No. 08-27

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Bank of New York Mellon Trust Company, N.A. (f/k/a The Bank of New York Trust Company, N.A.), as Indenture Trustee, *et al.*

Appellant-Petitioner

v.

Marathon Structured Finance Fund L.P., Mendocino Redwood Company LLC, and the Official Committee of Unsecured Creditors,

Appellees-Respondents

BANK OF AMERICA'S OPPOSITION TO THE EMERGENCY MOTION FOR STAY AND INJUNCTION FILED BY INDENTURE TRUSTEE AND OTHER PARTIES

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CERTIFICATE OF INTERESTED PERSONS PER FIFTH CIRCUIT LOCAL RULES 26.1.1, 27.4 AND 28.2.1

(1) 08-27: *The Bank of New York Mellon Trust Company, N.A. (f/k/a The Bank of New York Trust Company, N.A.), as Indenture Trustee, et al. vs. Marathon Structured Finance Fund L.P., Mendocino Redwood Company LLC, and The Official Committee of Unsecured Creditors*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Other Interested Parties	**Counsel**
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Department of Forestry and Fire Protection, the California Regional Water Quality Control Board, North Coast Region, the California State Water Resources Control Board, and the California Wildlife Conservation Board	Office of the Attorney General San Francisco, CA 94102-7004 Steven H. Felderstein Paul J. Pascuzzi Felderstein Fitzgerald Willoughby & Pascuzzi LLP Sacramento, CA 95814-4434
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Bank of America, N.A. ("BofA"), as agent for the secured lenders to Scotia Pacific Company LLC, respectfully submits this opposition to the Emergency Motion for Stay and Injunction to stay the effectiveness of the confirmation order pending appeal filed by the Bank of New York Trust Company, N.A., as Indenture Trustee for the Timber Notes (the "Indenture Trustee") and joined by Scotia Pacific Company, LLC ("Scopac"), CSG Investments and Scotia Redwood Foundation. The Bankruptcy Court correctly found that there are no grounds for a stay and even if grounds did exist, such a stay should be conditioned upon the Indenture Trustee providing financing in the amount of $25 million for Scopac and $5 million for the Palco Debtors (subordinate to the Palco secured debt), implementing the discount log program proposed by the Indenture Trustee, providing a securities opinion that the facilities and the program do not violate the Indenture and posting a bond in an amount no less than $176 million.

ARGUMENT

On July 8, 2008, after nearly eighteen months of hearings in the bankruptcy cases of Scotia Development, LLC *et al*, case no. 07-20027, the Bankruptcy Court confirmed a plan of reorganization (the "MRC/Marathon Plan"), founded upon transfer of the Debtors' businesses pursuant to investments by Mendocino Redwood Company, LLC ("MRC") and Marathon Structured Finance Fund L.P. ("Marathon"). Throughout the confirmation process, BofA remained

neutral between each of the proposed plans of reorganization and even voted in favor of competing plans proposed by the Debtors and MRC and Marathon.[1] At the end of the day, the Bankruptcy Court found that the only confirmable plan was the MRC/Marathon Plan. The MRC/Marathon Plan reorganizes the Debtors by integrating the timberland operation managed by Scotia and the sawmill operation managed by Palco pursuant to a business plan developed by MRC. The MRC/Marathon Plan approved by the Bankruptcy Court restructures the town of Scotia, California and allows residents to purchase their homes. The Plan provides for the payment of administrative claims, distribution of nearly $600 million to secured lenders, including payment of BofA's claim in full on the effective date (excluding default interest which will be paid over a twelve month period), assumption of miscellaneous administrative expenses, assumption of numerous contracts and leases, and distribution to unsecured creditors.

