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14 **UNITED STATES BANKRUPTCY COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**
16 **SAN FERNANDO VALLEY DIVISION**

17 In re
18 Meruelo Maddux Properties, Inc., et al.,
19 Debtors in Possession.

Case No. 1:09-13356-KT

Chapter: 11

**CALIFORNIA BANK & TRUST'S
OPPOSITION TO APPROVAL OF THE
DEBTORS' SECOND AMENDED
DISCLOSURE STATEMENT**

Date: June 14, 2010
Time: 9:30 a.m.
Place: Courtroom 301
21041 Burbank Blvd.
Woodland Hills, CA

20 Affects all Debtors

21 California Bank & Trust, a California banking corporation ("CB&T") hereby respectfully
22 submits its Opposition to the Debtors' Second Amended Disclosure Statement (the "Second
23 Amended Disclosure Statement"). In the interest of collective brevity, CB&T expects it will join
24 in oppositions filed by several of the other secured creditors (collectively, the "Oppositions") and
25 asserts the following additional grounds for disapproval of the Amended Disclosure Statement:

26 **I.**

27 **INTRODUCTION**

28 Although the Second Amended Disclosure Statement filed by Meruelo Maddux

1 Properties, Inc. (“MMPI”) and the related debtors (together with MMPI, the “Debtors”) has
2 addressed several of the inadequacies discussed in CB&T’s prior oppositions,¹ the Second
3 Amended Disclosure Statement still contains a fundamental flaw that prevents approval: the
4 Second Amended Joint Chapter 11 Plan of Meruelo Maddux Properties, Inc., et al. (the “Second
5 Amended Plan”) it purports to describe cannot be confirmed as a matter of law. “Where it is clear
6 that a plan of reorganization is not capable of confirmation, it is appropriate to refuse the approval
7 of the disclosure statement.” *In re Market Square Inn, Inc.*, 163 B.R. 64, 68 (Bankr. W.D. Pa.
8 1994). Among the legal inadequacies not addressed in the Second Amended Disclosure
9 Statement are the following:

- 10 • The Second Amended Plan improperly classifies claims in an attempt to
11 gerrymander classes of impaired consenting creditors.
- 12 • The Debtors transfer unsecured claims from one debtor entity to another solely to
13 increase the likelihood that the fabricated classes will fall in line with the Debtors’ wishes and
14 vote in favor of the Second Amended Plan.
- 15 • The Second Amended Plan still violates the absolute priority rule by proposing to
16 pay unsecured creditors less than the full value of their claims while at the same time channeling
17 substantial value to the Debtors’ equity holders through a “sale” available only to those equity
18 holders and the anonymous investors they personally select.
- 19 • The Second Amended Plan ignores the requirements of the Supreme Court’s ruling
20 in *203 N. LaSalle* restricting the new value exception.²
- 21 • The Second Amended Plan provides for an injunction and discharge in favor of
22 nondebtor third parties in direct violation of controlling Ninth Circuit law.

23 Furthermore, despite some improvements the Second Amended Disclosure Statement still
24 does not contain “adequate information” as required by Section 1125 of the Bankruptcy Code,³

25 _____
26 ¹ CB&T filed oppositions to the Debtors’ two previous formulations of the Disclosure Statement on January 7, 2010
(Docket # 933) and March 12, 2010 (Docket # 1172) and hereby incorporates the statements of facts and legal
27 arguments set forth therein.

² See *Bank of America National Trust & Savings Association v. 203 N. LaSalle Street Partnership*, 526 U.S. 434
(1999)(hereinafter “203 N. LaSalle”).

³ All statutory references are to title 11 of the United States Code (the “Bankruptcy Code”) unless otherwise noted.

1 and for that reason, cannot be approved. The Second Amended Disclosure Statement is deficient
2 in the following ways:

- 3 • It fails to discuss the factors used to determine an appropriate interest rate to be
4 applied to the debt owed CB&T in light of the risks associated with the Second
5 Amended Plan.
- 6 • It fails to provide any information on how the Debtors intend to make
7 substantial balloon payments to all of their secured creditors when the secured
8 obligations mature on the same date.
- 9 • The amount of CB&T's secured claim has been incorrectly listed in the
10 Amended Disclosure Statement as only \$7,153,799. As of December 16,
11 2009, CB&T's secured claim was no less than \$7,872,298.54 and the amount
12 of the claim has continued to increase due to accruing interest, fees and costs.

