UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re MERUELO MADDUX PROPERTIES, INC., et al. Debtor.	Case No. 2:11-cv-05458-SVW Case No. 2:11-cv-05577-SVW Case No. 2:11-cv-05655-SVW Case No. 2:11-cv-05832-SVW Bankr. Ct. Case No. 1:09-bk-13356-VK Hon. Stephen V. Wilson Chapter 11

APPEAL FROM ORDERS OF BANKRUPTCY COURT CONFIRMING CHAPTER 11 PLAN AND DENYING MOTION FOR RECONSIDERATION

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INTRODUCTION AND STATEMENT OF THE ISSUES

Missing from appellants' 61 pages of briefs—including an oversize brief filed without Court permission—is any meaningful discussion of the language of the statute that governs this appeal, 11 U.S.C. § 1129(b).

The omission is understandable: Nothing in the statute's language permits the requirement that appellants ask the Court to impose—that in order to confirm the Charlestown plan of reorganization the Bankruptcy Court had to determine the enterprise value of the debtors. If anything, the statute negates that requirement. All the Bankruptcy Court had to do was to determine whether the plan was fair and equitable as to appellants. It did so, exercising its discretion in light of numerous relevant factors, one of which was payment to the insider shareholders. The ruling is reviewed for abuse of discretion, and there is no basis for finding abuse. The order confirming the plan must therefore be affirmed.

The appeal suffers from an additional defect: The entities that owned the majority of the insider equity shares at issue did not file notices of appeal, so they are not before the Court, and the Court thus cannot grant any relief as to those shares.

STANDARD OF APPELLATE REVIEW

"On the question you ask depends the answer you get. If the problem is conceived of merely as a matter of arithmetic you get an arithmetical answer." *Bay Bridge Operating Co. v. Aaron*, 334 U.S. 446, 484 (1948) (Frankfurter, J., dissenting).

This case is not "a matter of arithmetic," as appellants urge. At its core is the Bankruptcy Court's *exercise of judgment*, a matter that cannot be reduced to quantifiable numbers. That is why, contrary to the opening briefs, Maddux Opening Brief ("Mad-OB") 3; Meruelo Opening Brief ("Mer-OB") 3, whether "a plan satisfies the 'fair and equitable' requirement of section 1129(b) of the Bankruptcy Code" is *not* reviewed de novo, but rather for abuse of discretion.

It's true that components of a bankruptcy court's fair-and-equitable ruling may be subject to different standards of review: Interpretations of Code provisions are questions

of law that are reviewed de novo, *e.g.*, *Blausey v. U.S. Tr.*, 552 F.3d 1124, 1132 (9th Cir. 2009), and a ruling "will often be based on subsidiary findings of fact, reviewable under the clearly erroneous standard," *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074, 1091 (3d Cir. 1986); *see Great W. Bank v. Sierra Woods Grp.*, 953 F.2d 1174, 1176 (9th Cir. 1992) ("fair and equitable" determination "involves questions of fact").[1]

But a bankruptcy court's weighing and balancing of factors to determine whether a plan is "fair and equitable" under section 1129(b) is another matter entirely. "Unless the district court's finding that the plan is fair and equitable is clearly erroneous, or unless the court abused its discretion, we must affirm." *Citibank, N.A. v. Baer*, 651 F.2d 1341, 1346 (10th Cir. 1980) (cited with approval in *In re Acequia, Inc.*, 787 F.2d 1352, 1358 (9th Cir. 1986)). *Baer* noted that reviewing courts cannot substitute their judgment on matters like this for the lower court's: "'If there is warrant for the action of the District Court, our task on review is at an end.'" *Id*. (quoting *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 318 U.S. 523, 564 (1943)); *see also In re Cogar*, 210 B.R. 803, 808 (B.A.P. 9th Cir. 1997) ("An order approving a reorganization plan is reviewed for an abuse of discretion").[2]

For this reason, a reviewing court must defer to the bankruptcy court's exercise of discretion, since the bankruptcy court is "ordinarily in the best position, as the trial court and as the ongoing supervisory court for the bankruptcy proceeding, to determine whether a compromise is in the best interest of the estate and 'fair and equitable.'" *In re*

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[1] Under the clearly erroneous standard, the Court must "accept findings of fact made by the bankruptcy court unless these findings leave the definite and firm conviction that a mistake has been committed by the bankruptcy judge." *In re Straightline Invs., Inc.*, 525 F.3d 870, 876 (9th Cir. 2008).

[2] Although some courts ascribe a de novo or mixed law and fact standard of review on whether a plan is fair and equitable, on close review it becomes clear that they're discussing subsidiary legal questions, such as whether the plan violates the absolute priority rule, *In re Perez*, 30 F.3d 1209, 1212-13 (9th Cir. 1994), or whether the bankruptcy court has considered the proper factors, *Patterson v. Fed. Land Bank* (*In re Patterson*), 86 B.R. 226, 227 (B.A.P. 9th Cir. 1988).

Bodenheimer, Jones, Szwak & Winchell L.L.P., 592 F.3d 664, 675 (5th Cir. 2009) (citation omitted). And, "[i]t is not appropriate to reverse an order for abuse of discretion unless the reviewing court has 'a definite and firm conviction that the court below committed clear error of judgment in the conclusion it reached upon weighing the relevant factors.'" *In re Advanced Packaging & Prods. Co.*, 426 B.R. 806, 817 (C.D. Cal. 2010) (quoting *Stine v. Flynn* (*In re Stine*), 254 B.R. 244, 248 (B.A.P. 9th Cir. 2000)).

We recognize that in reviewing the fair-and-equitable determination, this Court "must look to whether the bankruptcy court considered the correct factors, and gave them appropriate weight in the circumstances." *Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1091. "A lower court's decision will be overturned when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Stine*, 254 B.R. at 249 (citation omitted). This is the principle appellants rely on—they contend that the Bankruptcy Court's fair-and-equitable determination was infirm because the court was required to, but did not, determine the enterprise value of the reorganized debtor. We will demonstrate below that this contention is meritless, and that there is no basis for finding that the Bankruptcy Court abused its discretion.

STATEMENT OF THE CASE

A. Nature Of The Case And Disposition.

Less than two years after its initial public offering, Meruelo Maddux Properties, Inc. and 53 of its subsidiary companies (collectively "MMPI" or "Debtors") filed for relief under chapter 11 of the Bankruptcy Code. In the Bankruptcy Court, Debtors proposed a series of reorganization plans that would have eliminated or severely impaired existing shareholders' interests while leaving management (appellants Richard Meruelo and John Maddux) firmly in control. Eventually, the Bankruptcy Court allowed two non-insider shareholders, Charlestown Capital Advisors LLC and Hartland Asset

Management Corporation (collectively, "Charlestown") to propose their own competing plan. Other than insiders and a single secured creditor controlled by Meruelo, the Charlestown plan was consensual; it was supported by the official committee of equity holders and the official committee of unsecured creditors, and received the overwhelming support of non-insider shareholders and secured creditors. Following a lengthy confirmation trial and hearing process, the Bankruptcy Court confirmed the Charlestown plan. *See* Appellants' Joint Excerpts of Record ("ER") 388-540 (confirmed plan); ER1784-1814 (confirmation order), 1815-1900 (findings of fact and conclusions of law).

