No. 09-40307

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In the Matter of: SCOPAC; SCOTIA DEVELOPMENT LLC; SALMON CREEK LLC; SCOTIA INN INC; BRITT LUMBER COMPANY, INC; THE PACIFIC LUMBER COMPANY; STEVE WILLS TRUCKING AND LOGGING LLC,

Debtors.

BANK OF NEW YORK TRUST COMPANY, NA, as Indenture Trustee for the Timber Notes ("Indenture Trustee"); CSG INVESTMENTS; ANGELO, GORDON & CO. LP., AURELIUS CAPITAL MANAGEMENT, L.P.; DAVIDSON KEMPNER CAPITAL MANAGEMENT LLC; SCOTIA REDWOOD FOUNDATION, INC.,

***Appellants*,**

v.

PACIFIC LUMBER COMPANY; SCOTIA PACIFIC LLC; MARATHON STRUCTURED FINANCE FUND LP; MENDOCINO REDWOOD COMPANY LLC; COMMITTEE OF UNSECURED CREDITORS; BANK OF AMERICA,

***Appellees*.**

ANGELO, GORDON & CO. LP; AURELIUS CAPITAL MANAGEMENT LP; DAVIDSON KEMPNER CAPITAL MANAGEMENT LLC,

***Appellants*,**

v.

MARATHON STRUCTURED FINANCE FUND LP, MENDOCINO REDWOOD COMPANY LLC; COMMITTEE OF UNSECURED CREDITORS; BANK OF AMERICA; SCOTIA PACIFIC LLC; PACIFIC LUMBER COMPANY,

***Appellees*.**

CSG INVESTMENTS, INC.,

***Appellant*,**

v.

SCOTIA PACIFIC LLC; PACIFIC LUMBER COMPANY,

***Appellees*.**

SCOTIA REDWOOD FOUNDATION, INC.,

***Appellant*,**

v.

SCOTIA PACIFIC LLC; PACIFIC LUMBER COMPANY,

***Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION
CASE NO. 08-259

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

(1) No. 09-40307; *Bank of New York Trust Company, NA. as Indenture Trustee for the Timber Notes et al. vs. Scotia Pacific LLC et al.*

(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	**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 an 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. was a creditor of Palco. Town of Scotia Company LLC now owns assets of the Debtors and has distributed its membership interests to Marathon Special Opportunity Fund, L.P. and MSOF Town of Scotia Corp.)	Steven M. Schwartz David Neier Winston & Strawn LLP New York, New York John D. Penn Trey A. Monsour Fort Worth, Texas
Mendocino Redwood Company LLC (Managing members of Mendocino Redwood Company LLC are Alexander J. Dean, Jr., and John J. Fisher. The following affiliated entities participate in the Plan of	Allan S. Brilliant Dechert LLP New York, NY

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.)	Frederick C. Schafrick Richard M. Wyner Goodwin Procter LLP Washington, D.C.
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The Pacific Lumber Company, Scotia Development LLC, Britt Lumber Co., Inc., Salmon Creek LLC and Scotia Inn Inc. ("Palco"), which have been dissolved.	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"), whose certificate of formation has been cancelled.	Craig H. Millet Gibson Dunn & Crutcher LLP Irvine, California Kathryn A. Coleman Eric J. Fromme Hughes, Hubbard & Reed LLP Irvine, California

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March 5, 2010

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has not yet been scheduled in this case. Oral argument would significantly aid this Court's decisional process. *See* Fed. R. App. P. 34(a)(2)(C).

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Appellees Marathon Structured Finance Fund L.P. ("Marathon") and Mendocino Redwood Company LLC ("MRC") respectfully submit this brief demonstrating that the District Court properly dismissed for lack of subject-matter jurisdiction the appeal from the Bankruptcy Court's Order denying the Noteholders[1] Motion for a "superpriority" administrative expense claim under Section 507(b) of the Bankruptcy Code ("507(b) appeal").[2] [Excerpt-D].[3] Similarly, the District Court did not abuse its discretion in denying the Noteholders' request for rehearing and transfer of their 507(b) appeal to this Court. [Excerpts-E, F]. MRC and Marathon further show that this appeal should, in the alternative, be dismissed as equitably moot. If this Court concludes that the District Court had jurisdiction, it should remand for consideration of equitable mootness and the merits. Finally, in the event that this Court reaches the merits, MRC and Marathon show that the Bankruptcy Court's decision correctly applied the law to its well-supported findings of fact, and that the Noteholders unsuccessfully attempt to turn factual issues into legal ones.

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[1] "Noteholders" includes all appellants: The Bank of New York as Indenture Trustee and the individual Noteholders.

[2] All citations to the Bankruptcy Code are to 11 U.S.C.

[3] For the Court's convenience, we have adopted the same record citation form used by the Noteholders. *See* Noteholders' brief at 5 n.1.

COUNTERSTATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §158(d)(1). MRC and Marathon disagree, however, with the Noteholders' contention that the District Court had jurisdiction over the 507(b) appeal. The District Court correctly found that it lacked subject-matter jurisdiction due to the pendency in this Court of the appeal from the Order ("Confirmation Order") confirming the plan of reorganization proposed by MRC and Marathon ("MRC/Marathon Plan" or "Plan"). [Excerpt-D].

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the District Court properly dismiss the 507(b) appeal for lack of subject-matter jurisdiction because the appeal from the Confirmation Order, which was inextricably intertwined with and expressly incorporated the 507(b) ruling, was pending in this Court?

2. Did the District Court abuse its discretion in denying transfer of the Noteholders' appeal to this Court?

3. Should this appeal be dismissed on the alternative ground of equitable mootness?

4. If this Court concludes that the District Court had jurisdiction, should it remand to the District Court for consideration of equitable mootness and the merits?

5. Did the Bankruptcy Court fail to compensate the Noteholders for a decline in the value of their collateral during the bankruptcy when:

a. The Noteholders were provided with the value of their collateral as of the Petition Date—which was higher than on the Confirmation Date—deducting only the senior claim of Bank of America and amounts previously paid as adequate protection to reimburse the Noteholders' professionals;

b. The Bankruptcy Court found that the Noteholders had failed to carry their burden of showing a diminution in the value of their collateral using either foreclosure or fair market value; and

c. The alleged "hindsight" evidence was not objected to and, in any event, was neither inadmissible nor material to the Bankruptcy Court's findings?

COUNTERSTATEMENT OF THE CASE

This is not, as the Noteholders contend, an appeal from the Bankruptcy Court's 507(b) Order. Rather, this is an appeal from the District Court's (i) dismissal of the Noteholders' 507(b) appeal for lack of subject-matter jurisdiction and (ii) denial of the Noteholders' motion for rehearing and transfer. Accordingly, if this Court concludes that the District Court had jurisdiction, it should remand to

the District Court for consideration, in the first instance, of equitable mootness and the merits.[4]

STATEMENT OF FACTS

A. Background

The Pacific Lumber Company and certain of its subsidiaries (collectively, "Palco") owned a sawmill, cogeneration plant, and the Town of Scotia, California. [Dkt.-3088 p.2]. Palco's subsidiary, Scotia Pacific Company LLC ("Scopac"), owned and operated over 200,000 acres of timberlands in Humboldt County, California ("Timberlands"). [*Id.*].

Palco and Scopac filed petitions for relief under Chapter 11 of the Bankruptcy Code on January 18, 2007 ("Petition Date"). [*Id.* ¶3]. On the Petition Date, Scopac owed approximately $714 million to the Noteholders, who had a lien on substantially all of Scopac's assets. [Dkt.-2401 p.24]. Bank of America ("BofA") was owed approximately $36.2 million and had a senior lien on the same collateral. [*Id.* pp.24-25]. Marathon, which had provided pre- and post-petition financing to Palco, was owed approximately $160 million. [Dkt.-3088 ¶11].

[4] Much of the Noteholders' "Statement of the Case" constitutes factual assertions regarding the underlying merits of its 507(b) appeal. We address those in the Facts and Argument sections below.

B. The MRC/Marathon Plan and the Confirmation Hearing

While competing plans were filed, the Bankruptcy Court confirmed the Plan proposed by MRC/Marathon. [Dkt.-3088]. This Plan provided that MRC, an experienced timberland operator, and Marathon would reorganize the Debtors into two new entities, one to own the Timberlands and mill and the other, the Town of Scotia. [*Id.* p.3]. The Plan, as modified by the Confirmation findings, contemplated the contribution by MRC/Marathon of $580 million in fresh capital into the reorganized entities (with $510 million going to the Noteholders, $36.2 million to BofA, over $10 million to undisputed administrative claimants, and over $10 million to Palco's unsecured creditors), with Marathon converting its debt into equity. [*Id.* ¶¶29-30; Dkt.-3302-2 ¶4.1-.12].

At the Confirmation Hearing, the Bankruptcy Court heard extensive expert testimony on the key question of the value at Confirmation of the Noteholders' security interest in the Timberlands, including testimony from the Noteholders' principal expert, James Fleming, and MRC/Marathon's expert, Richard LaMont.[5] Fleming opined that the Timberlands' fair market value was $605 million (significantly less than the $714 million owed the Noteholders). [*Id.* ¶¶135-36]. LaMont opined that the fair market value was $430 million. [*Id.* ¶92.]

[5] Another Noteholders' witness, Glenn Daniel, opined that the Timberlands' value was between $575-$670 million. The Bankruptcy Court disregarded this opinion on several grounds, including that a senior employee of the same firm previously opined that the value was between $290-$500 million. [Dkt.-3088 ¶171].

On July 6, 2008, the Bankruptcy Court issued its 119-page Confirmation Findings, concluding, *inter alia*, that Fleming's analysis had "significant flaws" [*id.* ¶163], that LaMont was a "credible witness" [*id.* ¶134], and that the value of the Timberlands was "not more than $510 million." [*Id.* p.61]. The Bankruptcy Court, therefore, ruled that, to be confirmed, the Plan had to pay the Noteholders at least $510 million. [*Id.* p.9].