13 For each of these reasons, as well as those set forth in the Oppositions, the Second
14 Amended Disclosure Statement should not be approved.

15 II.

16 ARGUMENT

17 **A. The Court Should Not Approve The Second Amended Disclosure Statement Because** 18 **The Second Amended Plan Itself Cannot be Confirmed.**

19 Since the Second Amended Plan cannot be confirmed, the Second Amended Disclosure
20 Statement should not be approved, as it would be futile. *See In re Atlanta West VI*, 91 B.R. 620,
21 622 (Bankr. N.D. Ga. 1988) (denying approval of disclosure statement describing unconfirmable
22 plan “to avoid . . . a wasteful and fruitless exercise” that would “further delay a debtor’s attempts
23 to reorganize”).

24 CB&T is mindful of the distinction between issues that are appropriately addressed at the
25 time of the hearing on the disclosure statement and those more typically reserved for
26 confirmation. However, it is well established that courts may consider substantive plan issues at
27 the disclosure statement hearing and deny approval to disclosure statements predicated upon
28

1 plans that, on their face, cannot be confirmed. A court is authorized at a disclosure statement
2 hearing to address legal issues that determine whether a plan can be confirmed. *See In re*
3 *Moorpark Adventure*, 161 B.R. 254, 256-58 (Bankr. C.D. Cal. 1993); *see also In re Felicity*
4 *Assocs., Inc.*, 197 B.R. 12, 14 (Bankr. D.R.I. 1996)(“It has become standard Chapter 11 practice
5 that when an objection raises substantive plan issues that are normally addressed at confirmation,
6 it is proper to consider and rule upon such issues prior to confirmation, where the proposed plan
7 is arguably unconfirmable on its face.”) (internal quotation omitted); *In re Market Square Inn,*
8 *Inc.*, 163 B.R. 64, 68 (Bankr. W.D. Pa. 1994) (“Where it is clear that a plan of reorganization is
9 not capable of confirmation, it is appropriate to refuse the approval of the disclosure statement.”).

10 Denial of approval of the Second Amended Disclosure Statement at this stage will avoid
11 the further, futile proceedings at confirmation. For the reasons set forth below, the Second
12 Amended Disclosure Statement should not be approved:

13 **1. The Second Amended Plan Improperly Classifies Claims In An Attempt To**
14 **Gerrymander Consenting Classes Of Impaired Creditors.**

15 Because the Second Amended Plan improperly classifies claims in an attempt to
16 gerrymander classes of impaired consenting creditors, the Second Amended Plan has not been
17 proposed in good faith. In order to facilitate the cram down of the secured creditors, the Second
18 Amended Plan shuffles claims from one debtor to another, even though the shuffled claims arise
19 from obligations owed by MMPI and not by the property-owning debtors. For example, in the
20 case of CB&T’s particular debtor 788 South Alameda, LLC (“788 Alameda”), the Debtors have
21 unilaterally reassigned to 788 Alameda portions of claims filed by L.P. Carreras & Associates,
22 Inc. and Innercity Crime Prevention Group, Inc. against MMPI. The debts owed to these
23 creditors are not obligations of 788 Alameda and the claims cannot be simply reassigned to
24 CB&T’s debtor in order to give the Debtors’ an opportunity to confirm the Second Amended
25 Plan.⁴ At best, the unsecured claims asserted against MMPI give rise to potential insider claims

26 _____
27 ⁴ The attempt to reassign creditor claims also raises questions about the Debtors’ “business enterprise” theory
28 of operation, and the allocation of substantial “corporate overhead” to the property-owning debtors. If the overhead
is proper, because MMPI provides for the payment of a host of accounting and other such charges, then MMPI might
have a claim, but not the service provider covered by the “overhead” allocation.

1 that MMPI could assert against the property level debtors. Such unwarranted reclassification of
2 claims evidences that the Second Amended Disclosure Statement and the associated Plan are not
3 proposed in good faith. Considering that these unsecured claims are relatively modest in
4 comparison to the multi-million dollar claims of the secured creditors, the Court should not allow
5 the Debtors' attempt to gerrymander the votes of minor creditors to override the interests of the
6 secured creditors holding substantially larger claims.

