

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division
www.flsb.uscourts.gov

In re:

Chapter 11

SMF ENERGY CORPORATION
H&W PETROLEUM COMPANY, INC.
SMF SERVICES, INC.
STREICHER REALTY, INC.

Case No. 12-19084-BKC-RBR
Case No. 12-19085-BKC-RBR
Case No. 12-19086-BKC-RBR
Case No. 12-19087-BKC-RBR

(Jointly Administered Under Case
No. 12-19084-BKC-RBR)

Debtors.

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**EMERGENCY MOTION TO MODIFY DEBTORS' AMENDED
JOINT PLAN OF LIQUIDATION DATED OCTOBER 16, 2012**

Emergency Hearing Requested for December 14, 2012 at 9:30 a.m.

SMF ENERGY CORPORATION ("SMF") and three (3) of its subsidiaries and affiliates (collectively, the "Debtors"), by and through undersigned counsel, hereby file this Emergency Motion to Modify the *Debtors' Amended Joint Plan of Liquidation* dated October 16, 2012 (the "Motion"). In support thereof, the Debtors respectfully state as follows:

I. BACKGROUND

A. The Chapter 11 Filing

1. On April 15, 2012 (the "Petition Date"), the Debtors each filed a voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code.

2. On October 16, 2012, the Debtors filed the Debtors' *Amended Joint Plan of Liquidation* [D.E. 549], as modified, pursuant to Chapter 11 of the United States Bankruptcy Code (as amended, modified and supplemented, the "Plan") and accompanying *Debtors' First Amended Joint Disclosure Statement In Connection with Debtors' Amended Joint Plan of*

Liquidation [D.E. 550] (the “Disclosure Statement”).

3. On October 22, 2012, the Court entered an *Order: (A) Approving Disclosure Statement; (B) Approving Solicitation and Noticing Procedures for Voting on Plan; (C) Approving Special Noticing Procedures for Shareholders and the Establishment of a Record Date for Shareholders; and (D) Scheduling a Confirmation Hearing and Related Deadlines* (the “Order”) [D.E.565] (i) approving the Disclosure Statement, including all exhibits annexed thereto; (ii) establishing a record date for voting on the Plan; (iii) approving solicitation procedures for distribution of the Plan; (iv) approving the forms of ballots for the Plans; (v) establishing procedures for voting on the Plan; and (vi) scheduling a hearing and establishing notice and objection procedures in respect of confirmation of the Plan. Thereafter, the Disclosure Statement was transmitted to all Holders of Claims in each of the 4 impaired Classes set forth in the Plan (together, the "Voting Classes") as provided for in the Order.

4. The Plan provides a framework for liquidating and distributing the remaining assets of the Debtors’ Estates, including the prosecution of Litigation Claims.¹ The cornerstone of the Plan is the creation of the Liquidating Trust and the appointment of Soneet R. Kapila as the Liquidating Trustee. The Liquidating Trust, with input from an Oversight Committee also created under the Plan, will liquidate the Debtors’ remaining assets, prosecute Litigation Claims, make distributions to creditors under the Plan and otherwise perform all of the duties and responsibilities set forth in the Plan. The Plan has garnered nearly unanimous creditor support among voting constituents.

5. In connection with confirmation of the Plan, however, the following four (4) Limited Objections were filed, namely: (i) *Limited Objection of Wells Fargo Bank, National Association, to Confirmation of Chapter 11 Plan of Liquidation* (the “Wells Fargo

Objection”)[D.E. 615]; (ii) *Texas Comptroller of Public Accounts’ Limited Objection to Debtors’ Amended Joint Plan of Liquidation* (the “Texas Comptroller Objection”)[D.E. 616]; (iii) *Objection of Texas Taxing Authorities to Debtors’ First Amended Plan of Liquidation* (the “Texas Authorities Objection”)[D.E. 617] (the Texas Comptroller Objection and Texas Authorities Objection are collectively referred herein as “Taxing Authorities Objection”); and (iv) *Limited Objection to Confirmation of Chapter 11 Plan of Liquidation* (the “Board Objection”) [D.E. 618] (collectively, the “Objections”).

6. The hearing on confirmation of the Plan is currently scheduled for December 14, 2012 at 9:30 a.m. (the “Confirmation Hearing”).

II. Relief Requested

By this Motion, the Debtors request that the Court (i) authorize the Debtors to modify the Plan pursuant to the Modifications (as defined below), (ii) determine that the Modification complies with Section 1127 of the Bankruptcy Code, (iii) determine that the creditors in Classes 2, 3 and 5 under the Plan are not adversely affected by the Modification, (iv) determine that the Debtors are not required to re-solicit ballots on the Plan, as modified, from the holders of claims in Classes 2, 3, and 5, (v) determine that the prior acceptances of the Plan received by the Debtors be applied to, and used in connection with, confirmation of the Plan, as modified by the Modification, and (vi) set a hearing on this Motion concurrently with the Confirmation Hearing.