Richard Meruelo and John Maddux, along with entities related to Maddux, have appealed from the confirmation order and the Bankruptcy Court's denial of reconsideration. They have limited the scope of their appeal to whether what they received from the company for a portion of their insider equity interests—known as Class 1F shares under the plan—satisfied section 1129(b)(2)(C) of the Bankruptcy Code. The relief they seek is to be paid more money for the portion of their shares that were exchanged for cash or to get back the exchanged shares. They have disclaimed all other relief. *See* Arg. II, *infra*.

B. Relevant Factual And Procedural Background.

1. MMPI voluntarily files for chapter 11 relief.

MMPI was incorporated in 2006. ER1828 ¶3. It completed an initial public offering in 2007, selling 40 million shares to the public and 5.5 million to the IPO underwriters and raising approximately $425.7 million in net proceeds. *Id*. Meruelo was Chief Executive Officer and Chairman of the Board, and Maddux was President, Chief Operating Officer, and a Board member. Supplemental Excerpts of Record ("SER") 377 ¶1; Mad-OB 6. According to Meruelo, he was "the single largest shareholder of MMPI," purporting to own "39,911,378 shares (approximately 45.3% of the shares outstanding)," while Maddux contends that he and his related entities (the John Charles Maddux Trust U/D/T dated July 24, 2006, and Sunstone Bella Vista, LLC) owned "5,797,588 shares,

which was approximately 6.6% of the shares outstanding." Mer-OB 5; Mad-OB 6. According to Meruelo and Maddux, together they controlled MMPI. Mer-OB 6, 24-25; Mad-OB 7, 23-24.

In 2009, MMPI and 53 affiliated debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. ER1816, 1828 ¶1.

2. Debtors propose a series of reorganization plans favorable to insiders Meruelo and Maddux, after which the Bankruptcy Court terminates exclusivity.

In 2009 and 2010, Debtors proposed a series of reorganization plans that would have benefitted Meruelo and Maddux, leaving them in control of the company, but harmed other shareholders. ER1830 ¶11 (First Debtors' Plan proposed an undisclosed "New Value Investor"—later revealed to be entity controlled by Meruelo and Maddux—to end up with 100% ownership), 1830 ¶12 (First Amended Debtors' Plan), 1830-31 ¶13 (Second Amended Debtors' Plan proposed rights offering made available first to Meruelo and Maddux to acquire majority of shares and then to certain equity holders that MMPI deemed "eligible," with balance of any unpurchased shares made available to Meruelo and Maddux; shares offered would be unregistered and subject to transfer restrictions, and MMPI would be able to limit the number of shareholders to 250), 1831 ¶14 (Modified Second Amended Debtors' Plan provided that equity holders could either surrender shares in existing MMPI for 8 cents each or buy shares for 7 cents each in reorganized MMPI in a number equal to the number of existing shares they held; shares would be unregistered and subject to transfer restrictions, and MMPI would be able to limit the number of shareholders to 299).

After this series of debtor-proposed plans, in June 2010, the Bankruptcy Court granted the Debtors' motion to extend the exclusivity period. The court exempted Charlestown, however, giving Charlestown the opportunity to propose a competing plan. ER1831 ¶15.

3. Charlestown proposes a competing reorganization plan, and shareholders vote on the competing plans.

From July to October 2010, Charlestown proposed an initial reorganization plan and a series of amended plans. ER1832-34 ¶¶19, 24, 28-30. Meanwhile, Debtors continued to propose amended plans. ER1833 ¶¶23, 27.

The Fourth Amended Charlestown Plan offered both non-insider and insider equity holders the option of retaining their existing shares in reorganized MMPI or exchanging their shares for 35 cents each, but regardless of how many interest holders elected to exchange their shares, each shareholder was required to exchange a sufficient number of shares on a pro rata basis to ensure that MMPI Acquisition, LLC would end up owning 55% of all MMPI shares. ER1834 ¶30.

The Fourth Amended Debtors' Plan, provided that MMPI equity holders could retain their equity interests or redeem them for 25 cents per share, but altered the right of the Official Committee of Equity Holders ("OEC"), which had been appointed by the Office of the United States Trustee, to appoint three of the seven members of the MMPI board of directors. ER1835 ¶31.[3]

The Bankruptcy Court found that the evolution of these competing plans "reflected improved treatment being offered to equity holders in MMPI." ER1835 ¶32.

Under the Charlestown plan as eventually confirmed, the shareholders received 35 cents a share (45 cents a share for insiders) for the shares that the plan required to be exchanged. ER1787; SER739-41. All shareholders retained the remainder of their shares in reorganized MMPI. SER739-41. In addition, the Charlestown plan contained a number of provisions that would enable the company to emerge from bankruptcy as a

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[3] One of the persistent complaints of MMPI non-insider shareholders was that they had no say in managing the company. In an effort to woo the support of the OEC, Debtors had proposed in one version of their plan to give the OEC the right to appoint three of the seven directors to the post-chapter 11 board of MMPI. ER174. In a later version, Debtors conditioned this right on members of the OEC supporting and voting for Debtors' plan and against a Charlestown plan. SER86-87. But the Bankruptcy Court ruled that this condition was contrary to applicable law and that it was unenforceable. SER318-19.

successful entity, including a $23.6 million cash infusion as capital which funded the payments to creditors and shareholders and provided working capital for post-reorganization operations; a $15 million loan at reasonable terms; and the appointment of new management and a new board of directors (including three directors chosen by the OEC). SER800-08.

In October 2010, the Bankruptcy Court approved disclosure statements and ordered service of solicitation packages for the competing plans. ER1835-36 ¶¶33-36. Included in those packages was a letter from the OEC supporting Charlestown's plan and urging non-insider equity holders to vote for that plan. ER1836 ¶37.

The Charlestown plan provided for payment of all creditor claims and received the support of the official committee of equity holders and the official committee of unsecured creditors, and was also overwhelmingly supported by all non-insider secured creditors that had not previously entered into "lock up agreements" with Debtors. ER1836 ¶37, 1872 ¶14. However, as of the balloting deadline, "45,189,587 of the shares of MMPI's outstanding common stock that were held directly or indirectly by Richard Meruelo, John Maddux, other officers of MMPI or other members of MMPI's board of directors (collectively, 'Insider Equity') were tabulated as having voted in Class 1F," and that class rejected the Charlestown plan. ER1828 ¶4, 1843 ¶60(g).

4. After briefing, a lengthy confirmation trial, and further plan modifications, the Bankruptcy Court confirms the Charlestown plan.

The Bankruptcy Court ordered confirmation briefing, the first round of which was filed in December 2010. ER1836-37 ¶¶38-40. Trial began in late January 2011 and continued through February and March 2011. ER1816.

At the end of the confirmation trial, the Court took the two plans under submission; the parties continued to make modifications; and the Court held additional status conferences and hearings in April and May 2011. *See* ER1840-42 ¶¶52-59. Throughout this period, Debtors repeatedly argued that MMPI had to emerge from

chapter 11 by no later than May 31, 2011 because of supposedly inadequate cash reserves. SER627-28, 641. Yet, in the midst of further status conferences on May 17 and May 19, 2012, Debtors filed a "status conference report" that directly contradicted those arguments, SER675, prompting the Bankruptcy Court to observe that Debtors "created the impression that we had to get a plan effective by May 31st by misleading the Court about the amount of cash that was available." ER1139-40; *see also* ER1122-24.

At the May 19, 2011 hearing, the Bankruptcy Court announced that it would confirm the Charlestown plan. As reflected in its later written order, ER1784-1814, instead of 35 cents per share as originally proposed, the plan provided for a payment of 45 cents per share to Class 1F shareholders. ER1793. The court set forth detailed findings and conclusions supporting the determination that this was fair and equitable, which we discuss in greater detail in Argument I.C., *infra*.

