No. 08-27

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Bank of New York Mellon Trust Co. N.A., et al.,
Appellants-Movants,
v.
Marathon Structured Finance Fund L.P., et al.,
Appellees-Respondents.

OPPOSITION OF MENDOCINO REDWOOD COMPANY, LLC AND MARATHON STRUCTURED FINANCE FUND L.P. TO THE EMERGENCY MOTION FOR STAY PENDING APPEAL

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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, NA. (f/k/a The Bank of New York Trust Company, NA.), 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.

Appellees - Respondents	**Counsel**
Marathon Structured Finance Fund L.P. (Marathon Asset Management, LLC ("MAM") is a Delaware limited liability company that serves as the investment advisor to a family of funds. MAM is privately held and is a investment advisor registered with the SEC under the Investment Advisors Act. All of the funds that MAM advises are privately held, with limited partners in the United States and shareholders for certain funds incorporated in the Cayman Islands. MAM's affiliate Marathon Structured Finance Fund, L.P. is the Administrative Agent under the Term Loan Agreement, dated as of July 18, 2006, and the Revolving Credit Agreement, dated as of July 18, 2006, and as the DIP Agent under the Debtor-In-Possession Revolving Credit Agreement, dated as of August 6, 2007, for the Palco Debtors, for which certain of the Marathon funds are lenders.)	David Neier William Brewer Steven M. Schwartz Carey D. Schreiber Winston & Strawn, LLP New York, New York Eric E. Sagerman Winston & Strawn, LLP Los Angeles, California John D. Penn Haynes & Boone, LLP Ft. Worth, Texas Trey Monsour Haynes & Boone, LLP Dallas, Texas

Mendocino Redwood Company LLC (Managing members are Mendocino Redwood Company LLC are Alexander J. Dean, Jr., and John J. Fisher. The following affiliated entities participate in the Plan of Reorganization: Mendocino Forest Products Co. LLC and Humboldt Redwood Co. LLC. The equity of all of these entities is owned privately by Mr. Dean, Mr. Fisher, various family members of Mr. Fisher or trusts for which members of the Fisher family are beneficiaries, except that Marathon entities also hold equity in Humboldt Redwood Co.)	Allan S. Brilliant Brian D. Hail Craig R. Druehl Goodwin Procter LLP New York, NY Frederick C. Schafrick Richard M. Wyner Goodwin Procter LLP Washington, D.C. Kenneth M. Crane Peter G. Lawrence Perkins Coie LLP Chicago, Illinois
The Official Committee of Unsecured Creditors (The members of the Committee are Pacific Coast Trading, Inc., Steve Wills Trucking & Logging, LLC, SHN Consulting Engineers & Geologists, Environmental Protection Information Center, Pension Benefit Guaranty Corp., and Steve Cave)	Maxim B. Litvak John D. Fiero Kenneth H. Brown Pachulski Stang Ziehl Young Jones & Weintraub San Francisco, California

Appellant – Petitioner: The Bank of New York Mellon Trust Company, N.A., as Indenture Trustee (f/k/a the Bank of New York Trust Company, N.A.)	William Greendyke Zack A. Clement R. Andrew Black Johnathan C. Bolton Fulbright & Jaworski LLP Houston, Texas Louis R. Strubeck, Jr. O. Rey Rodriguez Toby L. Gerber Fulbright & Jaworski LLP Dallas, Texas
Noteholder Appellants: Angelo, Gordon & Co. L.P. Aurelius Capital Management, LP Davidson Kempner Capital Management LLC CSG Investments, Inc. And Scotia Redwood Foundation, Inc.	Isaac M. Pachulski Jeffrey H. Davidson Eric D. Winston Stutman, Treister & Glatt P.C. Los Angeles, California Murry Cohen Akin Gump Strauss Hauer & Feld LLP Houston, Texas Charles R. Gibbs David F. Staber J. Carl Cecere Akin Gump Strauss Hauer & Feld LLP Dallas, Texas Roger D. Townsend Alexander Dubose Jones & Townsend LLP Houston, Texas

