

No. 08-00027 and No. 08-40746

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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Bank of New York Trust Company, N.A., as Indenture Trustee for the Timber Notes; Angelo Gordon & Co LP, Aurelius Capital Management LP, and Davidson Kempner Capital Management LLC; Scotia Pacific Company LLC; CSG Investments; Scotia Redwood Foundation Inc. — Appellants,

v.

Official Unsecured Creditors' Committee; Marathon Structured Finance Fund L.P.; Mendocino Redwood Company LLC; The Pacific Lumber Company, United States of America, California State Agencies — Appellees.

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Direct Appeal from the United States Bankruptcy Court  
for the Southern District of Texas, Corpus Christi Division  
USBC No. 07-20027

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**EMERGENCY MOTION FOR RECONSIDERATION OF STAY AND  
INJUNCTION IN LIGHT OF MATERIALLY CHANGED  
CIRCUMSTANCES – FILED BY INDENTURE TRUSTEE**  
**[Expedited Ruling Requested on Monday, July 28, 2008]**

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(2) The undersigned counsel of record certifies that the listed persons and entities (on the following pages) 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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**CERTIFICATE PER FIFTH CIRCUIT LOCAL RULE 27.4**

The counsel for Indenture Trustee has contacted counsel for Appellees about this motion and expects that an opposition will be filed.

  
\_\_\_\_\_  
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Attorney for Appellant



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To the Honorable United States Court of Appeals for the Fifth Circuit:

The Bank of New York Mellon Trust Company, N.A., as Indenture Trustee (the “Indenture Trustee”) respectfully files this emergency motion for reconsideration asking this Court to issue an immediate stay order (i) in light of materially changed circumstances, and (ii) to protect this Court’s appellate jurisdiction. Indenture Trustee is informed that appellants CSG and Scotia Redwood Foundation are joining in this Motion; other appellants may follow.

The District Court denied stay relief and held it lacks jurisdiction. Because this Court has accepted the certified direct appeal in this matter, it now has sole and exclusive jurisdiction of this appeal, and is thus the appropriate court from which to obtain relief. This is especially true given the materially changed circumstances giving rise to this Motion, which directly affect this Court’s jurisdiction.

**I. Reason for Emergency Reconsideration of Denial of Stay**

**A. Procedural Posture – Changed Circumstances Necessitate A Stay**

On July 24, 2008, this Court accepted appellate jurisdiction over this watershed bankruptcy case pursuant to a certification for direct appeal from the Bankruptcy Court and a petition for permission to appeal. While the Court denied the Indenture Trustee’s motion for stay pending appeal, it recognized the urgency

of this matter and granted the Indenture Trustee's petition for permission to appeal on an expedited basis.

Although the Court denied the stay, it recognized the urgency of this matter be expediting this appeal. This Court has issued an expedited briefing schedule, and the case is now set for oral argument to occur in October. The Bankruptcy Court has been made aware of these developments through, *inter alia*, presentations by counsel and written electronic notices from this Court's Clerk. Despite the fact that the Bankruptcy Court therefore knew it had been divested of jurisdiction, it nonetheless entered an entirely new order on July 28<sup>th</sup> effectively modifying the judgment already on appeal and radically changing the confirmed reorganization plan already under review in this Court. The Bankruptcy Court has also purported to order parties to immediately transfer property, execute transaction documents and to otherwise make operational the challenged reorganization plan. A stay is appropriate to protect this Court's own jurisdiction in light of these materially changed circumstances.

**B. Important Background on the Two Separate Bankruptcy Estates and the Changed Circumstances Necessitating this Stay Request**

The case on appeal before the Court involves two distinct groups of Chapter 11 bankruptcy cases although related by business dealings but completely separate from a corporate structure standpoint. This corporate separateness was an integral part of the documents pursuant to which the timber notes were issued. The Pacific

Lumber (“Palco”) cases consist of a lumber mill, adjoining company town, and an electric generation plant. The Scotia Pacific (“Scopac”) cases consist of over 200,000 acres of redwood forest timberlands adjoining the town and mill. Marathon is the primary secured creditor in the Palco cases and the Bank of New York as Indenture Trustee is the primary secured creditor in Scopac. Both Marathon and the Indenture Trustee hold liens on virtually every asset of their respective bankruptcy estates. Although these cases are being jointly administered for procedural purposes before the same judge, they remain separate chapter 11 cases with separate estates.