5. The Bankruptcy Court denies motions to reconsider and to stay confirmation.

Debtors immediately filed a "Motion for Order (1) Striking Evidence Improperly Received After the Close of Trial through Judicial Notice, (2) Reconsidering Plan Confirmation Ruling, Or, In The Alternative, (3) Scheduling A Hearing To Consider Fair Value." ER986-1036. The Maddux entities filed a joinder in that motion, as did Meruelo. ER1164, 1175. The Bankruptcy Court denied the motion. ER1754. The Maddux entities and Meruelo orally requested, and the court denied, a stay of the order confirming the Charlestown plan pending an appeal. ER1775-76, 1781.

6. The Maddux entities and Meruelo appeal.

The Bankruptcy Court entered its confirmation order and its findings of fact and conclusions of law. ER1784, 1815. The Maddux entities and Meruelo appealed from the confirmation order. ER1901, 1941. The Bankruptcy Court later entered its orders denying a stay and reconsideration. ER1983, 1991. The Maddux entities and Meruelo appealed from the order denying reconsideration. ER1999, 2017.

Appellants filed emergency motions for stay pending appeal and ex parte applications for temporary stay in this Court, which denied the motions, determining, among other things, that appellants were not likely to succeed on the merits. *See* Case No. 11-05458, Docket No. 35 (07/08/2011) (order denying stay), at 4 & n.6.

Charlestown later moved to dismiss on the grounds that the appeals were jurisdictionally and equitably moot and, as to Meruelo, that he lacked standing to appeal the confirmation order because he did not file formal objections to the Charlestown plan. *See* Case No. 11-05458, Docket No. 48 (01/25/2012) (order denying motion). This Court denied the motion. *Id.* at 5.

ARGUMENT

I.

THE BANKRUPTCY COURT PROPERLY DETERMINED THAT THE CHARLESTOWN PLAN WAS FAIR AND EQUITABLE.

All parties agree that a plan of reorganization must be "fair and equitable" to dissenting impaired classes. 11 U.S.C. § 1129(b). After more than six months of hotly-contested confirmation proceedings, the Bankruptcy Court ruled that the Charlestown Plan was "fair and equitable" to appellants. But appellants claim that the Bankruptcy Court could not properly make this decision without a valuation hearing to determine the "fair value" of their equity interests.

There is no such requirement. Appellants do not cite a case that articulates a "fair value" standard in this context. Nor do they even discuss the language of the governing statute. Instead, they cite a hodgepodge of cases that have nothing to do with the issue presented here.

A. Under Section 1129(b)(2)(C)(ii), The Charlestown Plan Is "Fair And Equitable" To Appellants Because No Equity Class Junior To Them Received Or Retained Property.

Section 1129(a) lists the confirmation requirements for chapter 11 plans of reorganization. 11 U.S.C. § 1129(a) ("The court shall confirm a plan only if all of the

following requirements are met . . . "). One path to confirmation is if each impaired class of creditors and shareholders accepts the plan. *Id*. § 1129(a)(8).[4] But section 1129(b) gives plan proponents a path to confirmation even if they cannot obtain the consent of all impaired classes: "In section 1129(b), Congress crafted both specific and general rules for nonconsensual confirmation. In the colorful argot of bankruptcy practice, when the requirements of section 1129(b) are met, confirmation can be 'crammed down' the throat of the dissenting class." 7 Collier on Bankruptcy ¶ 1129.03 (16th ed. 2012).

A cramdown plan may be confirmed if it is "fair and equitable" with respect to the dissenting class of creditors or interest holders. Section 1129(b)(2) defines the term "fair and equitable" with respect to the three categories of claimants and interest holders: (1) Section 1129(b)(2)(A) defines "fair and equitable" with respect to secured creditors; (2) Section 1129(b)(2)(B) defines it with respect to unsecured creditors; and (3) Section 1129(b)(2)(C) defines it with respect to interest holders. The "general principle" of Section 1129(b) is that a plan may be confirmed with respect to a dissenting class "if that class and all below it are treated according to the absolute priority rule." *See* H.R. Rep. No. 95-595 at 413, *reprinted in* U.S.C.C.A.N. 5963. Under the absolute priority rule, no junior class may receive a distribution under the plan unless the dissenting class is paid in full.[5] *See* 7 Collier on Bankruptcy ¶ 1129.03[4][a][1] ("a plan of reorganization may not allocate any property whatsoever to any junior class on account of the members' interests or claims in a debtor unless all senior classes consent, or unless such senior classes receive property equal in value to the full amount of their allowed claims, or the debtor's reorganization value, whichever is less"). The "rule's focus is on allocation of the debtor's assets in a way that preserves nonbankruptcy understandings, not on full creditor payment. . . . Thus if all of the debtor's reorganization value is allocated to

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[4] Generally, a class of creditors or equity interest holders is "impaired" unless it "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." *See* 11 U.S.C. § 1124.

[5] "Treatment of . . . secured creditors is slightly different because they do not fall in the priority ladder, but the principle is the same." H.R. Rep. No. 95-595 at 413.

senior classes, and they are still not paid in full, absolute priority is *not* violated so long as no junior class participates on account of its junior interest." *Id*.

As it applies to equity interest holders, the absolute priority rule is codified in Section 1129(b)(2)(C):

> [T]he condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> * * *
>
> (C) With respect to a class of interests–
>
> (i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value . . . equal to . . . the value of such interest; or
>
> (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

The Bankruptcy Court concluded that the "Charlestown Plan satisfies section 1129(b)(2)(C)(ii) because there is no holder of any interest junior to the interests in Class 1F [the appellants' class] who will receive or retain property under the Charlestown Plan on account of such junior interest." ER1877 ¶27. The Bankruptcy Court explained that section 1129(b)(2)(C) means what it says: A plan will satisfy section 1129(b)(2)(C) if it satisfies section 1129(b)(2)(C)(i) *or* (ii); it need not satisfy both. ER1878 ¶29.

Other courts have reached the same conclusion. *In re P.J. Keating Co.*, 168 B.R. 464, 468 (Bankr. D. Mass. 1994) ("Because the test under section 1129(b)(C) is an alternative one, satisfaction of paragraph (ii) makes it unnecessary" for the plan to comply with paragraph (i)."); *see also In re Pero Bros. Farms, Inc.*, 90 B.R. 562, 564 (Bankr. S.D. Fla. 1988) ("The plan makes no provision for any interest junior to the shareholders. It therefore meets one of the two alternative requirements for cramdown").

This interpretation of section 1129(b)(2)(C) is consistent with a long line of decisions interpreting section 1129(b)(2)(A)—the parallel section that defines the term

"fair and equitable" with respect to secured creditors. Section 1129(b)(2)(A) uses the same statutory construction as section 1129(b)(2)(C)—it states that fair and equitable *includes* (i), (ii) *or* (iii), meaning that it provides for enumerated *alternatives*. The Ninth Circuit has held that Section 1129(b)(2)(A) only requires satisfaction of one of the three alternative definitions of "fair and equitable." *Arnold & Baker Farms v. United States ex rel. United States Farmers Home Admin.* (*In re Arnold & Baker Farms*), 85 F.3d 1415, 1420 (9th Cir. 1996) ("To be 'fair and equitable' the plan must satisfy, with respect to secured claims, one of the following three tests . . ."). Court after court has reached the same conclusion. *See In re Phila. Newspapers, LLC*, 599 F.3d 298, 305-06 (3d Cir. 2010); *Wade v. Bradford*, 39 F.3d 1126, 1130 (10th Cir. 1994); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters*. (*In re Briscoe Enters*.), 994 F.2d 1160, 1168 (5th Cir. 1993). In *Philadelphia Newspapers, LLC*, the Third Circuit explained:

> [Section] 1129(b)(2)(A) is phrased in the disjunctive. The use of the word "or" in this provision operates to provide alternatives—a debtor may proceed under subsection (i), (ii), *or* (iii), and *need not satisfy more than one subsection*. . . . Thus, any doubt as to whether subsections (i), (ii), and (iii) were meant to be alternative paths to meeting the fair and equitable test of § 1129(b)(2)(A) is resolved by the Bankruptcy Code itself, and courts have followed this uncontroversial mandate.