Debtors Counsel:	
The Pacific Lumber Company, Scotia Development LLC, Britt Lumber Co., Inc., Salmon Creek LLC and Scotia Inn Inc. (The "Palco Debtors")	Shelby Jordan Nathaniel Peter Holzer Jordan, Hyden, Womble, Culbreth & Holzer, P.C. Corpus Christi, Texas James L. Kinzie James R. Prince Luckey Macdowell Baker Botts LLP Dallas, Texas
Scotia Pacific Company, LLC ("Scopac")	Kathryn A. Coleman Craig H. Millet Gibson Dunn & Crutcher LLP New York, NY Eric J. Fromme Gibson Dunn & Crutcher LLP Irvine, California Aaron G. York Gibson Dunn & Crutcher LLP Dallas, Texas
Other Interested Parties	
Bank of America, N.A., as agent for secured lenders to Scotia Pacific Company LLC	Evan M. Jones Emily R. Culler Brian M. Metcalf Ana Acevedo O'Melveny & Myers LLP Los Angeles, California

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July 23, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

Following a lengthy trial, the Bankruptcy Court issued detailed findings confirming the reorganization plan submitted by respondents MRC and Marathon and rejecting the liquidation plan submitted by the Indenture Trustee. Ex. 1 hereto. Movants then sought a stay pending appeal. After two additional days of testimony on the impact of a stay, the court issued detailed Stay Findings that (1) any such stay will severely harm respondents and the other parties, (2) a stay will also grievously injure the public, (3) movants will not be irreparably harmed if the MRC/Marathon Plan is implemented, and (4) movants are unlikely to prevail on their fact-based appeal. Ex. 2 hereto ("S.F."). We show herein that the Bankruptcy Court did not abuse its discretion in denying a stay pending appeal.

First, the Bankruptcy Court found as a fact that <u>any</u> delay in implementing the MRC/Marathon Plan stay will severely and irreparably harm the other parties to these cases. S.F. ¶¶ 19-31. Because debtor "Palco is effectively out of cash" and "cannot afford to purchase logs necessary to operate," any stay "could result in the liquidation of Palco and shutdown of the Scotia Mill and Palco's cogeneration plant." *Id*. ¶ 23. Any stay also seriously risks the collapse of the MRC/Marathon Plan, which likewise would lead to Palco's liquidation and shutdown. *Id*. ¶¶ 20-22. And Palco's liquidation from either of these stay-related causes "(i) will cause the loss of hundreds of jobs, (ii) will eliminate the recovery by Palco's creditors … who would receive substantial payments under the MRC/Marathon Plan, (iii) will

create significant environmental risks, (iv) will further devalue Marathon's security in Palco's assets and (v) will damage the local economy." *Id.* ¶ 23. These factual findings are abundantly supported by the record.

Contrary to movants' assertion, these irreparable harms will result from any further stay, not just one past September 6, 2008. The court found that Palco is out of cash now (S.F. ¶ 23); that the debtor-in-possession financing expires August 6, 2008 and there are no funds to repay it (S.F. ¶ 21); and the MRC/Marathon Plan may be withdrawn at any time before it becomes effective (S.F. ¶ 20).

The court also made well-supported factual findings that the Indenture Trustee's proposed funding and "discount log" program "will not eliminate the significant risks to other parties resulting from a stay pending appeal" for numerous reasons, including that they are not firm commitments, will not solve the critical funding and operational problems arising from a failure to promptly implement the MRC/Marathon reorganization plan, and provide "no protection" to the other parties from the adverse effects of an appellate stay. S.F. ¶¶ 40-42.

The court's finding that a stay could well lead to the Debtors' liquidation underscores yet another reason why a stay would be improper. The bankruptcy plan proposed by the Indenture Trustee contemplated Scopac's liquidation, but that plan was overwhelmingly rejected by the other creditors and found to be uncon-

firmable by the Bankruptcy Court.[1] Because a stay pending appeal would force the Debtors into liquidation, it would hand the Indenture Trustee the substantive victory that, for very good reasons, it failed to obtain in the court below.

