

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION**

<b>In re:</b>	§	<b>Case No. 07-20027</b>
	§	
<b>SCOTIA DEVELOPMENT LLC, et al.</b>	§	<b>Chapter 11</b>
	§	
<b>Debtors.</b>	§	<b>(Jointly Administered)</b>
	§	

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**EMERGENCY MOTION FOR ORDER TO ENFORCE CONFIRMATION ORDER AND  
OTHER MISCELLANEOUS RELIEF**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 20 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

**EXPEDITED CONSIDERATION IS SOUGHT FOR FRIDAY, JULY 25, 2008, AT 9:30 A.M., IN HOUSTON, TEXAS.**

TO THE HONORABLE RICHARD S. SCHMIDT, UNITED STATES BANKRUPTCY JUDGE:

The Pacific Lumber Company (“Palco” or the “Palco Debtor”), Mendocino Redwood Company LLC (“MRC”), Marathon Structured Finance Fund LLP (“Marathon”) and the Official Committee of Unsecured Creditors (collectively the “Movants”) respectfully file this Emergency Motion For Order To Enforce Confirmation Order and Other Miscellaneous Relief (the “Motion”).

**JURISDICTION AND BACKGROUND**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157

and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. On January 18, 2007 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Debtors’ bankruptcy cases (collectively, the “Reorganization Cases”) are jointly administered under Case No. 07-20027. No trustee or examiner has been appointed in the Debtors’ bankruptcy cases. Debtors continue to operate their respective business and manage their properties as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

3. The Court confirmed the MRC/Marathon Plan in an Order entered July 8, 2008 [Docket 3302] (the “Confirmation Order”). The Court first stayed the effectiveness of the order for ten days and then only until Friday, July 25, 2008. The District Court refused to the Indenture Trustee’s request for a stay (2:08-mc-66). The 5<sup>th</sup> Circuit has also denied the Indenture Trustee and other Noteholders’ requests for an emergency stay. (#08-0027, Order dated July 24, 2008).

4. The Indenture Trustee and the Scopac Debtors have now indicated that they will refuse to cooperate in any consummation of the MRC/Marathon Plan. Thus, the Movants seek an Order directing the Debtors to comply with the Confirmation Order and to consummate the MRC/Marathon Plan.

#### **FACTS AND RELIEF REQUESTED**

5. Immediately after the Fifth Circuit denied the motions for stay pending appeal, the Indenture Trustee sent a letter asserting that, despite the denial of the stay motions, the MRC/Marathon Plan cannot be consummated at this time because the definition of the term “Effective Date” in the MRC/Marathon Plan requires that the Confirmation Order be a Final Order, and the definition of “Final Order” requires that the Indenture Trustee’s appeals be

exhausted. A copy is attached .

6. That contention is meritless. First, the Confirmation Order expressly stated “This is a Final Order and shall be immediately effective upon entry.” Confirmation Order, ¶ 53. Accordingly, the Confirmation Order is a Final Order, and the requirement of the Effective Date provision of the MRC/Marathon Plan has been satisfied. (Of course, this Court stayed the effectiveness of the Confirmation Order for a period of ten (10) days to allow the plan opponents to seek a stay from the Fifth Circuit, but the request for stay was denied.)

7. The Confirmation Order further provides that “In the event of any inconsistency between the MRC/Marathon Plan and this Order, this Order shall govern.” Confirmation Order, ¶ 47. Accordingly, even if the MRC/Marathon Plan contained some other possible method of determining whether or not the Confirmation Order had become a Final Order, such provision was trumped by the Confirmation Order which, as just quoted, expressly provides that it is a “Final Order.”

8. Moreover, all parties understood that the Confirmation Order was a Final Order within the meaning of the MRC/Marathon Plan. Counsel for MRC, Marathon and the Indenture all recognized that the MRC/Marathon Plan would close immediately notwithstanding an appeal. *See* July 10, 2008 Transcript, pp. 20:16-25 (counsel for Indenture Trustee acknowledging that MRC/Marathon Plan would close immediately.)

