the Second Amended Disclosure Statement fails to  
20                  provide adequate information concerning the compensation amounts and compensation  
21                  structure of the Reorganized Debtor.

22                  ///  
23                  ///  
24                  ///

25                  <sup>4</sup> The Second Amended Disclosure Statement provides that “John Maddux and Richard Meruelo  
26                  will continue to receive their car allowances. The officers will receive reimbursement of expenses  
27                  pursuant to customary company procedures” but provides no information concerning the amount of the car  
28                  allowance or what these “customary company procedures” are.

<sup>5</sup> The Court discussed this informational shortcoming during the previous disclosure statement  
                  hearing. Transcript of January 20, 2010 hearing, 95:2-97:16.

1                   **5. The Second Amended Disclosure Statement Lacks Adequate**  
2                   **Information Concerning Accounts Receivable, Avoidance**  
3                   **Actions or Claims Against Creditors**

4                   One of the *Scioto Valley* categories is the collectability of accounts receivable. 88  
5                   B.R. 168, 171-72. Another category of required disclosures is actual or projected value  
6                   that can be obtained from avoidance actions. *Id.*

7                   The Second Amended Disclosure Statement and the Exhibits appended to it  
8                   contain no discussion of the Debtors accounts receivable (intercompany or otherwise) and  
9                   whether there is any ability to collect them. Given that that Debtors' purported  
10                  consolidated operational structure leads to upstream and downstream liabilities between  
11                  property level entities and the Debtors' operating entities, no disclosure statement can  
12                  possibly provide adequate information without an explanation of these intercompany  
13                  receivables and liabilities.

14                  Similarly, the Second Amended Disclosure Statement contains absolutely no  
15                  information whatsoever about the potential value of avoidance actions. Information  
16                  concerning the value of the avoidance actions is essential to the adequacy of the Second  
17                  Amended Disclosure Statement. Although the Debtors' have included a list of transfers  
18                  made by the Debtors within a one-year lookback period, the Debtors have stated that: (1)  
19                  they do not intend to pursue any avoidance actions in the event their plan is confirmed;  
20                  and (2) in the event their plan is not confirmed, the risk that they will file avoidance  
21                  actions will increase. Second Amended Disclosure Statement, 132:17-26. Except for  
22                  disclosing that the Debtors do not intend to pursue avoidance actions in the event their  
23                  plan is confirmed, this information is uninformative and vague and provides no basis for  
24                  creditors to evaluate the likelihood of potential value of avoidance actions.

25                  Moreover, there is no information in the Second Amended Disclosure Statement  
26                  concerning the value of the Debtors' claims against any creditors. *See In re Coastal*  
27                  *Group Inc.*, 13 F.3d 81 (3d Cir. 1994) ("Chapter 11 debtor-in-possession has duty to  
28                  disclose potential adversary proceedings against creditors before creditors vote on plan.").

1 The Second Amended Disclosure Statement includes a “Retained Claims and Defenses  
2 and Reservations of Rights Section” that provides in part that the Debtors are retaining:

3 All claims and defenses pursuant to applicable non-bankruptcy  
4 law and Sections 502, 506, 510, 524, 542, and 553 of the  
5 Bankruptcy Code including, without limitation claims and  
6 defenses based on any Creditors’ assertion of unreasonable  
professionals’ fees, costs, charges and penalties (whether  
disguised as interest, or otherwise).

7 Second Amended Disclosure Statement, 131:21-25.

8 Although the Debtors have implicitly threatened to object to their lenders’  
9 professional fees, they have not provided any useful information concerning affirmative  
10 claims (or insurance recoveries) they may have against other parties that may help to fund  
11 the operation of their plan or that may increase the value of the estate. The Debtors  
12 should be required to provide this information before the Second Amended Disclosure  
13 Statement may be approved.<sup>6</sup>

14 **6. The Second Amended Disclosure Statement Lacks Adequate**  
15 **Information Concerning Non-Bankruptcy Litigation**

16 Among the required categories of disclosure is the existence, likelihood, and  
17 possible success of non-bankruptcy litigation. *In re County of Orange*, 219 B.R. 543, 460  
18 (Bankr. C.D. Cal. 1997) (stating that the policy under the Code factors disclosure by the  
19 debtor of all potential causes of action). Although the Second Amended Disclosure  
20 Statement discusses the eminent domain proceedings with the Metropolitan Transit  
21 Authority involving the property at 1339 East 7th Street, there is no discussion concerning  
22 the timing involved in, the likelihood or possible success concerning this proceeding, nor  
23 is there any other discussion concerning any other non-bankruptcy litigation involving the  
24 Debtors. Second Amended Disclosure Statement, 133. Moreover, the Second Amended  
25 Disclosure Statement references two eminent domain proceedings, but only discusses the  
26 one involving 1339 East 7th Street. It is not clear whether the reference to two

27 <sup>6</sup> The Court discussed this informational shortcoming during the previous disclosure statement  
28 hearing. Transcript, 132:10-15.

