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16 **UNITED STATES BANKRUPTCY COURT**

17 **CENTRAL DISTRICT OF CALIFORNIA –SAN FERNANDO VALLEY DIVISION**

18 In re
19 Meruelo Maddux Properties, Inc., et al.,
20 Debtor.

CASE NO. 1:09-bk-13356-KT
Chapter 11

21 Affects:

- 22 ➤ 2640 Washington Boulevard, LLC,
23 Case No. 1:09-bk-13397-KT
- 24 ➤ Meruelo Wall Street, LLC,
25 Case No. 1:09-bk-13366-KT

**Objections of East West Bank to
Debtors' First Amended Proposed
Disclosure Statement**

Hearing Date: March 19, 2010
Time: 9:30 a.m.
Place: Room 301
21041 Burbank Boulevard,
Woodland Hills

26 **INTRODUCTION**

27 East West Bank ("EWB"), successor to United Commercial Bank by
28 purchase from the Federal Deposit Insurance Corporation, hereby objects to the
Debtors' First Amended Proposed Disclosure Statement.

On November 6, 2009, United Commercial Bank ("UCB") was placed into
receivership by the Federal Deposit Insurance Corporation ("FDIC").
Concurrently with the initiation of the receivership EWB purchased from the FDIC

1 UCB's claims against 2640 Washington Boulevard, LLC and Meruelo Wall Street,
2 LLC. Notices of transfer of these claims have been filed. The claims and the
3 proposed plan treatment of the claims are as follows.

4 Debtor	2640 Washington Boulevard, 5 LLC	Meruelo Wall Street, LLC
6 Present Terms	7 Prime plus .5% not less than 8 8% due 12/5/2012 guaranteed 9 by bankrupt parent unpaid 10 principal \$6,066,073 as of 11 3/2009 with monthly payments 12 of \$47,947.12	13 Prime plus 2% not less than 14 6.5% due 11/5/2011 15 guaranteed by Richard 16 Meruelo unpaid principal 17 \$20,850,859 as of 3/2009 18 with monthly payments of 19 \$126,247.76
20 Plan Terms	21 4.00% PA due 6/2017 modified 22 guarantee, unpaid principal as 23 of 6/2010 of \$7,035,881 with 24 monthly payments of \$21,987 25 no customary default and 26 reporting provisions	27 4.00% PA due 6/2017 28 modified guarantee, unpaid principal as of 6/2010 of \$24,725,825 with monthly payments of \$77,268 no customary default and reporting provisions

ARGUMENT

22 Objections to plans which are on their face not confirmable are properly
23 entertained as objections to the disclosure statements for such plan. There are also
24 equitable and procedural justifications for addressing issues of feasibility which
25 appear on the face of the disclosure statement in this controversy involving 54
26 debtors plus two other debtors in a separate plan proceeding all of which largely
27 stand or fall together.

Statement of Objections

1 **I. Objections To Plan Provisions Which Appear To Be Nonconfirmable As**
2 **Proposed**

3 **1. Temporary Enforcement Injunction pages 119-121**

4 The Plan attempts to modify the rights of EWB against Richard Meruelo.
5 Richard Meruelo guaranteed payment of Wall Street's obligation to EWB. This
6 Court has Title 28 U.S.C. "related to" jurisdiction over all matters related to this
7 Chapter 11 case not prohibited by applicable law. This Court can exercise that
8 jurisdiction to the extent it is given authority by applicable law. The only
9 precedent cited by Debtors which supports a finding that this Court has both
10 jurisdiction and authority to exercise that jurisdiction to modify EWB's rights
11 against a non-debtor is *In re Regatta Bay, LLC*, 406 B.R. 875 (Bankr. D. Ariz.
12 2009), cited at page 9 of Debtors' January 13, 2010 "Omnibus Reply to Objections
13 to Disclosure Statement". *Regatta* was reversed on October 30, 2009. *In re*
14 *Regatta Bay, LLC*, 2009 WL 5730501, 2009 U.S. Dist. LEXIS 124995 (Bankr. D.
15 Ariz.) A copy of the decision reversing *Regatta* is attached as Exhibit 1 hereto.
16 For the reasons stated in Exhibit 1 EWB requests that the provisions relating to the
17 temporary enforcement injunction be stricken.