C. The Noteholders' 507(b) Claim

1. The 507(b) Motion Delays Confirmation.

On May 1, 2008, the day before the close of evidence at the Confirmation Hearing, the Noteholders filed a 507(b) Motion asserting that they were entitled, without stating a specific amount, to a superpriority claim under 507(b) of the Bankruptcy Code for the diminution in value of their collateral during the bankruptcy. [Dkt.-2814]. MRC and Marathon, among others, filed objections to the 507(b) Motion. [Dkt.-2907].

It was not until after issuance of the Confirmation Findings, however, that the Noteholders advised the Bankruptcy Court that their 507(b) claim could be several hundred million dollars on the ground that the Timberlands and the non-Timberlands collateral had allegedly decreased in value during the bankruptcy by approximately $200 million and $20 million, respectively. [Appellant-207 pp.14-15, 19-20, 25-26]. The parties and the Bankruptcy Court all recognized that, if the

Noteholders had a valid 507(b) claim in the amounts sought, the Plan would not be feasible and, therefore, could not be confirmed. [*Id.*] As the Bankruptcy Court stated, "if there is, in fact, a real administrative claim…. it's not confirmable. We all agree with that." [Appellant-208 p.13]. Accordingly, despite having issued its Confirmation Findings, the Bankruptcy Court delayed Confirmation and set a trial date for the 507(b) Motion.

2. The 507(b) Hearing

The Noteholders' principal contention at the 507(b) hearing, made through two expert witnesses, was that the Timberlands had declined in value between the Petition Date and Confirmation. [Dkt.-3211 pp.25-28]. The first, Fleming, testified that the Timberlands' value on the Petition Date was $646 million, $41 million greater than his Confirmation value and $136 million greater than the Bankruptcy Court's finding of value at Confirmation. [Appellant-384 pp.1-2; Dkt.-3088 ¶136]. Fleming, however, used the same methodology that the Bankruptcy Court previously discredited in its Confirmation Findings. [Dkt.-3088 ¶¶135-64; Appellant-211 p.124]. The second, Joseph Radecki, was an investment banker who could only testify about general macroeconomic factors without specific reference to the timber industry or to Scopac.[6]

[6] Radecki had "never previously valued timberlands"; did not know "how inflation affects the value of timberlands"; was not aware that appraisers of timberlands generally use 50-year models; had not inquired "whether discount rates in the timberlands business had declined during the bankruptcy period"; had "never done a timber harvest analysis"; did not know "whether the

Lamont, MRC/Marathon's valuation expert, testified that, far from declining, the fair market value of the Timberlands had in fact increased between the Petition Date and Confirmation. This was principally because any decline in value due to lower timber prices was far outweighed by a decline in the discount rates applicable to timber investments and such a decline increases valuation—particularly as applied to assets, like the Timberlands, with a 50-year investment horizon. [Appellee-276 ¶¶14-23]. LaMont's opinion was supported by MRC's Chairman, Alexander Dean, Jr., who testified that the model that MRC used to develop the Plan also showed that the value of the Timberlands increased due to the change in the discount rate. [Appellee-275].[7]

The Noteholders further contended that the value of their non-Timberlands' collateral decreased between the Petition Date and Confirmation primarily due to the payment of professional fees. [Dkt.-3211 ¶¶19-22].

3. The Bankruptcy Court's 507(b) Ruling

On July 7, 2008, the Bankruptcy Court issued an oral ruling denying the Noteholders' 507(b) Motion, stating that the "burden of proof … is upon the claimant to establish an administrative super priority claim." [Excerpt-H p.20]. After setting out the criteria for a 507(b) claim [*id.* pp.20-21], the Bankruptcy

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demand for purchasing timberlands has changed over the last two years" and did not "know anything about Scopac's revenues" or "costs and expenses." [Appellant-211 pp.21-38].

[7] It should be kept in mind that Confirmation occurred before the collapse of Lehman Brothers in September 2008.

Court stated: "I have two things that I can look at …. whether there is a potential decrease in the timberland value; and second, whether there is a potential decrease in the other security value." [*Id.* p.22]. The Bankruptcy Court thus applied the recognized two-point test for a 507(b) claim, comparing the value of collateral on the Petition Date and at Confirmation.

Looking at the Timberlands, the Bankruptcy Court stated that "the Indenture Trustee[] failed to meet its burden of proof or provided insufficient evidence that there was any change in value to the timberlands." [*Id.*]. The Bankruptcy Court found that Flemings' testimony that there were "more trees to harvest at filing" was "contrary to all the testimony in this case." [*Id.* p.23]. Moreover, the Bankruptcy Court disregarded Radecki's testimony because he "was not able to tie [his opinion] with any specificity to this case, to this county, to the redwood forests, or this industry specifically." [*Id.*]. The Bankruptcy Court further found that "the discount rates are a far bigger indicator of a change in value than change in the price of the logs," and "[s]ignificant evidence suggests that the discount rate has gone down since filing." [*Id.* p.25]. On that topic, "Marathon's expert did a comprehensive analysis of discount rates …," while Fleming "simply used a bond chart to pick a discount rate." [*Id.*].

Critically, the Bankruptcy Court reached the conclusion that the Noteholders failed to meet their burden using either the foreclosure or fair market value:

“[T]here’s been no evidence as to a decline in the foreclosure value of the case, but even looking at the fair market value, the evidence showed that from filing to confirmation, the forests grew so that there are more trees. Capital improvements were made.” [*Id.* pp.24-25]. The Bankruptcy Court concluded: “All of this may lead to a value being higher at confirmation, but the Court is not prepared to make that finding that there has been any change in value since the filing.” [*Id.* p.25]. This conclusion “is consistent with the long-term approach to valuing commodities like this forest ….” [*Id.* p.26].

The Bankruptcy Court, however, concluded that the value of the non-Timberlands collateral had declined between the Petition Date and Confirmation. Accordingly, the Noteholders were entitled to the value on the Petition Date. Based on “undisputed testimony,” the Bankruptcy Court found that, on the Petition Date, the “other assets that were the security for the Indenture Trustee equaled $48.7 million.” [*Id.* p.27]. The Bankruptcy Court ruled that Noteholders were entitled to that amount, subject to a deduction of $36.2 million owed to BofA, whose claim was senior to the Noteholders’. [*Id.* pp.27-28]. Thus, the value of the Noteholders’ non-Timberland security interests on the Petition Date was $12.5 million. The Noteholders had already been paid $8.9 million for their professionals’ fees, so they were only entitled to an additional $3.6 million to account for the decline in the value of the non-Timberlands collateral after the

Petition Date, plus $510 million for the value of the Timberlands. [*Id.* p.28]. The Bankruptcy Court described this ruling as a "reconsideration of my [confirmation] findings." [Appellant-214 p.18].

D. Confirmation Of The Plan And Denial Of The Noteholders' 507(b) Motion

The Plan was amended to increase the minimum payment to the Noteholders from $510 million to $513.6 million, thereby eliminating any additional administrative claim. [Excerpt-H p.28; Dkt.-3302-2 ¶4.6.2.1]. The Bankruptcy Court then entered both the Confirmation Order and the 507(b) Order. The Confirmation Order specifically incorporated the 507(b) findings and conclusions:

> On July 7, 2008, this Court announced its Findings of Fact and Conclusions of Law regarding the 507(b) Motion on the record in open Court and those are incorporated by reference herein.
>
> * * *
>
> The Court, based on the findings of fact and conclusions of law noted on the record in open court, denied the 507(b) Motion and finds that the Indenture Trustee does not have a 507(b) superpriority administrative claim as a result of the confirmation of the MRC/Marathon Plan.

[Dkt.-3302 pp.12, 14].

E. Appellate Proceedings

1. Appeal From The Confirmation Order

The Noteholders filed separate notices of appeal from the Confirmation Order and the 507(b) Order. [Dkt.-3302, 3303]. At the same time, the Noteholders

petitioned the Bankruptcy Court for a stay of the Confirmation Order pending appeal and for certification of a direct appeal from the Confirmation Order to this Court. [Dkt.-3308, 3309]. The Bankruptcy Court denied the stay request, but certified the case for direct appeal to this Court. [R3d:279-302]. While the District Court and this Court also denied a stay pending appeal [R3d:155-157, 162-163], this Court did grant the petition for direct appeal. [R3d:165].

As will be detailed below, pp. 23-24, in appealing the Confirmation Order, the Noteholders asserted that one of their issues on appeal was the failure of the Plan to "provide payment" of their superpriority claim. [Dkt.-3309 p.1] They did not, however, brief all 507(b) related issues in the Confirmation appeal, but rather raised select points concerning the valuation of their non-Timberland collateral.

This Court affirmed, in large part, the Confirmation Order. *See In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). The Court held that the Plan was properly confirmed based on the Bankruptcy Court's factual findings regarding valuation of the Noteholders' Timberlands and non-Timberlands collateral. *Id.* at 248-49. In reaching that conclusion as to the non-Timberlands collateral, the Court addressed the Bankruptcy Court's ruling at the 507(b) hearing. This Court recounted the Bankruptcy Court's ruling on diminution in value of the non-Timberlands collateral, even going through the Bankruptcy Court's precise calculations on how it valued the net amount of the non-Timberlands collateral at

$3.6 million. *Id.* at 249 n.24. While the Court did remand for further determination the Noteholders' contention that the Bankruptcy Court had not accounted for an $11.1 million post-petition receivable due Scopac from Palco (*id.* at 250),[8] significantly, that contention too had been litigated in the 507(b) hearing. [*See*, *e.g.*, Appellee-349; Appellant-211 pp.247-51].

2. Appeal From The 507(b) Order

Eight days after the 507(b) appeal was docketed in the District Court, the Noteholders and MRC/Marathon filed an agreed motion to establish a briefing schedule [R:145-49] that stated that it was "without prejudice to any procedural or substantive arguments or issues that might be raised by any party in the District Court Appeals, including issues regarding jurisdiction and mootness." [R:146]. The District Court's Order adopting the schedule contained the same condition. [R:150].