1 proceedings is a typographical error, whether the proceeding involving 1339 East 7th  
2 Street is really two related or interconnected eminent domain proceedings, or whether  
3 there is another eminent domain proceeding, about which, the Debtors have provided no  
4 information. Creditors have no method of ascertaining whether the Debtors are involved  
5 in other non-bankruptcy litigation, what the success of such litigation may be, or what the  
6 estimated value related to the litigation would be. Without this information, the Second  
7 Amended Disclosure Statement fails to contain adequate information under the standards  
8 set forth in *In re Scioto Valley*.

9 **7. The Second Amended Disclosure Statement Lacks Information**  
10 **Concerning Methodology Used in Valuing Real Property**

11 *In re Scioto Valley* lists as one category of required disclosures, “any financial  
12 information, valuations or pro forma projections that would be relevant to creditors’  
13 determinations of whether to accept or reject the plan.” 88 B.R. 168, 171-72. Courts have  
14 denied the approval of disclosure statements where real property valuations contained  
15 therein lack factual basis. *In re Reilly*, 71 B.R. 132, 135 (Bankr. D. Mont. 1987).

16 Here, the Debtors have stated the value of certain of its real property holdings in  
17 descriptions of different claimants’ categories of claims. There is no information  
18 concerning the methodology or process used in arriving at these values. If one were to  
19 assume that the valuation methodology used in the Second Amended Disclosure  
20 Statement is the same as the one employed by the Debtors in the relief from stay and cash  
21 collateral proceedings previously before the Court, the Court has already found Richard  
22 Meruelo’s valuation testimony to lack credence and has instead found the valuation  
23 testimony from certain of the secured creditors’ appraisers to be more credible on the  
24 issue of valuation. For example, in the *Amended Notice of Ruling on Bank of America,*  
25 *N.A.’s Request for Relief from Stay and Objection to Debtor’s Use of Cash Collateral* (at  
26 docket entry no. 910), the Court found that the value of the Union Loft property was  
27 closer to Bank’s valuation than the Debtors’ valuation. There is no information  
28

1 concerning the methodology or process the Debtors used in assigning values to their real  
2 property holdings.

3 **III.**

4 **THE SECOND DISCLOSURE STATEMENT CANNOT BE APPROVED**  
5 **BECAUSE IT DESCRIBES A PATENTLY UNCONFIRMABLE PLAN**<sup>7</sup>

6 Although the hearing on approval of a disclosure statement is not a substitute for a  
7 hearing on plan confirmation, a disclosure statement should not be approved if it is filed in  
8 support of a patently unconfirmable plan. *See, e.g., In re United States Brass Corp.*, 194  
9 B.R. 420, 428 (Bankr. E.D. Tex. 1996); *In re Atlanta West VI*, 91 B.R. 620, 622 (Bankr.  
10 N.D. Ga. 1988); *In re Spanish Lake Associates*, 92 B.R. 875, 877 (Bankr. E.D. Mo. 1988).  
11 The purpose of this rule is to avoid the waste and futility that would result from sending a  
12 disclosure statement to creditors and soliciting votes on the accompanying plan when it is  
13 clear from the beginning that the plan is unconfirmable. *Atlanta West VI*, 91 B.R. at 622;  
14 *In re Eastern Maine Electric Cooperative, Inc.*, 125 B.R. 329, 333 (Bankr. D. Maine  
15 1991); *In re Main Street AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999). Such  
16 expense is being borne solely by creditors and not those who stand to benefit the most  
17 from the Second Amended Plan. As such, public policy and judicial economy warrant the  
18 disapproval of the Second Amended Disclosure Statement because it: (1) arbitrarily  
19 classifies and assigns claims; (2) impermissibly restricts the offering of equity interests to  
20 pre-existing equity holders in the presence of impaired and objecting classes of creditors;  
21 (3) provides for impermissible non-debtor releases and injunctions;(4) proposes a  
22 cramdown rate of interest that is unsupported by law; (5) relies on an impaired consenting  
23 class that is not permitted to constitute an impaired consenting class for cramdown  
24 confirmation purposes; and (6) interferes with BofA's independent right to oppose claims  
25 against 760 S. Hill Street, LLC, Southpark, LLC and MMPI.

