

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:

SCHWAB INDUSTRIES, INC., et al.,

Debtors.

CHAPTER 11

CASE NO. 10-60702

(Jointly Administered)

JUDGE RUSS KENDIG

MOTION OF FLSMIDTH, INC. FOR AN ACCOUNTING, CLARIFICATION OF SALE OF ASSETS AND, PURSUANT TO FRCP 60, TO VACATE THE MAY 28, 2010 ORDER AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, SUBJECT TO HIGHER OR BETTER OFFERS PURSUANT TO BANKRUPTCY CODE SECTIONS 363 AND 365; (2) APPROVING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH SUCH SALE AND DETERMINING AND ADJUDICATING CURE AMOUNTS WITH RESPECT TO SUCH CONTRACTS AND LEASES; (3) WAIVING THE FOURTEEN-DAY PERIOD PROVIDED BY BANKRUPTCY RULE 6004(h); AND GRANTING RELATED RELIEF

AND NOW COMES, FLSMIDTH, INC. ("FLS"), by and through its counsel, and hereby moves this Court as follows:

INTRODUCTION

Moving party FLSmidth Inc. ("FLS"), hereby moves this Court, pursuant to FRCP 60, to vacate its May 28, 2010 Order (1) Authorizing the Sale of Substantially All of the Debtors' Assets, Free and Clear of Liens, Claims, Interests and Encumbrances, Subject to Higher or Better Offers Pursuant to Bankruptcy Code Sections 363 and 365; (2) Approving the Assumption and

Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Such Sale and Determining and Adjudicating Cure Amounts with Respect to Such Contracts and Leases; (3) Waving the fourteen-Day Period Provided by Bankruptcy Rule 6004(h); and Granting Related Relief (“Sale Order”) [Docket No. 455].

FLS is a creditor of Debtor Eastern Cement Corporation (“ECC”) and non-debtor Eastern Portland Cement Corporation (“EASTERN PORTLAND”) under a promissory note (“Note”) issued by EASTERN PORTLAND in February 2010. ECC is both a principal obligor and a guarantor of EASTERN PORTLAND’s obligations under the Note.

Debtors, on April 5, 2010, filed a Motion for an Order (1) Authorizing the Sale of Substantially All of the Debtors’ Assets, Free and Clear of Liens, Claims, Interests and Encumbrances, Subject to Higher or Better Offers Pursuant to Bankruptcy Code Sections 363 and 365; (2) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Such Sale and Determining and Adjudicating Cure Amounts with Respect to Such Contracts and Leases; (3) Waving the fourteen-Day Period Provided by Bankruptcy Rule 6004(h); and Granting Related Relief (“Sale Motion”) [Docket No. 241] to sell substantially all their assets. In their subsequently proposed asset purchase agreement, Debtors represented to this Court that all the assets to be sold constituted property of the Debtors’ estates. On May 28, 2010, this Court granted the Sale Motion and entered the Sale Order. However, unknown to this Court, the assets that were sold included receivables owned by EASTERN PORTLAND. Those receivables were not part of any of the Debtors’ estates and were beyond this Court’s jurisdiction. Accordingly, and for reasons stated more fully below, this Court must vacate the Sale Order and order an accounting so that all the EASTERN PORTLAND’s assets that were sold can be identified, quantified, repaid to Debtor ECC’s estate, and ultimately returned to EASTERN PORTLAND.

FACTS

1. FLS is a Pennsylvania corporation with its principal place of business in Bethlehem, Pennsylvania.
2. On February 28, 2010, Schwab Industries, Inc., and certain of its subsidiaries and affiliates including ECC (collectively “Schwab”) filed voluntary petitions for relief with this Court under Chapter 11 of the United States Bankruptcy Code.
3. Although an affiliate of Debtor Schwab Industries, Inc., EASTERN PORTLAND did not file for bankruptcy.
4. ECC and Eastern Portland are separate and distinct Florida corporations and were incorporated on March 29, 1967 and October 10, 1983 respectively. (Exhibit A, Affidavit of Mark F. Brancato, Esquire- hereinafter, “Brancato Affidavit”; Exhibit B).
5. ECC and EASTERN PORTLAND filed separate annual reports with the Florida Department of State, Division of Corporations. (Brancato Affidavit; see samples of reports filed by each in Exhibit B).
6. ECC’s Original Schedule B, Personal Property, Item 13, represented that it owns 100% of the common stock in EASTERN PORTLAND.
7. On September 6, 2006, EASTERN PORTLAND entered into a contract with FLS for the supply of a pneumatic ship unloader. EASTERN PORTLAND signed the contract in its own name, making no mention of ECC or being used by another company as a “d/b/a” to conduct business. (Brancato Affidavit, Exhibit C.)
8. At no time did ECC disclose to FLS that it contracted with FLS in the name of EASTERN PORTLAND or that it transacted business using EASTERN PORTLAND as its “d/b/a”. To the contrary, at all relevant times, ECC represented to FLS that it was distinct from and not responsible for the conduct, breaches or defaults of EASTERN PORTLAND.

