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7 Registered Holders of Credit Suisse First  
Boston Mortgage Securities Corp.,  
8 Commercial Mortgage Pass-Through  
Certificates, Series 2004-C3  
9

10 **UNITED STATES BANKRUPTCY COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**  
12 **SANTA ANA DIVISION**

14 In re  
15 1617 WESTCLIFF, LLC, a Delaware limited  
16 liability company,  
17 Debtor and Debtor-in-Possession.

Case No. 8:12-bk-19326-MW  
Chapter 11  
Date: November 20, 2013  
Time: 2:00 p.m.  
Place: U.S. Bankruptcy Court  
411 W. Fourth Street, Courtroom 6C  
Santa Ana, CA 92701-4503  
The Honorable Mark S. Wallace

20 **OBJECTION TO DEBTOR'S PROPOSED DISCLOSURE STATEMENT DESCRIBING**  
21 **MODIFIED FIRST AMENDED CHAPTER 11 PLAN OF REORGANIZATION**

22 Secured creditor Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Credit  
23 Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through  
24 Certificates, Series 2004-C3 ("Secured Creditor") objects to debtor 1617 Westcliff, LLC's  
25 ("Debtor") Proposed Disclosure Statement Describing Modified First Amended Chapter 11 Plan  
26 of Reorganization [Docket No. 223] ("Disclosure Statement"), as follows:  
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1 **I. INTRODUCTION**

2 The sole remaining issue in this chapter 11 case is a dispute over whether Secured  
3 Creditor or the Debtor's insider, Dr. Rettig, is entitled to approximately \$630,000 in undisbursed  
4 sales proceeds sitting in escrow following the Court approved § 363 sale of the Debtor's real  
5 property back in the beginning of September. Whatever the outcome of this dispute, creditors  
6 will be paid in full. For reasons discussed below, the disputed funds represent contractual,  
7 accrued default interest that must be paid to Secured Creditor in satisfaction of its allowed, fully  
8 secured claim. Accordingly, the Disclosure Statement should not be approved because the Plan  
9 (as defined below) does not provide for payment in full of Secured Creditor's claim, rendering  
10 the Plan unconfirmable on its face. Moreover, from a practical standpoint, since this dispute is  
11 the only issue standing in the way of confirmation (and, indeed, closing this case), Secured  
12 Creditor submits that it should be addressed now rather than later in the confirmation process.

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14  
15 **II. FACTUAL BACKGROUND**

16 On July 22, 2013, the Debtor filed a motion [Docket No. 176] ("Sale Motion") to sell its  
17 sole significant asset, the commercial real property commonly described as 1617 Westcliff  
18 Drive, Newport Beach, California (the "Property"), pursuant to section 363 of the Bankruptcy  
19 Code. In the Sale Motion, the Debtor sought to sell the Property (i) outside the ordinary course  
20 of business pursuant to section 363(b)(1),<sup>1</sup> and (ii) free and clear of liens pursuant to section  
21 363(f).<sup>2</sup> While the Sale Motion references a "not yet" confirmed (and to this date still  
22 unconfirmed) chapter 11 plan,<sup>3</sup> the Sale Motion sought nothing more than authority to sell the  
23 Property under sections 363(b) and (f). Simply put, it was a § 363 motion.

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26 \_\_\_\_\_  
<sup>1</sup> See Sale Motion at pp. 10 – 11.

27 <sup>2</sup> See Sale Motion at pp. 12 – 13.

28 <sup>3</sup> See Sale Motion at p. 14.

1 This Court granted the Sale Motion pursuant to an order entered August 20, 2013  
2 [Docket No. 188] (“Sale Order”). The Sale Order authorized the Debtor to sell the Property  
3 outside the ordinary course of business (§ 3) and free and clear of certain enumerated liens  
4 (§ 11). Paragraph 9 of the Sale Order provides that the “Debtor shall pay the undisputed portion  
5 of [Secured Creditor’s] claim in full from escrow upon closing[,]” while paragraph 10 provides  
6 that the “Debtor shall reserve, in a segregated trust account, all amounts necessary to pay in full  
7 the disputed portion of [Secured Creditor’s] claim, if any, including default interest, until such  
8 time as the dispute is resolved and upon further order of the Court.” The Sale Order did not state  
9 that the sale of the Property was pursuant a chapter 11 plan, and made no reference to any  
10 provision of chapter 11.  
11

