No. 08-_______

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CSG INVESTMENTS, INC. AND
SCOTIA REDWOOD FOUNDATION, INC.,

Appellants-Movants,

vs.

MARATHON STRUCTURED FINANCE FUND L.P.,
MENDOCINO REDWOOD COMPANY LLC, AND
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Appellees-Respondents.

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

JOINDER OF NOTEHOLDERS CSG INVESTMENTS AND SCOTIA REDWOOD FOUNDATION TO INDENTURE TRUSTEE'S EMERGENCY MOTION FOR STAY PENDING APPEAL

Roger D. Townsend
ALEXANDER DUBOSE JONES & TOWNSEND LLP
1844 Harvard Street
Houston, Texas 77009-4342
Telephone: 713.523.2358
Facsimile: 713.522.4553

Murry Cohen
AKIN GUMP STRAUSS HAUER & FELD LLP
1111 Louisiana Street, 44th Floor
Houston, Texas 77002-5200
Telephone: 713.220.5800
Facsimile: 713.236.0822

Charles R. Gibbs
David F. Staber
J. Carl Cecere
1700 Pacific Avenue, Suite 4100
Dallas, Texas 75201
Telephone: 214.969.2800
Facsimile: 214.969.4343

COUNSEL FOR APPELLANTS-MOVANTS

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

(1) 08-__________; *CSG Investments, Inc. And Scotia Redwood Foundation, Inc. vs. Marathon Structured Finance Fund L.P., Mendocino Redwood Company LLC, and The Official Committee of Unsecured Creditors*

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

Appellees – Respondents	**Counsel:**
Marathon Structured Finance Fund L.P.	David Neier William Brewer Steven M. Schwartz Carey D. Schreiber Winston & Strawn, LLP New York, New York Eric E. Sagerman Los Angeles, California John D. Penn Haynes & Boone, LLP Ft. Worth, Texas Trey Monsour Haynes & Boone, LLP Dallas, Texas

Mendocino Redwood Company LLC	Craig P. Druehl Allan S. Brilliant Brian D. Hail Goodwin Procter LLP New York Patrick Thompson Goodwin Procter LLP San Francisco, California
The Official Committee of Unsecured Creditors	Maxim B. Litvak John D. Fiero Kenneth H. Brown Pachulski Stang Ziehl Young Jones & Weintraub San Francisco, California
Appellant - Petitioner	**Counsel:**
CSG Investments, Inc. And Scotia Redwood Foundation, Inc. (No other publicly held company directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of appellant's outstanding voting securities.)	Murry Cohen Akin Gump Strauss Hauer & Feld LLP Houston, Texas Charles R. Gibbs David F. Staber J. Carl Cecere Akin Gump Strauss Hauer & Feld LLP Dallas, Texas Roger D. Townsend Alexander Dubose Jones & Townsend LLP Houston, Texas

Appellant - Petitioner	**Counsel:**
The Bank of New York Mellon Trust Company, N.A., as Indenture Trustee (f/k/a **The Bank of New York Trust Company, N.A.**) (publicly held parent company **The Bank of New York Mellon Corp., a Delaware Corporation**) (No other publicly held company directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of appellant's outstanding voting securities.)	William Greendyke Zack A. Clement R. Andrew Black Johnathan C. Bolton Jason L. Boland Mark A. Worden Travis A. Torrence Fulbright & Jaworski LLP Houston, Texas Louis R. Strubeck, Jr. O. Rey Rodriguez Toby L. Gerber Fulbright & Jaworski LLP Dallas, Texas

Murry Cohen by permission LaDawn Conway

Murry Cohen
Attorney for Appellants-Movants

CERTIFICATE PER FIFTH CIRCUIT LOCAL RULE 27.4

The counsel for CSG Investments, Inc. and Scotia Redwood Foundation, Inc. has contacted counsel for appellees about this motion and expects that an opposition will be filed.