18 **2. Elimination of Cash Collateral Adequate Protection**

19 The plan provides that the adequate protection for the cash collateral diverted
20 by the Debtors is to be released. This is an improper discharge of a lien the
21 necessity for which continues until the cash used is repaid. There are no grounds
22 for stripping EWB's lien. There has been a judicial determination that the value of
23 EWB's collateral is commensurate with the amount due it. There is no basis under
24 Title 11 U.S.C. § 506 or otherwise to strip EWB's adequate protection lien.
25

26 **II. Objections to Plan Provisions About Which More Information Is**
27 **Needed**

28 **1. Summary of Cash Flow Forecast Exhibit E page 12**

1 **a.** EWB will oppose confirmation and therefore, if the plan is confirmed
2 will be subject to a seven year term of payment. As indicated in
3 EWB's prior comments and declaration in support of its comments
4 regarding Debtors' first disclosure statement, the interest rate required
5 by current market conditions for its loans is greater than 4%. *Till v.*
6 *SCS Credit Corporation*, 541 U.S. 465 (2004). Debtors' operating
7 statements indicate accruals for approximately \$1,500,000 in interest
8 per month. The Cash Flow Projection projects approximately
9 \$1,000,000 a month. It is anticipated that market interest will be close
10 to the historical note rate and that accordingly the Debtors' cash
11 requirements for a one year period have been understated by
12 \$6,000,000. This alone over the five year projection period would
13 make the proposed plan not feasible. Accordingly it would be
14 appropriate to determine applicable interest rates as soon as possible
15 to assist in analyzing feasibility of the proposed plan prior to the
16 confirmation hearing. Feasibility should be the subject of expert
17 testimony to assist the Court and the expert will need to know what
18 the expected cash flow will be well in advance of the confirmation
19 hearing.

20 **b.** The projection assumes a \$26.4 million provision of cash from the
21 Debtors' 845 South Flower affiliate by June 30, 2011. There is
22 nothing in the disclosure statement relating to this cash source.
23 Failure to obtain this cash will make the plan not feasible. It is likely
24 that proceedings in the 845 South Flower case imminently will give
25 guidance as to the credibility of this cash provision. However, for the
26 purpose of evaluating this disclosure statement, it gives no
27 information relating to this pivotal plan event and therefore is clearly
28 not adequate as it is presently stated. There is no information upon

1 which a judgment can be based as to whether the expectation of
2 receipt of \$26.4 million is realistic.

3 c. The projections assume that interest payable to the Los Angeles
4 County Tax Collector will be approximately \$1,000,000 less than
5 demanded by the Collector. The settlement stipulation announced in
6 Court on March 3, 2010 will significantly change the cash flow
7 projections and materially adversely affect plan feasibility. The
8 projections should be changed to reflect the settlement.

9 d. The 54 Debtors consist of many Debtors which do not produce
10 enough cash to support either their operations or their debt service and
11 a few Debtors who produce cash which is used to support the rest of
12 the Debtors. The disclosure statement should clearly identify which
13 Debtors use cash and which Debtors contribute cash to the Debtors
14 operations. The cash flow detail schedules for each entity do not
15 detail interest payable by each entity. Including such interest will
16 make most of the entities, including 2640 Washington, cash flow
17 negative. Voting is on a single entity basis. EWB will vote in the
18 MMPI parent case by reason of MMPI's guaranty of 2640
19 Washington's debt and in the 2640 Washington and Meruelo Wall
20 Street cases as a secured creditor. The disclosure statement should
21 disclose on an entity by entity basis what the cash flow obligations of
22 each entity are including debt service. Without such information it is
23 not possible to arrive at an informed decision as to whether to vote for
24 or against the plan.
25

26 **2. Voting Page 4 lines 6-7**

27 Votes are tabulated debtor by debtor but it is not apparent if a vote is for the
28 plan as it applies to a particular debtor or to all debtors. The question is not
answered as to how a creditor of 2640 Washington can vote for the plan when

1 2640 Washington's ability to make its plan payments depends on the vote of other
2 cash negative and cash positive Debtors including votes and events in the 845
3 South Flower case about which no creditor in Debtors' case has disclosures.
4 Debtors were ordered to provide for voting on a Debtor by Debtor basis but it is
5 apparent that creditors have neither the information nor the mechanism for a
6 determination as to how to vote without knowing how all creditors of all Debtors
7 will vote.