MRC and Marathon moved to dismiss the 507(b) appeal on the grounds that the District Court lacked subject-matter jurisdiction due to the pending Confirmation appeal in this Court and that the appeal was equitably moot. [R:343-479, 587-674]. The District Court granted the motion on the jurisdictional ground finding that "[t]he record before this Court demonstrates that the 507(b) Order is an integral part of the Confirmation Order." It concluded that, because "the 507(b)

[8] The Bankruptcy Court did in fact account for the $11.1 million receivable. The Court stated that the accounts receivable were accounted for in Scopac's cash. [Appellant-214 pp.113-14].

Order is part of the Confirmation Order, which is currently on appeal to the Fifth Circuit Court of Appeals, … this Court does not have subject matter jurisdiction over this appeal." [Excerpt-D p.2].

The Noteholders sought rehearing requesting that the District Court vacate its Dismissal Order and transfer the appeal to this Court pursuant to 28 U.S.C. §1631. [R:695-711, 756-72]. On November 12, 2009, the District Court issued two orders denying the Noteholders' motion to transfer because the statutory conditions of 28 U.S.C. §1631 had not been satisfied. [Excerpts-E, F]. In rejecting the argument that transfer was in the interest of justice as statutorily required, the District Court found that the Noteholders had "made a conscious decision to chart their appeal between two separate courts" and that it was "not persuaded that [the Noteholders] were unaware or confused about the proper forum in which to bring this appeal." [Excerpt-F].

SUMMARY OF ARGUMENT

I. The District Court correctly dismissed this appeal for lack of subject-matter jurisdiction on the ground that the 507(b) Order was an "integral part of the Confirmation Order." [Excerpt-D p.2]. That conclusion is supported by the facts that Confirmation was delayed pending resolution of the 507(b) Motion; confirmation of the Plan would not have been feasible if the Noteholders had a 507(b) claim in the amounts asserted; the Confirmation Order expressly

incorporated the Bankruptcy Court's ruling on the 507(b) Motion; the Plan was modified to reflect the 507(b) ruling; and the actions of the Noteholders themselves in listing and litigating 507(b) issues in the Confirmation appeal. The Noteholders rely on the fact that the Bankruptcy Court issued a separate 507(b) Order, but the Bankruptcy Court assumed both appeals would be on the "same track," and the fact that it issued two orders cannot in any event create appellate jurisdiction that does not otherwise exist. More fundamentally, the Noteholders fail to refute the essential point that they could have raised all their 507(b) arguments in the Confirmation appeal. There is no good reason for allowing the Noteholders to litigate two interrelated appeals concurrently in different courts.

II. The District Court did not abuse its discretion in denying the Noteholders' request to transfer the appeal to this Court under 28 U.S.C. §1631. The Noteholders' appeal could not have been filed in this Court on the day it was filed in the District Court, as required for a §1631 transfer. Moreover, the record supports the District Court's conclusion that transfer would not be "in the interest of justice," as also required by §1631.

III. In the alternative, this appeal should be dismissed on the ground of equitable mootness. Allowance of the Noteholders' 507(b) claim in any material amount would, as all parties recognized, render the Plan infeasible. As a result, reversal of the 507(b) Order would destroy the Plan's success and irreparably

injure the numerous third parties who have relied on the Plan in the 20 months since Confirmation.

IV. If this Court concludes that the District Court did have jurisdiction, it should remand to the District Court for consideration of equitable mootness and the merits in accordance with the review procedures prescribed by Congress.

V. On the merits, the Bankruptcy Court's 507(b) Order should be upheld. The Noteholders argue that they are entitled to Scopac's "net proceeds" during the bankruptcy, but they did not raise this claim during the bankruptcy. Moreover, the claim is contrary to the two-point test under which adequate protection, for purposes of §507(b), is measured by the collateral's value on the Petition Date and on Confirmation. Furthermore, the claim that the Bankruptcy Court should not have deducted $8.9 million in fees previously paid to the Noteholders' professionals is inconsistent both with their statements below that those fees could be deducted and with 506(b) of the Bankruptcy Code.

There is no need for this Court to consider the Noteholders' contention that the Bankruptcy Court erroneously compared the foreclosure value of the Timberlands on the Petition Date to their fair market value at Confirmation. The Bankruptcy Court also compared the Timberlands' fair market value on the Petition Date and Confirmation and found that the Noteholders had not carried

their burden of showing a diminution in value. That finding is not challenged here and completely supports the Bankruptcy Court's decision.

Finally, the Noteholders' contention that the Bankruptcy Court's decision was based on improper "hindsight" evidence should be rejected. The Noteholders did not even object to admission of the testimony from LaMont about which they now complain. Moreover, their objections go to the weight of the evidence, not its admissibility, and, in any event, are without merit.

<u>STANDARD OF REVIEW</u>

This Court reviews questions of law, including legal conclusions with respect to the District Court's jurisdiction, *de novo*. *See Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 (5th Cir. 2008); *Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343, 346 (5th Cir. 2008). Factual findings, including those underlying dismissal for lack of jurisdiction, are reviewed under a clear error standard. Fed. R. Bankr. P. 8013; *In re Webb*, 954 F.2d 1102, 1104 (5th Cir. 1992); *Theriot v. United States*, 245 F.3d 388, 394 (5th Cir. 1998). The District Court's denial of rehearing and transfer is reviewed for an abuse of discretion. *See In re Blast Energy Services*, 593 F.3d 418, 423 (5th Cir. 2010); *Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 277 (5th Cir. 2007).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE 507(b) ORDER AND THE CONFIRMATION ORDER ARE INEXTRICABLY INTERTWINED AND THUS IT LACKED SUBJECT-MATTER JURISDICTION.

The Noteholders challenge [p.24] the dismissal of their appeal by the District Court asserting that it rests on the "demonstrably false premise that 'the 507(b) Order is an integral part of the Confirmation Order ….'" They assert that the Confirmation Order and 507(b) Order were based on "distinct records and hearings." These arguments are incorrect or, at best, misleading, and do not justify reversal.

A. The District Court Correctly Found That The 507(b) Order Was Integral To Confirmation.

The District Court started with the well-supported premise that the "filing of a notice of appeal is an event of jurisdictional significance …. [that] confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." [Excerpt-D p.1]. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *In re Transtexas Gas Corp.,* 303 F.3d 571, 579 (5th Cir. 2002). The Noteholders do not challenge this fundamental premise.

Trying to avoid this basic principle, the Noteholders challenge the District Court's determination that the "Bankruptcy Court expressly incorporates its 507(b)

ruling in the Confirmation Order," stating [p.25] that it "simply does not correspond to the record." The record, in fact, supports the District Court. The Confirmation Order specifically: (i) referenced the hearing on the 507(b) Motion; (ii) stated that the Court "***announced its Findings of Fact and Conclusions of Law regarding the 507(b) Motion on the record in open Court … [which] are hereby incorporated herein by reference***"; (iii) stated that the terms of the Plan and the Confirmation Order were "non-severable and mutually dependent"; and (iv) stated that "based on the findings of fact and conclusions of law noted on the record in open court, denied the 507(b) Motion and ***finds that the Indenture Trustee does not have a 507(b) superpriority administrative claim as a result of the confirmation of the MRC/Marathon Plan.***" [Dkt.-3302 pp.1-2, 12-13, 15, 14 (emphasis added)]. Thus, contrary to the Noteholders' assertions, the District Court's statement that the 507(b) ruling was "expressly incorporated" into the Confirmation Order is completely accurate.

Moreover, contrary to the Noteholders' argument, the District Court's determination that the 507(b) Order was an "integral part of the Confirmation Order" is absolutely correct. As the District Court rightly stated, the Bankruptcy Court "postponed entry of the Confirmation Order" until after the hearing on the 507(b) Motion "because all parties agreed it was critical for the court to determine the amount of the Indenture Trustee's administrative claim before the

MRC/Marathon Plan could be confirmed. In fact, all parties agreed the MRC/Marathon Plan could not be confirmed if the Indenture Trustee had an administrative expense claim exceeding $200 million." [Excerpt-D p.2].

The Noteholders do not challenge this statement of fact—nor could they. The reason why the 507(b) Motion needed to be resolved before the Plan could be confirmed is because all administrative claims must be paid in full to confirm a plan. The MRC/Marathon Plan, however, contemplated having no more than $580 million in cash available to pay the various claims ($510 million to the Noteholders, $36.2 million to BofA, over $10 million to undisputed administrative claimants and over $10 million to Palco's unsecured creditors). [Dkt. 3302-2 ¶¶4.1-.12]. Thus, if the Noteholders had a superpriority claim in any substantial amount, let alone $200 million, the Plan would not be feasible and could not be confirmed. As the Bankruptcy Court stated: "I'm just saying we all failed to see the significance of this [507(b)] motion in the confirmation, because if you have a $200 million claim, there's no way that they can confirm this plan." [Appellant-210 p.45]. Counsel for the Noteholders agreed, responding: "Correct." [*Id.*]. Indeed, as the Noteholders argued below and repeat here [p.33], the Plan's alleged failure to make provision for payment of their 507(b) claim raised "a substantial question" whether the reorganized entities would "have sufficient capital to operate and avoid either liquidation or the need for further reorganization if the claim is

allowed." [Dkt.-3308 ¶81]. There can, therefore, be no dispute that the Bankruptcy Court's 507(b) ruling was "integral," and essential, to the issuance of the Confirmation Order because it could not have been, and was not, issued until the 507(b) Motion was resolved with a determination that there was no substantial superpriority claim.

B. The Confirmation Order and 507(b) Order Were Based on Overlapping Records and Proceedings.

The Noteholders' argument [p.24] that the Confirmation Order and the 507(b) Order "were based on distinct records and hearings … and addressed different legal and factual aspects of the bankruptcy proceeding" is also flatly wrong. In fact, the record here shows that the issues and record were thoroughly intertwined.

For one thing, the Bankruptcy Court thought that the 507(b) hearing was part of the confirmation hearing. [*See* Appellant-214 p.159 ("Now we litigated [the 507(b) motion], I thought it was part of confirmation.")]. Moreover, the records on the two appeals were thoroughly intermixed. The Noteholders' designation of the record in this appeal includes the transcripts and 169 exhibits from the Confirmation Hearing [R:67-93], and the Confirmation record included every transcript and 94 exhibits (three less than in this appeal) from the 507(b) hearing. [Dkt.-3435 pp.41-42, 54-59].