599 F.3d at 305-06 (emphasis added) (citing *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm.* (*In re Pacific Lumber Co.*), 584 F.3d 229, 245 (5th Cir. 2009) for "the obvious proposition that because the three subsections of § 1129(b)(2)(A) are joined by the disjunctive 'or,' they are alternatives").[6]

The Tenth Circuit similarly held that "because the debtors' plan satisfied the requirements of 1129(b)(2)(A)(i), creditor was not entitled to the 'indubitable equivalent'

[6] *See also* H.R. Rep. No. 95-595 at 413 ("With respect to classes of equity, the court may confirm over a dissent if the members of the class are unimpaired, if they receive their liquidation preference or redemption rights, if any, or if no class junior shares under the plan.")

of his claims as described in 1129(b)(2)(A)(iii) [because] [t]hese requirements are written in the disjunctive. . . ." *Wade*, 39 F.3d at 1130; *see also In re Briscoe Enters.*, 994 F.2d at 1168 ("While this Court has held that simple technical compliance with one of the three options in 1129(b)(2)(A) may not necessarily satisfy the fair and equitable requirement, it has not transformed the 'or' in 1129(b)(2)(A) into an 'and.' As we hold that the plan satisfies 1129(b)(2)(A)(i), we need not attempt to decipher the meaning of 'indubitable equivalent.'"); *In re Criimi Mae, Inc.*, 251 B.R. 796, 807 (Bankr. D. Md. 2000) ("because of the disjunctive construction of section 1129(b)(2)(A), if debtors can meet the test of indubitable equivalence, the plan can be confirmed without compliance with subsection (ii)"); *CoreStates Bank, N.A. v. United Chem. Techs.*, 202 B.R. 33, 48 (E.D. Pa. 1996) ("In order to present a fair and equitable plan, the debtor need only satisfy *one* of the three tests articulated in § 1129(b)(2)(A).").

This was the Debtors' approach here until the Bankruptcy Court announced its tentative ruling in favor of the Charlestown plan.[7] In connection with the Modified Second Amended Debtors' Plan (which would have forced shareholders to accept 8 cents per share), Debtors' proposed disclosure statement contended that a plan need satisfy subsection (i) *or* (ii), *not both*. *See* SER64. They took the same position in the disclosure statement sent to creditors and shareholders. *See* SER262-63. And they reaffirmed this position in their opening brief in support of confirmation of their proposed plan not just once, but twice. SER372 (Section 1129(b)(2)(C) provides that a plan is fair and equitable with respect to a class of interests "where *either* (i) . . . *or* (ii)" is satisfied) (emphasis added), 373 ("Since there are no Classes junior to Class 2E, the Plan's treatment of that Class is fair and equitable.") (citing § 1129(b)(2)(C)).

[7] Prior to the Effective Date of the Charlestown plan, Meruelo and Maddux effectively controlled the Debtors.

B. Section 1129(b) Has No "Fair Value" Requirement Separate From Subsection (i).

In their Opening Briefs, appellants say absolutely nothing about section 1129(b)(2)(C). They never explicitly argue that "or" means "and." Nonetheless, they cannot prevail without transforming "or" into "and."

Appellants correctly state that "fair and equitable" may require something other than technical compliance with section 1129(b)(2)(C). But they fail to recognize the simple principle that an additional requirement must be precisely that—something different from what already appears in the statute. Their approach would read back into the statute a requirement that the disjunctive "or" eliminates—they would change "or" to "and." There is no basis for doing so.

In claiming that the Bankruptcy Court was required to conduct a valuation hearing in order to establish the "fair value" of their shares, appellants are simply re-packaging the value test in section 1129(b)(2)(C)(i) by putting the word "fair" in front of it. They do not—because they cannot—explain how this valuation hearing would be any different from a valuation hearing conducted under section 1129(b)(2)(C)(i). So, à la Humpty Dumpty, "or" means "and."

Not surprisingly, appellants cannot cite a single case that applies their so-called "fair value" standard. Instead, they cite a variety of cases that discuss valuation in totally different contexts: cases involving secured creditors seeking relief from stay to pursue foreclosure of their collateral, cases decided under the old Bankruptcy Act, and cases involving a corollary to the absolute priority rule that is not applicable here.

The foreclosure cases—*In re Colorado Spanish Peaks Ranch, Inc.*, 661 F.2d 759 (9th Cir. 1981) and *In re FRE Real Estate, Inc.*, 450 B.R. 619 (Bankr. N.D. Tex. 2011)—do not involve the "fair and equitable" standard or even plans of reorganization generally. Rather, they involve motions for relief from stay, which are governed by section 362, not section 1129. Section 362(d)(2) provides that a bankruptcy court shall

grant relief from stay if, among other things, the debtor has no equity in the property, and it specifically requires courts to determine whether debtors have equity in their property. So it's hardly surprising that courts take evidence on the value of the property as compared to the amount of secured debt.

Appellants cite two cases decided under the old Bankruptcy Act of 1898—*Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 441 (1968) and *Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 526 (1941). These cases are readily distinguishable because the Act did not define "fair and equitable." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1360 (7th Cir. 1990) ("The Bankruptcy Act of 1898 required plans of reorganization to be 'fair and equitable' but did not define that phrase"). The Bankruptcy Code superseded the common law definition of "fair and equitable": "Everything changed with the adoption of the Code in 1978. The definition of 'fair and equitable' is no longer a matter of common law; § 1129(b)(2) defines it expressly." *Id*. at 1361.[8]

Even if *TMT Trailer* and *Consolidated Rock* had been decided under the Code, they don't support appellants' "fair value" argument. *Consolidated Rock* is a straightforward absolute priority case. The Court held that the trial court must make adequate findings as to the value of the assets "so that criteria will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole." *Consolidated Rock*, 312 U.S. at 524. Without proper valuation of the company and earnings, "indefensible participation of junior securities in plans of reorganization may result." *Id*. at 525-26. In other words, the Court did not direct the trial court to determine whether equity holders received "fair value" for their shares. To the contrary,

[8] The Bankruptcy Court recognized the distinction between cases decided under the Act and cases decided under the Code. ER1721 ("[T]hose cases . . . are really in a different context of [the Act.]").

the Court directed the trial court to determine whether the absolute priority rule dictated that equity receive *nothing*.

TMT Trailer articulates a corollary to the absolute priority rule, referred to in *Collier on Bankruptcy* as the prohibition on paying a "premium" for creditors' claims. *See* 7 Collier on Bankruptcy ¶ 1129.03[4][a][i][C][ii]. While the absolute priority rule prohibits equity from receiving a distribution unless creditors are paid in full, under the "no premium" rule creditors cannot receive more than the full amount of their claim. *See id*. ("The second major component of the 'fair and equitable' requirement is that no creditor or interest holder be paid a 'premium' over the allowed amount of its claim. Once the participant receives or retains property equal to its claim, it may receive no more."). As addressed in *TMT Trailer*, when creditors receive stock in the reorganized company rather than cash, a bankruptcy court cannot determine whether those creditors are receiving more than full payment unless it values the reorganized company. 390 U.S. at 441 ("Since participation by junior interests depends upon the claims of senior interests being fully satisfied, whether a plan of reorganization excluding junior interests is fair and equitable depends upon the value of the reorganized company.").