7 **2. The Second Amended Plan Does Not Meet The Fair And Equitable Cram**
8 **Down Requirements Under Subsection 1129(b).**

9 A plan of reorganization can be confirmed over the dissent of impaired classes of creditors
10 or interest holders only if the treatment of the impaired class is "fair and equitable." 11 U.S.C.
11 § 1129(b). With respect to a class of unsecured claims, Subsection 1129(b)(2)(B) provides that a
12 plan is not fair and equitable and may not be confirmed over the objection of a non-accepting
13 unsecured creditor class that will receive less than the full value of their claims as of the effective
14 date of the plan, if the holder of any claim or interest that is junior to the claims of the unsecured
15 creditor class, including an equity holder, receives or retains any property under the Plan. 11
16 U.S.C. § 1129(b)(2)(B); see *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005).
17 Subsection 1129(b)(2)(B)(ii) sets forth what is commonly referred to as the "absolute priority
18 rule."

19 Here, the Debtors propose to pay general unsecured creditors less than the full value of
20 their claims as of the effective date, while at the same time permitting its equity interest holders to
21 retain interests in the reorganized Debtors. If the holders of general unsecured claims vote to
22 reject the Second Amended Plan, the Second Amended Plan cannot be confirmed unless the
23 equity holders provide "new value" in exchange for the retention of their interests. *Bonner Mall*
24 *Partnership v. U.S. Bancorp Mortgage Co.*, (In re *Bonner Mall Partnership*), 2 F.3d 899 (9th Cir.
25 1993). This is the "new value" exception to the absolute priority rule.

26 The Supreme Court in *203 N. LaSalle* did not rule on whether, in fact, the Bankruptcy
27 Code includes a new value exception to the absolute priority rule. While reserving that issue, the
28

1 Supreme Court limited any new value exception and established certain requirements equity
2 interest holders must meet in order to retain their interests. The Supreme Court held that “old
3 equity holders are disqualified from participating” in a “new value” plan when the old equity
4 holders retain the exclusive opportunity without consideration of alternatives. *203 N. LaSalle*,
5 526 U.S. at 434. The Supreme Court reacted to the fact that in the case before the Court, the
6 debtor’s partners “enjoyed an exclusive opportunity” akin to an option. *Id.* at 455. According to
7 the Supreme Court, it is “the exclusiveness of the opportunity, with its protection against the
8 market’s scrutiny of the purchase price by means of competing bids” that renders the plan subject
9 to objection. *Id.* at 456. The Court ruled that “plans providing junior interest holders with
10 exclusive opportunities free from competition and without benefit of market valuation fall within
11 the prohibition of § 1129(b)(2)(B)(ii).” *Id.* at 458.

12 The Second Amended Plan is exactly what the Supreme Court prohibited in *203 N.*
13 *LaSalle*. The first Disclosure Statement provided that the Debtors’ existing equity holders would
14 contribute \$10 million to retain their equity interests. A number of creditors objected on the
15 grounds that the Plan violated the ruling of *203 N. LaSalle*. The Second Amended Plan, which
16 has still been filed within the Debtors’ exclusivity period, now offers to existing equity holders
17 and a few anonymous investors personally selected by the existing equity holders, the exclusive
18 right to purchase up to 500,000 equity shares in the reorganized Debtors for the price of \$20 a
19 share. If the selected investors do not purchase the offered shares, the Second Amended Plan
20 allows the equity holders to purchase those shares, allowing the current equity holders to retain
21 100 percent of the equity in the reorganized Debtors. As with the first Disclosure Statement,
22 there is no discussion in the Second Amended Disclosure Statement of the value of the equity
23 interests being offered; the total sales price of the shares simply equals the same \$10 million that
24 was originally proposed to be contributed by the equity holders under the first Plan. Moreover,
25 the Second Amended Plan does not provide a procedure for soliciting competing bids on the
26 equity interests being purchased. The Second Amended Plan provides the existing equity holders
27 with the exclusive opportunity that the Supreme Court proscribed with its ruling in *203 N.*

1 *LaSalle*. Thus, the Second Amended Plan cannot be confirmed because the Debtors fail to
2 subject the proposed purchase price of the shares to market scrutiny, as required under 203 N.
3 *LaSalle*.