Second, the court accurately held that the public interest weighs heavily against a stay. S.F. ¶¶ 28-30. Prompt implementation of the MRC/Marathon Plan is supported by the State of California, numerous federal, state, county, and local governmental agencies, newspapers, environmental groups, and local residents. S.F. ¶¶ 28-29. Indeed, "the proper running of the town of Scotia, its schools, churches, water facilities, the power plant and sewage treatment operations, will all be at risk if the MRC/Marathon Plan is not promptly consummated, not to mention the significant loss of jobs in the Town of Scotia," which is owned by Debtors. S.F. ¶ 28. "Local residents will be significantly impacted if Palco's cogeneration plant and the Scotia Mill are shut down. It is fair to say that for the community, an entire way of life is at risk." *Id*. ¶ 23. By contrast, despite movants' river of rhetoric, the court found that "[n]o evidence was presented that denial of a stay pending appeal would impact the securitization market." *Id*. ¶ 31.

Third, the court correctly held that the Indenture Trustee has failed to demonstrate that the Noteholders will suffer irreparable injury if a stay is denied. S.F.

[1] The court found, *inter alia*, that the Indenture Trustee's plan "is not proposed in good faith because it is laden with conflicts of interest"; "is not designed to facilitate a reorganization … but rather a foreclosure"; "is not feasible"; and lacks any buyer. Confirmation Findings pp. 3-4, 118.

¶¶ 17-18. The Indenture Trustee argues that its appeal may become moot. But mootness alone is insufficient, and the Bankruptcy Court correctly found that the Indenture Trustee cannot show any irreparable harm even if its appeal is mooted, given the court's findings: (1) that the Noteholders will receive at least $513.6 million upon consummation of the MRC/Marathon Plan, and (2) that any assertion that the Noteholders would receive more from the debtors' liquidation is "highly speculative" because, *inter alia*, "an auction is not likely to result in a higher recovery to the Indenture Trustee than under the MRC/Marathon Plan." S.F. ¶ 18.

Moreover, movants' "emergency" is largely their own doing. In denying the stay motion, the Bankruptcy Court certified a direct appeal and stayed the Confirmation Order for 10 days "to allow the Indenture Trustee to seek further relief from the Fifth Circuit." S.F. p. 18. Instead, movants sought a stay from the District Court in an effort to get a second bite at the apple and delay confirmation as long as possible – a ploy that court properly rejected. Movants' tactical delay should not be rewarded with a stay that would irreparably harm all other parties.

Finally, the court properly held that "there is not a substantial likelihood of success on appeal." S.F. ¶¶ 10-16. The court emphasized that the "key issue" at confirmation was the value of the Timberlands. *Id*. ¶ 12. As to that factual issue, the court "heard extensive testimony from a multitude of experts and reviewed thousands of pages of expert reports and exhibits," "made credibility determina-

tions" as to the witnesses, and issued detailed factual findings on the value of the Timberlands. *Id*.; see also Confirmation Findings ¶¶ 92-218. The court also correctly recognized that while the Indenture Trustee "attempts to turn valuation into a legal issue," its arguments fail because "[t]o the extent the Indenture Trustee raises legal arguments, these issues are well settled" and do not camouflage the point that, at bottom, "[t]he primary arguments made by the Indenture Trustee on appeal are based on [the Bankruptcy Court's] factual findings." S.F. ¶ 16. Finally, the court rejected movants' effort to twist snippets of old e-mails taken out of context, and partial quotations of its own bench observations, into some sort of admission contrary to the court's detailed factual findings. See Stay Exh. D (7/7/08 Tr.) at 11-14. For all of these reasons, movants show no likelihood of reversal on the "key" factual finding as to valuation that is at the heart of this case.

In short, the Bankruptcy Court acted well within its discretion in denying a stay given that movants have not satisfied any of the criteria, much less all of them.

The Bankruptcy Court also made detailed findings that, even if movants had met the requirements for a stay, it would have required movants to both (1) post a bond in the amount of $176 million as security for the foreseeable losses to the other parties from the delayed implementation and potential collapse of the MRC/Marathon Plan during an appeal, and (2) provide interim financing and other measures to ensure the debtors' continued operations. S.F. ¶¶ 33-47. If this Court

were to grant a stay despite all of the points discussed above, it should, at the very least, be conditioned on those same protections.

ARGUMENT

I. MOVANTS MUST SHOW THAT THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN DENYING A STAY.

A lower court's decision to deny or grant a stay pending appeal is reviewed only for abuse of discretion. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 579 (5th Cir. 1996); *In re Beverly*, 468 F.2d 732, 741 (5th Cir. 1972). An "abuse of discretion" occurs "only when there is definite and firm conviction that the court ... committed clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Conkling v. Turner*, 18 F.3d 1285, 1293 (5th Cir. 1994).