Murry Cohen by permission Lori Ann Conway

Murry Cohen
Attorney for Appellants-Movants

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

CSG Investments, Inc. ("CSG") and Scotia Redwood Foundation, Inc. ("SRF") (collectively, "Movants"), pursuant to Rules 8 and 27 of the Federal Rules of Appellate Procedure and Fifth Circuit Local Rules 8.4 and 27.3, file this Joinder to the Indenture Trustee's Emergency Motion for Stay and Injunction Pending Appeal of the Bankruptcy Court's Judgment and Confirmation Order, filed on this date. CSG and SRF, along with other parties, sought a stay pending appeal in the District Court in motions filed on July 17 and 18, 2008. R. Tab. A. On July 21, the District Court did not rule on the merits of Appellants' request for a stay, but denied the stay, concluding that this Court, and not the District Court, is the appropriate court to grant such a stay in the context of a direct appeal. R. Tab B. **Accordingly, the Bankruptcy Court's existing interim stay is effective through Thursday, July 24, 2008.** R. Tab C.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

CSG and SRF disagree with the Bankruptcy Court's Confirmation Order, but do not dispute its basic recitation of the facts. R. Tab D at 2-9. Accordingly, they refer the Court to that Order for the factual background of this case. Also, an appeal arising out of this bankruptcy on an unrelated issue was filed in this Court in 2007. *See Ad Hoc Group of Timber Noteholders v. The Pacific Lumber Co.*, 508 F.3d 214 (5th Cir. 2007). As provided in that opinion, Debtor Scotia Pacific Company LLC ("Scopac") is a

limited liability company formed as a "special purpose" subsidiary of Pacific Lumber Company ("Palco"). *Id.* at 216. Palco transferred to Scopac approximately 200,000 acres of timberlands in Northern California ("the Timberlands"), and Scopac's business is to "derive maximum revenue from the timber grown on these lands." *Id.* at 217. To fund its business, Scopac borrowed approximately $867 million from investors in the capital markets. *Id.* "The Timber Notes Scopac executed are senior secured obligations of Scopac and are secured by the land and the income generated through the harvesting and sale of timber." *Id.* CSG and SRF together own over 35% of the Timber Notes secured by the Timberlands. R. Tab E.

In early 2007, Palco and Scopac filed separate Chapter 11 bankruptcy petitions. On July 8, 2008, the Bankruptcy Court entered the Order now being appealed, which confirmed a combined plan of reorganization for all Debtors proposed by Mendocino Redwood Company, LLC ("MRC" - a purchaser); Marathon Structured Finance Fund, L.P. ("Marathon"- a Palco creditor), and the Official Committee of Unsecured Creditors (the "MRC/Marathon Plan"), and denied a reorganization plan for Scopac proposed by the Indenture Trustee ("the Indenture Trustee Plan"). The Indenture Trustee represents the Timber Noteholders, who are secured creditors of only Scopac and not the other Debtors. The MRC/Marathon plan pools the assets of Scopac with Palco, a separate Debtor.

The MRC/Marathon Plan calls for sale of the Timberlands to Newco, a newly-created entity partially owned by MRC and Marathon, for $530 million. R. Tab F. The MRC/Marathon Plan provides only one potential "bidder" of the property – MRC, and denies the Indenture Trustee any opportunity to credit bid on the value of the Noteholders' collateral. *Id.* The MRC/Marathon Plan requires that the court accept Marathon's evaluation of the Timberland through appraisals. *Id.*

On the other hand, the Indenture Trustee Plan rejected by the Bankruptcy Court would have called for the sale of the Timberlands in a competitive open-bidding process. This plan was fully confirmable, and enjoyed the support of all of the noteholders, including CSG and SRF, because it likely provided a higher recovery for the Scopac estate than would the consolidated MRC/Marathon Plan. R. Tab G. The mere prospect of participating in an open-bidding process for the Timberlands attracted a number of potential bidders, including SRF, which made a firm offer of $603 million. R. Tabs H-M; *see also* April 11, 2008 Hr'g Trp't at 148:5-9, 211:6-8; 265:20-26;266:1 at Tab N. Given the level of interest in the Timberlands, the bidding would have only gone up from there. Under the MRC/Marathon Plan, however, the marketplace is now closed.

After the Bankruptcy Court entered the Order, the Indenture Trustee, CSG, and SRF all filed separate notices of appeal to the District Court. The Indenture Trustee also

filed (1) an Emergency Motion for Stay Pending Appeal, R. Tab O; and (2) an Emergency Request for Certification Pursuant to 28 U.S.C. Section 158(d)(2) and Interim Rule 8001(f) of the Federal Rules of Bankruptcy Procedure, Tab P, both of which were joined by CSG and SRF.