Notwithstanding the separateness of the two estates, the MRC/Marathon Plan purports to deal at once with both cases, forcing a sale of the Indenture Trustee’s timberland collateral and the lumber mill and plant to a third-party buyer to be formed and owned by Mendocino Redwood Company LLC (“MRC”) and Marathon. Under the Plan, payment (at a deeply discounted amount) on the debt owed to the Indenture Trustee and the resulting forced sale shall take place upon the “Effective Date”, a specially defined term under the Plan. The “Effective Date” means a date which occurs, among other things, after the confirmation order becomes a “Final Order”, also a defined term under the Plan. Under the definition contained in the Plan, the existence of a Final Order is, among other things, dependent upon the absence of any appeal of the confirmation order.

After this Court entered its order denying the Indenture Trustee's initial motion for stay pending appeal on July 24, 2008, MRC/Marathon immediately demanded they be provided wiring instructions for purposes of making an immediate distribution to the Indenture Trustee under the Plan. After repeated demands upon the Indenture Trustee, including a threat of a putative contempt motion, the Indenture Trustee delivered wiring instructions to the Plan Proponents with a reservation of all rights and defenses, including the legal position that the confirmation order was still on appeal and therefore not "Final" as specially defined in the Plan. In the Bankruptcy Court, the MRC/Marathon Plan Proponents filed an Emergency Motion for Order to Enforce Confirmation Order and Other Miscellaneous Relief just before midnight on July 24, 2008, thereby leaving the Indenture Trustee no time to prepare a written response. This was only 8 hours after this Honorable Court entered its order granting the Indenture Trustee's motion for certification of direct appeal and expedited the appeal.

Leaving the Indenture Trustee with just moments to prepare any type of written response to the MRC/Marathon midnight filing, the Bankruptcy Court held hearings on the morning of July 25, 2008, centered around MRC/Marathon's request that the Bankruptcy Court issue declaratory relief, despite the clear language of the Plan itself, that the confirmation order was "Final" for purposes of triggering the "Effective Date", thereby enabling implementation of the Plan so

that funds may be immediately wired to the Indenture Trustee to extinguish its liens on the timberlands and facilitate imminent transfer of the assets. Such a distribution will force an equally immediate transfer of title to the timberlands to the third party buyer specified in the MRC/Marathon Plan.

The Bankruptcy Court’s latest ruling must be stayed; otherwise, the currently–on–appeal reorganization plan will be activated and put into action — and this Court’s plenary jurisdiction will be irretrievably harmed. *Cf. In re T-H New Orleans Limited P’ship*, 188 B.R. 799, 810 (E.D. La. 1995) (modification, after notice of appeal filed, of order that plan not be effective until all appeals ended, held a violation of 11 U.S.C. § 1127, which required notice and hearing).

**C. Under the Plan’s Unambiguous Provisions, the “Effective Date” of the Plan has Not Occurred Because Appeals of the Confirmation Order are Still Pending.**

The language of the Plan is clear and unambiguous — its express terms unequivocally provide that the “Effective Date” of that plan will not occur so long as any appeal from the Confirmation Order remains pending.

For the “Effective Date” to occur, two requirements must be met. First, there must be a “Final Order” (uniquely defined) confirming the Plan; *and* second, all conditions to the consummation of the plan under Article XI of the Plan must have been satisfied or waived. Specifically, the “Effective Date” of the MRC/Marathon Plan is defined in “Appendix A to MRC/Marathon First Amended

Plan, As Further Modified, with Technical Modifications” (the “Plan Appendix”), as follows:

*Effective Date* means the date specified by the Plan Proponents in a notice filed with the Bankruptcy Court as the date on which this Plan shall take effect, and which occurs *after* (i) **the Confirmation Order becomes a Final Order; and** (ii) each of the conditions precedent to the Effective Date provided for in Article XI of the Plan have been satisfied or waived.

Plan Appendix at p. 4 (emphasis added); *see* Tab 3<sup>1</sup>.

Although part (ii) of the definition of Effective Date apparently permits the Article XI conditions to be waived, there is **no** provision permitting waiver of the requirement of a “Final Order” (set forth in clause (i) of this conjunctive provision). The requirement for a “Final Order” is absolute; nothing exists in either the “Effective Date” definition or in the MRC/Marathon Plan itself that permits or contemplates the possibility of waiver. This is in stark contrast to Section 11.2 of the Plan, which expressly permits the waiver of any conditions set forth in Section 11.1. Because the “Final Order” requirement is indisputably not a

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<sup>1</sup> All references to appendix items are to the previously-submitted Indenture Trustee appendix items, with the exception of the Bankruptcy Court’s latest July 28th order which is appended directly hereto.



condition contained in Section 11.1, Section 11.2 does not operate to permit the “Final Order” requirement to be waived.