12 On September 23, 2013, the Debtor filed a Statement of Property Sold Pursuant to FRBP  
13 6004(f)(1) [Docket No. 210]. Attached to this document is a Seller’s Final Settlement Statement  
14 indicating, among other things, that (i) escrow had closed on September 10, 2013, (ii) a  
15 “disputed amount” of \$632,860.31 had been held back in escrow; and (iii) net proceeds in the  
16 amount of \$794,659.30 were paid to the Debtor out of escrow.  
17

18 On October 18, 2013, over a month after escrow closed, the Debtor filed a new  
19 Disclosure Statement and related plan [Docket No. 225] (“Plan”). The Disclosure Statement  
20 confirms that all secured claims have been paid in full out of escrow save and except for the sum  
21 of \$632,860.31, representing approximately \$532,860.31 in default interest owed to Secured  
22 Creditor under the terms of the governing loan documents and applicable law (the “Default  
23 Interest”), together with an additional \$100,000.00 for Secured Creditor’s accruing attorneys’  
24 fees (collectively with the Default Interest, the “Hold-Back Funds”).<sup>4</sup>  
25  
26  
27

28 <sup>4</sup> See Disclosure Statement at p. 12.

1 Given that the Property has been sold, there are no assets to administer.<sup>5</sup> Thus, the Plan  
2 simply proposes to use the \$794,659.30 in net sale proceeds that the Debtor received from  
3 escrow to pay in full remaining creditor claims totaling approximately \$686,125.00.<sup>6</sup> The only  
4 unresolved issue is the dispute over Secured Creditor's right to payment of the Default Interest as  
5 part of its allowed secured claim.  
6

7 The dispute boils down to whether the Default Interest – which the Debtor does not  
8 contest is otherwise proper, due, and owing under the terms of the governing loan documents and  
9 applicable law – can be “cured” and therefore excluded from Secured Creditor's allowed claim  
10 pursuant to section 1124(2) of the Bankruptcy Code, as interpreted by the Ninth Circuit in *In re*  
11 *Entz-White Lumber and Supply, Inc.*, 850 F.2d 1338 (9<sup>th</sup> Cir. 1988). In the Plan, the Debtor,  
12 citing to *Entz-White*, avers that because the sale closed before the Plan's proposed effective date,  
13 “all defaults with respect to [Secured Creditor's] note will be deemed cured upon confirmation  
14 [of the Plan], thereby eliminating default interest on [Secured Creditor's] claim.”<sup>7</sup> The Debtor  
15 takes this position notwithstanding that (i) the Property was sold through the Sale Motion, not the  
16 unconfirmed Plan, and (ii) the Sale Motion was a separate and distinct procedural vehicle that  
17 preceded the Plan by months.  
18

19 If the Debtor is able to cure its loan defaults vis-à-vis *Entz-White*, then the Default  
20 Interest will be eliminated and the Hold-Back Funds will belong to the Debtor, leaving the  
21 Debtor's equity holder (i.e., the Debtor's insider, Dr. Rettig, through his company, Rettig  
22 Portfolio, Inc.) approximately \$740,000 after full payment of remaining claims. If, however, the  
23 Debtor cannot effect a cure under *Entz-White*, then the Hold-Back Funds must be paid to Secured  
24  
25

26 <sup>5</sup> See Disclosure Statement at p. 19 (“The Estate primarily comprises cash which is the net sales proceeds from sale  
of the Property.”)

27 <sup>6</sup> See Disclosure Statement at p. 12.

28 <sup>7</sup> See Plan at p. 3; Disclosure Statement at p. 12.

1 Creditor as an allowed component of its claim, leaving Dr. Rettig approximately \$110,000 after  
2 payment of remaining claims. For reasons discussed below, under binding Ninth Circuit  
3 authority the Debtor's defaults cannot be cured, and the Default Interest must be paid to Secured  
4 Creditor as part of its allowed claim.

### 6 **III. DISCUSSION**

#### 7 **A. Under binding Ninth Circuit law, the Default Interest Cannot Be Eliminated 8 Because the Property Was Sold Through the Sale Motion, not the Plan.**

9 In *General Electric Capital Corp. v. Future Media Productions Inc.*, 536 F.3d 969 (9<sup>th</sup>  
10 Cir. 2008), the Ninth Circuit Court of Appeals clarified the limits of a chapter 11 debtor's ability  
11 to cure loan defaults and thereby obviate default interest à la *Entz-White*, confirming that a  
12 debtor cannot cure defaults through an asset sale "outside the context of a chapter 11 plan." The  
13 debtor in *Future Media*, like the Debtor here, sold its assets through a 363 motion, as opposed to  
14 a chapter 11 plan. Following the sale, a dispute arose over the secured creditor's right to default  
15 interest, to which it was otherwise entitled under the loan agreement and applicable law.  
16 Resolution of the dispute turned on whether, under *Entz-White*, the debtor could cure default  
17 interest through a sale motion.