Furthermore, the Noteholders themselves in the Confirmation appeal made several arguments based on the 507(b) record. They, for instance, challenged the integrity of MRC/Marathon's valuations using an exhibit from the 507(b) Hearing that they even placed into their Record Excerpts for the Confirmation appeal.[9] The Noteholders also argued that the Bankruptcy Court had not properly valued their non-Timberlands collateral. This Court rejected that contention squarely on the basis of the Bankruptcy Court's 507(b) ruling:

> The Indenture Trustee also asserts that the bankruptcy court necessarily failed to provide the Noteholders with the indubitable equivalent value of property secured by their lien because it did not value the non-timberland collateral. This is incorrect. ***The bankruptcy court expressly valued the Noteholders non-timberland collateral at $48.7 million, an amount representing cash and cash equivalents in Scopac's accounts on the petition date. After subtracting the Bank of America's priming lien and the Indenture Trustee's legal fees, the net value of the non-timberland collateral was $3.6 million.*** The court added this amount to its prior timberland valuation of $510 million, and the sum represented the total value of collateral secured by the Noteholders' lien.

Pacific Lumber, 584 F.3d at 249 n.24 (emphasis added). Finally, the issue on which the Court remanded—the Noteholders' contention that they had not received the value of an $11.1 million receivable from Palco—was based on a 507(b) hearing exhibit and litigated in that hearing, not in the earlier Confirmation

[9] R3d:526 (referring to Excerpt-I in the Confirmation appeal which was the Noteholders' Ex. 160 at the 507(b) Hearing as indicated at R3d:64).

hearing, and was a specific part of the issue whether there had been a diminution in value in the non-Timberlands collateral. [*See*, *e.g.*, Appellee-349; Appellant-211 pp.247-51].

C. The Noteholders Listed The Denial Of Their 507(b) Claim As A Ground For Appealing The Confirmation Order.

In contradiction to their current position, the Noteholders previously cited denial of their 507(b) Motion as a ground for appealing from the Confirmation Order. The Noteholders sought a stay pending appeal from the Confirmation Order in part on the ground that the Plan "fails to provide for the payment of the Indenture Trustee's superpriority administrative claim …." [Dkt.-3309 p.1]. Similarly, in seeking certification for a direct appeal to this Court, the Noteholders argued that one reason justifying such an appeal was that the "Plan makes no provision for payment of [their] superpriority administrative claim …." [Dkt.-3308 ¶81]. In that same brief, the Noteholders included as an issue they intended to raise with this Court whether the Plan "improperly fails to provide for the payment … a secured creditors' ***administrative*** claims …." [*Id.* p.10 (emphasis added)]. Finally, certain Noteholders included in their statement of issues for their Confirmation appeal "whether the Bankruptcy Court erred as a matter of law in concluding that the Marathon/MRC Plan satisfies 11 U.S.C. §1129(a)(9) because it does not adequately provide for payment in full of the Indenture Trustee's superpriority claim asserted under 11 U.S.C. §507(b)." [R:437].

The fact that the Noteholders chose not to fully brief the denial of the 507(b) claim in the Confirmation appeal does not give them power to raise the issue now, as any issues not briefed are waived. *See*, *e.g. Procter & Gamble Co. v. Amway Corp.,* 376 F.3d 496, 499 n.1 (5th Cir. 2004). The Noteholders try [pp.32-34] to avoid this conclusion by claiming that their current appeal deals with "allowance" of their 507(b) claim while the issues that they raised in the Confirmation appeal dealt with the "treatment" of such claims in the Plan. In the context of this case, no such distinction exists. There never was a genuine appellate issue as to the treatment of the Noteholders' 507(b) Claim. The Bankruptcy Code requires that any administrative claim be paid to the extent allowed (11 U.S.C. §1129(a)(9)(A)), and the Plan so provided. [Dkt.-3302-2 ¶2.1]. The only disputed issue was the extent to which the 507(b) Claim would be allowed, and the Plan was, in fact, amended to provide the additional $3.6 million that the Bankruptcy Court allowed in the 507(b) hearing. [*Id.* ¶4.6.2.1].

D. The Fact That The Bankruptcy Court Issued Two Orders Did Not Give The District Court Jurisdiction Over A Separate 507(b) Appeal.

The Noteholders' jurisdictional claim [pp.26-27] rests on a procedural technicality—that the Bankruptcy Court, at their request, issued a separate 507(b) Order and, as a result, made three conforming changes to MRC/Marathon's proposed Confirmation Order. But the fact that the Bankruptcy Court issued two

orders, rather than one, cannot create appellate jurisdiction that does not otherwise exist. Indeed, the Bankruptcy Court itself stated when it acceded to their request to issue separate orders: "Now we litigated [the 507(b) Motion], ***I thought it was part of confirmation***. ***I don't see the difference between having a separate order and other one*** [*sic*], but I will sign a separate order if there's no objection." [Appellant-214 p.159 (emphasis added)]. The Bankruptcy Court, by issuing a separate order, certainly was not opening the door to the Noteholders' attempt to litigate concurrent appeals from the orders in different courts.[10] On the contrary, the Court thought that any appeals would be on the "same track." [*Id.* p.193]. Moreover, the claim [p.21] that the issuance of two orders provided the Noteholders with a good-faith belief for their actions rings hollow, as the District Court observed in stating that it was "not persuaded that [the Noteholders] were unaware or confused about the proper forum in which to bring this appeal." [Excerpt-F].

The Noteholders accuse [p.27] MRC/Marathon of delay by not moving to dismiss the 507(b) appeal until after the Confirmation appeal was argued. But as shown above, p.13, in the joint motion to establish a briefing schedule—filed eight days after the 507(b) appeal was docketed—MRC/Marathon expressly reserved their right to raise jurisdictional objections and thus put the Noteholders on notice.

[10] The Noteholders' statements to the Bankruptcy Court [Br. pp. 24-25] as to why they wanted a separate order also do not change the effect of the Confirmation Order.

[R:145-49]. MRC/Marathon's silence would, in any event, be no excuse for the Noteholders' actions given the bedrock principle that the parties' acquiescence cannot create subject-matter jurisdiction that does not otherwise exist. *E.g.*, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

E. None Of The Noteholders' Other Grounds For Justifying A Separate 507(b) Appeal Have Merit.

The Noteholders make a number of other meritless arguments in support their position that the District Court had jurisdiction to hear their 507(b) appeal. They argue [p.28] that separate proceedings "often proceed simultaneously in different courts." But the cited cases deal with instances where a bankruptcy court was allowed to proceed with "aspects of the case" that were not the subject of a pending appeal. *See*, *e.g.*, *In re Sullivan Central Plaza I, Ltd.*, 935 F.2d 723, 727 (5th Cir. 1991). That is not the case here where the record shows that the Confirmation Order and 507(b) Order were inextricably intertwined, that the Confirmation Order incorporated the 507(b) decision, and that issuance of the Confirmation Order depended upon the ruling on the 507(b) Claim. Thus, contrary to the Noteholders' assertion [p.28], the 507(b) Order does far more than "touch upon" the Confirmation Order—it was, as the District Court correctly ruled, "integral" to the Confirmation Order. *See In re Whispering Pines Estates, Inc.,* 369 B.R. 752, 759 (1st Cir. B.A.P. 2007) (appeal of confirmation order divested

bankruptcy court of jurisdiction over motion for relief from the stay because the motion was "closely related" to and "interfered with" the pending appeal).

The Noteholders argue [pp.34-35] that it is common for reorganization plans to provide for post-confirmation payment of various administrative claims, but that is irrelevant. Run-of-the-mill administrative claims are filed after confirmation because they typically include professional fees and other costs that cannot be finalized until after the work is completed and are not of a magnitude that would impact the feasibility of the plan. Here, by contrast, allowance of the alleged 507(b) Claim, or even any significant portion thereof, would have rendered the Plan unconfirmable due to a lack of feasibility. Furthermore, the 507(b) Order was not issued after the Confirmation Order, but incorporated into and issued concurrently with it. The fact that post-confirmation administrative allowance orders might be appealed separately does not mean that the 507(b) Order could be appealed separately from the Confirmation Order.

The Noteholders set up [p.36] the strawman of asserting that dismissing this appeal will somehow interfere with the direct-review statute, 28 U.S.C. §158(d)(2). The fact, however, that this Court granted direct review on the ground that some of the issues raised by the Confirmation appeal were novel or of public importance in no way relieved the Noteholders from their obligation to raise all of their issues regarding the Confirmation Order in that appeal. Indeed, in the Confirmation

Appeal, the Noteholders did not limit themselves to issues of precedential significance, even including assertions that this Court found "insufficient to raise an intelligible appellate point." *Pacific Lumber*, 584 F.3d at 249 n.24.

Moreover, the 507(b) Claim would not have been left in appellate limbo, as the Noteholders argue, for they could and should have raised all of their 507(b) arguments in the Confirmation appeal, whatever court heard that appeal in the first instance. An appellate court has subject-matter jurisdiction to rule on the issues "fairly included" in an order or judgment before it. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (under 28 U.S.C. §1292(b), a court of appeals "may address any issue fairly included within the certified order"). In this case, the Bankruptcy Court's rulings on the 507(b) Motion were not only "fairly included" in the Confirmation Order certified for direct appeal to this Court, they were expressly incorporated therein and were a necessary precondition to issuance of the Confirmation Order.

Finally, the Noteholders argue [p.37] that the limitation on concurrent jurisdiction applied by the District Court "would defeat [the] purpose of achieving judicial economy." But what would actually defeat judicial economy would be allowing the Noteholders to maintain overlapping appeals from concurrently entered intertwined orders in two different courts. All of the Noteholders' arguments could and should have been raised in its appeal from the Confirmation

Order, whether that appeal had been heard, in the first instance, in this Court or the District Court. A single appeal is obviously far more efficient than multiple appeals.

In other contexts, this and other courts have declined to "set up a system where there would be duplicative appeals, one to the district court and one to the Court of Appeals." *Resolution Trust Corp. v. Nernberg*, 3 F.3d 62, 67 (3d Cir. 1993) (citing with approval *In re Meyerland Co.*, 960 F.2d 512, 517 (5th Cir. 1992) (en banc)). The same principle applies here. The District Court's dismissal should be affirmed.