4 **3. The Second Amended Plan Violates Ninth Circuit Law By Providing For An**
5 **Injunction And Discharge Of Non-Debtor Third Parties.**

6 The discharges and injunctions of the non-debtor parties and guarantors provided by the
7 terms of the Second Amended Plan do not comport with Ninth Circuit authority prohibiting
8 bankruptcy courts from discharging obligations and liabilities of non-debtors. *See In re American*
9 *Hardwoods*, 885 F.2d 621, 626 (9th Cir. 1989); *See also In re Lowenschuss*, 67 F.3d 1394, 1401
10 (9th Circuit 1995) (“This court has repeatedly held, without exception, that § 524(e) precludes
11 bankruptcy courts from discharging the liabilities of non-debtors.”).

12 The permanent injunction granted by the Second Amended Plan prohibits the holders of
13 undefined “**other debt or liability**” from taking any action against the Debtors’ affiliates, current
14 or former officers, directors, agents, employees and representatives.⁵ Additionally, the Second
15 Amended Plan provides for an injunction against pursuing guarantees provided by each of the
16 following insiders: (i) John Maddux, (ii) Belinda Meruelo, (iii) The Meruelo Living Trust, (iv)
17 Richard Meruelo, and (v) the Richard Meruelo Living Trust.

18 Although the Second Amended Plan states that the injunction against the guarantors is
19 “temporary,” and provides a list of hypothetical events that would lift the injunction, the ultimate
20 effect is identical to a bankruptcy discharge and the Court should not be persuaded by the
21 Debtors’ attempt to circumvent Ninth Circuit law through semantics. Indeed, the very case the
22 Debtors cite in support of such an injunction, *In re Regatta Bay, LLC*, was overturned on the
23 grounds that such injunctions are impermissible under the Bankruptcy Code. *See Coronado City*
24 *Views, LLC, v. Regatta Bay, LLC*, 2009 WL 5730501 (D.Ariz. 2009). Due to the impermissible
25 discharges and injunctions, the Second Amended Plan cannot be confirmed, and for that reason,
26 the Second Amended Disclosure Statement should not be approved.

27
28 ⁵ Amended Plan, p. 145, lines 10-28.

1 **B. The Second Amended Disclosure Statement Still Does Not Contain “Adequate**
2 **Information” As Required By Section 1125.**

3 Section 1125 requires that prior to the solicitation of acceptances of a plan of
4 reorganization, each impaired claimant and interest holder must receive a disclosure statement
5 that has been previously approved by the court as containing “adequate information.” 11 U.S.C.
6 § 1125(b). “Adequate information” is defined as:

7 [I]nformation of a kind, and in sufficient detail, as far as is
8 reasonably practicable in light of the nature and history of the
9 debtor and the condition of the debtor’s books and records, that
10 would enable a hypothetical reasonable investor typical of holders
11 of claims or interests of the relevant class to make an informed
12 judgment about the plan

11 11 U.S.C. § 1125(a)(1). The purpose of a disclosure statement is to provide sufficient
12 information so that a typical investor can make an informed judgment whether to vote for or
13 against the plan. *In re Unichem Corp.*, 72 B.R. 95, 97 (Bankr. N.D. Ill. 1987). “Because
14 creditors and the bankruptcy court rely heavily on the debtor’s disclosure statement in
15 determining whether to approve a proposed reorganization plan, the importance of full and honest
16 disclosure cannot be overstated.” *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81
17 F.3d 355, 362 (3d Cir. 1996). In addition to all of the reasons set forth in the Oppositions, the
18 following deficiencies demonstrate that the Second Amended Disclosure Statement fails to meet
19 the requirements of Section 1125.

20 **1. The Second Amended Disclosure Statement Fails To Provide Sufficient**
21 **Information On The Determination Of The Interest Rate To Be Applied To**
22 **CB&T’s Claim.**

23 A debtor seeking to confirm a plan over the objection of a dissenting class of creditors
24 must satisfy Subsection 1129(b)(2). Under this subsection, deferred cash payments due a secured
25 creditor must total “a value, as of the effective date of the plan, of at least the value” of the
26 secured creditor’s interest in the collateral. 11 U.S.C. § 1129(b)(2)(A)(i)(II). A plan distribution
27 based on present value is intended to place the holder of an allowed claim, to be paid in the
28 future, in the same economic position as if the debtor had paid the claim or surrendered the

1 collateral on the plan's effective date.