18  
19 Holding that no cure was possible through a 363 sale, the Ninth Circuit clarified the  
20 limits of its *Entz-White* decision. The Court first stated the general rule that "default rate  
21 [interest] should be enforced, subject only to the substantive law governing the loan agreement,  
22 ***unless a provision of the Bankruptcy Code provides otherwise.***" 536 F.3d at 973 (emphasis  
23 added), *citing Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007).  
24 The Court explained that *Entz-White* identified such an "otherwise" scenario. To wit, section  
25 1124(2) of the Bankruptcy Code<sup>8</sup> permits a debtor to cure a prepetition default and thereby  
26

27  
28 <sup>8</sup> Section 1124(2) provides that a class of claims is impaired under a plan unless the debtor "cures" any default that occurred prior to or during the bankruptcy case.

1 “nullify” the consequences of default, including avoidance of default interest. *Id.* Accordingly,  
2 *Entz-White* stands for the proposition that “an oversecured creditor [is] not entitled to interest at  
3 the default rate where its claim [is] paid in full *pursuant to the terms of a Chapter 11 plan.*”  
4 536 F.3d at 973 (emphasis in original).

5  
6 The Court was exceedingly careful to limit *Entz-White* to sales made through a chapter 11  
7 plan, confirming in no uncertain terms that the “cure” provided for in section 1124 cannot be  
8 transposed to section 363 since “the text of § 363 does not mention ‘cure’ and the procedures set  
9 out in that section do not implicate the concept of ‘cure.’” *Future Media*, 536 F.3d at 974.  
10 Criticizing contrary BAP authority, the Court held that “there is no ‘cure’ of events of default, de  
11 facto or otherwise, in the context of an asset sale.” *Id.* Accordingly, the Court ruled that *Entz-*  
12 *White* was inapplicable, and remanded the matter to the bankruptcy court with the instruction  
13 that the default interest should be presumed allowed unless the rate is “unenforceable under  
14 applicable nonbankruptcy law.” *Id.* The docket in the underlying bankruptcy case reflects that  
15 the debtor subsequently confirmed a chapter 11 plan.<sup>9</sup>

16  
17 Here, just as in *Future Media*, the Debtor’s assets were sold, and Secured Creditor’s fully  
18 secured claim was paid (save for the Hold-Back Funds), through a 363 motion – not through a  
19 chapter 11 plan. That the Debtor belatedly tries to “bootstrap” the completed 363 sale into the  
20 Plan does not change the fact that this Court approved both the sale of the Property and payment  
21 to Secured Creditor from escrow pursuant to the Sale Motion, Sale Order, under the standards of  
22 section 363 – not pursuant to the Plan or the provisions of chapter 11. Indeed, the Plan does not  
23 contemplate a sale of the Property; it merely proposes to distribute proceeds from the prior Court  
24 approved sale that concluded months earlier.

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28 <sup>9</sup> In re Future Media Productions Inc., Case No. 1:06-bk-10170-GM, Central District of California (San Fernando  
Valley Division).

1           Moreover, while the Sale Order authorizes the Debtor to reserve the Hold-Back Funds in  
2 a segregated account pending further Court order (not uncommon in sale orders), nothing in the  
3 Sale Order provides that payment of the Default Interest (or, for that matter, any component of  
4 Secured Creditor’s allowed claim) shall be deemed to have occurred pursuant to a chapter 11  
5 plan to be confirmed at some point in the future. In short, the Property was sold in a 363 sale,  
6 nothing more.  
7

8           The Ninth Circuit was crystal clear in *Future Media* that under a plain reading of the  
9 Bankruptcy Code an *Entz-White* cure is not possible where an asset sale occurs through a 363  
10 motion. The Debtor, for obvious reasons, seeks to avoid *Future Media*, taking the position that  
11 language in the Plan referencing the prior Sale Motion, and/or language in the Sale Motion  
12 referencing a chapter 11 plan (the Plan did not even exist at the time the Sale Motion was filed),  
13 retroactively in order to make the sale of the Property appear to have been pursuant to the Plan as  
14 opposed to the Sale Motion. The Debtor cannot so casually side-step dispositive case law. A  
15 363 motion is not a plan, and vice versa.  
16