8 **3. Loan Modification Terms page 57**

9 These are not scheduled to be filed until after comments on them are
10 required to be filed. This renders the disclosure statement inadequate and
11 constitutes a failure to timely file a disclosure statement.

12 **4. Good Faith and New Value pages 107-115**

13 **a. New Value**

14
15 *Bank of America National Trust and Savings Association v. 203 North LaSalle*
16 *Street Partnership*, 526 U.S. 434 (1999) requires market based assurance that
17 insiders are paying fair market value when they retain control of a debtor. The
18 income tax disclosure, pages 149 lines 9 to 12, gives us assurance that Messrs.
19 Meruelo and Maddux intend to retain control of the Debtors for income tax net
20 operating losses.¹ As to who else will be shareholders it is not clear.

21
22
23 ¹ The assumption in the referenced income tax disclosure that IRC § 382 will not
24 limit use of the Debtors' net operating losses after confirmation is unprecedented,
25 not supportable, and relevant on the face of the disclosure statement to feasibility.
26 Continuity of net operating losses in bankruptcy cases has been for a long time
27 dependent, loosely stated, on continuity of interests of creditors or shareholders. In
28 this plan all old stock is being cancelled and no stock is being distributed to
creditors. There is no continuity of interest of shareholders or creditors. *Mascot
Stove Co. v. Comm'r*, 1220 F.2d 153 (6th Cir. 1941) *cert. den.* 315 U.S. 802
followed by Wells Fargo Bank & Union Trust Co. v. U.S., 115 F. supp. 655 (N.D.
Ca. 1953) *aff'd by Wells Fargo Bank & Union Trust co. v. U.S.*, 225 F.2d 298 (9th
Cir. 1955) *cert den.* 350 U.S. 947; *Accord: Templeton's Jewelers, Inc., v. U.S.*, 126

1 There are no disclosures in this disclosure statement which give us assurance
2 that Messrs. Maddux and Meruelo are satisfying their fiduciary obligations as
3 officers and directors and that the value which is being paid for the stock is fair.

4 A plan must comply with applicable law. This plan has extensive securities
5 provisions and shareholder restructuring which requires compliance with Delaware
6

7
8 F.2d 251 (6th Cir. 1942), *cited by* IRS Action on Decision, 1967 AOD LEXIS 147
9 (1967). A glance at 15 COLLIER ON BANKRUPTCY ¶ TX1104[6] reveals the following
10 comment referencing the regulations under section 382's bankruptcy exception to the
limitations in § 382(a):

11 TAMRA requires that such 50% stock ownership result from such
12 persons previously being creditors or shareholders. Thus it is doubtful
13 that new issuances of stock to existing shareholders and creditors for
14 new value will permit such persons to qualify under the special
15 bankruptcy exception because such new issuance of stock will be
16 treated as in exchange for new value, as opposed to being in exchange
for existing creditor or equity positions.

17 If new value shareholders don't qualify under § 382's bankruptcy exception then
18 they it is not apparent how they qualify under § 382's nonbankruptcy rules.

19 The proof of service of the disclosure statement does not indicate that the
20 disclosure statement has been served on the Internal Revenue Service in any
21 manner and not on Angela Smith, IRS Insolvency Group, Stop 5022, 300 North
22 Los Angeles Street, Los Angeles, CA 90012, the representative responsible for
23 monitoring this case for the IRS. In order for the Court at confirmation to enter the
required finding under Title 11 U.S.C. § 1129(d), the IRS should be allowed to
participate as fully as any other creditor.

24 The proof of service for the notice of the March 19, 2010 hearing notice
25 does not appear to comply with Rule 2002(b) in that the notice was not sent to all
26 creditors. The IRS is a creditor with a filed claim in the MMPI parent case. The
27 initial order limiting notice entered in this case does not apply to this hearing and
28 accordingly EWB is reviewing the issue of adequacy of service of the notice of this
hearing.