The four relevant factors are: "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest." *E.g.*, *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982) ("*Ruiz II*") (internal quotes and citations omitted). The party seeking the stay bears the burden as to each of these prerequisites. *Id.*; *Arnold v. Garlock, Inc.* 278 F.3d 426, 438-39 (5th Cir. 2001). As to the first element, "[l]ikelihood of success remains a prerequisite in the usual case even if it is not an invariable require-

ment. Only 'if the balance of equities (*i.e.* consideration of the other three factors) is ... *heavily tilted* in the movant's favor' will we issue a stay in its absence, and, even then, the issue must be one with patent substantial merit." *Ruiz II*, 666 F.2d at 857 (italics in original, citation omitted). With respect to the Bankruptcy Court's rulings as to each of these factors, "[f]indings of fact are reviewed only for clear error; legal conclusions are subject to *de novo* review." *Paulsson Geophysical Servs. v. Sigmar*, 529 F.3d 303, 306 (5th Cir. 2008).

II. THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN DENYING A STAY.

A. Respondents and Other Parties Will Suffer Irreparable Harm From a Stay.

1. Palco's Lack of Funds Will Result in Its Liquidation.

The court found that "Palco is effectively out of cash, has not been paying its professionals or interest on the Marathon DIP loan and cannot afford to purchase logs necessary to operate." S.F. ¶ 23. This finding is undisputed.[2]

The court further found that "[i]t is undisputed that the liquidation of Palco" will (1) cause the loss of hundreds of jobs, (2) eliminate any recovery by Palco's creditors, (3) create significant environmental risks, (4) devalue Marathon's security in Palco's assets, (5) damage the local economy, and (6) put at risk the running of the Town of Scotia and its schools, churches, water facilities, power plant, and

[2] See 7/11/08 Tr. 153:23-155:11, 127:21-128:13, 149:5-150:11, 164:6-169:19, 309:4-23; 7/10/08 Tr. 175:18-177:15; Palco 13 week Cash Flow Forecast, Hearing Exhibit 7; Declaration of John Young, Hearing Exhibit B, p. 1.

sewage treatment operations – meaning that, "for the community, an entire way of life is at risk." S.F. ¶¶ 23, 28-30. These factual findings are abundantly supported by the record evidence and hence certainly not clearly erroneous.[3]

The Indenture Trustee argues unpersuasively that the court should have limited its consideration to Scopac and ignored the impacts on Palco. As the court correctly found, "[t]he Confirmation Order and the MRC/Marathon Plan provide for reorganization of all of the Debtors and a stay of the Confirmation Order will therefore impact many parties, not just the creditors of Scopac." S.F. ¶ 19.[4] Moreover, the court found that a liquidation of Palco would injure Scopac as well. S.F. ¶ 25. The record evidence supports these findings too.[5]

2. A Stay Risks Losing the MRC/Marathon Plan.

The court found that a stay would also create "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." S.F. ¶ 20. The court further found that, "[i]f the MRC/Marathon Plan is withdrawn, there is a significant risk that the Debtors will be liquidated." *Id.* ¶ 22. These factual findings are fully grounded.

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[3] See 7/10/08 Tr. 143:21-145:11, 75:8-76:17.

[4] *See also, e.g., In re F.G. Metals, Inc.*, 2008 WL 2440708, *9 (Bankr. M.D. Fla. May 16, 2008); *In re Fairmont Commc'n Corp.*, 1993 WL 428710, *4 (Bankr. S.D.N.Y. Oct. 12, 1993); *In re Great Barrington Fair and Amusement, Inc*., 53 B.R. 237, 240 (Bankr. D. Mass 1985). In any event, the Indenture Trustee's argument is empty formalism. Even if Palco and its creditors were not considered "parties" for purposes of the stay analysis, the impact on them would have to be taken into account in determining whether a stay is in the public interest.

[5] 7/10/08 Tr. 146:12-148:11; Confirmation Findings ¶¶ 227-28.