“Final Order,” in turn, is specifically and uniquely defined in the Plan Appendix as follows:

***Final Order*** means an order of a court: (a) as to which the time to appeal, petition for writ of certiorari, or otherwise seek appellate review or to move for reargument, rehearing, reconsideration or stay has expired and *as to which no appeal, petition for writ of certiorari, or other appellate review, or proceedings for reargument, rehearing, reconsideration or stay shall then be pending*; or (b) as to which any right to appeal, petition for certiorari, or move for reargument, rehearing or stay shall have been waived in writing by all parties with such right; or (c) *in the event that an appeal, writ of certiorari, or other appellate review or reargument, rehearing, reconsideration or stay thereof has been sought, which order shall have been affirmed by the highest court to which such order was appealed or from which writ of certiorari or other appellate review or reargument, rehearing, reconsideration or stay was sought, and as to which the time to take any further appeal, to petition for writ of certiorari, to otherwise seek appellate review, and to move for reargument, rehearing,*

*reconsideration or stay shall have expired*; provided, however, that the possibility that a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure or under section 1144 of the Bankruptcy Code, or any analogous rule under the Bankruptcy Rules, may be filed with respect to such order shall not cause such order not to be a Final Order.

Plan Appendix at 5 (emphasis added); *see* Tab 3.

Based upon the plain language of the Plan Appendix, the Confirmation Order cannot be a “Final Order” (as defined in the Plan documents) if *any* appeal is pending. There is no provision — whether in the definition of “Effective Date” or “Final Order” or in the Plan itself — that qualifies or permits a waiver of that requirement. Appellants each timely filed notices of appeal from the Confirmation order. Accordingly, so long as any appeals from the Confirmation Order are pending, the Confirmation Order is not a “Final Order,” and the “Effective Date” has not occurred. Any attempt to now rewrite the Plan is squarely prohibited.

The appellants each timely filed notices of appeal from the Confirmation Order.

**D. The Bankruptcy Court Clearly and Indisputably Erred in Ruling that the Confirmation Order Somehow Modified the Plan.**

The Bankruptcy Court’s July 28th Order purporting to retroactively modify the Plan is without any cognizable legal basis. Just as the Bankruptcy Court cannot

strip the appellants of their well-established rights to seek appellate review, likewise the Bankruptcy Court cannot retroactively declare that it — without motion, notice or hearing — somehow (impliedly) rewrote the extensive “Final Order” provisions expressly set forth in the Plan. Nonetheless, the Bankruptcy Court has now ordered just that result. The July 28th Order is attached hereto at Tab 4.

The Bankruptcy Court bases its ruling primarily on paragraph 53 of the Confirmation Order, which simply provides, in pertinent part: “This is a Final Order and shall be immediately effective upon entry.” Tab 1 at 49, ¶ 53. Of course, a great distinction exists between “final order” meaning the order is not interlocutory, but final and appealable and the specially-defined Plan term meaning “not subject to further appeal” in any court. It would be counterintuitive — and jarringly unreasonable — to now read the term “Final Order” in paragraph 53 to mean “not subject to further appeal,” because an appeal was clearly contemplated and legally available — in fact, *the Confirmation Order contained a temporary stay expressly conditioned on the Indenture Trustee filing a notice of appeal*. Tab 1. But “not subject to further appeal” is exactly what is necessary for the Confirmation Order to constitute and function as a “Final Order” as defined in the Plan — the Plan defines “Final Order” as one from which no appeal has been taken or is pending.

The Bankruptcy Court's innocuously titled "Order to Enforce Plan" is a legal impossibility and contradicts the clear and unambiguous provisions of the Confirmation Order and Plan. The Confirmation Order expressly incorporates the Plan in its entirety and orders that "each provision of the MRC/Marathon Plan shall have the same validity, binding effect and enforceability as if fully set forth in this Order." *See* Tab 1, ¶ 49. Moreover, the Confirmation Order adopts the definitions of terms contained in the Plan. *See id.*, fn.1.