In re Oneida Ltd., 351 B.R. 79 (Bankr. S.D.N.Y 2006) involved the same prohibition on paying "premiums" to creditors. Under the plan in *Oneida*, equity holders were "wiped out" and certain secured creditors received stock in the reorganized company. To determine whether the plan improperly conferred too much value to creditors, the bankruptcy court valued the debtor's assets. *Id*. at 87.

C. The Bankruptcy Court Properly Found That The Charlestown Plan Was Fair And Equitable To Insider Shareholders.

The Bankruptcy Court understood what appellants do not: Having complied with subsection (ii), the Charlestown plan need not comply with subsection (i), but it must satisfy section 1129(b)(1)'s broader mandate that it be "fair and equitable." ER1878-79 ¶30. The Court found that, under the facts and circumstances of the case, the Charlestown plan was fair and equitable if it paid insider shareholders 45 cents per share

for the shares that were exchanged for cash. This is a classic "totality of the circumstances" determination properly left to the sound discretion of a trial court. As we detail below, the Bankruptcy Court had ample evidence before it to support a finding that 45 cents was a fair and equitable price for the redeemed shares under the circumstances.

Appellants' misconception of "value." As a threshold matter, even if enterprise value were relevant—it isn't—appellants confuse two distinct concepts of value—the value of MMPI pre-reorganization and the projected value of MMPI as a going concern post-reorganization. They do this because, by their own admission, MMPI could not reorganize without the infusion of outside cash. This implies a very low enterprise value pre-reorganization.

Maddux cites *In re Bush Indus., Inc.*, 315 B.R. 292, 299 (Bankr. W.D.N.Y. 2004) for the proposition that "[f]or purposes of the cram down provisions of 11 U.S.C. § 1129(b), the debtor must demonstrate its present value as a reorganized entity." Mad-OB 17. But, like *Oneida*, in *Bush* the court had to value the debtor company to determine whether a plan violated the absolute priority rule by paying creditors a premium. Because creditors were receiving stock in the reorganized company and because the bankruptcy court needed to determine whether those creditors were receiving more than full payment, the bankruptcy court necessarily needed to determine the value of the reorganized company. The fair value of the reorganized debtor, in the court's words, "is critical to the issue of whether a proposed stock distribution will cause secured creditors to receive more than the outstanding balance on their claims." *Bush*, 315 B.R. at 295. This hardly supports that idea that MMPI insider shareholders are entitled to compensation based on the reorganized value of the company.

The absurdity of appellants' argument is revealed when one considers that an outside investor (MMPI Acquisition, LLC) gave the Company $38 million in debt and equity in exchange for new shares representing 55% of the Company's stock post-exchange. Not all of that money went to shareholders in exchange for their shares. Some went into the Company to pay unsecured creditors and to fund post-reorganization

operations. If appellants' argument were correct, it would never make sense for an investor to put money into a company in exchange for the issuance of equity.

Here is why: If a company had a pre-reorganization value of $100, an investor might agree to contribute $100 in exchange for 50% of the company (implying a post-reorganization value of $200). If compensation to existing shareholders were based on pre-reorganization value, existing shareholders would not be entitled to compensation because the value of their 50% share in the post-reorganization company is the same as their 100% share in the pre-reorganization company. If existing shareholders were entitled to receive compensation based on the post-reorganization value of the company, however, they would be entitled to $100. The investor's entire $100 equity investment would be wiped out, and the investor would have paid $100 for $50 worth of stock.

This hypothetical illustrates another fallacy in appellants' arguments. Over and over, appellants state that the Charlestown plan forced them to sell their shares for 45 cents. This is an inaccurate and misleading characterization of the Charlestown plan. Under the Charlestown plan, appellants received 45 cents per share for half their shares, *and* one share in a reorganized company for the other half. In other words, the "value" given to appellants includes shares in a company that has been recapitalized with an infusion of new equity and debt and that has retained independent professional management. These post-reorganization shares are, almost by definition and by appellants own admission, more valuable than the pre-reorganization shares.

The Bankruptcy Court's fair and equitable determination. The Bankruptcy Court properly considered the facts and circumstances of the case to determine that the Charlestown Plan was "fair and equitable." Among other things:

- The Charlestown Plan was one of three competing plans seeking support of creditors and shareholders. The interests of outside shareholders were represented by an official equity committee with competent legal and financial advisors. The Bankruptcy Court considered evidence showing that the per-share price offered by the Charlestown Plan was the subject of an

arm's-length negotiation. ER1880 ¶33.[9] The Court accepted this evidence as tending to establish that a 35 cents per-share price would satisfy the fair and equitable test. *Id*.

- The overwhelming majority of non-Insider shareholders voted to accept the Charlestown Plan and to reject Debtors' Plan. Debtors themselves presented evidence showing that a substantial portion of non-Insider shares are owned by professional investors who served on the OEC. Thus, the votes necessarily reflected the preferences of sophisticated and well-informed investors.
- Debtors had negotiated a convertible loan with Watermarke Properties, Inc. that allowed conversion of debt to equity four years after funding at a nominal share price of 50 cents. ER1881 ¶ 35.[10] This necessarily implied a present share price substantially lower than 50 cents.
- There was an active market for the stock, which traded at 45 cents on May 18, 2011. ER1881 ¶35. Further, the Court cited evidence that "some 300,000 shares of MMPI stock were sold in February 2011 for an average of $.50 per share." *Id.*; *see also* SER412-13.

The Bankruptcy Court properly considered that Debtors had relied on the share trading price in formulating their proposed plans. ER1831 ¶14, 1881 ¶34. Appellants contend that the Bankruptcy Court could not rely on evidence that Debtors' plan offered a 25 cent share price because it only applied to voluntary redemptions. This argument

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[9] The Bankruptcy Court cited the deposition testimony of Stephen Taylor, which was received in evidence during the confirmation trial, in which he testified that $23 million was a fair price to pay for 55% of MMPI with new management, as called for by the Charlestown plan. ER1880 ¶ 33; *see also* SER466-67. The Court also cited the OEC letter stating that the OEC' had participated in negotiations relating to treatment of non-insider equity holders, including the price of 35 cents per share for MMPI shares being acquired under the Charlestown Plan. ER1880 ¶ 33; *see also* SER303-05.