II. THE DISTRICT COURT PROPERLY DENIED THE NOTEHOLDERS' MOTION FOR REHEARING AND TRANSFER OF THE 507(b) APPEAL TO THIS COURT.

Following the District Court's dismissal of the 507(b) appeal for lack of subject-matter jurisdiction, the Noteholders filed a motion for rehearing, asserting that, instead of being dismissed, the 507(b) appeal should have been transferred to this Court under 28 U.S.C. §1631. [R. 695-711].[11] The District Court denied the Noteholders' motion because they could not satisfy two of the requirements of §1631: that this Court could have heard the 507(b) appeal at the time the notice of

[11] 28 U.S.C. §1631 provides in relevant part that if an action or appeal is filed and "that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought at the time it was filed."

appeal was filed and that the transfer be "in the interest of justice." [Excerpt-E, F]. The District Court did not abuse its discretion as to either prong of its ruling.[12]

First, the District Court properly found that this Court "could not have heard the appeal of the 507(b) Order on the date the notice of appeal thereof was filed because it did not have jurisdiction to do so." [Excerpt-E p.2]. That is because the 507(b) appeal was filed on July 9, 2008, fifteen days before this Court granted permission, on July 24, 2008, for a direct appeal under 28 U.S.C. §158(d). *Id.*

The Noteholders do not dispute that their motion fails to satisfy this express requirement of §1631. Instead, they assert [p.40] that the District Court's decision leads "to the utterly bizarre result that *no court* had jurisdiction to hear the 507(b) Appeal if this Court [does] not permit a direct appeal of the 507(b) Order." This contention misses the fundamental point that the Noteholders had only one proper appeal and that was the appeal from the Confirmation Order. It was on that appeal that the 507(b) issues could and should have been raised. Nothing in §1631 provides a remedy for an unsuccessful attempt to split a single appeal into two separate appeals in different courts.

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[12] The Noteholders imply [p.39] that transfer is "mandatory," but what is mandatory is that the court exercise its discretion under §1631 on whether to transfer a case. *See Trujillo v. Williams*, 465 F.3d 1210, 1222-23 (10th Cir. 2006). Similarly, the District Court in *Salazar-Regino v. Trominski*, 415 F.3d 436, 446 & n.16 (5th Cir. 2005), *vacated*, 549 U.S. 1093 (2006), had not considered whether to transfer the case under §1631.

Second, the District Court correctly found the "interest of justice" would not be served by a transfer because the Noteholders "under the guise of the 507(b) Order being a separate and distinct order, made a ***conscious decision*** to chart their appeal between two separate courts." [Excerpt-F p.1 (emphasis added)]. The Court further was "***not persuaded that [the Noteholders] were unaware or confused about the proper forum in which to bring this appeal***." [*Id.* pp.2-3 (emphasis added)]. The Noteholders' own conduct, detailed above, amply supports these conclusions. The record shows that Noteholders never treated the 507(b) hearing and record as being wholly separate and distinct from Confirmation and further shows that the attempted prosecution of separate appeals was the result of a stratagem rather than a reasoned jurisdictional analysis.

The interests of justice do not require relieving the Noteholders from the consequences of their tactical decisions merely because they did not succeed. *See In re Dep't of Energy Stripper Well Litig.*, 206 F.3d 1345, 1354 (10th Cir. 2000) (denying transfer to Federal Circuit where appellants allowed duplicate appeal in that Court to be dismissed with prejudice while they erroneously pursued suit in the Tenth Circuit because appellants had "ample opportunity to pursue these cases in the proper forum"); *Duran v. Reno*, 1998 WL 781167, at *1 (2d Cir. Nov. 6, 1998) (affirming that a transfer would not be in the interests of justice "in light of the fact that Duran, at an earlier stage in this litigation, resisted defendants'

suggestion that his claim be transferred to the Second Circuit"); *Puri v. Gonzales*, 464 F.3d 1038, 1043 (9th Cir. 2006) (affirming denial of transfer stating that "it appears that the real reason that Puri requests a §1631 transfer of this action is so that he can circumvent our earlier order of dismissal").

Accordingly, the District Court did not abuse its discretion in denying the request to transfer the appeal to this Court.

III. THIS APPEAL SHOULD BE DISMISSED ON THE GROUND OF EQUITABLE MOOTNESS.

Alternatively, this appeal should still be dismissed as being equitably moot. "The doctrine of equitable mootness should be and often is applied to forestall bankruptcy appeals from confirmed bankruptcy plans, because the appellate courts recognize that 'there is a point beyond which they cannot order fundamental changes in reorganization cases.'" *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008) (*quoting In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994)). "The doctrine rests on the need for finality, and the need for third parties to rely on that finality, in bankruptcy proceedings." *In re Grimland, Inc.*, 243 F.3d 228, 231 (5th Cir. 2001).

This Court has prescribed a three-factor test for determining when an appeal of a bankruptcy case has become equitably moot: (1) whether the complaining party has failed to obtain a stay; (2) whether the plan of reorganization has been substantially consummated; and (3) whether the relief requested would adversely affect the rights of parties not before the court or the success of the plan. *Id.* In the

Confirmation appeal, the Court found that these requirements had been satisfied as to several issues raised by the Noteholders. *Pacific Lumber*, 584 F.3d at 250-51. The record in this appeal similarly establishes that the prerequisites for equitable mootness have been satisfied: namely, the Noteholders did not obtain a stay; the Plan has been substantially consummated; and its unraveling would adversely affect both the success of the Plan and the rights of third parties. [R.343-48, 350-51, 673-74].

This Court in *Pacific Lumber* did decline to dismiss certain challenges to the Bankruptcy Court's treatment of its secured claims on the ground of equitable mootness. But that ruling rested, in material respect, on the Court's understanding that the Indenture Trustee had escrowed the $513.6 million paid it under the Plan so that "the expectations of third parties other than MRC/Marathon could be largely preserved despite a decision reinstating, or re-evaluating the Noteholders' liens." 584 F.3d at 244-45. Those escrowed funds, however, were distributed to the Noteholders in December 2008. [R3d:695-96]. Consequently, those funds are no longer available to protect the expectations of third parties who have relied on the Plan for the past 20 months.

In comparable circumstances, the Third Circuit in *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) (en banc), ruled that a secured creditor's claim that it had been denied protection against diminution of its collateral was equitably moot.

Like the Noteholders, the claimants in that case were not directly seeking reconsideration of confirmation, but instead seeking to receive payment for their adequate protection claim. *Id*. at 561. Nevertheless, the Third Circuit affirmed the district court's dismissal of the appeal on the ground of equitable mootness, concluding that there was an "integral nexus between the feasibility of confirmation and the adjudication of the [creditor's] claim …." *Id.* at 564. The Court based its decision on the facts that "the reorganization plan was consummated, no stay was obtained, numerous other parties have changed their positions, and numerous irrevocable transactions have been completed as a result of the consummation of the Plan." *Id.* at 566-67.

The same conclusions apply here. The Noteholders' 507(b) filings in the lower courts have sought "not less than $170 million." [R.211]. The Bankruptcy Court and the parties all recognized that allowance of a claim of that magnitude would have rendered the MRC/Marathon Plan infeasible and thus required that the 507(b) Motion be resolved before the Plan could be confirmed. [Appellant-208 p.9]. Indeed, in January 2009 the reorganized successor to the timber operations, Humboldt Redwood Company, did not have liquid assets to pay a judgment of $8.9 million and even a judgment in excess of $3 million would place it in default on its loan agreement. [R.673-74].

Thus, as in *Continental Airlines*, reversal of the Bankruptcy Court's 507(b) Order would adversely affect the success of the Plan and irreparably injure numerous third parties who have come to rely on it. The reorganized company could be placed back in bankruptcy, threatening the investment of MRC/Marathon; hundreds of employees, vendors and customers who have relied on confirmation of the Plan in doing business with the reorganized entities would be severely prejudiced; and the environment would be threatened by the uncertainty of who would operate the Timberlands, which are subject to extensive environmental regulations at the local, state and federal levels. Accordingly, even if there is jurisdiction, this appeal should be dismissed on the ground of equitable mootness.

IV. IF THE COURT RULES THAT THE DISTRICT COURT HAD JURISDICTION TO HEAR THIS APPEAL, THE CASE SHOULD BE REMANDED TO THAT COURT.

If the Court rules that merits of this appeal should be addressed, an initial question is what Court should decide them in the first instance. The Noteholders [p.41] argue that this Court should address the merits now; but that is true only if the Court rules that the appeal should have been transferred to this Court. If the Court rules that the District Court had jurisdiction, the appeal should be heard in the first instance by that Court. That is the standard procedure prescribed by 28 U.S.C. §158(a)(2), and it places the appeal in the forum where the Noteholders previously argued it should be heard.

There is no good reason here for departing from the judicial review procedures adopted by Congress by forgoing District Court review. The Noteholders assert [p.41] that this Court should reach the merits on the ground of "judicial economy." Overall judicial economy, however, would be better served by requiring the District Court to perform the appellate tasks assigned it by Congress. Allowing the District Court to do its job will assist this Court, first, because its decision might obviate the need for a later appeal to this Court, and, second, because the District Court's decision will help ensure that the parties' contentions have been focused and screened before being heard by this Court.

V. IF THE COURT REACHES THE MERITS, IT SHOULD REJECT THE NOTEHOLDERS' CHALLENGES TO THE 507(b) ORDER.

The automatic stay in bankruptcy prevents secured creditors from foreclosing on their interests in collateral so long as those interests are granted adequate protection from diminution during the bankruptcy. *See* 11 U.S.C. §§361, 362(d).[13] If adequate protection granted at the outset of a case later proves inadequate, the creditor may pursue a "superpriority" administrative expense claim under 507(b) "to the extent that the proffered adequate protection was insufficient." *In re Carpet Center Leasing Co.*, 991 F.2d 682, 685 (11th Cir. 1993)

[13] "Adequate protection" may take the form of regular cash payments, a replacement lien, or such other relief "as will result in the realization … of the indubitable equivalent of [the secured creditor's] interest in such property." 11 U.S.C. §361.