1 law as indicated in EWB's prior comments filed in response to Debtors' first
2 disclosure statement. The disclosure statement provides that California law (page
3 159) applies to such restructuring. Perhaps as to offering of securities that may be
4 true as it may also be true as to federal securities law. As to Delaware law
5 applicable to the Delaware Debtor in this case, the Delaware Supreme Court has
6 stated:

7 The concept of fairness has two basic aspects: fair dealing and fair
8 price. The former embraces questions of when the transaction was
9 timed, how it was initiated, structured, negotiated, disclosed to the
10 directors, and how the approvals of the directors and the stockholders
11 were obtained. The latter aspect of fairness relates to the economic
12 and financial considerations of the proposed merger, including all
13 relevant factors; assets, market value, earnings, future prospects, and
14 any other elements that affect the intrinsic or inherent value of a
15 company's stock.²

16 The prior disclosure statement provided for a \$10,000,000 New Value
17 contribution from an unnamed source. The amount is still \$10,000,000 and the
18 source is still unnamed and the mechanism is contrary to applicable New Value
19 authorities and other applicable law as previously pled by EWB.³

20 **b. Good faith**

21 There is a good faith issue inherent in the new value controversy. If the
22 controlling shareholders are attempting to depress the value of the Debtors in order
23 to decrease the amount they must pay to retain control of the company, that has
24 both a new value and good faith component.

25 A troubling complexity in valuation of MMPI's stock exists because it is clear
26 from its projections and past history that it has always has been and will continue

27 ² *Weinberger v. UOP, Inc.* 457 A.2d 701, 715 (Del. 1983).

28 ³ "Commentators agree that filing a new value plan is sufficient cause to terminate
the debtors' exclusive right to file a plan under 11 U.S.C. § 1121(d)." *In re
Situation Agmt. Sys., Inc.*, 252 B.R. 859, 864 (Bankr. D. Mass 2000).

1 to be a money losing operation. The projected cash requirements include payments
2 on many properties which should be abandoned. Although this Court has given
3 deference to management's business judgment in deciding to retain cash loss
4 properties, there could be an ulterior reason for retaining properties which have
5 never had and do not have any demonstrable prospects of paying debts which
6 encumber them. These properties diminish the overall enterprise value of MMPI.
7 If MMPI were to abandon many of the cash negative properties, as it will have to
8 do to make its payments on the remaining properties, the enterprise value of MMPI
9 would increase. Retention of the cash flow negative properties could be intended
10 merely to diminish the value of its stock for purpose of the New Value
11 computation. As soon as Messrs. Meruelo and Maddux are again in control of
12 MMPI the cash flow negative properties could be turned back to lenders with liens
13 on the properties through nonrecourse foreclosures.

14 The Court should require disclosure of the Debtors' justification for keeping the
15 properties which are non-income producing, particularly the properties such as the
16 one regarding which PNL is the lender which has been the subject of
17 condemnation proceedings by the City of Pomona and which the Debtors are
18 proposing to demolish. It is noted that some of these properties are proposed for
19 sale such as the Barstow Produce Center which is subject to significant debt but
20 produces no income. Nevertheless there should be some demonstration of benefit
21 to the estate from retention of properties which appear to have only the potential of
22 being a cash drain for the foreseeable future and an adverse influence on the
23 enterprise value of the issuer of the stock under the plan.

24 **5. Disclosure of Income Potential of Cash Positive Debtors**

25
26 There is no disclosure of the income potential of the cash positive Debtors.
27 That information is necessary for all creditors to make an informed decision as to
28 the viability of the plan. There should be disclosure for each cash positive Debtor
of the leases, terms and sources of income for each such Debtor.

1 Debtor has applying the interest rate required by *Till*. There is no information
2 regarding how \$26.4 million will come from the 845 South Flower case or what is
3 happening in that case which could be the basis for an expectation of funds from
4 that source. Within the 54 debtor case group for which this disclosure statement is
5 intended there are few cash providers and many cash negative debtors. There can
6 be no fully informed vote on this plan on an entity by entity basis without knowing
7 what entities will have confirmed plans. Debtors should be required to disclose
8 why they intend to retain loss producing assets, those assets should not be taken
9 into account in determining the necessary new value amount, there should be a
10 disclosure as to how the new value component of the plan complies with applicable
11 state and federal laws and why the procedures for determining new value required
12 by *203 North LaSalle* are not being utilized.