Lastly, under section 1127(b) of Bankruptcy Code Chapter 11, a plan can only be modified post-confirmation after notice and a hearing:

**(b)** The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

11 U.S.C. § 1127(b). There has been no motion to modify the Plan's requirement of a "Final Order", no notice of any hearing on such a motion and no hearing on such a motion. Because the Bankruptcy Court lacked any

authority to *sua sponte* modify the Plan without compliance with section 1127(b), its so-called Order Enforcing the Plan constitutes a clear and indisputable legal error. Further, because a timely appeal was taken and direct certification accepted by this Court before the Bankruptcy Court's July 28th Order, that Order is actually void and of no force or effect insofar as it might impinge on this Court's jurisdiction.

## **II. The Bankruptcy Court Lacked Jurisdiction to Enter the Post-Appeal July 28th Order Modifying the Plan — Stay Relief is Appropriate.**

It is a fundamental tenet of federal civil procedure that “the filing of a notice of appeal from the final judgment of a trial court normally divests the trial court of jurisdiction and confers jurisdiction upon the appellate court.” *Tex. Comptroller of Public Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.)*, 303 F.3d 571, 578-79 (5th Cir. 2002) (citing *Griggs v. Provident Consumer Co.*, 459 U.S. 56, 58 (1982)). Because this case involves a direct appeal to this Court from the Bankruptcy Court as provided under 28 U.S.C. § 158(d)(2), this Court obtained jurisdiction over the case the moment it accepted certification. *See Drive Financial Serv's L.P. v. Jordan*, 524 F.3d 343 (5th Cir. 2008). This likewise divested the Bankruptcy and District Court's jurisdiction over the certified appeal. The acceptance of certification confers jurisdiction on the court of appeals and “divests the [lower court] of its control over those aspects of the case involved in

the appeal.” *Griggs*, 459 U.S. at 58. “This rule applies with equal force to bankruptcy cases.” *Id.*

More specifically, “once an appeal is pending, it is imperative that a lower court not exercise jurisdiction over those issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process.” *Whispering Pines Estates, Inc. v. Flash Island, Inc. (In re Whispering Pines Estates, Inc.)*, 369 B.R. 752, 759–60 (B.A.P. 1st Cir. 2007) (bankruptcy court had no jurisdiction to modify confirmed plan to allow the transaction at the heart of the plan to go forward because even if not an express issue on appeal, it “so impacted the issues on appeal that the Bankruptcy Court was divested of jurisdiction over that issue.”). An order of a bankruptcy court which interferes with or attempts to circumvent the appeal process is null and void as a matter of law. *In re Southold Dev. Corp.*, 129 B.R. 18, 19 (E.D.N.Y. 1991).

Accordingly, a bankruptcy court has no jurisdiction to modify a confirmed plan of reorganization while an appeal from a confirmation order is pending. *See, Whispering Pines*, 369 B.R. at 759; *Southold Dev. Corp.*, 129 B.R. at 19. In particular, once an appeal from a confirmation order is pending, a bankruptcy court is divested of jurisdiction to modify the plan’s effective date. *Southold Dev. Corp.*, 129 B.R. at 19 (bankruptcy court order altering definitional section of plan to

remove plan's automatic stay pending appeal to permit the debtor to close on the sale of property despite the pendency of appeals *held void*). Such a change constitutes a "substantial alteration and modification of the plan." *In re T-H New Orleans Ltd. P'ship*, 188 B.R. 799, 810 (E.D. La. 1995) (approving bankruptcy court's refusal to modify plan's "effective date" clause to become effective regardless of pending appeal), *aff'd*, 116 F.3d 790 (5th Cir. 1997). "If the [plan proponent] had wanted such a plan, it should have proposed it as such originally. The court cannot now let the [plan proponent] substantially modify the confirmed plan." *Id.* See also *Whispering Pines*, 369 B.R. at 760.

Here, the Bankruptcy Court modified the MRC/Marathon Plan to change the definition of "Effective Date" after the appellants filed their notices of appeal and after this Court granted permission to appeal. The Bankruptcy Court had no jurisdiction to make this modification, and its July 28th Order is null and void and should be vacated or stayed pending final resolution of this appeal. *In re Southold Dev. Corp.*, 129 B.R. at 19.

Further, legislative history for the 2005 Bankruptcy Code amendments provides compelling additional support for this Court issuing status quo and stay orders to protect its jurisdiction pending this appeal. Part 1 of House Report 109-31 explains that in enacting the bankruptcy direct appeal statute, Congress intended that the circuit courts exercise their powers to articulate bankruptcy law and

thereby create binding precedent and stare decisis effect. House Report 109-31, pt. 1, at 148-49, *reprinted in* 2005 U.S.C.C.A.N. (vol. 4) 88, 206-07.