9. Further, the Indenture Trustee and Scopac Debtors petitioned this Court, the District Court for the Southern District of Texas and the Fifth Circuit for emergency relief because they knew and understood that the MRC/Marathon Plan would go effective after the stay expired. Indeed, the Indenture Trustee argued to this Court in its Motion for Stay [Docket 3309], pp. 75-76 “Unless the stay is granted, the Indenture Trustee will suffer irreparable harm by

implementation of the MRC/Marathon Plan. Specifically, unless a stay pending appeal is granted, Marathon and MRC will quickly move to consummate the sale of Scopac's assets, and then argue that the Indenture Trustee's appeal has become moot, thereby potentially depriving the Trustee of the ability to seek complete and meaningful appellate review and eviscerating its statutory right of full appeal."

10. The Indenture Trustee and its counsel argued the same thing to the District Court. In an affidavit dated July 17, 2008, counsel swore: "As is set forth more fully in the Motion and accompanying Memorandum of Law in Support of the Motion (the "Memorandum"), substantial consummation of the MRC/Marathon Plan (as defined in the Motion) and subject confirmation order is likely in the absence of a continued stay pending appeal and, as a result, the Indenture Trustee may be left without an effective and complete remedy. [4.] The emergency circumstances present themselves because the appealed from confirmation order will become operative immediately after July 25, 2008 (the last day of the bankruptcy court's interim stay), such that immediate additional stay relief is necessary to protect Indenture Trustee's appellate rights and its collateral interests in the unique real property at issue in this case." See Affidavit Of William Greendyke In Support Of The Indenture Trustee's Emergency Motion For Stay Pending Appeal dated July 17, 2008. ¶¶ 3-4.

11. Similarly, the Indenture Trustee's Motion for Stay in the District Court argued: "Unless this Court sets an immediate hearing of the Stay Motion, at the earliest possible setting, the Indenture Trustee will be subjected to increasing risk that substantial consummation of the MRC/Marathon Plan and confirmation order will occur and, as a result, the Indenture Trustee may be left without an effective remedy. Thus, absent immediate consideration of the Stay Motion, and subsequent entry of a stay pending appeal, the Indenture Trustee is in significant

jeopardy of being left without an effective, complete remedy and of losing its rights to the unique timberlands at issue in this case, including, but not limited to, its right to credit bid and to foreclose on its interests.” *See* The Indenture Trustee’s Motion For Expedited Consideration Of Emergency Motion For Stay Pending Appeal, filed July 17, 2008.

12. Similarly in the its Emergency Motion for Stay and Injunction filed with the Fifth Circuit, the Indenture Trustee represented that “If this Court does not grant a stay pending appeal, the Indenture Trustee . . . will lose its rights to meaningful and complete appellate review.” *See* Emergency Motion for Stay and Injunction filed July 22, 2008, p. 6.

13. Indeed, the Indenture Trustee and Scopac Debtors are judicially estopped from arguing that the MRC/Marathon Plan will not become effective until all appeals are exhausted, because they asserted precisely the opposition position to this Court, the District Court, and the Fifth Circuit in their stay motion papers and obtained both an interim stay and an expedited appeal on the basis of those representations. *See Ginter v. Alliant Bank (In re Ginter)*, 349 B.R. 193, 197-198 (B.A.P. 8th Cir. 2006) (“The doctrine of judicial estoppel is uniformly recognized as having the purpose of protecting the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.”). This attempted change of position is especially egregious because the Indenture Trustee must have had this argument ready at the very same time they were crying “emergency” to the Fifth Circuit.

14. In sum, the Effective Date provision of the MRC/Marathon Plan is satisfied because the Confirmation Order is a “Final Order,” and the Indenture and other plan opponents are estopped from arguing otherwise.

15. Furthermore, Section 11.2 of the MRC/Marathon Plan expressly provides that “the conditions to the Effective Date set forth in Section 11.1.2” can be waived by in whole or in

part by MRC and Marathon. Thus, by its very terms, the MRC/Marathon Plan itself provides that MRC and Marathon can waive any conditions that might prevent the plan from becoming effective. To the extent necessary, by this pleading, MRC and Marathon have now done so.

16. If the definition of “Effective Date” and “Final Order” in the plan documents, Confirmation Order and orders of the Court created any ambiguity, the ambiguity should be resolved so that the Plan proponents – the parties who have the ability to waive conditions retain the power to effectuate the plan. It makes no sense to tie the Plan Proponents’ hands through semantic gamesmanship. That is particularly true here where all parties – including the IT, Scopac, MRC, Marathon, the Committee and Palco – all acted and believed that to be the case.