On July 15, 2008, the Bankruptcy Court entered Findings of Fact, Conclusions of Law and Order ("F/F"), denying the request for a stay pending appeal but certified the Order for direct appeal. R. Tab Q. The court provided an interim stay of the confirmation order through July 24, 2008. On July 21, the District Court denied a stay without rulings on the merits of the stay request, concluding that this Court is the appropriate court to grant such a stay in the context of a direct appeal. R. Tab R.

This Court has Power to Issue a Stay

This Court has the power to issue a stay pending appeal of the bankruptcy court's Order confirming the MRC/Marathon Plan. *See* 28 U.S.C. § 158(d)(2)(D); Fed. R. App. 8(a)(2); Fed. R. Bankr. P. 8017(c).

Argument

I. This Court applies an equitable balancing test of the four factors in granting stay.

When presented with a motion for stay pending appeal, this Court employs a four-part test: (1) the movant's likelihood of success on the merits; (2) the irreparable harm to the movant if the stay is not granted; (3) the substantial harm to other parties if

the stay is granted; and (4) the public interests implicated in granting or denying the stay. *In re First S. Sav. Ass'n*, 820 F.2d 700, 709 (5th Cir. 1987). This Court "has refused to apply these factors in a rigid mechanical fashion." *Reading & Bates Petroleum Co. v. Musslewhite*, 14 F.3d 271, 272 (5th Cir. 1994). Instead, the factors must all be balanced and considered as a whole. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

The first element – likelihood of success – is "not an invariable requirement." *Ruiz v. Estelle*, 666 F.2d 854, 857 (5th Cir. 1982). "[T]he movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *First S. Sav. Ass'n*, 820 F.2d at 704. Where the issues on appeal present questions of law, "especially questions involving application of law, or when the law has not been definitely addressed by a higher court, the movant more easily satisfies the [likelihood of success] element." *Culwell v. Tex. Equip. Co., Inc.* (*In re Tex. Equip. Co., Inc.*), 283 B.R. 222, 227 (N.D. Tex. 2002) (citing *In re Westwood Plaza Apartments Ltd.*, 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993)).

II. The record and the law demonstrate a strong likelihood that Movants will succeed on the merits in the appeal.

The issues on appeal in this case are both profound and numerous. More importantly, they are pure *legal* issues, reviewable *de novo* by this Court. *Kane v. Nat'l Union Fire Ins. Co.*, __ F.3d __, 2008 WL 2721157, at *2 (5th Cir. July 14, 2008) ("Questions of law, including interpretation and application of the Bankruptcy Code, are reviewed *de novo*."). Rejecting movants' request for a stay, the bankruptcy court characterized the issues for appeal as mere challenges to the court's finding, on disputed facts, of the value of the Timberlands, reviewable under a clearly erroneous standard of review. (F/F 11-13, 16) This characterization is wrong. Movants' principle issues on appeal involve pure legal questions – primarily statutory construction issues – that require reversal of the Confirmation Order *even if the bankruptcy court's finding of value is unchallenged on appeal.*

Thus, Movants' appeal is much more than a simple challenge to the bankruptcy court's resolution of disputed facts. The principal issues on appeal are pure questions of law of vital importance to the propriety of the MRC/Marathon Plan.

A. The Plan constitutes an improper substantive consolidation of the Debtors.

Movants will challenge the MRC/Marathon Plan on appeal as effectuating a *de facto* substantive consolidation of the Debtors, which is improper as a matter of law.

Under the MRC/Marathon Plan, the assets of Scopac will be pooled with the assets of Palco, and the pooled assets will then be used to pay creditors of both estates without any attempt to identify which estate's assets are being used to pay which estate's creditors. Meanwhile, intercompany claims will be eliminated. This constitutes substantive consolidation, which, because of potential inequities caused by the redistribution of value among creditors of consolidated entities, is only rarely allowed in other circuits. *See, e.g., In re Owens Corning*, 419 F.3d 195, 208-09 (3d Cir. 2005); *Chem. Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966). While this Court has not yet faced this issue, movants anticipate that the Court will adopt the sound rationale of *Owens Corning*, which prohibits substantive consolidation under the circumstances of this case.