13 The claims scheduled and filed in each case should be correctly stated.

14 The Internal Revenue Service, and all creditors, should be served with notice of
15 the disclosure statement hearing.

16 Submitted this 12th day of March, 2009

17
18 JUNG & YUEN, LLP
19 Elmer Dean Martin III, A Professional Corporation
20 By /s/ Elmer Dean Martin III
21 Elmer Dean Martin III
22 Co-Counsel for East West Bank
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**In the Matter of Regatta Bay, LLC, Debtor; Coronado City
Views, LLC, Appellant, vs. Regatta Bay, LLC, Appellee.**

No. CV-09-0874-PHX-ROS

**UNITED STATES DISTRICT COURT FOR THE DIS-
TRICT OF ARIZONA**

2009 U.S. Dist. LEXIS 124995

October 30, 2009, Decided

October 30, 2009, Filed

PRIOR HISTORY: *In re Regatta Bay, LLC, 406 B.R. 875, 2009 Bankr. LEXIS 1293 (Bankr. D. Ariz., 2009)*

COUNSEL: [*1] For Coronado City Views LLC, Appellant: Ali MM Mojdehi, LEAD ATTORNEY, Anne W Hamann , Janet D Gertz , Baker & McKenzie LLP, San Diego, CA; Edward N Benito , Frederic L Gordon , Gordon & Holmes, San Diego, CA.

For Regatta Bay LLC, an Arizona limited liability company, Appellee: David Wm Engelman, Wade Michael Burgeson, LEAD ATTORNEYS, Bradley David Pack, Engelman Berger PC, Phoenix, AZ; Edward N Benito , Frederic L Gordon , LEAD ATTORNEY, Gordon & Holmes, San Diego, CA.

JUDGES: Roslyn O. Silver, United States District Judge.

OPINION BY: Roslyn O. Silver

OPINION

ORDER

Coronado City Views, LLC ("CCV") appeals from an order of the Bankruptcy Court confirming a plan of reorganization for Regatta Bay, LLC. For the following reasons, the confirmation order will be reversed.

BACKGROUND

This appeal involves four actors: Regatta Bay, an Arizona limited liability company involved in the development and sale of condominiums in California; John Dell Wright ("Wright"), a manager of Regatta Bay; Philip Lee Keesling ("Keesling"), the other manager of Regatta Bay; and Coronado City View, LLC ("CCV"), a California limited liability company involved in real estate development. The sole members of Regatta Bay are the family trusts of [*2] Wright and Keesling.

In 2006, CCV sued Regatta Bay, Wright, and Keesling in California Superior Court for, among other claims, fraud by intentional misrepresentation. On April 16, 2008, the California court entered judgment (the "Judgment") on a jury verdict of six million dollars in favor of CCV and against Regatta Bay, Wright, and Keesling. (Doc. 7-18 at 8). The Judgment provided that Regatta Bay, Wright, and Keesling were jointly and severally liable for the entire amount. (*Id.*).

Regatta Bay, Wright, and Keesling appealed the Judgment. They did not, however, seek a stay of the Judgment nor did they post a supersedeas bond. Thus, the Judgment became immediately collectible and CCV began collection efforts. CCV claims that during its attempt to collect on the Judgment, it learned that Wright and Keesling have "vast assets that [] exceeded any liabilities, including substantial assets that were either liquid or easily liquidated." (Doc. 33 at 6). The appeal of the Judgment remains pending at this time.

On August 20, 2008, Regatta Bay filed for bankruptcy. Thus, the automatic stay prevented any further attempts by CCV to collect the Judgment from Regatta Bay. Wright and Keesling did not [*3] file for bankruptcy and CCV continued its efforts to collect the Judgment from them. To prevent these collection efforts, Regatta Bay sought a temporary restraining order from the Bankruptcy Court. The Bankruptcy Court granted Regatta Bay's request and prohibited

CCV from making any effort to collect the Judgment, even efforts aimed at Wright and Keesling. The Bankruptcy Court later granted a preliminary injunction with the same prohibition on CCV's collection efforts.