MRC can withdraw from the Plan if a stay is in place 60 days after confirmation, *i.e.*, on September 6, 2008, and both MRC and Marathon can jointly withdraw at any time before the Plan becomes effective. *Id.* ¶ 20. The court found that the MRC/Marathon Plan could well collapse because, during any appeal, "interest rates could change, alternative transactions could become available, MRC could decide it is unwilling to continue to reserve more than $200 million of capital for a transaction that is tied up in court for an indeterminate period of time, [or] the economy could further deteriorate." *Id.* The court further found that extension of MRC's loan commitment is "beyond its control." *Id.*[6]

The court also correctly found that "[t]he risk that the MRC/Marathon Plan could collapse if a stay is granted is increased because the $75 million DIP [financing] facility Marathon provided to the Palco Debtors matures on August 6, 2008, and there are no funds to repay Marathon." S.F. ¶ 21.[7]

The Indenture Trustee mistakenly argues that any injury to MRC and Marathon if they withdraw the Plan would be a "self-inflicted wound." Not only would the collapse of the plan due to economic changes not be "self-inflicted," but the severe harms would befall not just MRC and Marathon, but the debtors, their creditors, other constituencies, and the public at large. S.F. ¶¶ 23-23, 25-56, 28-30.

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[6] See MMX Exhibit 157 (financing commitment expires August 15, 2008); 7/11/08 Tr. 257:19-259:11, 295:22-296:10.

[7] See 7/11/08 Tr. 149:5-150:11.

3. The Bankruptcy Court Properly Found that the Indenture Trustee's Alternative Proposals Are Inadequate.

The court properly found as a fact that the Indenture Trustee's proposed DIP financing and "discount log" program "will not eliminate the significant risks to other parties resulting from a stay pending appeal." S.F. ¶ 41. First, the proposal is not a firm one; it is disputed whether the proposal would violate the Indenture.[8] The court said that the Indenture Trustee would have to obtain a legal opinion on this point from independent counsel (*id*. ¶ 34), but the Indenture Trustee has not come forward with any such opinion. Second, the proposal does not address Palco's other critical funding needs. *Id*.[9] Third, Scopac will lose substantial sums by providing discounted logs to Palco. *Id*.[10] Fourth, the amount of the proposed funding is too little, and the duration of the discounted logs plan is too short. *Id*.[11] Finally, "[t]he Indenture Trustee's proposal provides no protection to creditors, other parties in interest and the public interest from the risk that the MRC/Marathon Plan will not be consummated due to a stay pending appeal." *Id*.[12]

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[8] See 7/11/08 Tr. 75:11-76:5, 152:5-15, 322-322:14, 245:10-247:16**.**

[9] See 7/11/08 Tr. 203:15-24, 166:23-170:8, 171:1-173:6.

[10] See JTX 9; Young Proffer, Exhibit B; 7/11/08 Tr. 153:18-155:11.

[11] See 7/11/08 Tr. 313:25-314:17, 67:8-69:1.

[12] The court correctly found inadequate the Indenture Trustee's proposal that MRC could seek alternative financing from Beal Bank, which has not committed to such financing and is MRC's litigation adversary. S.F. ¶ 42. The court also properly rejected the assertion that Palco's sawmill and plant could be bought and operated by Sierra Pacific Industries ("SPI"). S.F. ¶ 24; Confirmation Findings ¶¶ 303-07. As the court found, "SPI's interest is speculative and deser-

B. The Public Interest Weighs Heavily Against Any Stay.

The court found that the public interest "weighs strongly against a stay pending appeal." S.F. ¶ 28. "The State of California, California's wildlife and forestry agencies, the federal wildlife agencies, numerous other federal, state, county and local government agencies, editorials in five Northern California newspapers and local residents all support confirmation of the MRC/Marathon Plan." *Id*. This is because the MRC/Marathon Plan "ensures that an experienced and environmentally conscious timber operator will run the Palco and Scopac Timberlands in accordance with the applicable government regulations. This is particularly important given the contentious environmental history of the Scopac Timberlands and millions of dollars of backlogged roadwork that must be completed to comply with existing regulations." *Id*. "In addition, the proper running of the town of Scotia, its schools, churches, water facilities, the power plant and sewage operations, will all be at risk if the MRC/Marathon Plan is not promptly consummated, not to mention the significant loss of jobs in the Town of Scotia." *Id*.

The Indenture Trustee asserts that the confirmation order will disrupt financial markets. Notwithstanding movants' extravagant rhetoric, the Bankruptcy

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ving of little weight," given that it presented no binding agreement, the price is unacceptable, and SPI was not even willing to appear in court or even for a deposition. S.F. ¶ 24.