Instead of looking to *Owens Corning*, *et al.* for guidance, the bankruptcy court focused on the Indenture Trustee's knowledge that Marathon was proposing a comprehensive plan to reorganize all debtors. F/F 13. Such knowledge, if any, does not vitiate the bankruptcy court's legal error in effectuating an improper, *de facto* substantive consolidation of the Debtors.

The bankruptcy court similarly noted that, after exclusivity was lifted, the Indenture Trustee, who represents only secured creditors of Scotia (and not Palco), had "the same opportunity" as Marathon to propose a comprehensive plan for all Debtors.

F/F 13. In fact, the court seemed to view the lifting of exclusivity as a "free-for-all" to "steal" value from Scopac's estate. At the 507(b) hearing, the bankruptcy court commented:

> Marathon certainly had no equity in this case.... [B]y lifting exclusivity, again, everybody then is given equal opportunity to steal the other person's ownership. That's what the effect of lifting exclusivity is. Maybe we don't say it quite that coldly, but that's exactly what happens once you lift exclusivity. It's then everybody's chance to put forth a plan that might give them the best possible situation.

R. Tab R.1 While the lifting of exclusivity *is* an opportunity for others to submit proposed plans, it *is not* an opportunity to submit a plan, like Marathon's, that improperly strips value from a separate bankruptcy estates. Here, the Indenture Trustee's opportunity to submit a consolidated plan does not mean Marathon's Plan is confirmable – under correct principles of law it is not.

Accordingly, the bankruptcy court's findings on this issue constitute error as a matter of law, F/F 13, 15-16, and Movants are likely to succeed on appeal. At a minimum, they have shown that this is a serious legal question of vital importance to the propriety of the MRC/Marathon Plan, warranting a stay of the plan pending appeal. *See First S. Sav. Ass'n*, 820 F.2d at 704; *In re Westwood Plaza Apartments*, 150 B.R. at 168 (believing its decision on the merits was correct but granting stay because the legal questions involved were important to the confirmation of the plan and had not yet been addressed by the Fifth Circuit).

B. The Plan violates the "absolute priority rule."

Another question of law on appeal is whether the MRC/Marathon Plan violates the "absolute priority rule" by providing for the payment of unsecured priority tax claims and unsecured administrative expenses out of the consideration being paid by Newco for Scopac's assets encumbered by the Timber Notes. The "absolute priority rule" prohibits the diversion of any portion of a secured creditor's collateral or its proceeds to pay unsecured creditors before the secured creditor is paid in full. *See, e.g., Consol. Rock Prod. Co. v. Du Bois*, 312 U.S. 510, 527-29 (1941) (stating that under the absolute priority rule, secured creditors "*must receive ... compensation for the senior rights which they are to surrender*") (emphasis added); *Mokava Corp. v. Dolan*, 147 F.2d 340, 345 (2d Cir. 1945). Courts have long recognized that the "fair and equitable" requirement incorporates the absolute priority rule. *See id.*

Here, even assuming the accuracy of the bankruptcy court's determination of the Timberlands' value, the transactions contemplated by the MRC/Marathon Plan are undisputed and demonstrate that collateral proceeds otherwise payable to the Noteholders on account of the unsecured portion of their claims will be diverted to pay unsecured claims in another estate (Palco). Under the MRC/Marathon plan, the assets of Palco were transferred outright to MRC/Marathon, leaving nothing to satisfy Palco Creditors. But unsecured claims of Palco creditors were paid nonetheless. The money

to satisfy these claims must necessarily come out of Scotia's assets. Yet these assets cannot be reached until the more senior secured claims of the Noteholders are fully satisfied. As such, the MRC/Marathon Plan violates the absolute priority rule and the bankruptcy court's finding to the contrary is error as a matter of law. F/F 15. Movants are likely to succeed on this issue on appeal; alternatively, a serious legal question of vital importance to the propriety of the MRC/Marathon Plan exists, warranting a stay of the plan pending appeal.