On April 20, 2009, the Bankruptcy Court confirmed a plan of reorganization (the "Plan"). The Plan provides, in relevant part, that Regatta Bay will continue operating and attempting to sell condominium units. The proceeds from these sales will be used to pay the first-mortgage on the property. After payment of the mortgage, proceeds from sales will be placed in a reserve fund for the payment of the Judgment. The Plan requires payment of the Judgment, in full, within nine hundred days of the date the Plan went into effect. To ensure that Regatta Bay remains in operation and able to sell the condominiums, the Plan requires Wright and Keesling contribute \$ 400,000.00 to Regatta Bay to cover operating expenses. The Plan prohibits [*4] Wright and Keesling from transferring or encumbering any of their assets except as may be approved by the Bankruptcy Court.

The crucial portion of the Plan on appeal is the "Enforcement Injunction." (Doc. 7-3 at 23-24). The Enforcement Injunction prohibits CCV from "(a) commencing or continuing in any manner [an attempt to recover on the Judgment]; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree, or order on account of [the Judgment]; (c) creating,

perfecting, or enforcing any lien or encumbrance on account of [the Judgment]." (*Id.* at 24). The Enforcement Injunction applies to collection efforts by CCV against Regatta Bay as well as Wright and Keesling. The Enforcement Injunction does not, however, enjoin any creditor of Wright and Keesling other than CCV. Thus, other creditors remain free to assert claims against Wright and Keesling and CCV has submitted evidence that such other creditors are involved in collection efforts. ¹ (Doc. 46). The Enforcement Injunction will remain in place until the earlier of (1) all payments required by the Plan are made or (2) the reorganization case is dismissed or converted to a Chapter 7 case.

1 The Enforcement [*5] Injunction places CCV at a unique disadvantage vis-a-vis other creditors of Wright and Keesling. If the Bankruptcy Court believed that providing Wright and Keesling with protection from their creditors was essential to a successful reorganization of Regatta Bay, *all* of Wright and Keesling's creditors should have been subject to the Enforcement Injunction. As it currently stands, Wright and Keesling's other creditors remain free to engage in collection efforts. Thus, those other creditors' collection efforts against Wright and Keesling could frustrate the Plan to the same extent CCV's collection efforts might do so. But an injunction prohibiting all

of Wright and Keesling's creditors from engaging in any collection efforts would be an obvious abuse of the bankruptcy process by protecting Wright and Keesling's assets without forcing Wright and Keesling to submit themselves to the bankruptcy process. *See 11 U.S.C. § 524(e).*

CCV sought a stay of the Enforcement Injunction from the Bankruptcy Court. CCV argued, as it had with respect to the temporary restraining order and preliminary injunction, that the Bankruptcy Court could not enjoin CCV from taking collection efforts against the nondebtors [*6] Wright and Keesling. The Bankruptcy Court rejected CCV's stay request, ruling there was no prohibition on a reorganization plan delaying the enforcement of a creditor's judgment against nondebtors. CCV filed its appeal of the Plan with this Court on April 24, 2009.

The appeal presents three issues. First, whether the Bankruptcy Court erred by confirming the Plan containing the Enforcement Injunction. Second, whether the Plan is feasible in light of Wright's and Keesling's conflicts of interest. And third, whether the Plan was proposed in bad faith because its "primary purpose" was to shield Wright and Keesling. Based on CCV's briefing, it appears that a decision in its favor on the first issue will dispose of the entire appeal.

ANALYSIS

A. Jurisdiction and Standard of Review

This Court has jurisdiction over the final judgment of the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). In reviewing that judgment, the Bankruptcy Court's conclusions of law are reviewed *de novo* and its factual findings are reviewed under the clearly erroneous standard. *In re Coleman*, 560 F.3d 1000, 1003 (9th Cir. 2009).

B. Enforcement Injunction

To begin, it is undisputed that Wright and Keesling did not declare [*7] bankruptcy. Also, it is undisputed that the Bankruptcy Court had power to grant an injunction after confirmation of the Plan to protect Regatta Bay from Regatta Bay's creditors. That is, the Bankruptcy Court had the power to protect Regatta Bay from collection efforts by CCV during the pendency of the Plan. Where the parties disagree is whether the Bankruptcy Court could issue an injunction, even an injunction limited to a discrete time, against CCV with respect to collections efforts against the nondebtors Wright and Keesling. The Bankruptcy Court could not issue such an injunction.