26  
27 <sup>7</sup> BofA fully reserves the right further brief the issues discussed in this section and to raise  
28 additional and further issues and arguments regarding whether the Debtors' Second Amended Plan of  
Reorganization is confirmable.

1           **A. The Second Amended Plan Is Not Confirmable Because It Arbitrarily**  
2           **Classifies and Assigns Claims to the 54 Different Debtor Estates**

3           Although the Debtors have classified and identified the claims associated with each  
4 given bankruptcy estate, the Debtors also appear to have classified and reassigned certain  
5 of the claims in a somewhat arbitrary manner. Exhibit H to the Second Amended  
6 Disclosure Statement sets forth a list of Debtors with their corresponding claims. In  
7 reviewing the lists of Debtors and their corresponding claims, it appears that the Debtors  
8 have reassigned or reallocated claims from the MMPI claims register to the claims  
9 registers of individual Debtors. Notwithstanding that the Court has not ruled on the  
10 pending Claims Allocation Motion, there appears to be no factual basis or no description  
11 of methodology in the Second Amended Disclosure Statement for reassigning or  
12 reallocating claims between different debtors.

13           For example, in looking at the Class C general unsecured claims for 760 S. Hill  
14 LLC, it appears that the Debtor has reallocated or reassigned at least five claims. Exhibits  
15 to Second Amended Disclosure Statement, 258-259. The Claims Allocation Motion itself  
16 does not fully explain why these claims, among others, are being reallocated and provide  
17 sufficient backup to support the reallocation. The Second Amended Disclosure Statement  
18 does not either but must to do.<sup>8</sup>

19           Allowing the Debtors to arbitrarily and unilaterally reassign and reallocate claims  
20 filed in one bankruptcy case to an entirely separate bankruptcy case permits the Debtors  
21 too much discretion and creates a situation ripe for abuse and claims gerrymandering to  
22 manipulate and manufacture impaired consenting classes. At a minimum, the Debtors  
23 should be required to prominently identify and disclose claims it purports to reassign from  
24 one Debtor to another and to provide the rationale for reallocating the claims (and in the

25 \_\_\_\_\_  
26 <sup>8</sup> Although the Official Committee of Unsecured Creditors (the "Committee") and the Debtors  
27 entered into a stipulation that provided for the reallocation of misfiled claims into their proper respective  
28 cases, the stipulation is silent concerning who gets to determine whether a claim has been misallocated (do  
the Debtors get to unilaterally decide how to reassign claims, does the Committee?) and provides no  
information concerning the mechanism of how the claims are to be reallocated.

1 L.P. Carreras claim, for allocating a given amount of that claim to each individual  
2 Debtor), including backup information.

3 **B. The Second Amended Plan Cannot Be Confirmed Because the Equity**  
4 **Rights Offering is Impermissibly Limited to MMPI's Pre-Existing**  
5 **Equity Holders**

6 The equity contribution scheme outlined in the Second Amended Plan violates 11  
7 U.S.C. § 1129(b) because the offering of the new equity interests is limited to the Debtors'  
8 pre-existing equity holders despite the impairment of secured and unsecured claims under  
9 the Second Amended Plan.

10 The Supreme Court has specifically rejected the limitation of equity offerings to  
11 pre-existing shareholders in the presence of impaired or objecting classes of creditors in  
12 *Bank of America Nat'l Trust and Savings Ass'n v. 203 North LaSalle Street P'ship*, 526  
13 U.S. 434 (1999). The Supreme Court reasoned that equity offerings of this nature violate  
14 11 U.S.C. § 1129(b) because the exclusive equity offering right is "property" that the  
15 equity holder is receiving on account of his claim.

16 Hence, it is that the exclusiveness of the opportunity, with its  
17 protection against the market's scrutiny on the purchase price  
18 by means of competing bids or even competing plan  
19 proposals, renders the partners' right a property interest  
20 extended "on account of" the old equity position and therefore  
21 subject to an unpaid senior creditor class's objection.

22 526 U.S. at 456.