Section 1127(a) of the Bankruptcy Code allows a plan proponent to modify a plan “at any time before confirmation,” but further provides that such proponent “may not modify such plan so that such plan as modified fails to meet the requirements of Sections 1122 and 1123 of this title.” Section 1127(c) provides that the proponent of the modification shall comply with the disclosure requirements of Section 1125 of this title with respect to the plan as modified. Courts

¹ Capitalized terms used herein and not otherwise defined shall have the meaning set forth in the Plan.

do not require notice of a modification if the modification does not adversely change a claimant's treatment. *In re Dow Corning Corporation*, 237 B.R. 374, 379 (Bankr. E.D. Mich. 1999).

Bankruptcy Rule 3019 provides that in a Chapter 11 case:

after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Rule 3019 explains when it is necessary to re-solicit parties who have previously voted on the plan. *Dow Corning*, 237 B.R. at 379. If a modification does not materially impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well. *In re American Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988). Other creditors, not affected by the plan modification, do not have a substantive right to insist upon non-modification of the Plan. *In re Rhead*, 179 B.R. 169 (Bankr. D. Ariz. 1995). Given that the Plan, as modified by the Modification described below, does not change the treatment of claimants in Classes 2, 3 and 5, then such claimants who overwhelmingly accepted the Plan prior to the Modification are and should be deemed to have accepted the Plan as modified by the Modification.

As such, pursuant to Bankruptcy Rule 3019, the claimants in Classes 2, 3 and 5 do not need to be re-solicited in respect of confirmation of the Plan as modified. To determine otherwise would needlessly delay confirmation, increase the administrative expenses in connection therewith and heighten the risk of the Plan's failure in contravention of the goal of

consensual plans under the Bankruptcy Code. *See American Solar King*, 90 B.R. at 825-26; *Dow Corning*, 237 B.R. at 378.

Based on the foregoing, the Plan, as modified by the Modification below, complies with the applicable provisions of the Bankruptcy Code and 11 U.S.C. §1129. Further, the lack of inclusion in the Disclosure Statement of the information contained in this Modification does not impair the adequacy of disclosure in the Disclosure Statement. No party in interest will be prejudiced by virtue of the relief requested.

III. Plan Modifications.

The modifications proposed herein (the “Modification”) will resolve the Wells Fargo Objection and Taxing Authorities Objection filed in connection with confirmation of the Plan.

RESOLUTION OF WELLS FARGO OBJECTION

The Debtors seek to clarify and modify the Plan in reference to the treatment proposed to Wells Fargo Bank, National Association (“Wells Fargo”) in connection with the Class 2 - Allowed Secured Claim of Wells Fargo by adding the following provisions to Article V, ¶2 of the Plan:

“1. Notwithstanding anything to the contrary in the Plan, the Liquidating Trust Agreement or this Confirmation Order:

(a) all prior orders of the Court and written stipulations signed by the Debtors relating to claims, liens, security interests, rights and remedies of Wells Fargo and claims against Wells Fargo (including, without limitation, the Cash Collateral Orders, the Sale Orders, and Docket Nos. 283, 384, 406, 451 & 594) (i) shall survive confirmation of the Plan and remain enforceable against and binding upon (subject to any appellate action with respect thereto) the Debtors, the Liquidating Trust, the Liquidating Trustee and the Oversight Committee, and (ii) govern over any inconsistent provisions in the Plan, the Liquidating Trust Agreement or this Confirmation Order; and

(b) the existence, extent and perfection of the liens and security interests of Wells Fargo in its collateral and cash proceeds thereof shall not be affected by confirmation of the Plan or the transfer of any such proceeds or collateral to the Liquidating Trust or any bank account maintained by the Debtors or the Liquidating Trustee at a bank other than Wells Fargo; and

(c) to the extent that any action for surcharge under section 506(c) of the Bankruptcy Code is asserted against Wells Fargo or its collateral at any time, the claims and defenses of Wells Fargo in response thereto shall be considered and resolved as if Wells Fargo's collateral and proceeds of collateral had not been distributed to others as provided in the Plan and authorized by this Confirmation Order.

2. The Debtors and the Liquidating Trustee are hereby authorized under the Plan and section 363 of the Bankruptcy Code to distribute cash collateral of Wells Fargo to pay Allowed Administrative Claims, Allowed Priority Tax Claims, fees owed to the United States Trustee and Allowed Priority Claims; provided, however, that as adequate protection of Wells Fargo's liens and security interests and consistent with the priority scheme in the Bankruptcy Code and Article V of the Plan, unless and until otherwise agreed by Wells Fargo in writing or ordered by the Court (whether pursuant to a motion to estimate Wells Fargo's remaining claims, a motion for allowance and payment of such claims, a motion to authorize further use of cash collateral or otherwise), no distributions may be made under the Plan from collateral or proceeds of collateral of Wells Fargo to holders of Allowed Claims in Classes 3-6 of the Plan."