CCV's argument on appeal centers on the Bankruptcy Court lacking authority to confirm the Plan in light of the Plan containing the Enforcement Injunction. It is well established that bankruptcy courts lack "the power to confirm plans of reorganization which do not comply

with applicable provisions of the Bankruptcy Code." *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995). The apparent authorization for the Enforcement Injunction is found at 11 U.S.C. § 105. ² That section grants bankruptcy courts power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" [*8] of the bankruptcy code. Thus, the Ninth Circuit has ruled that *section 105* "empowers the court to enjoin preliminarily a creditor from continuing an action or enforcing a state court judgment against a nondebtor *prior* to confirmation of a plan." *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 624 (9th Cir. 1989) (emphasis added). *Section 105* also "permits the court to issue both preliminary and permanent injunctions after confirmation of a plan to protect the debtor and the administration of the bankruptcy estate." *Id. at 625. Section 105* does not, however, permit a permanent injunction post-confirmation of a plan to protect nondebtors. *Id. at 625-627. See also In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 601-02 (10th Cir. 1990) (holding a stay against a nondebtor "may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor"). At issue here is whether *section 105* permits a post-confirmation injunction protecting nondebtors when that injunction is limited in time. ³

2 In denying CCV's request for a stay of the confirmation order pending this appeal, the Bankruptcy Court ruled that its power to include [*9] the Enforcement Injunction in the Plan "comes not from a bankruptcy court injunction issued under Code § 105, but rather from the statutory language of Code § 1141(a) [that] 'the provisions of a confirmed plan bind . . . any creditor.'" Regatta Bay did not address this rationale in its initial briefing. The Court directed Regatta Bay to "explain how [section 1141(a)] grants the Bankruptcy Court power to issue the type of injunctive relief at issue." (Doc. 51). Regatta Bay's response makes little effort to do so. Instead of responding to the question presented by the Court, Regatta Bay chose to reargue the points addressed in its prior briefings. In its brief on the issue of section 1141(a), CCV argued that "section 1141(a) has no relevance at all to whether collection efforts against a non-debtor third party may be enjoined under a chapter 11 plan." (Doc. 54 at 2). In light of Regatta Bay's failure to explain section 1141(a)'s relevance, the Court agrees with CCV that section 1141(a) cannot serve as the substantive basis for an injunction against nondebtors.

3 Arguably, the Ninth Circuit has already addressed this issue. In 2007, the Ninth Circuit addressed

the standard a bankruptcy [*10] court should use when determining whether to grant a preliminary injunction staying a proceeding in which the debtor is not a party. *In re Excel Innovations, Inc.*, 502 F.3d 1086 (9th Cir. 2007). According to that decision, the "maximum injunctive relief" available against a nondebtor is "a stay until confirmation of a reorganization plan." *Id.* at 1095. This statement, however, does not appear necessary to the decision in the case. Thus, the statement qualifies as dicta and is not binding on this Court. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (discussing non-binding dicta). Accordingly, the issue of a post-confirmation injunction limited to a specific time remains unresolved.

The Bankruptcy Appellate Panel discussed a post-confirmation injunction affecting nondebtors in the case *In re Rohnert Park Auto Parts, Inc.*, 113 B.R. 610 (BAP 9th Cir. 1990).⁴ There Seaport Automotive Warehouse, Inc. had sold automotive parts and supplies to the partnership Rohnert Park Auto Parts, Inc. Seaport initiated a state court action against the partnership as well as the individual partners to collect on unpaid goods. The partnership subsequently filed for bankruptcy. The bankruptcy [*11] court eventually confirmed a reorganization plan that prohibited Seaport from taking any collection efforts against the partnership *as well as the in-*

dividual partners (the nondebtors) for a period of five years. The Bankruptcy Appellate Panel found that prohibiting collection efforts against the nondebtors was not authorized by the Bankruptcy Code.

4 While this ruling is not binding, it is useful as an aid in understanding the Bankruptcy Code. *See In re Healthcentral.com*, 504 F.3d 775, 784 n.3 (9th Cir. 2007) ("[D]ecisions by the BAP are not binding . . . [but may be] . . . persuasive and aid us in our reading of the Bankruptcy Code.").