9. Disputes regarding the contract arose between EASTERN PORTLAND and FLS, resulting in the commencement of litigation by EASTERN PORTLAND in 2008 in its own name and on its own behalf against FLS. The action was removed to the U.S. District Court, Middle District of Florida (Tampa Division, hereinafter, “MD FL”), Case No. 8:08-CV-00637-T-24TBM (“FL Litigation”). FLS asserted counterclaims against EASTERN PORTLAND. (Brancato Affidavit; Exhibit D).

10. ECC was not a party to the contract or the FL Litigation.

11. During the FL Litigation, FLS learned of facts indicating that ECC was using EASTERN PORTLAND as its alter ego. Accordingly, FLS informed both EASTERN PORTLAND and ECC that it would look to ECC to pay any judgment in FLS’ favor if EASTERN PORTLAND was unable to pay.

12. FLS served a notice of taking deposition and subpoenae on Key Bank concerning credit arrangements for financing the project of which the FLS-EASTERN PORTLAND contract was a part. EASTERN PORTLAND, ECC, Schwab Industries, Inc. and other companies affiliated with Schwab Industries moved for a protective order. (Brancato Affidavit; Exhibit E).

13. In their motion, counsel for the moving parties represented to the MD FL on behalf of ECC and the other non-parties:

a. The credit arrangements were between Key Bank on the one hand and Schwab Industries and specified subsidiaries on the other (which, significantly for the purposes of FLS Motion, did not include EASTERN PORTLAND) (Brancato Affidavit; Exhibit E, Supplemental Motion, Paragraph 7);

b. FLS “has no right to obtain financial information on [EASTERN PORTLAND’s] parent company or subsidiaries, as such information is not relevant in this proceeding” (Id., Paragraph 12);

c. The Key Bank documentation sought by FLS included “complete financial disclosures of [EASTERN PORTLAND’s] affiliates and parent companies who are not parties to this case and are not subject to financial Discovery...” (emphasis added) (Id., Paragraph 13); and,

d. FLS’ discovery of financial information in Key Bank’s possession “should be limited only to actual credit agreements on which [EASTERN PORTLAND] is a signatory, and any notices of default naming [EASTERN PORTLAND], during the operative time period in this case” (emphasis added) (Id, Paragraph 15).

14. Counsel further represented behalf of ECC and the other non-parties in their supporting Memorandum:

a. ECC and the other Schwab companies “have standing to object to a notice in any subpoena, as they have personal rights and a financial privilege in the information sought, and a relation to which they are entitled protection. Id. at 4:30 (prohibiting over broad financial discovery from third parties)..... The parent company and affiliates are not parties to this matter, and their financial information is in no way at issue herein” (emphasis added) (Brancato Affidavit; Exhibit E, Supporting Memorandum, Pg. 9); and,

b. FLS’ discovery of information in Key Bank’s possession should be limited only to “actual credit agreements” with EASTERN PORTLAND and correspondence concerning defaults by EASTERN PORTLAND “as opposed to its parent and affiliated companies” (emphasis added) (Id., Pg. 10).

15. Thus, ECC not only refrained from telling the MD FL that EASTERN PORTLAND was its “d/b/a”, but it expressly and unconditionally represented to the court that it was separate and distinct from EASTERN PORTLAND and not responsible for its defaults. The court granted the motion and the deposition proceeded.

16. On July 28, 2009, Key Bank's attorney wrote to FLS' trial counsel regarding FLS' subpoenas, stating, "there are no documents responsive to the Subpoenas, as 'Eastern Portland Cement Corp.' was not a signatory to any financing documents, nor the recipient of any notices of default, for the time period March 2006 through March 2008." (Brancato Affidavit; Exhibit F).