2 The Second Amended Disclosure Statement does not provide adequate information⁶ on
3 how the Debtors selected 4% as the interest rate for calculating the Second Amended Plan
4 payments to CB&T.⁷ In order to be sufficient, the Disclosure Statement must provide
5 information as to how the Debtors arrived at the 4% rate, and under what methodology, in order
6 for CB&T to determine whether it is the appropriate interest rate to compensate CB&T for the
7 risks associated with the Second Amended Plan. Instead the Debtors have simply proposed the
8 same 4% interest rate for all secured claims in a Procrustean, "one size fits all," approach that
9 fails to account for the significant differences between the individual Debtors, properties and
10 outstanding obligations, which all impact the determination of an appropriate market rate of
11 interest.

12 Furthermore, the appropriate interest rate to be applied to the secured debt owed CB&T,
13 determined in compliance with the Supreme Court's ruling in *Till v. SCS Credit Corp.*⁸ should be
14 determined before the ballot submission deadline so creditors can make an informed decision
15 regarding the feasibility of the Second Amended Plan. Such a determination could potentially
16 avoid the need for a protracted and costly confirmation hearing.

17 **2. The Feasibility Analysis Contained In The Second Amended Disclosure**
18 **Statement Is Inadequate.**

19 Although the Debtors have addressed a number of the issues raised in CB&T's first two
20 oppositions, the Second Amended Disclosure Statement still fails to provide sufficient
21 information for a creditor to properly evaluate the feasibility of the Second Amended Plan. The
22 Second Amended Disclosure Statement fails to provide any information on how the Debtors
23 intend to make the substantial balloon payments to all of their secured creditors at the end of the
24 seven year term provided in the Second Amended Plan.⁹ Although the Debtors' financial

25 _____
26 ⁶ Frankly, the Second Amended Disclosure Statement provides no such information.

27 ⁷ CB&T believes that a rate of 4% does not compensate for the risks associated with payments under the
28 circumstances proposed in the Second Amended Plan.

⁸ 541 U.S. 465 (2004).

⁹ Other than the few secured creditors that have reached settlements with the Debtors, CB&T is informed and
believes that the remaining secured creditors intend to reject the Second Amended Plan. Under the terms of the

1 projections forecast the sale of a number of properties encumbered by approximately \$105
2 million in secured debt, the Second Amended Plan still proposes balloon payments potentially in
3 excess of \$200 million dollars on the seventh anniversary of confirmation. The Second Amended
4 Disclosure Statement should reference the risks associated with this potentially challenging
5 requirement. Without a detailed explanation of the source of funds to make the substantial
6 balloon payments, the creditors and the Court will be unable to evaluate the feasibility of the
7 Second Amended Plan.

8 **3. CB&T's Claim Has Been Incorrectly Listed In The Second Amended**
9 **Disclosure Statement.**

10 The amount of CB&T's secured claim has been incorrectly listed in the Second Amended
11 Disclosure Statement as only \$7,153,799; the Debtors continue to ignore the ongoing application
12 of interest and other costs and charges, even when the Court has made findings related to such.
13 As of December 16, 2009, CB&T's secured claim was no less than \$7,872,298.54 and the amount
14 of the claim has continued to increase due to accruing interest, fees and costs.

15 **III.**

16 **CONCLUSION**

17 Accordingly, CB&T respectfully requests that based upon the foregoing concerns, the
18 Court deny approval of the Second Amended Disclosure Statement, and grant such other relief
19 that is just and proper.

20 DATED: May 17, 2010

BUCHALTER NEMER
A Professional Corporation

21
22 By: /s/ Brian Harvey

23 BRIAN T. HARVEY
24 Attorneys for Creditor
California Bank & Trust

25
26
27 Second Amended Plan all secured creditors who elect to vote not to accept the Debtors' plan will be provided interest
28 only payments over seven years with a balloon payment of all outstanding obligations due on the seventh anniversary
of the effective date.

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 an 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: Buchalter Nemer, 1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017

The foregoing document described **CALIFORNIA BANK & TRUST'S OPPOSITION TO APPROVAL OF THE DEBTORS' SECOND AMENDED DISCLOSURE STATEMENT** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** 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):

On 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 in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. *Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.*

Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. *Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.*

Service information continued on attached page

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

R. Reeder
Type Name

/s/ R. Reeder
Signature

In re: MERUELO MADDUX PROPERTIES, INC., et al.	CHAPTER 11
Debtor(s).	CASE NUMBER 1:09-bk-13356-KT

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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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II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL(indicate method for each person or entity served):

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