If this Court does not stop the Bankruptcy Court's latest order which modifies the reorganization plan and orders its immediate implementation, congressional intent and this Court's jurisdiction will be materially frustrated. A temporary stay to preserve the status quo is now necessary (beyond all the reasons the Indenture Trustee originally presented) for the additional reason that the lower court exceeded its authority and directly interfered with this Court's jurisdiction. When that has happened before, this Court has acted forcefully and immediately by granting extraordinary relief to prevent the exercise of non-existent judicial power.

In fact, this Court has gone well beyond the limited relief of a temporary stay, like the Indenture Trustee seeks, and instead granted the far greater relief of a writ of mandamus. And it has done so almost as a matter of right. "When a writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ *almost as a matter of right.*" *United States v. Denson*, 603 F.2d 1143, 1147 (5th Cir. 1979) (*en banc*) (emphasis added) (mandamus issued to correct district court's imposition of an unlawful award of probation); *see also In re Hot-Hed, Inc.*, 477 F.3d 320 (5th Cir. 2007) (mandamus directing remand of a case where the trial court had incorrectly found subject matter jurisdiction); *In re Reyes*, 814 F.2d 168 (5th Cir.



1987) (issuing mandamus to correct discovery order that allowed inquiry into citizenship of migrant farm workers; such discovery was beyond the matters at issue in the case).

If, as shown, the extraordinary writ of mandamus would lie when this Court finds lower courts acting in clear violation of statutes and beyond their jurisdiction, this Court should not hesitate to grant the lesser, temporary, non-final remedy of a stay pending appeal. *See Denson*, 603 F.2d at 1147 (granting mandamus and holding that there should be no “balancing of factors” where a court has exceeded its jurisdiction). Stay relief should be granted to foreclose what will surely become the Appellees’ mantra to avoid complete appellate review in this case – that implementing the Plan and transferring the unique redwood timberlands at issue in this case renders the appeal equitably moot. This will arguably make any appeal equitably moot. *See In re Manges*, 29 F.3d 1034, 1038-39 (5th Cir. 1994) (noting that an appeal becomes equitably moot after the plan has been substantially completed and the rights of third parties would be affected); *see also In re Dynamic Tooling Systems, Inc.*, 378 B.R. 417 (B.A.P. 10th Cir. 2007) (finding appeal moot after lower court modified the effective date of a plan).

### **CONCLUSION AND PRAYER FOR RELIEF**

In light of the materially changed circumstances, Indenture Trustee respectfully asks this Court to expedite consideration of this Motion, to act as soon

as possible, and to issue a status quo order staying the Bankruptcy Court's latest Order, vacating the Bankruptcy Court's Order of July 28, 2008, and enjoining A\]-Appellees from implementing the reorganization pending this appeal. To the extent this Court concludes that appropriate relief should be granted via issuance of mandamus, the Indenture Trustee requests that this Motion be treated as a petition for writ of mandamus. To allow for this option, the Indenture Trustee is serving this Motion on the Bankruptcy Court. Indenture Trustee also requests all other appropriate relief to which it may be entitled whether at law or in equity.

Dated: July 28, 2008  
Houston, TX

Respectfully submitted,

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Timber Notes**

### CERTIFICATE PER FIFTH CIRCUIT RULE 27.3

I certify that the facts supporting the Emergency Consideration of the Motion are true and complete and that the Fifth Circuit Rule 27.3's requirement of telephonic notice to the clerk's office and opposing counsel has been complied with.

  
William Greendyke

### PROOF OF SERVICE

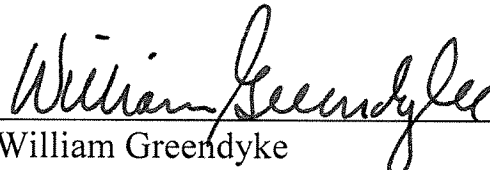
I certify that copies of this Motion were served today by e-mail (to all e-mail addresses listed below), and overnight FedEx (to any addressees listed without e-mail information), on July 28, 2008, on the persons named below. Pursuant to Fifth Circuit Rule 27.3, the Motion was served on all parties at the same time it was filed with the Court, and all such persons agreed to service of the document and all appended items by electronic means.

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