Court correctly found that "[n]o evidence was presented that a denial of stay would impact the securitization market." S.F. ¶ 31.[13]

C. The Indenture Trustee Has Failed To Prove That the Noteholders Will Suffer Irreparable Injury Without a Stay.

The "irreparable" injury claimed by the Indenture Trustee is that its appeal might become moot if a stay is denied and the MRC/Marathon Plan is consummated. As the court below correctly observed, "the majority of courts addressing this issue have concluded that the risk of equitable mootness alone does not constitute irreparable harm sufficient to justify a stay pending appeal." S.F. ¶ 17, citing numerous cases.

The Bankruptcy Court also correctly found that, in this particular case, movants have not shown that implementation of the MRC/Marathon Plan would cause them actual financial harm. S.F. ¶ 17. "[U]nder the MRC/Marathon Plan, the Indenture Trustee will receive, among other things, a minimum of $513.6 million in cash on the Effective Date." *Id*. ¶ 18. And although "[i]f the Indenture Trustee were successful on appeal, it would be able to auction Scopac's Timberland," "[t]he result of an auction of the Timberlands is highly speculative." *Id*. ¶ 18. Indeed, the court specifically found that, given that "[a]ny sale is subject to regulatory review and oversight"; that "the Timberlands have been offered for sale

[13] Movant's argument is also absurd on its face, since any investors reading the Confirmation Findings would see that the creditors are receiving the full value of their secured claims.

since … this Court terminated exclusively, yet no firm offers were made"; and that "an auction is not likely to result in a higher recovery to the Indenture Trustee than under the MRC/Marathon Plan." *Id*. These findings are supported by extensive record. See Confirmation Findings ¶¶ 278-93.

D. Movants Also Have Not Established A Likelihood of Success on the Merits.

As we now show, the Bankruptcy Court also correctly determined that movants have not shown that they are likely to prevail on the merits of their appeal, which they must also do to obtain any stay. S.F. ¶¶ 10-16.

1. The Key Valuation Ruling is Not Likely to be Held Clearly Erroneous.

The Bankruptcy Court found that the "key issue" raised during the Confirmation Hearing was a factual issue – namely, the value of the Timberlands. S.F. ¶ 12; see also Confirmation Findings p. 8. The court noted that it had heard extensive live testimony and reviewed voluminous documentation, made credibility findings, and issued numerous and highly detailed subordinate and ultimate findings of fact as to the value of the Timberlands. S.F. ¶ 12; Confirmation Findings ¶¶ 92-218. Appellate reversal is therefore extremely unlikely with respect to this "key" issue, which is reviewed only for clear error. S.F. ¶¶ 11-12.

Movants' only try at challenging this core factual finding is to assert that the Scotia Redwood Foundation (an affiliate of the largest Noteholder, the Beal Bank)

made a bid for the Timberlands of $603 million. The court found as a fact, however, that the Beal Term Sheet "contains numerous contingencies and raises substantial concerns about its genuineness" and "appears to be a straw man for a foreclosure sale and not a serious bid to reorganize the Debtors or even Scopac." Confirmation Findings p. 4. Extensive evidence supports these findings. See Confirmation Findings ¶¶ 259-72.

Movants also assert that the record contains "damning" e-mails and that the Bankruptcy Court recognized them as such, but in fact the Bankruptcy Court made factual findings precisely to the contrary. See Stay Exh. D (7/7/08 Tr.) at 11-14. Specifically, the court found that movants were taking the statements out of context and that, when considered in context, they do not undermine the court's findings or evidence any improper intent or conduct by Marathon or MRC. *Id*.

The court also found that "[a]pparently recognizing this tremendous hurdle" of impeaching the factual valuation finding, "the Indenture Trustee attempts to turn valuation into a legal issue, but again fails to show a likelihood of success." S.F. ¶ 13. The court explained that it had "applied well recognized law in confirming the MRC/Marathon Plan." *Id*. In particular, the court cited the well-settled legal principal that "Section 1129 of the Bankruptcy Code requires that a secured creditor receive the present value of its secured claim" and noted that "[t]he Indenture Trustee is being paid the present value of its secured claim in cash as that value

was found by this Court." *Id*. (emphasis added). As the court said, "[t]here is little doubt that this has been allowed in reorganization cases for decades." S.F. ¶ 14.