(per curiam); *Pacific Lumber*, 584 F.3d at 239 n.11. The burden of proof is on the creditor seeking 507(b) superpriority. *See*, *e.g.*, *In re Mendez*, 259 B.R. 754, 757 (Bankr. M.D. Fla. 2001); *In re Ralar Distributors, Inc.*, 166 B.R. 3, 7 (Bankr. D. Mass. 1994), *aff'd*, 182 B.R. 81 (D. Mass. 1995), *aff'd*, 69 F.3d 1200 (1st Cir. 1995).

Because the interest protected by adequate protection and, consequently, 507(b), is the value of collateral at the date of the petition, 507(b) creates a two-point test to measure the value of collateral on the Petition Date and at Confirmation. Using that test, the Bankruptcy Court found that the value of the Timberlands had not decreased during the bankruptcy and that the value of the non-Timberlands collateral had decreased to the extent of requiring payment of an additional $3.6 million, which represented the net interest of the Noteholders in the non-Timberland collateral as of the Petition Date.

The Noteholders contend that the Bankruptcy Court erred in: (1) adopting a two-point test to determine whether there had been a decline in value of its collateral that did not include proceeds received during the case and that subtracted the adequate protection payments received by them during the case to pay their professionals' fees; (2) basing its determination on the foreclosure value, rather than the fair market value, of the Timberlands on the Petition Date; and (3) basing its determination of the Timberlands' value on the Petition Date on improper

"hindsight" evidence. All of these contentions should be rejected as lacking merit, and issues (1) and (3) were not raised below and thus have not even been preserved for appeal. Moreover, these contentions are based on an incorrect understanding of 507(b) and the precise protection that it affords secured creditors.

A. The Bankruptcy Court Did Not Err In Its 507(b) Determination When It Did Not Include Scopac's Post-Petition Net Proceeds.

The Bankruptcy Court awarded the Noteholders the entire value of their collateral as of the Petition Date, taking into account the adequate protection payments made on their behalf during the course of the case. The Noteholders now argue that this was not enough. They assert [pp.45-49] that, in addition to receiving any diminution in value of its collateral between the Petition Date and Confirmation, they are also entitled to receive $29.7 million in "encumbered net proceeds" that Scopac allegedly received while the automatic stay was in place. Further, they contend [pp.49-50] that the Bankruptcy Court should not have deducted the $8.9 million in adequate protection payments that Scopac had previously paid the Noteholders' bankruptcy professionals. The Noteholders failed to preserve these arguments for appeal and, in any event, they are without merit.

1. The Noteholders Waived The Claim For Scopac's Net Proceeds By Not Raising It In The Bankruptcy Court.

This Court has stated repeatedly that it does "'not consider arguments or claims not presented to the bankruptcy court.'" *In re Ginther Trusts*, 238 F.3d 686,

689 (5th Cir. 2001) (citations omitted); *accord*, *e.g.*, *In re Duncan*, 562 F.3d 688, 697 (5th Cir. 2009) ("It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered."). That principle applies here to the Noteholders' claims seeking Scopac's net proceeds during the bankruptcy.

The 507(b) Motion did not contain a claim for the "net proceeds" received by Scopac during the bankruptcy. It asserted that the Indenture Trustee was entitled to a "superpriority administrative expense claim for the diminution of value of its collateral[,] … including but not limited to the over $20 million in professional fees and other expenses paid by Scopac." [Dkt.-2814, ¶9]. Thus, there was a claim for diminution in the pre-petition collateral, including any cash collateral used to pay Scopac's professionals, but no additional claim for any "net proceeds" earned by Scopac during the period of the bankruptcy stay. The word "proceeds" does not even appear in the Motion.

Nor was any claim for "net proceeds" raised during the 507(b) Hearing. Not once during the 507(b) hearing did the Noteholders claim that the value of "net proceeds" must be added to the value of their collateral on the Petition Date in determining diminution in value. The brief in support of the 507(b) Motion asserted that the Noteholders were entitled "to a superpriority administrative expense claim for the postpetition diminution in value of its collateral," including cash collateral. [Dkt.-3211, at ¶65]. But, once again, there was no contention that

they were also entitled to recover Scopac's net proceeds during the bankruptcy in addition to any diminution in the cash collateral between the Petition Date and Confirmation. The word "proceeds" appears only once in their brief filed in the Bankruptcy Court, in an unrelated parenthetical quotation addressing whether Scopac benefited from the use of the collateral. [*Id.* ¶41 (quoting *In re J.F.K. Acquisitions Group*, 166 B.R. 207, 212 (Bankr. E.D.N.Y. 1994))].[14] Nor does the word "proceeds" appear in the Noteholders' post-trial brief. [Dkt.-3277]. Moreover, neither submission cites Bankruptcy Code Section 552(b), the statutory provision on which a claim for proceeds would be based.

As shown in the next section, the Noteholders are not entitled to "net proceeds" under the two-point test for determining a failure of adequate protection. But even if that were not so, it would still be prejudicial for this Court to consider the Noteholders' entitlement to net proceeds because if that claim had been raised in the Bankruptcy Court, MRC/Marathon would have had other strong defenses to it, including the so-called "equity exception" of §552(b)(1). Under §552(b)(1), a secured creditor with a valid lien on proceeds may have that interest enforced against proceeds received post-petition "except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." This provision is generally applied "where the value of the collateral or its proceeds was

[14] The same is true of the Noteholders' proposed findings of facts and conclusions of law submitted post-hearing in support of the 507(b) claim. [Dkt.-3281 ¶100].

substantially enhanced through post-petition efforts of a party other than the secured creditor, such as the debtor or the trustee." *In re Ceron*, 412 B.R. 41, 51 (Bankr. E.D.N.Y. 2009).

In this case, the equity exception would clearly have been applicable *if* the Noteholders had actually made a claim for Scopac's proceeds, because the Scopac estate was required to expend significant resources to convert trees standing in the Timberlands into inventory that could be processed and sold to generate proceeds. Unlike rent from real property, converting standing trees into cash proceeds, as this Court noted, requires substantial and on-going efforts. *In re Scotia Pac. Co.,* 508 F.3d 214, 217 (5th Cir. 2007). Not only did Scopac fell trees and transport the logs to mills for processing; but under environmental regulations, Scopac was obligated to comply with regulatory permits; design and implement timber-harvesting plans and monitor water quality; plan, design and engineer roads; and perform erosion control, reforestation, vegetation management, streambed remediation, and watershed analysis. *Id.*[15]

The Court should accordingly rule that the Noteholders have waived any claim under 507(b) to Scopac's net proceeds.

[15] Since the issue was not raised below, no record was developed below regarding the "amount" of "net proceeds." Noteholders contend that EBITDA equates to "net proceeds." Undoubtedly, however, Scopac expended cash on capital expenditures and paid interest to BofA that was not included in EBITDA.

2. In Any Event, The Noteholders Have No Valid Superpriority Claim To Scopac's Net Proceeds.

The Noteholders leap from the premise that they had a lien on Scopac's assets to the conclusion that any revenues received during the case must be added to their 507(b) claim. Significantly, they cite no apposite case law supporting this assertion. [*See* Br. pp.45-50].[16] More importantly, they ignore the case law holding that, when valuing collateral for purposes of adequate protection (and therefore any resulting 507(b) claim), the appropriate time for such valuation is the date of the petition. This Court addressed the proper time for valuing collateral for purposes of adequate protection in *In re Stembridge*, 394 F.3d 383 (5th Cir. 2004), stating: "***Adequate protection, properly defined, is the amount of an asset's decrease in value from the petition date***." *Id.* at 387 (emphasis added) (citing *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 370 (1988)). That is, "the code entitles the secured creditor to the ***present value of its claim at the institution of the automatic stay***." *Id.* (emphasis added).

The Bankruptcy Court complied with *Stembridge* by valuing the collateral ***as of the Petition Date*** and ***as of Confirmation*** and ruling that the Noteholders must recover any diminution from the Petition Date value, subject to the

[16] The Noteholders cite [p.48] *In re Flagstaff Foodservice Corp.*, 739 F.2d 73 (2d Cir. 1984), but that case only holds that, in the absence of a "carve out" like that in the Cash Collateral Orders, the superpriority administrative claim of a secured creditor had priority over the claims of the debtors' bankruptcy professionals. It did not involve the issue whether a secured creditor was entitled to receive superpriority status for a claim to the net proceeds received by a debtor between the petition date and confirmation under §507(b).

deductions for the amounts owed to BofA (not challenged here) and for the amounts previously paid by Scopac for the Noteholders' professional fees (discussed in the next section).

Not only did the Bankruptcy Court follow the law of this Circuit as stated in *Stembridge*, but its decision is well-supported by other case law. *In re Addison Properties Ltd. Partnership*, 185 B.R. 766 (Bankr. N.D. Ill. 1995), contains an exhaustive review of the case law on whether proceeds under 552(b) received during the bankruptcy case must be considered when determining adequate protection. The court ruled that 552(b) proceeds should not be considered in calculating adequate protection, concluding its well-reasoned opinion by stating: "***For purposes of adequate protection, the claim of the secured creditor is fixed as of the date of filing. Section 552(b) proceeds increase the collateral securing that claim, but do not increase the claim for purposes of adequate protection.***" *Id.* at 784 (emphasis added); *accord, e.g.*, *In re Cafeteria Operators, L.P.*, 299 B.R. 400, 406, 410 (Bankr. N.D. Tex. 2003); *In re Markos Gurnee P'ship*, 252 B.R. 712, 717 (Bankr. N.D. Ill. 1997), *aff'd*, 1998 WL 295507 (N.D. Ill. May 21, 1998); *In re Duval Manor Assocs.*, 191 B.R. 622, 633-34 (Bankr. E.D. Pa. 1996). The Bankruptcy Court's decision here is in accord with these well-reasoned holdings, and it should be affirmed.

B. The Bankruptcy Court Properly Deducted From The Noteholders' Collateral Payments Made By Scopac To the Noteholders' Professionals.