Two days after entry of the confirmation order, the Bankruptcy Court held an emergency hearing on the motion of the Indenture Trustee to stay the effectiveness of the Confirmation Order. With over eighteen months of intimate experience with these Debtors in these bankruptcies, numerous motions, hundreds of hearings, a multitude of pleadings and days of live testimony, and cognizant of

[1] BofA was not allowed to vote for the Indenture Trustee plan because it was deemed unimpaired, but BofA made clear that if the plan was confirmable, BofA would support it.

the significant conditions precedent in the plan agreements, and the absence of continued funding in the case of Palco and insufficient funding in the case of Scotia, the Bankruptcy Court made the following findings of fact:

> If the MRC/Marathon Plan is stayed pending appeal, there is a substantial risk that MRC and/or Marathon may be unwilling or unable to proceed with the MRC/Marathon Plan at or before the conclusion of any appeal. There is no dispute that if a stay is in place 60 days following the date of the Confirmation Order, MRC has an absolute right to withdraw the MRC/Marathon Plan. Moreover, MRC and Marathon can jointly withdraw the MRC/Marathon Plan at any time prior to it going effective.

See Findings of Fact and Conclusions of Law on the Emergency Motion of the Indenture Trustee for Stay Pending Appeal and the Petition for Direct Appeal to the Fifth Circuit Court of Appeals at ¶ 20 attached hereto as Exhibit A. Recognizing that any one of dozens of contingencies – failure of financing, further deterioration of the economy, or even forest fires – might terminate the deals on which the Plan is based, and that the proposed auction the Indenture Trustee refers to in its papers was in fact a single party with no real offer on the table, and that the risk of rendering the movants' appeal moot is not a legally cognizable harm, the Bankruptcy Court denied the stay that is now requested of this Court.

BofA is aware that MRC, Marathon and the Official Committee of Unsecured Creditors and the California State Agencies intend to advance arguments to show that the stay motion should be denied. BofA generally joins in those oppositions and given the emergency nature of this proceeding will not

further burden the Court with a restatement of those issues. BofA would like to focus on one point -- not only is the Indenture Trustee not entitled to stay, its proposal for bond is woefully deficient.[2] There is a single proposal before the Court to actually pay BofA or any other creditor -- the confirmed plan. If various Noteholders succeed in their transparent effort to drive that plan away, BofA and all other creditors stand at significant risk. While BofA has a blanket lien on substantially all of Scotia's assets, that collateral is completely uninsured. As testimony in the bankruptcy case showed, it is not common in the industry to insure timberlands. However, even the Beal Bank bid advanced by the Indenture Trustee as an alternative to the confirmed plan anticipated that the buyer could back out of the proposed sale in the case of forest fires (that bid has of course expired by its terms). Thus, the stay sought by the Indenture Trustee puts not only the one "deal" which would pay BofA and others at risk, it leaves the very collateral not only at economic but real physical risk. As the Bankruptcy Court noted, there are presently severe wildfires in California and the yearly "fire season" has only begun. *Id.*

The Indenture Trustee proposes to require no bond for a sixty day stay and asks this Court to consider a bond only after Marathon and MRC irrevocably

[2] The Indenture Trustee's bonding proposal would also artificially cap BofA's monthly legal fees. While the number could be sufficient based on prior history, it is inconsistent with the rights of the parties and the Bankruptcy Court's existing stipulated cash collateral orders which impose no artificial limit on BofA's reasonable fees to be paid before those of the Noteholders.

walk away from the present plan! This is a perfect example of closing the barn door after the horse has fled. Once MRC or Marathon decides to walk, it is too late to protect the parties with a bond. That such a result would presumably permit the Indenture Trustee to acquire the Scotia assets at whatever price it chooses is not an accident. The Indenture Trustee's bond proposal is patently illusory.

The decision of the Bankruptcy Court that the appellants meet none of the requirements for a stay pending appeal is well reasoned and correct. Even were it not, the suggestion that a bond need be considered only after irreparable harm is suffered -- and the one viable deal lost -- is ludicrous. BofA respectfully requests that the Court deny the Indenture Trustee's request for a stay pending appeal.

Dated: July 22, 2008

O'MELVENY & MYERS LLP

By /s/ Evan M. Jones

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* The applications for admission to the Fifth Circuit Court of Appeals for these attorneys are in process. These attorneys are also admitted *pro hac vice* to the United States Bankruptcy Court for the Southern District of Texas.

CERTIFICATE OF SERVICE

I certify that this pleading was served via email on the following on July 22, 2008:

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EXHIBIT A