The court began its analysis by agreeing that *11 U.S.C. § 105* "endow[s] the court with general equitable powers" but it "does not authorize relief inconsistent with more specific law." *Id. at 615*. The court then observed that according to *section 524(e) of the Bankruptcy Code*, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *Id.* Because the reorganization plan at issue "affected" the liability of nondebtors by prohibiting collection efforts for five years, the [*12] reorganization plan ran afoul of *section 524*. Thus, the injunction prohibiting collection efforts for five years was

not permitted. The situation in this case is very similar.

The Enforcement Injunction temporarily prohibits CCV from engaging in collection efforts against Wright and Keesling. Under the reasoning of *In re Rohnert Park Auto Parts, Inc.*, this temporary prohibition "affect[s] the liability" of Wright and Keesling and is barred by *section 524*. Regatta Bay offers no explanation how the temporary prohibition can be construed as not "affecting" Wright and Keesling's liability. Reversal is required.

Accordingly,

IT IS ORDERED Coronado City Views, LLC shall submit a proposed order reversing and remanding this matter to the Bankruptcy Court for entry of an amended confirmation order.

IT IS FURTHER ORDERED the Motion to Stay (Doc. 20) and the Motion for Extension of Time (Doc. 37) are **DENIED AS MOOT**.

DATED this 30th day of October, 2009.

/s/ Roslyn O. Silver

Roslyn O. Silver

United States District Judge

In re: Meruelo Maddux Properties, Inc., et al,

Debtor(s).

CHAPTER 11

CASE NUMBER 1:09-bk-13356-KT

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:
22632 Golden Springs Drive, Suite 190
Diamond Bar, CA 91765

A true and correct copy of the foregoing document described **Objections of East West Bank to Debtors' First Amended Proposed 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 March 12, 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:

- Michael C Abel mca@dgdk.com
- John J Bingham jbingham@dgdk.com
- Peter Bonfante peterbonfante@bsalawfirm.com
- Julia W Brand jwb@dgdk.com
- Jennifer L Braun jennifer.l.braun@usdoj.gov
- Martin J Brill mjb@lnbrb.com
- Howard Camhi hcamhi@ecjlaw.com
- James E Carlberg jcarlberg@boselaw.com
- Sara Chenetz chenetz@blankrome.com
- Ronald R Cohn rcohn@horganrosen.com
- Enid M Colson emc@dgdk.com, ecolson@dgdk.com
- Michaeline H Correa mcorrea@jonesday.com
- Brian L Davidoff b davidoff@rutterhobbs.com,
calendar@rutterhobbs.com;jreinglass@rutterhobbs.com
- Aaron De Leest aed@dgdk.com
- Michael G Fletcher mfletcher@frandzel.com, efiling@frandzel.com;shom@frandzel.com
- Barry V Freeman bvf@jmbm.com, bvf@jmbm.com
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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

In re: Meruelo Maddux Properties, Inc., et al,

Debtor(s).

CHAPTER 11

CASE NUMBER 1:09-bk-13356-KT

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- United States Trustee (SV) ustpreion16.wh.ecf@usdoj.gov
- Jason L Weisberg jason@dgdclawyers.com
- Jasmin Yang jyang@swlaw.com



Service information continued on attached page

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):

On March 12, 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 via U.S. Mail:

David P Beitchman
16130 Ventura Blvd Ste 570
Encino, CA 91436

Securities Exchange Commission
Los Angeles Regional Office
Attn: Sandra Lavigna
5670 Wilshire Blvd., 11th Floor
Los Angeles, CA 90036

Arthur J Hazarabedian
California Eminent Domain Law Group
3429 Ocean View Blvd Ste L
Glendale, CA 91208

Honorable Kathleen Thompson
United States Bankruptcy Court-
Central District of California
21041 Burbank Boulevard, Suite 305
Woodland Hills, CA 91367

Service via FedEx:

Honorable Kathleen Thompson
United States Bankruptcy Court- Central District of California
21041 Burbank Boulevard, Suite 305
Woodland Hills, CA 91367

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.

March 12, 2010
Date

Cynthia P. Miller
Type Name

/s/ Cynthia P. Miller
Signature