[10] In January 2011, Debtors had filed evidence of Watermarke's $15 million loan commitment, under which Watermarke could elect, at any time after the fourth anniversary of the funding, to convert the principal loan amount into 30 million shares of MMPI common stock with a pro rata adjustment for 50 cents per share. ER1837 ¶41; *see also* SER385.

fails for two reasons. First, Debtors proposed several plans where redemption of shares was not voluntary, including a plan that gave shareholders 8 cents per share unless they participated in a rights offering at 7 cents per share. ER1831 ¶14. In other words, existing shareholders were given a choice: Pay 7 cents over and above what you already paid for your shares, or accept an 8 cent buy-out price. To call the 7 cents a "voluntary" buy-out stretches the definition of voluntary beyond recognition. Second, to the extent that Debtors' final plan included a truly voluntary buy-out price, the share price is still relevant evidence of what is fair and equitable. Appellants were officers and directors of a public corporation and a debtor in possession. They had an affirmative obligation to treat shareholders fairly under both state law and bankruptcy law. *See*, *e.g.*, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) ("[T]he debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee"); *see also In re Zenith Elecs. Corp.*, 241 B.R. 92, 108 (Bankr. D. Del. 1999) (finding that section 1129(a)(3) "incorporate[s] Delaware law (as well as any other applicable nonbankruptcy law) . . . [and] [i]n evaluating a transaction between a controlling shareholder and its corporation, the Delaware courts require a showing that the transaction is entirely fair"). They were also required to propose their plans in good faith. 11 U.S.C. § 1129(a)(3) (plan must be "proposed in good faith and not by any means forbidden by law"). Given their fiduciary obligations, appellants cannot disavow their own proposed buy-out prices as irrelevant to what is "fair and equitable."

In opposition to all the evidence that the Bankruptcy Court considered, appellants submitted nothing. Appellants contend that M. Freddie Reiss valued MMPI at over $100 million. This is simply false. Debtors offered the declaration of M. Freddie Reiss dated December 30, 2010, ER847-58, to support what they contended was the value of the Debtors' assets. The Bankruptcy Court considered and rejected the Debtors' contention that Reiss's testimony was probative of share value. The Bankruptcy Court observed that "Reiss admitted that he did not actually value the assets of MMPI and rather simply added up the book value of assets on a balance sheet or added up Richard Meruelo's

valuations of the real properties owned by the Property Level Debtors and subtracted the secured debt encumbering the assets and properties—a simple mathematical calculation." ER1879 ¶32. The Bankruptcy Court also observed that "Reiss expressly testified that he has not valued *shares of stock in* MMPI and has not expressed a professional opinion of the value of *shares of stock in* MMPI." *Id*. The Bankruptcy Court thus appropriately discounted Reiss's testimony as it was not "an actual valuation or an expert's professional opinion of value." ER1880 ¶32.

D. The Bankruptcy Court Properly Considered The Pink Sheet Trading Price To Help It Evaluate Whether The Charlestown Plan Was Fair And Equitable.

Appellants' attacks on the Bankruptcy Court's consideration of the pink sheet rest on the faulty premises that MMPI's enterprise value was relevant to the Bankruptcy Court's fair and equitable determination, and that the court considered the pink sheet in connection with that value. We have shown above that enterprise value wasn't relevant at all. And determining enterprise value wasn't why the Bankruptcy Court considered the pink sheet. The pink sheet share price was just one of many factors—and a minor one at that—in the Bankruptcy Court's determination of what share price insider shareholders should receive in order for the plan to be fair and equitable as to them.

Appellants tacitly admit, because they don't argue otherwise, that the pink sheet was proper evidence of the market price for MMPI shares. They could hardly do otherwise, since courts have long found pink sheets to be appropriate evidence of share price. *See, e.g.*, *Weber v. SEC*, 222 F.2d 822, 823 (2d Cir. 1955) ("[w]e see no reason not to adhere to our prior decision permitting the introduction of [Pink] Sheets as evidence of such market prices"); *Merritt, Vickers, Inc. v. SEC*, 353 F.2d 293, 296 (2d Cir. 1965) (holding that pink sheet prices "constitute sufficient proof of prevailing market prices 'in the absence of evidence of the contrary'").

1. Pink sheet prices are a proper subject of judicial notice.

Judicial notice of publicly traded stock prices is well recognized because these prices are indisputable facts derived from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b)(2); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 n.8 (2nd Cir. 2000); *see also In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002) (taking judicial notice of stock price data); *SEC v. Bilzerian*, 814 F. Supp. 116, 123 n.19 (D.D.C. 1993) ("Court may take judicial notice of closing stock prices pursuant to [FRE] 201").

Pink Sheet prices are no different. *See*., *e.g.*, *Johnson v. Wiggs*, 443 F.2d 803, 806 (5th Cir. 1971) (pink sheet prices are in the public domain); *United States v. Kelly*, 349 F.2d 720, 734 (2d Cir. 1965) (pink sheet prices are published daily). Indeed, "the modernized, energized Pink Sheets is becoming more prominent in the world of public securities markets." 24 William M. Prifti, *Securities: Public and Private Offerings* § 9:23 (West 2011). "These 'pink sheets' list thousands of stocks together with the names of brokerage firms 'making a market' in the stock by offering to buy it at one price (the 'bid' price) and offering to sell at a somewhat higher price (the 'asked' price). Likewise, the pink sheets also publish the bid and asked prices for each particular stock." *Kelly*, 349 F.2d at 734.

As the Bankruptcy Court correctly found, "[t]here is an active over the counter market for MMPI shares which are traded under the symbol 'MMPIQ.'" ER1881 ¶ 35. Furthermore, pink sheet trading prices are readily available on the Internet. *See OTC Pink Market Activity*, OTCMarkets.com, http://www.otcmarkets.com/otc-pink/home (last visited Apr. 26, 2012). The Court took notice of the fact that "[a]s of May 18, 2011, the day prior to the Court's oral ruling confirming the Charlestown Plan, shares with the symbol MMPIQ traded at $.45 per share with a trading volume in 23,700 shares (and with a volume as high as 179,000 shares as recently as March 21, 2011)." ER1881 ¶ 35.

Since published stock quotes are indisputable facts derived from sources the accuracy of which cannot reasonably be questioned, the Bankruptcy Court properly took judicial notice of them. *See Ganino*, 228 F.3d at 166 n.8.

2. The Bankruptcy Court properly took judicial notice after the trial's conclusion.

FRE 201 expressly allows a court to take judicial notice "at any stage of the proceeding." Fed R. Evid. 201(d). This rule applies as late as Supreme Court review. *E.g., Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977); *see also* Fed. R. Evid. 201 advisory committee's note (stating "judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal"); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000) (taking judicial notice of opening and closing stock prices on appeal). There is accordingly no merit to Maddux's contention that the court erred in taking judicial notice of the trading price after the close of trial.

The Maddux parties cite *Colonial Leasing Co. of New England, Inc. v. Logistics Control Grp. Int'l*, 762 F.2d 454, 461 (5th Cir. 1985) in support of their claims that they were procedurally prejudiced by the bankruptcy court's taking judicial notice. Mad-OB 32. But *Colonial Leasing* only states the obvious: that post-verdict judicial notice "may be circumscribed by other considerations," such as "'the requirement of fairness.'" 762 F.2d at 461.

Here, there was nothing unfair or prejudicial about taking judicial notice of the pink sheet trading price after trial. Neither appellant even focused on the share price issue until the Bankruptcy Court appeared on May 17 that it was leaning toward confirming the Charlestown plan at 35 cents a share. Most important, the court's ultimate 45-cent determination unquestionably *benefitted* appellants. Their own share-price evidence easily supported the 35-cent price in Charlestown's plan, which the court was inclined to accept before looking at the pink sheet. This evidence included the provision in one Debtors' proposed plan that would have forced shareholders to buy at 8 cents or sell at 7 cents; the provision in another Debtors' proposed plan that pegged the

price at 25 cents; and the Watermarke financing, which priced the shares at 50 cents after four years. *See* Arg. I.C., *supra*.