2. Movants' Other Merits Arguments Also Fail to Show A Likelihood of Success on Appeal.

a. Indubitable equivalent value/right to credit bid. The court held that the requirement that the MRC/Marathon Plan be "fair and equitable" under Section 1129(b)(2)(A) is satisfied because it provides for the non-consenting secured creditors to realize "the indubitable equivalent" of their secured claims. Confirmation Findings pp. 113-14. As to the law, the court explained that a plan complies with this requirement "by providing the secured creditor with the value of its collateral." Confirmation Findings pp. 6, 113, citing *Matter of Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1350 (5th Cir. 1989). As to the facts, the court held that "[t]he Indenture Trustee is being paid the present value of its secured claim in cash as that value was found by this Court" (S.F. ¶ 13; see also Confirmation Findings pp. 9, 114). Given that the legal rule comes from Fifth Circuit precedent and that the factual valuation finding is unimpeachable, there is no likelihood of reversal.

The court also correctly held that, because the MRC/Marathon Plan satisfies the "indubitable equivalent" test of Section 1129(b)(2)(A)(iii), the Indenture Trustee has no right to credit bid, which arises under an alternative subsection. Confirmation Findings pp. 7, 113-14. The caselaw cited by the Bankruptcy Court agrees. *See In re Criimi Mae, Inc.*, 251 B.R. 796, 806 (Bankr. D. Md. 2000); *In re Broad*

Assocs. LP, 125 B.R. 707, 711 (Bankr. D. Conn. 1991); see also *In re Briscoe Enters.*, 994 F.2d 1160, 1168 (5th Cir. 1993) (subsections are in the alternative). The court also found that there would be no right to credit bid in on the particular facts of this case anyway, both (1) because "the Plan contemplates transfer of the Timberlands and milling operations to a newly formed corporation as a part of a reorganization and not a sale"; and (2) because the Noteholders had the right to make an election under section 1111(b)(2) of the Bankruptcy Code, but "chose not to avail themselves of that protection and cannot now claim a right to credit bid." Confirmation Findings pp. 5, 7, 114-15. Given that the court's fact-based "indubitable equivalent" ruling renders the credit bid argument legally irrelevant, and that this argument also was rejected for still other fact-specific reasons, movants have shown no likelihood of reversing the Confirmation Order on this ground.

b. Absolute priority rule. The court's conclusion that the absolute priority rule is satisfied here follows necessarily from its factual finding that the MRC/Marathon Plan pays the secured creditors the full value of their collateral, and only thereafter provides additional and separate consideration to unsecured creditors. Confirmation Findings pp. 5-9, 17, 100, 113-14. Because this factual finding is unassailable, this issue presents no plausible basis for reversal.

c. Substantive consolidation. The court made a factual finding that "none of the assets of Scopac are being used to pay the debts of any other debtor

with the exception of the Plan provision that establishes a single litigation trust for the benefit of all the unsecured creditors" (Confirmation Findings pp. 7-8, 88-89), and the Plan was thereafter modified to create separate trusts. The court also found that funds are coming from additional contributions by Marathon and from synergies. *Id*. pp. 96, 100. Given that the court rejected movants' arguments based on these factual findings, which are supported by the record, any claim that some issue of law is presented here is simply incorrect.

d. Classification. The court rejected the Indenture Trustee's "gerrymandering" argument on the facts, holding that "reasonable business reasons" exist for the classifications and that the different classes "have a different stake in the future viability of the ongoing business." Confirmation Findings p. 93. It further found that "[t]he classification scheme in the MRC/Marathon Plan was not an attempt to obtain an Impaired consenting Class." *Id*. Finally, it also held that this point is moot because "[e]ven if separate classification of Classes 8 and 9 was not appropriate there are other impaired consenting Classes of creditors, and thus any improper separate classification does not render the MRC/Marathon Plan unconfirmable." *Id*. (citing, *e.g.*, *In re Greystone III Joint Venture*, 995 F.2d 1274, 1279 (5th Cir. 1991)). Given these rulings, reversal on this ground is implausible.