23 The Supreme Court noted that the plan in that case:

24 Is doomed ... by its provision for vesting equity in the  
25 reorganized business in the Debtor's partners without  
26 extending an opportunity to anyone else either to compete for  
27 that equity or to propose a competing reorganization plan.

28 526 U.S. at 455.

Here, as in *203 North LaSalle*, the Second Amended Plan provides for an equity  
rights offering that, by its own terms, is limited to MMPI's pre-existing equity holders.

The Second Disclosure Statement provides:

1 To provide funding for the Plan, MMPI will sell in a private  
2 placement transaction 500,000 shares of MMPI common stock  
3 to the Initial Investors and Eligible Investors selected by  
4 MMPI for the purpose of raising capital in the amount of  
5 \$10,000,000 ("New Equity"). MMPI has received  
6 confirmation that the Initial Investors will purchase at least  
7 250,001 shares for an aggregate amount of at least \$5,000,020.  
8 The remaining shares not purchased by the Initial Investors  
9 will be purchased by Eligible Investors. In the event MMPI  
10 does not sell the remaining shares to Eligible Investors, other  
11 than the Initial Investors, then such shares will be purchased  
12 by the Initial Investors.

13 Second Amended Disclosure Statement, 137:5-12.

14 The Second Amended Plan provides that following the effective date of the Plan,  
15 MMPI's existing common stock will be canceled and extinguished and that the new  
16 equity interests shall comprise the ownership of the reorganized MMPI. Second  
17 Amended Plan, 145-146.

18 The equity rights offering described in the Second Amended Disclosure Statement  
19 is prohibited by *203 North LaSalle*. MMPI's pre-existing equity holders cannot purchase  
20 shares in the reorganized MMPI at prices that are not tested by competitive bidding or an  
21 open marketplace. For this reason alone, the Second Amended Plan cannot be confirmed.  
22 An approval of the Second Amended Disclosure Statement is likewise not possible.

23 **C. The Second Amended Plan is Not Confirmable Because It Contains**  
24 **Impermissible Releases, Discharges and Injunctions With Respect to**  
25 **Non-Debtor Obligations**

26 As in the Debtors' previously proposed plans, the Second Amended Plan similarly  
27 contains impermissible non-debtor releases. Non-debtor releases and/or discharges  
28 coupled with injunctions, such as the ones contemplated in the Plan with respect to the  
Guarantors, are impermissible under Ninth Circuit authority. "This court has repeatedly

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<sup>9</sup> The Second Amended Disclosure Statement defines "Initial Investor" as "Richard Meruelo, or an entity controlled or designated by Richard Meruelo and/or John Maddux or an entity controlled or designated by John Maddux" and defines "Eligible Investors" as "one or more accredited investors as defined in rule 501(a) of Regulation D, as amended, under the Securities Act selected by MMPI" (emphasis added).

1 held without exception, that § 524 precludes bankruptcy courts from discharging the  
2 liabilities of non-debtors”).<sup>10</sup> *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995)  
3 (citing *In re American Hardwoods*, 885 F.2d 621, 626 (9th Cir. 1985); *Underhill v.*  
4 *Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985)).<sup>11</sup>

5 Here, the Second Amended Plan provides for an impermissible release and  
6 discharge of non-debtor guaranties and for an injunction against enforcement actions  
7 against non-debtor entities (specifically, John Maddux, Belinda Meruelo, The Meruelo  
8 Living Trust, Richard Meruelo, and the Meruelo Living Trust, who are defined in the  
9 Second Amended Disclosure Statement as the “Guarantors”). The Second Amended Plan  
10 provides:

11 The Confirmation Order shall act as a temporary injunction  
12 (the “Temporary Enforcement Injunction”) to stay and restrain  
13 the taking of any of the following actions against the  
14 Guarantors and the Pledgors in their capacity as guarantors or  
15 pledgors, or against property in which the Guarantors or  
16 Pledgors hold an interest, on account of any judgments, claims  
17 or causes of action that arise out of [sic] relate to Claims  
18 against the Debtors or the Debtors’ Estates or MM 845 Flower  
19 or the MM 845 Flower Estate, and which judgments, claims or  
20 causes of action if asserted or enforced against the Guarantors  
21 or Pledgors may give rise to a claim or indemnity or  
22 contribution against the Debtor-obligor or MM 845 Flower (an  
23 “Enjoined Claim”).