The pink sheet price thus did nothing more than confirm for the court that Charlestown's proposal of 35 cents for the insider shareholders was in the ballpark and that with the court's 10-cent enhancement there could be no question but that the plan was fair and equitable. Indeed, without the pink-sheet evidence, it is more probable than not that the court would have ended up confirming the plan at 35 cents. So even if the court erred by considering the pink sheet, there was no prejudice. *See Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 943 (9th Cir. 2009) ("A party seeking reversal for evidentiary error must show that the error was prejudicial, and that the verdict was 'more probably than not' affected as a result.").

II.

THE COURT LACKS JURISDICTION TO AWARD ANY RELIEF AS TO THE VAST MAJORITY OF CLASS 1-F SHARES, WHICH WERE OWNED BY NON-APPEALING ENTITIES.

A. Appellants Seek Only Increased Compensation For Class 1-F Shares.

In opposition Charlestown's motion to dismiss for mootness, Meruelo argued that mootness did not bar the appeal because he only sought to obtain compensation for his shares. Case No. 11-05577, Docket No. 26 (01/09/2012), at 10 (Meruelo describing "narrow issues" addressed in appeal); *see also id.* at 14-15. The Maddux entities responded similarly. Case No. 11-05458, Docket No. 44 (01/09/2012), at 2, 12.

In denying the motion, the Court relied on appellants' express limitation of the relief they sought, noting that "[a]ppellants contend that they do not seek a 'modification' of the Plan" but "seek limited relief, *i.e.*, the payment of additional money from Charlestown to Appellants in order to 'fairly' compensate them for the forced sale of their shares in the Company." Case No. 11-05577, Docket No. 29 (01/25/2012), at 2; *see also id.* at 3 (Court noting that "under certain circumstances" it could "order the

payment of monetary damages in connection with the appeal of a confirmation order" and again relying on "the limited relief sought by Appellants").

The two opening briefs confirm that the only relief appellants seek on appeal is more money for their Class 1F shares or return of those shares to appellants. *See, e.g.*, Mer-OB 5; Mad-OB 33.

B. Most Of The Class 1-F Shares Were Owned By Entities That Did Not Appeal.

As relevant here, the confirmation order states that shareholders were to receive 35 cents per share for their shares of MMPI Common Stock except for three shareholders— "(a) (i) Merco Group - Roosevelt Building, LLC, (ii) Richard Meruelo, *as trustee of the Richard Meruelo Living Trust* U/D/T dated September 15, 1989 and (iii) Sunstone Bella Vista LLC"—who were to receive 45 cents per share. ER1793 (emphasis added).

Sunstone Bella Vista LLC ("Sunstone") is one of the Maddux entities that appealed from the confirmation order and order denying reconsideration. ER1901, 1999. And in the Bankruptcy Court, Sunstone had also joined in objecting to the Charlestown plan and in Debtors' motion to reconsider. ER859-60, 1175-76.

In contrast, the other two shareholders—entities identified as owning Class 1F shares—Merco Group - Roosevelt Building, LLC ("Merco") and Richard Meruelo, as trustee of the Richard Meruelo Living Trust U/D/T dated September 15, 1989 ("Trust")—did none of these things. Neither the Maddux entities' notices of appeal nor Richard Meruelo's notice of appeal or amended notice identify Merco as an appellant or even as a party to the appeal. ER1901-04, 1941-45, 1999-2003, 2017-21. Likewise, Richard Meruelo's notice of appeal and amended notice do not identify the Trust as an appellant or a party to the appeal. ER1941-45, 2017-21. And, also unlike Sunstone, neither Merco nor the Trust had joined in objections to the Charlestown plan or in the motion to reconsider. Meruelo's joinders in the "bullet-point" objection to the plan and

in the motion to reconsider were in his name only and did not mention Merco or the Trust. ER709-10, 1164-65.

Yet, it was Merco and the Meruelo Trust that owned the vast majority of the Class 1F shares identified in confirmation order, with Sunstone owning about only 6.6%. *See* ER727 (tabulation of votes of Class 1F shares against Charlestown plan by Merco, Richard Meruelo "as trustee," and Sunstone); *see also* Mad-OB 6.

C. The Court Has No Jurisdiction To Award Relief To The Non-Appealing Entities That Owned The Class 1-F Shares.

"'[T]he failure to timely file a notice of appeal is a jurisdictional defect barring appellate review.'" *In re Wiersma*, 483 F.3d 933, 938 (9th Cir. 2007); *accord In re Cedar Funding, Inc.*, 419 B.R. 807, 815 n.10 (B.A.P. 9th Cir. 2009). Here, neither Merco nor the Trust has ever filed any notice of appeal, and the deadline expired many months ago. Nor are they identified as appellants in any brief—Meruelo filed his brief solely in his own name. This Court thus lacks jurisdiction in this appeal to grant relief with respect to those non-appealing entities' shares.

The Court cannot overlook the failure of Merco and the Trust to timely appeal. It has long been the general rule that "[o]nly the parties named in the notice of appeal are brought within the appellate court's jurisdiction." *Cook & Sons Equip., Inc. v. Killen*, 277 F.2d 607, 609 (9th Cir. 1960). The same rule obtains in bankruptcy proceedings. As explained in *Smith v. Dairymen, Inc.*, 790 F.2d 1107, 1110 (4th Cir. 1986), Federal Rule of Bankruptcy Procedure 8001(a) "requires '[a]n appeal from a final judgment, order, or decree of a bankruptcy judge to a district court . . . [to be] taken by filing a notice of appeal with the clerk of the bankruptcy court' within the time prescribed by law, and, significantly, provides that '*[e]ach* appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004[.]" Interpreting this rule, *Dairymen* held that "absent exceptional circumstances not present here, only a party who files a notice of appeal properly invokes the appellate jurisdiction of the district court." *Id.* at 1111 (citing *In re Abdallah*, 778 F.2d 75, 77 (1st Cir. 1985)

(jurisdiction lacking as to parties who failed to file timely notices of appeal even though similarly-situated party filed timely notice) and *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (stating rule that an appeal by one creditor will not "save the situation for another if the first withdraws his appeal—if for no other reason than that the time for the other to take an appeal will generally have expired")); *see also* 10 Collier on Bankruptcy ¶ 8001.07[2] ("It is vital that the notice specify by name the appellant or appellants. Thus, notices of appeal failing to identify each of the appellants may result in the non-listed appellants losing their right of appeal.").

Outside the bankruptcy context, the Ninth Circuit has allowed a corporate party to amend after the deadline to include a holding company, citing a "functional equivalent" standard. *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 691 n.2 (9th Cir. 2009). But that decision was based on Federal Rule of Appellate Procedure 3(c), which—unlike bankruptcy Rule 8001—provides that "[a]n appeal must not be dismissed . . . for failure to name a party whose intent to appeal is otherwise clear from the notice." And in *Vivendi*, there were other documents filed contemporaneously with the notice of appeal that indicated that the holding company intended to appeal. 586 F.3d at 691 n.2. Here, nothing on the face of Meruelo's notice of appeal or in anything filed with it indicates that an appeal by Merco or the Trust was intended.