17. Moreover, the Confirmation Order also provides that “Prior to the Effective Date, the MRC/Marathon Plan Proponents may make additional appropriate non-material, technical adjustments and modifications to the MRC/Marathon Plan without further order or approval of the Bankruptcy Court subject to any order of this court that may be entered with respect to the Settlement Motion.” Confirmation Order, ¶ 41. The Confirmation Order further provides that the MRC/Marathon Plan Proponents can amend the MRC/Marathon Plan to the extent any such modification is necessary. *See* Confirmation Order, ¶ 41. This Court should make such a finding in that there is no question that any such modification is the epitome of a “non-material, technical adjustment[] and modification” of the MRC/Marathon Plan. *See* Confirmation Order, ¶ 41.

18. Finally, to the extent any modification or amendment of the MRC/Marathon Plan is necessary to clarify that the Confirmation Order in fact was a Final Order within the meaning of the MRC/Marathon Plan, this Court has the power and jurisdiction over the Confirmation Order to make such modification. As the Fifth Circuit noted in *In re Transtexas Gas Corp. v.*

*TransTexas Gas*, it retains the power to address elements of the bankruptcy proceeding that are not the subject of an appeal. *See In re Transtexas Gas Corp. v. TransTexas Gas*, 303 F.3d 571, 580 n.2 (5th Cir. Tex. 2002) (“We have also repeatedly recognized that, when a notice of appeal has been filed in a bankruptcy case, the bankruptcy court retains jurisdiction to address elements of the bankruptcy proceeding that are not the subject of that appeal.”).<sup>1</sup> Additionally, Section 1127(b) permits modification of the Confirmation Order in this way because it would not affect any distribution to any creditors. *See* 11 U.S.C. § 1127(b) (plan proponent may modify a plan after confirmation so long as the plan meets the requirements of sections 1122 and 1123); *cf.* Interim Rule 3019 (modifications may be made after the plan has been accepted and after confirmation if the proposed modification does not adversely change the treatment of any creditor). Even if there was any doubt on this issue, the MRC/Marathon Plan Proponents can modify the MRC/Marathon because it would not alter the treatment of a claim or interest. *See* MRC/Marathon Plan § 40(b).

19. In short, the Indenture Trustee is wrong in its assertion that the requirements for consummation of the MRC/Marathon Plan are not satisfied. The Movants accordingly seek an Order of this Court pursuant to Section 1142(a) directing the Scopac Debtors to comply with the Confirmation Order. Further, this Court should enter an Order pursuant to Section 1142 (b) that authorizes an officer of MRC or Marathon to execute any documents on behalf of the Scopac Debtors or any other party in interest that are necessary for the consummation of the MRC/Marathon Plan. Section 1142 (b) provides that:

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<sup>1</sup> *See also In re Sullivan Cent. Plaza I, Ltd.*, 935 F.2d 723, 727 (5th Cir. Tex. 1991) (same); *DiCola v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re Prudential Lines, Inc.)*, 170 B.R. 222, 243-44 (S.D.N.Y. 1994); *In re Strawberry Square Assocs.*, 152 B.R. 699, 701 (Bankr. E.D.N.Y. 1993) (determining that a notice of appeal from a bankruptcy order does not divest the bankruptcy court over issues not on appeal).

The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

Plainly, the Court should provide that authorization to an officer of the Plan Proponents.

20. Movants further request that, notwithstanding Fed. R. Bankr. P. 6004(h), the terms and conditions of the proposed Order submitted with this motion shall be immediately effective and enforceable upon signing.

**CERTIFICATE OF SERVICE**

21. In compliance with Bankruptcy Local Rule 1001(h), contemporaneously with this pleading, the Debtor has filed as a separate document a certificate of service containing the names and addresses of the parties served, the manner of service, the name and address of the server, and the date of service.

WHEREFORE, Movants respectfully request that the Court enter the order submitted with this Motion, granting the relief sought herein, and granting such other and further relief as is just and proper.

Dated: July 24, 2008

Respectfully submitted,

**BAKER BOTTS L.L.P.**

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