17           **B.     The Sale of the Property Cannot be Deemed to Have Been Pursuant to the**  
18           **Plan.**

19           The Debtor takes the novel, unsupported position that so long as the Property was sold  
20 via a 363 motion in contemplation of a plan, then the sale should be deemed to have been  
21 “pursuant to” the Plan. The Debtor is apparently inviting the Court to make new law. The U.S.  
22 Supreme Court, however, flatly rejected just such an argument in the context of a debtor’s effort  
23 to obtain a stamp-tax exemption in connection with its court approved asset sale. In *Florida*  
24 *Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008), the chapter 11 debtor sold its  
25 assets through a 363 sale, and only later confirmed a chapter 11 plan. A dispute arose between  
26 the debtor and the state taxing authority over whether section 1146(a)’s stamp tax exemption  
27 applied to the sale.  
28

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1 The bankruptcy court ruled that the asset sale was a transfer “under” the confirmed plan  
2 “because the sale was necessary to consummate the plan.” 554 U.S. at 37. The district court  
3 affirmed, as did the Eleventh Circuit Court of Appeals, holding that section 1146’s tax  
4 exemption can apply to pre-confirmation transfers that are “necessary to the consummation of a  
5 confirmed plan” and have some “nexus between the pre-confirmation transfer and the confirmed  
6 plan.” *Id.* at 37 – 38. The Eleventh Circuit reasoned that its ruling took into account the  
7 “practical realities” of chapter 11 cases, where a debtor may need to sell its assets before  
8 confirming a plan. *Id.* at 38.

10 The U.S. Supreme Court flatly rejected the Eleventh Circuit’s reasoning and reversed,  
11 holding that under the plain language of the Bankruptcy Code section 1146(a)’s stamp tax  
12 exemption applies “only to transfers made pursuant to a Chapter 11 plan that has been  
13 confirmed.” 554 U.S. at 52 – 53. Because the sale occurred pre-confirmation, section 1146 did  
14 not apply to exempt the sale from state stamp taxes. *Id.* at 53. The Court specifically rejected  
15 the debtor’s argument that applying section 1146 only to post-confirmation transactions would  
16 undermine a debtor’s ability to reorganize since debtors may need to sell assets before  
17 confirming a plan. In particular, the Court explained that if it were to recognize an exemption  
18 for pre-confirmation transfers it would be recognizing an exemption “that ***Congress has not***  
19 ***clearly expressed.***” 554 U.S. at 50 (emphasis in original).

22 To that end, the Supreme Court reiterated that it would not substitute its view of policy  
23 for legislation duly passed by Congress, explaining that if the “practical realities” of chapter 11  
24 make post-confirmation asset sales less common, “it is incumbent upon the Legislature, and not  
25 the Judiciary, to determine whether § 1146(a) is in need of revision.” 554 U.S. at 52.

26 In the instant matter, we have binding Ninth Circuit authority, in the form of the *Future*  
27 *Media* decision, holding that under the Bankruptcy Code’s plain language default interest cannot  
28



1 be avoided through a 363 motion. Rather, a cure of loan defaults under section 1124(2) is  
2 possible only when an asset sale occurs pursuant to a chapter 11 plan. Given that Congress has  
3 clearly expressed the limited applicability and effect of section 1124, there is no basis for this  
4 Court to recognize a broader interpretation that Congress has not clearly expressed. As such,  
5 *Entz-White* is not applicable, and the Default Interest cannot be eliminated.  
6

7 **C. The Disclosure Statement Cannot Be Approved Because the Plan Is**  
8 **Unconfirmable on Its Face.**

9 Since there is no legal basis upon which the Debtor can “cure” the Default Interest  
10 (meaning avoid paying it), the Plan is unconfirmable on its face and the Disclosure Statement  
11 cannot be approved. *See, e.g., In re Arnold*, 471 B.R. 578, 586 (Bankr. C.D. Cal. 2012)  
12 (“[W]here a plan is on its face nonconfirmable, as a matter of law, it is appropriate for the court  
13 to deny approval of the disclosure statement describing the nonconfirmable plan.”), *quoting In re*  
14 *Silberkraus*, 253 B.R. 890, 899 (Bankr. C.D. Cal. 2000).