1. The Noteholders Failed to Preserve This Claim.

The Noteholders contend that the Bankruptcy Court should not have deducted the $8.9 million in adequate protection payments paid by Scopac to the Noteholders' bankruptcy professionals. On several occasions before the Bankruptcy Court, they, however, took the opposite position. On July 3, 2007, the following colloquy between the Court and Indenture Trustee's counsel took place:

> The Court: …. ***And you're saying by that that your clients have agreed that to the extent that they are undersecured, then your fees come out of their collateral***.
>
> Mr. Clement: ***That is the understanding that I think all parties involved here have,*** is that if we're oversecured, the amount of these fees get added to the claim. And ***if we're undersecured the amount of these fees will have paid out of our client's collateral in all likelihood***.

[Appellant-163 p.11 (emphasis added)].

The Noteholders further acknowledged in their principal 507(b) brief that the fees paid their professionals should be deducted. They stated: "Scopac has spent $23 million of the Indenture Trustee's cash collateral to pay professional fees relating to its bankruptcy case. ***Subtracting the $7 million paid to the Indenture Trustee's professionals***, leaves $16 million of the Indenture Trustee's cash

collateral that has been spent on professional fees and is no longer available as collateral to the Indenture Trustee." [Dkt.-3211 at ¶22 (emphasis added)].

An attorney for certain of the Noteholders told the Court at the outset of the 507(b) Hearing that it was a "wash" whether or not Scopac paid certain fees of the Indenture Trustee's professionals because, if those fees weren't paid, there "would simply have been more collateral for our claim." [Appellant-210 p.23]. This statement makes sense only if it is understood that the 507(b) claim would be reduced by the amount of any payment by Scopac for the Indenture Trustee's professional fees. Moreover, Noteholders' counsel told the Court in closing argument: "The total professional fees … that were paid are … $25,713,443.… [A]n issue that had come up … during the opening about the professional fees paid to the indenture trustee…. ***I think it's only fair that those amounts be subtracted out of the total fees that have been paid to all professionals in the case, which leaves you with a balance of about $17 million***." [Appellee-186 pp.27-28 (emphasis added)].

The Noteholders did make an argument similar to that made here in their ***post-trial*** 507(b) brief [Dkt.-3277 ¶¶13-14]. Surely, the Bankruptcy Court was entitled to rely on their repeated acknowledgements before and during the 507(b) trial that their professionals' fees could be deducted from their collateral. To preserve this issue for appeal, the Noteholders should have made their objections

known clearly before and during trial, and not wait until after trial to spring it on the Court and MRC/Marathon.[17] *See Glass Containers Corp. v. Miller Brewing Co.*, 643 F.2d 308, 312 (5th Cir. 1981) ("'… a litigant cannot strategically lie behind the log until after the trial and receipt of evidence … before raising an issue ….").

2. The Bankruptcy Court Properly Deducted Fees Paid To The Noteholders' Professionals.

In any event, the Noteholders' argument that the adequate protection payments received during the case to pay their professionals should not be deducted from their 507(b) claim must be rejected as a matter of law. Under section 506(b) of the Bankruptcy Code, a secured creditor is entitled to payment of interest and fees during the course of the bankruptcy ***only if*** it is oversecured.[18] *See United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. at 372-73. In accordance with *Timbers*, where a secured creditor is undersecured, it is not entitled to recover attorneys' fees during the case. *See Baybank-Middlesex v.*

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[17] Moreover, although the Noteholders now complain [p.48] that payments of $28.5 million were paid to bankruptcy professionals out of their collateral, throughout the case, the Noteholders specifically consented to the payment of bankruptcy professionals out of their cash collateral through carve-out provisions in the Cash Collateral Orders entered by the Bankruptcy Court, and in exchange they were granted adequate protection. [*E.g.*, Dkt.-454 ¶32]. It is disingenuous for the Noteholders to now complain about the treatment to which they previously consented.

[18] Section 506(b) states: "To the extent that an allowed secured claim is secured by property the value of which … is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose."

Ralar Distribs., Inc., 69 F.3d 1200, 1204-05 (1st Cir. 1995) (undersecured creditor has no claim for post-petition fees under 507(b)).

Moreover, because 507(b) only provides for a superpriority claim to the extent that adequate protection previously granted fails, adequate protection payments for professional fees made during the course of a case must be subtracted when calculating a 507(b) claim. *See, e.g.*, *In re Carpet Center Leasing Co., Inc.*, 991 F.2d at 689 n.3 (subtracting previous adequate protection payments from 507(b) claim); *In re J.F.K. Acquisitions Group*, 166 B.R. at 212 (same).

In short, the Noteholders were never entitled to recover interest or attorneys' fees during the bankruptcy. The payment of their professional fees, therefore, was properly subtracted by the Bankruptcy Court in determining the extent to which adequate protection had failed.

C. Contrary To The Noteholders' Claims, The Bankruptcy Court Made A Finding—Unchallenged Here—That There Was No Decrease In The Fair Market Value Of The Timberlands.

The Noteholders assert that the Bankruptcy Court denied the 507(b) Claim "because there was '[n]o evidence … that the *liquidation or foreclosure value* at filing was higher than the *fair market value* at confirmation.'" [Br. p.51 (quoting Excerpt-H p.24:16-19 (emphasis by Noteholders)]. This characterization of the Bankruptcy Court's ruling is both incomplete and unfair.

What the Bankruptcy Court ruled was that the Noteholders had failed to sustain their burden of proof in establishing that the Timberlands had declined in value during the bankruptcy whether one compared their foreclosure value ***or*** their fair market value at the Petition Date to their fair market value at Confirmation. The Court stated: "I believe that the … Indenture Trustee[] failed to meet its burden of proof or provided insufficient evidence that there was any change in value to the timberlands." [Excerpt-H p.22]. After criticizing the expert evidence submitted by the Noteholders [*id.* pp.22-23], the Court discussed the appropriate standard: "All of the cases dealing with adequate protection of undersecured creditors … based the value of adequate protection on the liquidation or foreclosure value." [*Id.* p.24]. But the Court then stated:

> it seems to me that the evidence suggests that there has not been a decline from the — In fact, there's been no evidence as to a decline in the foreclosure value of the case, ***but even looking at the fair market value, the evidence showed that from filing to confirmation, the forests grew so that there are more trees.*** Capital improvements were made—roads, tree planting, watershed analysis—which freed more areas for harvesting.… [T]he tree planting and watershed analysis did free up more areas for harvesting, which ultimately will lead to more value. All of this may lead to a value being higher at confirmation, but ***the Court is not prepared to make that finding that there has been any change in value since the filing.***

[Excerpt-H pp.24-25 (emphasis added)]. The Court then concluded,

> ***the value of the forests has remained relatively constant since the filing***. This is consistent with the long-term approach to value commodities like this forest whose worth is based on constantly

> growing timber, the unique nature of these acres in this place and with this type of wood.
>
> ***The question before the Court is whether the value has decreased, and the Court finds it has not***.

[*Id.* pp.25-26 (emphasis added)].[19]

On this record, there can be no doubt that the Bankruptcy Court, in addition to ruling that there was no evidence as to the Timberlands' foreclosure value on the Petition Date, also ruled as well that there had been no decline in the Timberlands' fair market value between the Petition Date and Confirmation. Indeed, ***in their District Court brief the Noteholders admitted that "the Bankruptcy Court also stated that the fair market value of the Timberlands at the Petition Date was also equal to their fair market value at Confirmation***." [R.175].

Moreover, as the Noteholders also admitted in the District Court [R.185], all of the valuation evidence before the Bankruptcy Court had been framed in terms of whether there had been a decline in the Timberlands' fair market value, and the Bankruptcy Court made findings with respect to that testimony. [Excerpt-H pp.22-23, 25-26]. If the Bankruptcy Court had rested its ruling solely on the lack of evidence as to foreclosure value, there would have been no need for it to assess the

[19] The Bankruptcy Court, in a like vein, stated the next day: "Now, keeping in mind I compared the amount you're getting for what I thought was fair market value, I mean I think the test would be the amount you're getting compared to foreclosure value. ***But I didn't hold them to that***." [Appellant-214 p.193 (emphasis added)].

conflicting expert testimony as to whether there had been a decline in the fair market value of Timberlands.

If the issue were squarely presented to this Court, MRC and Marathon would contend that the correct measure of a secured creditor's interest for purposes of adequate protection is foreclosure value because "the secured creditor should be granted the same value as if he had the collateral in his hands to liquidate as of the date of commencement of the proceeding."[20] In view of the fact, however, that the Bankruptcy Court also found the Noteholders had adduced insufficient evidence to show a decline in the fair market value of the Timberlands between the Petition Date and Confirmation, the issue need not be decided. The Noteholders, after all, have made no effort to show that the Bankruptcy Court erred in discrediting the opinions of their two experts or to show that the finding of no change in fair market value of the Timberlands was clearly erroneous. Accordingly, there is no reason for this Court to pass on the Noteholders' contention that it is error to use foreclosure value when this Court's ruling on the question of whether to apply a foreclosure standard can have no effect on the judgment in this case. *See In re*

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[20] *In re Modern Warehouse, Inc.*, 74 B.R. 173, 177 (Bankr. W.D. Mo. 1987); *accord In re Johnson*, 247 B.R. 904, 910 (Bankr. S.D. Ga. 1999) ("Foreclosure value, not replacement value, should be the basis of the super priority administrative expense claim."); *In re Ralar Distributors*, *Inc*., 166 B.R. 3, 7 (Bankr. D. Mass. 1994) ("The value relevant for adequate protection purposes, however, is not book value. It is liquidation value realizable by the creditor."), *aff'd*, 182 B.R. 81 (D. Mass. 1995), *aff'd*, 69 F.3d 1200 (1st Cir. 1995); *see also In re Stembridge*, 394 F.3d at 386-88 & n.5 (considering the appropriate valuation for cram-down under § 1325(a) while specifically reserving the question of the proper valuation standard for calculating a § 507(b) claim).

Segerstrom, 247 F.3d 218, 223 (5th Cir. 2001) (court can affirm on any ground decided below).