**RESOLUTION OF THE TEXAS COMPTROLLER OBJECTION AND
TREATMENT OF PRIORITY TAX CLAIMS**

The treatment of Priority Tax Claims set forth in Article III of the Plan shall be modified to provide as follows:

Priority Tax Claims. Each Holder of an Allowed Priority Tax Claim under section 507(a)(8) of the Bankruptcy Code shall receive from the Debtors and/or Liquidating Trustee, on account of such Allowed Priority Tax Claim, regular installment payments with interest at the rate determined by applicable nonbankruptcy law as set forth in accordance with section 511 of the Bankruptcy Code as of the calendar month in which the Plan is confirmed in Cash in accordance with Section 1129(a)(9)(C) of the Bankruptcy Code commencing on the later of (i) the Effective Date or (ii) as soon thereafter as reasonably practicable after the date of a Final Order Allowing such Priority Tax Claim. Notwithstanding the above, each Holder of an Allowed Priority Tax Claim may be paid under such other terms as may be agreed upon by both the Holder of such Allowed Priority Tax Claim and Debtors and/or the Liquidating Trustee, as the case may be.

Section VI (I) of the Plan shall be modified (new language is underlined) to provide as follows:

Except as provided in the Plan or the Confirmation Order with respect to the rights of, and treatment afforded the Holders of Allowed Claims and Allowed Interests, as of the Effective Date, all Persons who have held, hold or may hold Claims, rights, causes of action, liabilities or

any equity Interests with respect to the Debtors or their Assets based upon any act or omission, transaction or other activity of any kind or nature that occurred or arose prior to the Effective Date, regardless of the filing, lack of filing, allowance or disallowance of such a Claim or Interest and regardless of whether such Person has voted to accept the Plan and any successors, assigns or representatives of the foregoing, will be precluded and permanently enjoined on and after the Effective Date from, on account of such Claims, rights, causes of action, liabilities or any equity Interests: (1) commencing or continuing in any manner any action or other proceedings against the Liquidating Trust, the Liquidating Trustee or the Liquidating Trust Assets; (2) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order against the Liquidating Trust, the Liquidating Trustee or the Liquidating Trust Assets; (3) creating, perfecting or enforcing any lien or encumbrance against the Liquidating Trust, the Liquidating Trustee or the Liquidating Trust Assets; (4) asserting against the Liquidating Trust, the Liquidating Trustee or the Liquidating Trust Assets, a setoff, right or claim of subordination or recoupment of any kind against any debt, liability or obligation due to the Debtors; and (5) commencing or continuing any action, in any manner, in any place that does not comply with or that is inconsistent with the provisions of the Plan, provided however, that nothing in the Plan shall alter or impair the Texas Comptroller of Public Accounts' rights under Section 553 of the Bankruptcy Code.

Section VII of the Plan shall be modified (new language is underlined) to provide as follows:

In addition, except as otherwise expressly provided in the Plan, all persons, entities and parties in interest who have held, hold or may hold Claims or Interests are permanently enjoined, from and after the Effective Date, from: (i) commencing or continuing in any manner any action or other proceeding of any kind on account of such Claim against, or Interests in, the Debtors, the Debtors' Estates or the Liquidating Trust; (ii) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order against the Debtors, the Debtors' Estates, the Liquidating Trust; (iii) creating, perfecting or enforcing any encumbrance of any kind against the Debtors, the Debtors' Estates, the Liquidating Trust or against the Assets or the Liquidating Trust Assets, property or interests in property of the Debtors, the Debtors' Estates or the Liquidating Trust, with respect to any such Claims or Interests; and (iv) asserting any defense or right of setoff, subrogation, or recoupment of any kind against any obligation due from the Debtors, the Debtors' Estates, the Liquidating Trust Estate or against the Assets, the Liquidating Trust Assets, property or interests in property of the Debtors, the Debtors' Estates or the Liquidating Trust, with respect to any such Claim or Interests, provided however, that nothing in the Plan shall alter or impair the Texas Comptroller of Public Accounts' rights under Section 553 of the Bankruptcy Code.

WHEREFORE, the Debtors respectfully request that the Court enter an Order, or authorize inclusion of language into an order confirming the Plan: (i) authorizing the inclusion of the additional language regarding Wells Fargo claim set forth above; (ii) authorizing the

modification to the treatment and payment of Priority Tax Claims; (iii) determining that creditors in Classes 2, 3 and 5 under the Plan are not adversely affected by the Modification; (iv) determining that the Debtors are not required to re-solicit ballots on the Plan, as modified, from the holders of claims in Classes 2, 3 and 5; (v) determining that the prior acceptances of the Plan be applied to and used in connection with confirmation of the Plan, as modified by the Modification; (vi) determining that the Modification complies with the provisions of Section 1127 of the Bankruptcy Code and does not affect the adequacy of disclosure under Section 1125 of the Bankruptcy Code; (vii) setting a hearing on this Motion concurrently with confirmation on the Plan and final approval of the Disclosure Statement; and (viii) granting such other relief as the Court deems appropriate.

Dated: December 12, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was served via CM/ECF notification to all parties registered to receive notice on the 12th day of December, 2012.

By: /s/ Heather L. Harmon
Heather L. Harmon, Esq.
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