24 Second Amended Plan, 151:20-28.

25 The combination of third party releases and injunctions is prohibited. There is  
26 absolutely no justification in the Second Amended Plan or the Second Amended  
27 Disclosure Statement as to why the third party releases, discharges and injunctions are  
28 warranted. It is a rare occurrence for a court to approve such plan provisions. If the  
Debtors believe that those types of provisions are appropriate, the Debtors bear the burden  
of justifying such provisions and adequately informing their creditors and other interest

<sup>10</sup> Bank reserves the right to renew its objection that non-debtor releases are unwarranted under Ninth Circuit law in the event this issue is still relevant during the plan confirmation proceedings.

<sup>11</sup> *In re Regatta Bay*, 406 B.R. 875 (Bankr. D. Ariz. 2009), a case that the Debtors had previously relied upon in support of their proposition that non-debtor injunctions are allowable was reversed on appeal at *In re Regatta Bay*, 2009 U.S. Dist. LEXIS 124995 (D. Ariz. 2009).

1 holders in the Second Amended Plan and Second Disclosure Statement of the nature,  
2 extent, scope, and rationale for the provision. Without any discussion whatsoever  
3 regarding the above, the Second Amended Plan cannot be confirmed and the Second  
4 Amended Disclosure Statement cannot be approved.

5 **D. The Second Amended Plan is Not Confirmable Because the Cramdown**  
6 **Rate of Interest It Proposes to Pay Secured Creditors Does Not Satisfy**  
7 **the Requirements of *Till v. SCS Credit Corp.***

8 The Second Amended Plan proposes to pay the Debtors' secured creditors interest  
9 at 4.0% per annum for the duration of the Second Amended Plan (either five or seven  
10 years depending on whether a given creditor accepts or rejects the Second Amended  
11 Plan). For this reason alone, the Second Amended Plan is not confirmable because the  
12 proposed rate of interest is not permitted under *Till v. SCS Credit Corp.*, 541 U.S. 465  
13 (2004) and bankruptcy cases decided post-*Till*.

14 Although *Till* involved a Chapter 13 cramdown situation, it has been adopted by  
15 bankruptcy courts in analyzing the proposed rate of interest to be paid to cramdown  
16 creditors. *In re American Trailer & Storage, Inc.*, 419 B.R. 412 (Bankr. W.D. Mo. 2009)  
17 (collecting bankruptcy cases using *Till* analysis and following *Till* to arrive at interest  
18 rate). *Till* provides a formula approach for determining cramdown interests rates, by  
19 looking to the national prime rate as baseline and permitting the bankruptcy court to adjust  
20 the prime rate in accordance with certain risk factors such as the circumstances of the  
21 estate, the nature of the security, and the duration and feasibility of the plan. 541 U.S. at  
22 479. In the *Till* context, the Supreme Court noted that courts have generally approved a  
23 risk premium of 1 to 3% above the prime rate. *Id.*; see also *In re American Trailer &*  
24 *Storage*, 419 B.R. at 436 (approving 5% cramdown interest rate after analyzing interest  
25 rate adjustments under the *Till* methodology); *In re Griswold Building LLC*, 420 B.R. 666,  
26 696 (Bankr. E.D. Mich. 2009) (applying *Till* analysis to cramdown interest rate and  
27 finding that 5% adjustment above the prime rate was appropriate after adding a 3%  
28

1 upwards adjustment for risk of the plan's feasibility and 2% upwards adjustment was  
2 appropriate in light of the circumstances of the case).

3 The Second Amended Plan proposes to resolve Bank's claims against 760 S. Hill  
4 LLC and Southpark LLC (and all of the Debtors' other secured creditors) in the following  
5 manner:

6 The Holder shall receive deferred Cash payments over a  
7 period of either (i) five years from the Effective Date if the  
8 Holder votes to accept the Plan or (ii) seven years from the  
9 Effective Date if the Holder votes to reject the Plan (the  
10 "Maturity Date"), in an aggregate amount equal to the amount  
11 of the Allowed Secured Claim, plus interest from the Effective  
Date on the unpaid portion of the Allowed Secured Claim, at  
the rate described below. ...Each installment shall be in the  
amount equal to interest on the Allowed Claim at the rate of  
4.0% per annum or as otherwise established by the Court.