C. The Plan deprives the Indenture Trustee of the right to credit bid.

Also at issue on appeal is whether the bankruptcy court was required to provide the Indenture Trustee, as a secured creditor, a right to "credit bid" on the collateral. The Bankruptcy Code requires secured creditors who, like the Indenture Trustee, dissent from a plan of reorganization to receive "fair and equitable" treatment. *See* 11 U.S.C. § 1129(b)(2). To provide "fair and equitable" treatment, a plan providing for the sale of a secured claimant's collateral free and clear of liens must also permit the secured creditor to credit bid up to the full amount of its allowed claim. 11 U.S.C. § 1129(b)(2)(A)(ii); 11 U.S.C. § 363(k). The MRC/Marathon Plan permits the sale of the Timber Noteholders' collateral free and clear of liens, and provides for the Timber Noteholders to receive cash in exchange for their collateral, but does not provide any right for the

Indenture Trustee to bid on the collateral. As such, it violates the requirements of the Bankruptcy Code as a matter of law.

To address this problem, the bankruptcy court concluded that the Indenture Trustee was required under section 1111(b)(2) of the Code to first elect to have its claims treated as fully secured or forgo its credit-bid right. F/F 13. *See* 11 U.S.C. 1111(b)(2). This construction of the Code is incorrect as a matter of law. Together, and without reference to section 1111(b), sections 1129(b)(2)(A)(ii) and 363(k) unambiguously mandate that, to be "fair and equitable," a plan that provides for the sale of collateral must afford secured creditors the right to credit bid. Under straightforward statutory construction, the bankruptcy court erred as a matter of law by confirming a plan that fails to do this.

The bankruptcy court further attempted to sidestep the credit-bid requirement of section 1129(b)(2)(A)(ii) by apparently concluding that a cash payment equal to the (disputed) value of the collateral satisfies one of the other subsections of section 1129. F/F 13-14. This constitutes an improper (and unprecedented) construction of the Code as a matter of law. There is no dispute that the Plan proposes a sale of the Noteholders' collateral, free and clear of all liens. As such, section 1129(b)(2)(A)(ii) applies, requiring the Plan to afford the Indenture Trustee the right to credit bid. Any other construction of section 1129 would render subsection (ii) meaningless.

Accordingly, the bankruptcy court's findings on this issue constitute error as a matter of law, and movants are likely to succeed on appeal. F/F 13-61. At a minimum, they have shown that this is a serious legal question of vital importance to the propriety of the MRC/Marathon Plan, warranting a stay of the plan pending appeal. In sum, the principal issues on appeal in this case are serious legal questions critical to the propriety of the MRC/Marathon Plan.[1] Contrary to the bankruptcy court's finding [F/F 16], none of the issues is well settled in support of the Confirmation Order; indeed, the bankruptcy court's application of the law has no precedent. While key questions on appeal have not yet been addressed by this Court, under a proper construction of the Bankruptcy Code and case law from other circuits, movants have shown that reversal is likely.

III. The Noteholders and Indenture Trustee will suffer irreparable harm without a stay.

The Bankruptcy Court's ruling that the Noteholders and Indenture Trustee would not suffer irreparable harm if a stay is not permitted is solely based on the following erroneous "findings":

- That the Indenture Trustee asserted only potential equitable mootness of the appeal as proof of harm, which is insufficient to support a stay. F/F 17.

[1] The cases cited by the bankruptcy court involving primarily challenges to factual findings are therefore inapplicable, since the principle issues on appeal in this case are question of law that require reversal regardless of the bankruptcy court's resolution of disputed facts. F/F 11.

- That the result of an auction of the Timberlands after success on appeal "is highly speculative." F/F 18.

The court was incorrect, both because it overlooked a serious, obvious, and certain risk of harm to the Movants and Indenture Trustee, and because it failed to consider the risk that the mooting of the appeal would render that harm irreparable.

A. The Bankruptcy Court misapplied the authorities addressing equitable mootness.

Of course, the risk of a moot appeal alone presents a significant risk to the Movants and Indenture Trustee, and, in this Circuit, so long as confirmation is certain to moot an appeal, irreparable harm usually will be found. *See In re First South Sav. Ass'n*, 820 F.2d 700, 704-05 (5th Cir. 1987); *see also ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 348 (S.D.N.Y. 2007) ("where the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied").[2]

The cases cited by the Bankruptcy Court in its Findings of Fact are not to the contrary. *See* F/F 17. The court cites a number of cases wherein a risk of mootness did not lead to a conclusion that irreparable harm would occur. But in these cases, the