e. Unfair discrimination. The court made a factual finding that "Class 9 is not comprised of trade creditors with whom the Debtors intend on maintaining

business relationships, but rather primarily represents the unsecured deficiency claim of the Noteholders with whom there is not currently and will be no ongoing business relationship." Confirmation Findings ¶ 244. The court further found as a fact that "there is no unfair discrimination of Class 9 because as the Court previously found, the classification structure and different treatment of Class 8 and Class 9 were necessary to the reorganization and were not done for the purpose of gerrymandering an impaired consenting class." *Id*. p. 112. Finally, the court found based on the facts "[t]he MRC/Marathon Plan is also fair and equitable to Class 9 (consisting primarily of the Noteholders' unsecured deficiency claim) because no Holder of any Claim or Interest junior to Class 9 will receive or retain any property." *Id*. p. 114. These well-supported, fact-specific rulings present no likelihood of appellate reversal.

In sum, the Bankruptcy Court acted well within its discretion in refusing to stay the confirmation order pending appeal.

III. IF A STAY IS GRANTED, MOVANTS SHOULD BE REQUIRED TO, *INTER ALIA*, POST A BOND OF AT LEAST $176 MILLION.

If this Court were to decide to grant any stay despite the Bankruptcy Court's considered judgment and the vehement opposition from respondents and essentially all of the other interested parties, this Court should, in accordance with the Bankruptcy Court's findings, require movants to post a bond in the amount of $176 million, as well as to provide the interim financing and log discount program as

specified by the Bankruptcy Court. S.F. ¶¶ 33-47. As the Bankruptcy Court held, under Fifth Circuit precedent, security for a money judgment should "include the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay," and this full-protection principle is equally applicable to non-monetary judgments. S.F. ¶ 43 (citation omitted).

The court noted that, in the event of a stay, two types of protections are needed: (1) measures to keep the debtors operating, and (2) protection against losses resulting from the delayed implementation or collapse of MRC/Marathon Plan. S.F. ¶¶ 34, 36. As a result, the court held that the Indenture Trustee would have to provide (1) financing, a discounted log program, and opinion from independent counsel that the financing and log program would not violate the terms of the Scopac Indenture, and (2) a bond of $176 million. S.F. ¶¶ 40-41, 45-47.

The court made well-supported factual findings showing that the foreseeable losses from a stay add up to $141.0 million. S.F. ¶ 45.[14] Multiplying by 125% to account for other risks, as is common in these situations, the court calculated the necessary bond amount as $176 million. S.F. ¶ 46. This Court should, if it decides to enter any stay, impose this same condition.[15]

[14] See Joint Disclosure Statement (MMX 35); Johnston declaration (Stay Hearing Ex. 2); 7/10/08 Tr. 139:4-141:15; 7/11/08 Tr. 173:7-173:21, 238:17-239:22; 5/1/08 Tr. 95:13-96:10.

[15] As the court correctly held, respondents are entitled to protection against losses resulting from delay even if the MRC/Marathon Plan is ultimately consummated. S.F. ¶ 33.

Any objection to that amount as being prohibitively high is meritless. First, the Court found that "[t]here is no dispute that the Noteholders have adequate capital to post a substantial bond." S.F. ¶ 44. Second, the court observed that the Noteholders would only be at risk to the extent of "actual damages" – meaning that if they are worried about the size of the bond, then they must agree that a stay may well cause enormous actual damages. *Id*. Further, much larger bond amounts have been required to stay other confirmation orders. *E.g.*, *In re Adelphia Communications Corp.*, 361 B.R. 337, 350 (S.D.N.Y. 2007) ($1.3 billion bond), *stay and mandamus denied*, No. 07-279 (2d Cir. Feb. 9, 2007).

Finally, movants' assertion that no bond should be required until the MRC/Marathon Plan collapses is patently meritless. If no bond were due until the Plan collapses and movants were then to fail to post the bond, the other parties would be left unprotected for their massive losses.

In short, no stay should be entered, but if one is, movants should be required, prior to the effectiveness of the stay, to post a bond in the amount of $176 million, to agree to provide the interim funding and discount log program, and to furnish an opinion of independent counsel that the funding and log program do not violate the Indenture, all as specified in ¶ 47 of the Bankruptcy Court's Stay Findings.

CONCLUSION

The motion for a stay pending appeal should be denied.

Respectfully submitted,

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