12 Second Amended Disclosure Statement, 70: 2-25.

13 Given that the national prime rate is currently 3.25%<sup>12</sup>, the proposed 4% interest  
14 rate does not fairly reflect the risk and uncertainty that the Debtors' creditors must bear in  
15 waiting to see whether the Debtor will be able to fund and implement the Second  
16 Amended Plan (which appears to be completely unfeasible given the financial data  
17 available). Considering the factors identified in *Till* indicates that significant upwards  
18 adjustments to the cramdown interest rate are appropriate in light of the circumstances.  
19 The Debtors are proposing a Second Amended Plan that will make payments over five to  
20 seven years and the secured lenders' collateral base is mostly commercial real property  
21 whose value has generally plummeted in the last few years. There is no indication that the  
22 value of commercial real estate will increase at any point in the near future. Additionally,  
23 the financial projections underlying the Second Amended Disclosure Statement suggest  
24 that the Second Amended Plan and the Debtors' ability to fund payments under the  
25 Second Amended Plan are highly speculative at best. A .75% risk premium above the  
26 national prime rate is not supportable or defensible under the *Till* formula analysis.

27 \_\_\_\_\_  
28 <sup>12</sup> [www.wsjprimerate.us](http://www.wsjprimerate.us)

1           **E. The Debtors Cannot Consider the County of Los Angeles Tax Collector**  
2           **as an Impaired Consenting Class**

3           Although the Debtors have described the County of Los Angeles Tax Collector (the  
4           “County”) as an impaired consenting class entitled to vote on the plan, and although the  
5           County and the Debtors have entered into a Settlement Agreement (which has not yet  
6           been approved by the Court) requiring the County to vote in favor of the Debtors’ plan,  
7           the County is prohibited from constituting an impaired consenting class for purposes of  
8           cramdown confirmation.

9           Several cases state that claims for ad valorem property taxes, which require the  
10          treatment specified in Bankruptcy Code § 1129(a)(9)(C) and (D) may not constitute  
11          impaired accepting classes for purposes of cramdown confirmation.

12                         There is also another reason why the debtor's plan could not  
13                         be confirmed. The debtor argues that it can satisfy the  
14                         requirements of § 1129(a)(10), which requires that at least one  
15                         class of impaired claims accept the plan, by obtaining  
16                         acceptance from impaired priority tax creditors. Although we  
17                         assumed above that the debtor would have obtained the  
18                         acceptance of an impaired class other than the unsecured  
19                         creditor class, we fail to see how the priority tax creditors can  
20                         be an impaired class for purposes of § 1129(a)(10). If the  
21                         priority tax creditors agree to a treatment other than what they  
22                         are entitled to, they are not impaired. Similarly, if the priority  
23                         tax creditors are paid in full as required by § 1129(a)(9)(C),  
24                         then they are also not impaired. In either situation, the priority  
25                         tax creditors are conclusively presumed to have accepted the  
26                         plan because the claims are not impaired. See 11 U.S.C. §  
27                         1126(f).

21          *In re Winters*, 99 B.R. 658, 663-664 (Bankr. W.D. Pa. 1989). *See also In re Bryson*  
22          *Properties, XVIII*, 961 F.2d 496, 501 (4th Cir. 1992) (citing *In re Perdido Motel Group,*  
23          *Inc.*, 101 Bankr. 289 (Bankr. N.D. Ala. 1989) and noting that unpaid ad valorem taxes did  
24          not constitute an impaired class that could accept a plan and bind other truly impaired  
25          creditors to a cram down); *In re Mortgage Inv. Co.*, 111 B.R. 604, 611-612 (Bankr. W.D.  
26          Tex. 1990) (noting that a plan may be confirmed as long as priority tax claims are not the  
27          only impaired consenting class relied upon to reach cramdown); *In re Equitable Dev.*  
28          *Corp.*, 196 B.R. 889, 893-894 (Bankr. S.D. Ala. 1996) (stating that debtor would not be

1 allowed to use the class of priority tax creditors to provide needed acceptance of their  
2 plan).

3 For the same reason, the County's property tax claims, which are required to be  
4 paid in the manner provided under Bankruptcy Code § 1129(a)(9)(C) and (D), cannot  
5 constitute impaired consenting claims binding other truly impaired creditors to cramdown  
6 confirmation of plans. If the Second Amended Plan is premised upon the County  
7 constituting an impaired consenting class, the plan is not confirmable in the event no other  
8 class of creditors votes to accept the plan. Although BofA will not brief the issue in the  
9 context of this objection to the Second Amended Disclosure Statement, BofA reserves the  
10 right to argue that the County's vote was not procured in good faith and should not be  
11 counted, that the County's impairment was contrived in order to manufacture an impaired  
12 consenting class, and that the plan is not confirmable under Bankruptcy Code § 1129(a)(3)  
13 because it has not been proposed in good faith.