[2] *See also Ginther v. The Ginther Trusts (In re Ginther Trusts)*, 238 F.3d 686, 689 (5th Cir. 2001) ("a failure to obtain a stay is fatal to a challenge of a bankruptcy court's authorization of the sale of property"); *In re Texas Equip. Co., Inc.*, 283 B.R. 222, 228 (Bankr. N.D. Tex. 2002) (holding that if a party appeals an order approving a sale of property, unless the party obtains a stay pending

potential for mootness did not establish irreparable injury only because either (1) the potential that the appeal would be mooted was entirely speculative, or (2) the appellants could not establish any *harm* that would be caused by mooting of the appeal. The thrust of these cases, then, is that the consummation of a reorganization that moots an appeal establishes that the circumstance is "irreparable" – it does not, by itself, demonstrate "harm." In fact, one of the cases cited by the Bankruptcy Court (wherein irreparable harm *was* found) confirms this view on facts substantially similar to this case. In *In re Moreau*, the bankruptcy court found irreparable harm to a bank existed in part because, if no stay issued, a refinancing plan would go into effect that would moot the bank's appeal as well as cause the bank an unrecoverable net loss. *See* 135 B.R. 209, 214-215 (N.D.N.Y. 1992), *cited in* F/F 17.

Likewise, the appeal in this case will definitely become moot if the stay is not granted, leaving the Movants and Indenture Trustee without any effective remedy. Once the assets are transferred to Newco, the damage is done. The MRC/Marathon Plan will almost immediately be consummated. MRC/Marathon would have every reason to consummate the sale as soon as the Bankruptcy Court's order goes into effect. MRC/Marathon has the ability to close on the assets; by closing quickly, they could prevent any possibility of losing on appeal. When the assets are sold, there will be no

---

appeal, such party would be left without effective remedies).

recourse against Newco, any of the debtors, or the Timberlands themselves after confirmation, and it will be virtually impossible (and unfair to all involved) to overturn the plan at that point. *See Matter of Manges*, 29 F.3d 1034, 1038-39 (5th Cir. 1994) (noting that an appeal becomes equitably moot after the point where the plan has been substantially consummated and the rights of third parties would be affected).

B. Substantial harm will befall Movants and Indenture Trustee.

If a stay is not granted, and the appeal becomes moot, the Movants and Indenture Trustee will be deprived forever of the highest value available for their collateral. At public auction, the Timberlands would yield at least $75 million more than what MRC/Marathon paid, on the basis of SRF's offer alone—probably more. The Bankruptcy Court incorrectly found that "[t]he Timberlands have been offered for sale since before this bankruptcy case began, and certainly since this Court terminated exclusivity, yet no firm offers were made." F/F 18. On the contrary, while the SRF offer was made subject to certain conditions (such as regulatory approval that would have been required in any case), it represented a credible bid to purchase the property at a higher price than MRC was offering. R. Tab S.

Moreover, the Indenture Trustee will be deprived of its right, on behalf of the Noteholders, to make use of the property through purchase in a credit bid. *See infra* Part II.C. If the noteholders are able to exercise their statutory right to a credit bid, they

undoubtedly will provide a greater recovery for the entire estate than MRC's lowball offer, and might yield, over time, more for the noteholders than even that which might have been available if their collateral were sold at public auction.

C. Other interested parties in the Scopac proceeding will not suffer substantial harm if the Court grants a stay.

Little harm will inure to other relevant interested parties if a stay is granted, and certainly none that outweighs the substantial, irreparable harm to Movants and the Indenture Trustee. The Bankruptcy Court's findings to the contrary are based on the following assumptions: (1) that it must consider potential harm to *all* parties connected to *all* of the debtors, not just the creditors of Scopac; and (2) that there was a substantial risk that Marathon would be unwilling to proceed with the proposal if a stay was ordered. F/F 19-27. Both are erroneous. Only harm to Scopac is relevant in this analysis. In addition, there is no evidence to support the notion that Marathon would refuse to consummate its own plan. In fact, even if Marathon refused to do so, such harm should not be considered in the balance, as it is in the nature of a "self-inflicted wound." Any remaining harm to interested parties can be remedied through the arrangement offered by the Indenture Trustee.