Nor can Meruelo have standing to pursue appellate relief on behalf of non-appealing entities Merco and the Trust. Under the "person aggrieved" standard, *In re Fondiller*, 707 F.2d 441, 442-43 (9th Cir. 1983), "[a]ppellate standing requires that a party be directly and adversely affected by the order of the bankruptcy court—that it diminish the appellant's property, increase its burdens, or detrimentally affect its rights." *In re Thorpe Insulation Co.*, Nos. 10-56543, 10-56622, 2012 WL 1089503, at *8 (9th Cir. Apr. 3, 2012). Insofar as the confirmation order affects Merco and the Trust, it does not "diminish [Richard Meruelo's] property, increase [his] burdens, or detrimentally affect [his] rights." *Id.*

Even if Meruelo is a member of Merco—a limited liability company—that does not give him standing to pursue an appeal on Merco's behalf. "To the contrary, courts have consistently held that officers and shareholders of creditor corporations may not appeal bankruptcy orders, in their own names, where the corporation is the party aggrieved by the orders because any injury to the officer or shareholder is indirect rather than direct." *Advantage Healthplan, Inc. v. Potter*, 391 B.R. 521, 541 (D.D.C. 2008), *aff'd on other grounds sub nom. In re Greater Southeast Cmty. Hosp. Found., Inc.*, 586 F.3d 1 (D.C. Cir. 2009).[11] One of those courts determined that even a *sole* shareholder and principal had no standing to appeal a judgment against the corporation. *Anchorage Nautical Tours*, 145 B.R. at 641-42.

Like a corporation, a limited liability company such as Merco "has a legal existence separate from its members." *Kwok v. Transnation Title Ins. Co.*, 170 Cal. App. 4th 1562, 1571 (2009). And "[l]ike corporate shareholders, members of a limited liability company hold no direct ownership interest in the company's assets." *Denevi v. LGCC*, 121 Cal. App. 4th 1211, 1215 n.1 (2004); *accord Capon v. Monopoly Game LLC*, 193 Cal. App. 4th 344, 357 n.11 (2011) ("[A] member of an LLC 'has no interest in specific limited liability company property'") (quoting Cal. Corp. Code § 17300); *Kwok*, 170 Cal. App. 4th at 1570-71.

Nor is Meruelo's appeal on behalf of himself equivalent to an appeal on behalf of the Trust. Owning property *as trustee* of a trust is not the same as owning property as an individual. *Kwok*, 170 Cal. App. 4th at 1571 ("[E]ven if appellants had individually succeeded to the LLC's interest in the property upon the LLC's dissolution, the transfer of title to themselves as trustees did not arise by operation of law because appellants were not members of the LLC in their capacities as trustees"); *see also id.* at 1567

[11] *Advantage Healthplan* cited *In re EToys, Inc.*, 234 Fed.Appx. 24, 2007 WL 1433668 (3d Cir. 2007); *In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637, 641–42 (B.A.P. 9th Cir. 1992); *In re DuPage Boiler Works, Inc.*, 965 F.2d 296, 298 (7th Cir. 1992); and *In re Dein Host, Inc.*, 835 F.2d 402, 406 (1st Cir. 1987). *Advantage Healthplan*, 391 B.R. at 541.

(property did not devolve to appellants individually "but rather was transferred by deed from the named insured to appellants as trustees of their family trust, a totally separate legal entity"); *cf.* Cal. Prob. Code § 18000(a) (recognizing distinction between individual and individual acting in representative capacity as trustee for purposes of personal liability on contract). Meruelo recognizes this distinction: in other instances after the plan's confirmation—but not in the appeal—he has filed pleadings expressly in both his individual capacity and his capacity as trustee. *E.g.*, SER834-35 (request of Meruelo "individually and as trustee" of the Trust for payment of administrative claims).

Meruelo also cannot claim that he has standing on the basis that he has been described at times as owning insider shares. To begin with, he does own a small number of shares individually. But even if he didn't, the description of him as an insider shareholder would not confer standing to seek relief for shares he does not own. The District Court in *Advantage Healthplan* sensibly rejected the argument that referring to a corporate creditor's president as "shorthand" for the corporation did not make the president himself a creditor. 391 B.R. at 540 n.11. And the D.C. Circuit, affirming the district court, further rejected the corporate president's argument that he had appellate standing by virtue of having been a "party in interest" in the bankruptcy court under 11 U.S.C. § 1109(b). As the Circuit Court explained, appellate standing in bankruptcy matters is governed by the "person aggrieved" standard. *Greater Southeast*, 586 F.3d at 6.

Finally, whatever appellate relief appellants might achieve as to Class 1F shares they actually own, that relief would not apply to shares owned by Merco and the Trust. As *Dairymen* explained, "under general principles of appellate procedure and jurisdiction," a non-appealing entity should be unable to benefit from a decision obtained by an appealing party, and "[t]his generally is true even if the co-parties' rights will be affected equally by resolution of the very same issues." 790 F.2d at 1109 (citing 9 Moore's Federal Practice ¶ 204.11[4], at 4-54 to -55 (2d ed. 1980) for the proposition that "[t]he general principle that a judgment will not be altered on appeal in favor of a

party who did not appeal applies as well to cases in which the interests of the party not appealing are aligned with those of the appellant'"); *see also In re Cinematronics, Inc.*, 916 F.2d 1444, 1448 (9th Cir. 1990) (noting in bankruptcy case that "[o]rdinarily, 'a party may only appeal to protect its own interests, and not those of a coparty,' even though the outcome of the appeal may have some effect on the party") (citation omitted).

CONCLUSION

For the foregoing reasons, the orders of the Bankruptcy Court should be affirmed.

Dated: April 27, 2012

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Attorneys for Appellee and Reorganized Debtor EVOQ Properties, Inc. (formerly known as Meruelo Maddux Properties, Inc.)

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned, counsel of record for Appellee and Reorganized Debtor EVOQ Properties, Inc. (formerly known as Meruelo Maddux Properties, Inc.), certifies that the following listed parties may have a pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

1. Charlestown Capital Advisors, LLC
2. Hartland Asset Management Corporation
3. EVOQ Properties, Inc.
4. MMPI Acquisition, LLC
5. John Charles Maddux
6. The John Charles Maddux Trust U/D/T Dated July 24, 2006
7. Sunstone Bella Vista, LLC
8. Richard Meruelo
9. Merco Group - Roosevelt Building, LLC
10. Richard Meruelo, as trustee of the Richard Meruelo Living Trust U/D/T dated September 15, 1989

Dated April 27, 2012

By: /s/
Robin Meadow
Attorney of record for Appellee and Reorganized Debtor EVOQ Properties, Inc. (formerly known as Meruelo Maddux Properties, Inc.)

NOTICE OF RELATED CASES

The following actions previously filed or currently pending in the Central District appear related to this action under Local Rule 83-1.3.1:

1. *In re Meruelo Maddux Properties, Inc.*; District Court Case No.: 2:09-cv-05976-SVW (assigned to United States District Judge Steven V. Wilson);
2. *In re Meruelo Maddux Properties, Inc. et al.*; District Court Case No.: 2:09-cv-08329-SVW (assigned to United States District Judge Steven V. Wilson);
3. *County of Los Angeles Tax Collector v. Bank of America et al.*; District Court Case No.: 10-cv-03536-SVW (assigned to United States District Judge Steven V. Wilson);
4. *In re Meruelo Maddux Properties, Inc. et al.*; District Court Case No.: 2:11-cv-03775-SVW (assigned to United States District Judge Steven V. Wilson);
5. *In re Meruelo Maddux Properties, Inc. et al.*; District Court Case No.: 2:11-cv-04206-SVW (assigned to United States District Judge Steven V. Wilson); and
6. *In re Meruelo Maddux Properties, Inc. et al.*; District Court Case No.: 2:11-cv-04124-SVW (assigned to United States District Judge Steven V. Wilson).

ADDENDUM

ADDENDUM OF STATUTES AND RULES

11 U.S.C. § 1129

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under

the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

Federal Rule of Bankruptcy Procedure 8001(a).

(a) Appeal as of Right; How Taken. An appeal from a judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U.S.C. §158(a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.