14 **F. The Debtors Cannot Interfere With or Terminate BofA's Independent**  
15 **Right to Objection to Creditor Claims**

16 Section 502(a) provides that "[a] claim or interest, proof of which is filed under  
17 section 501 of this title, is deemed allowed unless a party in interest, including a creditor  
18 of a general partner in a partnership that is a debtor in a case under chapter 7 of this title,  
19 objects." 11 U.S.C. § 502(a) (2010). A creditor is a "party in interest" who has standing  
20 to object to a proof of claim filed by another creditor. *See In re Colt Engineering, Inc.*,  
21 288 B.R. 861, 877 (Bankr. C.D. Cal. 2003) (holding that secured creditors are entitled to  
22 object to claims of other creditors); *Power Five, Inc. v. General Motors Corp.*, 219 B.R.  
23 513 (D.C.S.D. Ind. 1998) ("Creditors of the debtor are parties in interest, within the  
24 meaning of Section 502."); *In re Richard J. Grassgreen*, 172 B.R. 383, 388 (Bankr. M.D.  
25 Fl. 1994) ("[W]hen a debtor is acting as debtor in possession, a creditor, as a party in  
26 interest, has standing to object to claims without necessity of Court approval.").

27 Section IV.K of the Second Amended Plan of Reorganization provides that "After  
28 the Confirmation Date, only the Reorganized Debtor will have the authority to File

1 objections, settle, compromise, withdraw or litigate to judgment objections to Claims and  
2 Interests. As the Court is aware, BofA tendered payment to the Los Angeles County Tax  
3 Collector (the "Tax Collector") payment for all pre-petition property taxes on the Union  
4 Lofts and Southpark properties. The Tax Collector has taken the position that the  
5 payment was not made. Given the preliminary stages of the matter, it may be sometime  
6 before the dispute is resolved. If Section IV.K is read literally, it could be argued that  
7 BofA would no longer have any right to maintain its dispute with the Tax Collector or any  
8 other creditor. Construed in this way, Section IV.K is impermissible. The Debtors may  
9 not interfere with or terminate BofA's independent right to oppose creditors' claims.  
10 Section IV.K's renders the Second Amended Plan unconfirmable.

11 **IV.**

12 **CONCLUSION**

13 WHEREFORE, for the foregoing reasons, the Bank respectfully requests that the  
14 Court disapprove of the Second Amended Disclosure Statement and require the Debtors to  
15 further amend the Second Amended Plan and Second Amended Disclosure Statement to  
16 address the objections raised by the Bank.

17  
18 Dated: May 17, 2010

SNELL & WILMER, L.L.P.

19  
20 By: /s/ Eric S. Pezold (#255657)

21 Donald L. Gaffney  
22 Eric S. Pezold  
23 Jasmin Yang  
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In re: MERUELO MADDUX PROPERTIES, INC., et al., Debtor(s).	CHAPTER 11 CASE NUMBER - 1:09-bk-13356-KT
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**NOTE:** When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate a NEF because only orders that have been entered are placed on the CM/ECF docket.

**PROOF OF SERVICE OF DOCUMENT**

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is 600 Anton Boulevard, Costa Mesa, CA 90071 The foregoing documents described as: **BANK OF AMERICA, N.A.'S OBJECTION TO DEBTORS' SECOND AMENDED DISCLOSURE STATEMENT** will be served or was served in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. **On May 17, 2010**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Service information continued on attached page

**II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL**(indicate method for each person or entity served): **May 17, 2010**, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid in the United States Mail and/or with an overnight mail service addressed as follows:

The Honorable Kathleen Thompson  
United States Bankruptcy Court - Warner Center  
21041 Burbank Boulevard, Suite 305  
Woodland Hills, CA 91367-6609  
(Overnight Mail)

Service information continued on attached page

**III. SERVED BY FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each person or entity served): Pursuant to Fed. R. Civ. Proc. 5 and/or controlling LBR, on \_\_\_\_\_, I served the following person(s) and/or entity(ies), who consented in writing to such service method, by facsimile transmission and/or email as follows:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

May 17, 2010  
Date

Dana Lewis  
Type Name

/s/ Dana Lewis  
Signature

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