Scopac and Palco are separate bankruptcy cases that have not been actually consolidated into a single bankruptcy. Accordingly, the security to be given by a creditor of Scopac—in appealing a confirmation order as it applies to the Scopac

bankruptcy case—need protect only the interests of parties to the Scopac bankruptcy case. The security offered by the Indenture Trustee goes far beyond that requirement to preserve the status quo pending appeal.

An overriding issue at the Bankruptcy Court stay hearing was whether Scopac and Palco could survive for six months while an appeal is pending. The evidence is clear that Scopac is cash-flow positive and could survive. Recognizing, however, that Palco might not be able to continue in operation and Scopac could lose its major customer, Scopac and the Indenture Trustee proposed a $25 million Debtor-in-Possession financing by Lehman Brothers, and a program to provide up to five million board feet of logs per month to Palco without payment, except for maintenance and reforestation services to be provided to Scopac. Indenture Trustee's Proposal in Support of its Request for Stay Pending Appeal R. Tab T. In this manner, the Indenture Trustee exceeded any obligations to Scopac by assuring the continued operations of Palco. The value of this security is approximately $50 million, more than assuring that the status quo will be maintained.

D. A stay would greatly further the public interest.

That the Confirmation Order and the issues addressed in its appeal are of high importance to the public is an understatement. The fact that several high-ranking public officials—including California's Governor and two members of Congress—have

voiced their concerns regarding the Debtors' reorganization demonstrates the critical nature of the matter at stake.

Indeed, serious issues of public interest *are* at stake in this case, which the Bankruptcy Court ignored. F/F 22-23. First, there is a strong public interest in preserving the statutory right of appellate review—a right that will be eviscerated if stay is denied. *See In re Adelphia Commc'ns Corp.*, 361 B.R. at 342. Empowering bankruptcy courts to frustrate appellate review of their own decisions by denying a stay discourages the due process of law and provides little incentive for those courts to ensure their rulings will withstand scrutiny.

Additionally, the MRC/Marathon Plan disintegrates the corporate separateness of Scopac from the Palco Debtors by consolidating the two entities for purposes of paying *Palco* creditors, most of whom have interests subordinate to Movants' and the Indenture Trustee's. R. Tab U. The Bankruptcy Court also totally ignored this fact. The decision's resulting adverse impact on companies seeking to obtain favorable financing—because of the risk that a healthy company might be infected by an ailing affiliate through substantive consolidation—is underscored by the appearance and participation of amicus curiae The American Securitization Forum. Untested and unexplained by lack of an appeal, the decision will jeopardize a prevalent form of commercial financing.

Moreover, those aspects of the public interest that the court believed "weigh[] strongly" against a stay are not as obvious as the Bankruptcy Court found. F/F ¶ 28. The court apparently believes the MRC/Mendocino Plan is the only way to "ensure[] that an experienced and environmentally conscious timber operator will run the . . . Timberlands in accordance with applicable government regulations." *Id.* But this belief ignores the fact that any operator would be bound to follow the "applicable government regulations." Moreover, the Bankruptcy Court conveniently sidesteps the fact that an environmentally-responsible timber operator (to whom the Timberlands would be of great value) would likely appear at public auction. In fact, it is almost certain that the Timberlands will end up in the hands of an environmentally-responsible operator—these are the only potential buyers that would receive the required governmental approval for the sale of the Timberlands.

Finally, the public interest is best served by preserving stability in debtor/creditor law, protecting the credit markets, and allowing for competitive bidding, none which are advanced by the MRC/Marathon Plan. Accordingly, the public interest would be best served by a stay pending appeal so a full determination of the issues can occur.

IV. Any bond pending appeal should be in an amount necessary to protect only Scopac's creditors.

Movants and the Indenture Trustee contend no bond or security is required in this case. Should the Court condition a stay on the filing of a bond or security, however, the

Court should give no deference to the Bankruptcy Court's findings regarding a bond, as they are *dicta* since that court did not grant a stay. *See* F/F 33-39. Moreover, the bond amount, if any, should be that which is necessary to protect only Scopac's creditors, not Palco's, as well. The Bankruptcy Court's suggestion of a $176 million bond is grossly inflated and erroneous because, among other things, it concerns purported protection for Palco and MRC, a non-party.