D. The Bankruptcy Court's Decision Was Not "Based" On Improper Hindsight Evidence.

The Noteholders make no effort to challenge the Bankruptcy Court's findings as clearly erroneous, but they do make factual arguments in the guise of a legal argument [p.56] that the "bankruptcy court's valuation of the Timberlands at the Petition Date was based on a hindsight-driven valuation that did not reflect how an appraiser (or a buyer) would have evaluated the Timberlands at that time." This is apparently an argument that, as a matter of law, valuation testimony using hindsight is always inadmissible. In raising this argument, the Noteholders conveniently omit that their own expert admitted using "hindsight" evidence. In determining his value as of the Petition Date, Fleming used post-petition timber prices from the spring of 2007 even though those prices were indisputably higher than prices on the Petition Date.[21] In any event, the Noteholders have not

[21] *See* Appellant-211 pp.177-78:

> Q. … [F]or prices, you did something different. For prices, you went through the spring of '07 when prices were at their peak. Isn't that right?
>
> A. I analyzed—I—
>
> Q. Is that right?
>
> A. Yes, in this case.

preserved this issue for appeal, and the contention is wrong, both legally and factually.

1. The Noteholders Have Failed To Preserve The Issue For Appeal.

If the Noteholders' legal argument were correct (which it is not), they would still have to show that they made a contemporaneous objection to the evidence. Fed. R. Evid. 103. They assert [p.57] that they objected to the use of hindsight evidence, but they only cite a colloquy with the Bankruptcy Court in which the counsel for the Noteholders argued what he contended was the appropriate valuation standard. [*See* Appellant-210 pp.57-58]. There was no contemporaneous objection to the admission of the now-challenged testimony of LaMont. On the contrary, the direct testimony proffer of LaMont [Ex. MMX 91; Appellant-276][22] went into evidence pursuant to a stipulation only preserving the right of the parties "to argue the truth, reliability and relevance of any exhibit, as well as the weight the Court should afford any exhibit." [Appellant-212 pp.18, 22 ("MMX 89 through MMX 92 … are all admitted.")]. There was thus no contemporaneous objection to LaMont's alleged use of hindsight evidence in his valuation or motion to strike it, and this contention has not been preserved for

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[22] Direct testimony in the 507(b) hearing was put in through the written proffers combined with a few minutes of direct examination.

appeal. [Dkt.-3265 p.2 (stating without contradiction by Noteholders that LaMont's proffer had been admitted without objection)].

2. There Is No Inflexible Rule Prohibiting The Use Of Later-Developed Evidence In Determining a 507(b) Motion.

The precise question before the Bankruptcy Court was whether there had been any decline in the value of the Timberlands from the Petition Date to Confirmation. Viewed in this light, it is appropriate to consider factors that could have resulted in a decline, or an increase, in value of the Timberlands after filing—which, by definition, would be using "hindsight" to evaluate what happened after the Petition Date. The Noteholders cite no case holding that it is improper to use "hindsight" evidence in evaluating whether there had been a failure of adequate protection for purposes of 507(b).

Moreover, the caselaw does not establish that there is any ironclad rule barring use of later-developed evidence in valuation. On the contrary, this Court has said, in the context of determining whether a creditor was oversecured and thus entitled to interest under 506(b), that the Bankruptcy Code "leaves valuation questions to judges on a case-by-case basis" and that "the Bankruptcy Code does not prescribe any particular method of valuing collateral." *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 799 (5th Cir. 1997). Where relevant, after-developed evidence can shed light on an asset's value at an earlier date. *See In re Roblin*

Indus., Inc., 78 F.3d 30, 37 (2d Cir. 1996) ("[T]he ***later 1986*** appraisal of $18 million was evidence that the value of the GFM machine in ***April 1985***, even if sold in place, would have been substantially less than the earlier appraisal of $22-23 million." (emphasis added)); *In re Coated Sales, Inc.*, 144 B.R. 663, 668 (Bankr. S.D.N.Y. 1992) ("[T]he court may consider information '***originating subsequent to the transfer date if it tends to shed light on a fair and accurate assessment of the asset or liability as of the pertinent date (transfer date).***'") (emphasis added, citation omitted).

The cases cited by the Noteholders are not to the contrary. They hold that after-developed evidence cannot be used by itself to overturn contrary findings by a court or agency as to the value of an asset at earlier date. *See Brimberry v. Commissioner*, 588 F.2d 975, 979 (5th Cir. 1979) (refusing to overturn Commissioner's decision because "Brimberry's evidence [from later years] that the debt became partially worthless in 1967 and 1968 is persuasive but not compelling"); *In re Hannover Corp.*, 310 F.3d 796, 802 (5th Cir 2002) (upholding bankruptcy court decision on fraudulent transfer claim that option had value at time of transfer: "Without more, the fact that an option has become worthless in no way proves that it was worthless at an earlier date.").

In short, the use of after-developed evidence in valuation testimony goes to the weight to be given to that testimony, not to its admissibility.

3. The Noteholders Have Failed To Show That Admission Of The Alleged Hindsight Testimony Was Either Erroneous Or Prejudicial.

Finally, the Noteholders have failed to show that admission of Mr. LaMont's alleged use of hindsight evidence was either erroneous or prejudicial. They claim [p.56] that the Bankruptcy Court's "valuation of the Timberlands … was based on a hindsight driven valuation …." But, as, as seen above, the Bankruptcy Court's decision was based on a determination that the Noteholders had "provided insufficient evidence that there was any change in value to the timberlands." [Excerpt-H p.22]. Moreover, the Court did not believe that it was a "close" issue. [Apellant-214 p.193].

The decision was not based on LaMont's testimony, for the Bankruptcy Court did not accept LaMont's opinion that the Timberlands had increased in value. Instead, the Bankruptcy Court's ruling was primarily based on the deficiencies in the Noteholders' case—their failure "to meet [their] burden of proof." [*Id.*] Fleming's 507(b) testimony was based on methodology that the Court had previously found in its Confirmation findings to have "significant flaws." [Dkt.-3088 ¶163]. Radecki had no knowledge of the timber industry in general or Scopac in particular. The Noteholders do not challenge the rejection of their expert testimony here. Nor do they challenge the aspects of LaMont's testimony that the Court did rely on—"that discount rates are a far bigger indicator

of a change in value than change in the price of logs" and that LaMont had done a "comprehensive analysis" on discount rates. [Excerpt-H p.25]

Moreover, the Noteholders' various quibbles with LaMont's testimony are without merit and, in any event, not prejudicial. They attack Lamont's use of the *Pacific Rim Reporter* for pricing data [pp.58-59], but LaMont fully explained why he had concluded that the Pacific Rim data "was the best representation of long-term pricing for the redwood market." [Appellee-212 p.70]. Further, the Bankruptcy Court found LaMont to be a credible witness and, as noted, also found the increase in value resulting from the change in the discount rate ($60 million according to LaMont) to be "a far bigger indicator of a change in value" than any alleged impact resulting from the use of erroneous log prices (asserted by the Noteholders to be $15 million). [Excerpt-H p.25]. Hence, LaMont would not have found a decline in value even if he had used the prices urged by the Noteholders. [Appellee-276 ¶19].

The Noteholders also contend [p.61] that LaMont should have based his valuation on Scopac's overly optimistic projections for an annual harvest rate of 100 million board-feet. They further criticize LaMont for contributing to a business plan in November 2007 that estimated a harvest of 78 million board-feet, but then using 60 million board-feet as the harvest rate in his valuation. The Indenture Trustee further references an email that Dean sent in April 2006

[Appellant-416 p.UBS0000672], where he used a harvest projection of 90 million board-feet. But LaMont testified that his prior estimate of 78 million board-feet was a "first-cut analysis" based on a website at a time when he had "very minimal contact" with Scopac. [Appellant-212 pp.78-79]. Similarly, Dean explained that the email was sent at a time when MRC had not completed due diligence of Scopac, other than determining that the Timberlands' value was less than Scopac's debt. [Appellant-210 p.177]. Contrary to what the Noteholders argue, an expert appraisal of the Timberlands conducted on the Petition Date would not have simply accepted without question Scopac's inflated projections for the timber harvest. Rather, an appraiser would have undertaken the same sort of due diligence that led LaMont and Dean to conclude that the Timberlands could not sustain harvests at a level of 100 million board-feet.

Finally, the Noteholders contend [p.62] that LaMont improperly relied on later evidence to conclude that the Timberlands' observed growth was exceeding the harvest rate, which increased the value of the Timberlands at Confirmation by $5 to $7 million. But this adjustment only accounted for about 10% of the increase in the Timberlands' value as opined by LaMont [Appellant-212 p.86], and its elimination would not have provided a basis for challenging the Bankruptcy Court's finding that there had been no post-petition decline in the Timberlands' value. In any event, the Noteholders' assertion that the Bankruptcy Court based its

determination on this evidence is wrong. While the Bankruptcy Court referred to there being "more trees," it went on to say that such evidence "may lead to the value being higher at confirmation, but the Court is not prepared to make that finding[,] that there has been any change in value since the filing." [Excerpt-H p.25]. Thus, the evidence was in any event not prejudicial because it was not relied upon by the Bankruptcy Court.

CONCLUSION

This Court should affirm the decisions of the District Court dismissing the 507(b) appeal for lack of subject-matter jurisdiction and denying the Noteholders' motion for rehearing and transfer of the 507(b) appeal to this Court. If this Court concludes that the District Court had jurisdiction, it should remand to the District Court for consideration of equitable mootness and the merits in the first instance. If the Court, however, decides not to remand, it should either dismiss the appeal as equitably moot or affirm on the merits the Bankruptcy Court's decision denying the 507(b) Motion.

March 5, 2010

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CERTIFICATE OF SERVICE

I certify that, pursuant to Federal Rule of Appellant Procedure 25(d), that on March 5, 2010, I caused an original and seven copies of the foregoing brief, plus one CD containing the brief in PDF form, to be sent by Federal Express to the Clerk for next day delivery and that I electronically filed the brief with the Clerk by using the CM/ECF system.

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I hereby certify that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 32.3 because it contains 13,784 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

I hereby further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

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