15 In particular, the Plan does not provide for payment of the Default Interest as an allowed  
16 component of Secured Creditor’s claim. Thus, the Plan alters Secured Creditor’s legal and  
17 contractual rights, rendering Secured Creditor’s claim impaired. *See* § 1124(1). The Plan is  
18 therefore unconfirmable because (i) the Plan does not provide Secured Creditor with at least the  
19 amount that it would receive in a chapter 7 liquidation (§ 1129(a)(7)(ii)); (ii) Secured Creditor  
20 does not accept the Plan (§ 1129(a)(8)); (iii) the Debtor cannot cram down Secured Creditor’s  
21 claim because the Plan does not provide Secured Creditor with cash payments totaling at least  
22 the allowed amount of its secured claim (§ 1129(b)(2)(A)(II)); and (iv) the Plan does not  
23 otherwise comply with applicable provisions of the Bankruptcy Code (§ 1129(a)(1)).  
24 Accordingly, since the Plan is unconfirmable on its face, the Disclosure Statement cannot be  
25 approved.  
26  
27

1 **IV. CONCLUSION**

2 For all the foregoing reasons, the Debtor cannot cure its defaults under the loan  
3 agreement and thereby obviate the Default Interest. Rather, the Default Interest must be paid to  
4 Secured Creditor in satisfaction of its allowed secured claim. Since the Plan does not provide for  
5 payment of the Default Interest to Secured Creditor, the Plan is unconfirmable on its face.  
6 Accordingly, the Court should not approve the Disclosure Statement, and should deem the Plan  
7 unconfirmable unless and until it is amended to provide for payment of the Default Interest to  
8 Secured Creditor, together with such additional amounts from the Hold-Back Funds as necessary  
9 to reimburse Secured Creditor for all attorneys' fees and costs that it has accrued since the sale of  
10 the Property closed.  
11

12  
13 Dated: November 6, 2013

**DUANE MORRIS LLP**

14  
15 By: /s/ Aron M. Oliner (152373)

16 ARON M. OLINER  
17 Attorneys for Secured Creditor  
18 Wells Fargo Bank, N.A., as Trustee for the  
19 Registered Holders of Credit Suisse First  
20 Boston Mortgage Securities Corp.,  
21 Commercial Mortgage Pass-Through  
22 Certificates, Series 2004-C3  
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## 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: Duane Morris LLP, One Market Plaza, Spear Street Tower, Suite 2200, San Francisco, CA 94105-1127.

A true and correct copy of the foregoing document entitled (*specify*): **Objection to Debtor's Proposed Disclosure Statement Describing Modified First Amended Chapter 11 Plan of Reorganization**, 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 stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On November 6, 2013, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Attorney for Debtor: Sarah C. Boone - sboone@marshackhays.com, ecfmarshackhays@gmail.com  
D. Edward Hays - ehays@marshackhays.com, ecfmarshackhays@gmail.com
- U.S. Trustee: Michael J. Hauser - michael.hauser@usdoj.gov, ustpregion16.sa.ecf@usdoj.gov
- Attorney for Wells Fargo Bank, N.A.: Aron M. Oliner – roliner@duanemorris.com
- Attorney for Burnham-Ward Properties: Penelope Parmes – pparmes@rutan.com
- Interested Party: Leonard M. Shulman - LShulman@shblpl.com

**2. SERVED BY UNITED STATES MAIL:**

On November 6, 2013, I served the following persons and/or entities at the last known addresses 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 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.

D. Edward Hays / Sarah C. Boone  
Marshack Hays LLP  
870 Roosevelt Avenue  
Irvine, CA 92620  
Debtor's Counsel

Office of The United States Trustee  
411 West Fourth Street, Suite 9041  
Santa Ana, CA 92701

**3. SERVED BY OVERNIGHT EMAIL** (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) November 6, 2013, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

VIA FEDERAL EXPRESS  
The Honorable Mark S. Wallace  
U.S. Bankruptcy Court  
Ronald Reagan Federal Building  
411 W. Fourth Street, Suite 6135  
Santa Ana, CA 92701-4503

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

November 6, 2013	Aristela Wise	/s/ Aristela Wise (xxx-xx-2624)
<i>Date</i>	<i>Printed Name</i>	<i>Signature</i>

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.