Should the Court condition a stay on a bond or security, the amount should be reasonable, not constitute a windfall to the appellees, and should not cover purely speculative, theoretical, or "self-inflicted" potential damages.

CONCLUSION AND PRAYER FOR RELIEF

Accordingly, Movants respectfully request the Court to (1) expedite consideration of this motion to on or before July 24, 2008; (2) grant a stay of the Bankruptcy Court's Judgment and Order (a) pending the Court's determination of the Appellants' Petition for Permission to Appeal and (b) for the duration of the appeal; (3) (a) set the amount of a bond, if any, as the Court deems necessary or (b) remand to the bankruptcy court for a determination of a bond amount within parameters set by the Court; and (4) grant all other appropriate relief.

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

By: ______________________
Murry Cohen
Texas State Bar #045085001111
Louisiana Street, 44th Floor
Houston, Texas 77002-5200
Telephone: 713.220.5800
Facsimile: 713.236.0822

Charles R. Gibbs
Texas State Bar #07846300
David F. Staber
Texas State Bar #18986950
J. Carl Cecere
Texas State Bar #24050397
1700 Pacific Avenue, Suite 4100
Dallas, Texas 75201
Telephone: 214.969.2800
Facsimile: 214.969.4343

ALEXANDER DUBOSE JONES & TOWNSEND LLP

Roger D. Townsend
Texas State Bar #20167600
1844 Harvard Street
Houston, Texas 77009-4342
Telephone: 713.523.2358
Facsimile: 713.522.4553

Counsel for Appellants-Movants

PROOF OF SERVICE

I certify that copies of this motion were served today by e–mail on July 22, 2008, on the persons named below:

David Neier dneier@winston.com William Brewer wbrewer@winston.com Steven M. Schwartz sschwartz@winston.com Carey D. Schreiber cschreiber@winston.com Winston & Strawn, LLP 200 Park Avenue New York, NY 10166 *Counsel for Marathon Structured Finance Fund L.P.*	Eric E. Sagerman esagerman@winston.com Winston & Strawn, LLP 333 South Grand Avenue Suite 3800 Los Angeles, CA 90071 *Counsel for Marathon Structured Finance Fund L.P.*
John D. Penn pennj@haynesboone.com Haynes & Boone, LLP 201 Main Street, Suite 2200 Fort Worth, TX 76102 *Counsel for Marathon Structured Finance Fund L.P.*	Trey Monsour monsourt@haynesboone.com Haynes & Boone, LLP 901 Main St. Suite 3100 Dallas, TX 75202 *Counsel for Marathon Structured Finance Fund L.P.*
Allan S. Brilliant abrilliant@goodwinprocter.comB rian D. Hail bhail@goodwinprocter.com Craig P. Druehl cdruehl@goodwinprocter.com Godwin Procter LLP 620 Eighth Avenue New York, NY 10018-1405 *Counsel for Mendocino Redwood Company LLC*	Patrick Thompson pthompson@goodwinprocter.com Goodwin Procter LLP Three Embarcadero Center 24th Floor San Francisco, CA 94111 *Counsel for Mendocino Redwood Company LLC*

Maxim B. Litvak mlitvak@pszjlaw.com John D. Fiero jfiero@ pszjlaw.com Kenneth H. Brown kbrown@pszjlaw.com Pachulski Stang Ziehl Young Jones & Weintraub 150 California Street, 15th Floor San Francisco, CA 94111-4500 *Counsel for The Official Committee of Unsecured Creditors*	William Greendyke wgreendyke@fulbright.com Zack A. Clement zclement@fulbright.com R. Andrew Black rblack@fulbright.com Johnathan C. Bolton jbolton@fulbright.com Travis A. Torrence ttorrence@fulbright.com Fulbright & Jaworski LLP 1301 McKinney, Suite 5100 Houston, Texas 77010-3095 Toby L. Gerber tgerber@fulbright.com Louis R. Strubeck, Jr. lstrubeck@fulbright.com O. Rey Rodriguez orodriguez@fulbright.com Fulbright & Jaworski LLP 2200 Ross Avenue, Suite 2800 Dallas, Texas 75201-2784 *Counsel for Indenture Trustee*

Murry Cohen by permission LaDawn Conway

Murry Cohen