17. As limited by the MD FL's order, FLS took Key Bank's deposition on August 18, 2009. ECC and EASTERN PORTLAND were represented by separate lawyers from different law firms. (Brancato Affidavit; Exhibit G). Significantly for the purposes of this motion:

a. Key Bank's designee unconditionally testified that EASTERN PORTLAND was not and never had been a borrower from the bank. (Id., at 13, 39, 48).

b. During his cross-examination, ECC's counsel showed the Key Bank designee records from the Florida Department of State concerning ECC and EASTERN PORTLAND "to see if this refreshes [his] recollection that Eastern Portland Cement was a separate corporation" (Id, at 47-49). He also showed the designee EASTERN PORTLAND's contract with FLS, asking him to state the obvious, i.e. the contract was between those two parties and ECC was not mentioned. (Id, at 49-50).

c. At various other times during the deposition, both counsel for ECC and counsel for EASTERN PORTLAND took pains to ensure that the record confirmed the distinction between ECC and EASTERN PORTLAND. (See, for example, Id., at 4; 12, Lines 19-25; 13, Line 1; 39, Lines 14-20; 45, Lines 19-24; 46, Lines 7-9, 17-25; 47, Lines 1-2).

18. In February 2010, FLS, EASTERN PORTLAND and ECC entered into a written Settlement Agreement ("Settlement Agreement"). (Brancato Affidavit; Exhibit H). It was signed by the parties in counterparts, with ECC and EASTERN PORTLAND signing the Settlement Agreement and its attached Note as independent parties on February 12, 2010. The Recitals of the

Settlement Agreement noted, in part, “FLSmith Inc. also contends that Eastern Cement Corp. may be liable in whole or in part to pay FLSmith Inc.’s claims against Eastern Portland Cement Corporation in the Litigation.” It was because of that claim that ECC was a party to the Settlement Agreement.

19. No mention was made in the Settlement Agreement of ECC having done business using EASTERN PORTLAND as its “d/b/a”. Instead, the recitals stated, “the parties vigorously oppose and contest the respective claims of the parties herein,” which obviously applied in part to ECC’s denial of FLS’ claim that ECC “may be liable in whole or in part” to pay FLS’ claims against EASTERN PORTLAND. (Brancato Affidavit; Exhibit H).

20. The Note attached to the Settlement Agreement included the following relevant terms:

a. EASTERN PORTLAND would pay FLS \$125,000.00 in five equal \$25,000 installments commencing May 1, 2010,

b. If EASTERN PORTLAND defaulted in paying any installment for more than 10 days, the entire Note would be due and payable with interest, collection costs and attorneys’ fees, and

c. ECC unconditionally guaranteed full payment of the Note as a principal obligor and guarantor, and not as a surety. (Brancato Affidavit; Exhibit H).

21. On March 1, 2010, lawyers for EASTERN PORTLAND and ECC transmitted another copy of the Note to FLS’ trial counsel. The Note bore the date February 24, 2010 and was signed by David A. Schwab for EASTERN PORTLAND and ECC as their respective Vice-Chairman. (Brancato Affidavit; Exhibit I).

22. In connection with this bankruptcy action, ECC filed its schedule of litigation on April 16, 2010. It listed the FL Litigation in the schedule and noted its status as “Dismissed.” In

effect, ECC represented it was a party to the FL Litigation, when, in fact, it was not. At the same time, however, ECC did not list FLS as a creditor in its original Schedule F-Creditors Holding Unsecured Nonpriority Claims.

23. EASTERN PORTLAND did not pay the first installment payment under the Note by May 1, 2010. FLS contacted EASTERN PORTLAND's president, Mark Newhart, to determine when or whether that installment would be paid. (Brancato Affidavit; Exhibit J). FLS used the same e-mail address for Mr. Newhart that he used when he first communicated with FLS in February, 2008 as EASTERN PORTLAND's new President. (Id).

24. On May 20, 2010, Mr. Newhart told FLS in reply, "As you may know, our company is operating under Chapter 11 Bankruptcy Rules since the 28th of this year. Hence, all of our payables are subject to the Rules of Chapter 11." (Brancato Affidavit; Exhibit J). However, EASTERN PORTLAND is not a debtor in these proceedings, was not in bankruptcy as of May 20, and was not operating under Chapter 11 Rules.

25. On or about June 9, 2010:

a. FLS filed a Proof of Claim against ECC in these proceedings in the amount of \$125,000.00; and,

b. Mark F. Brancato, FLS' General Counsel-Special Matters wrote to Mr. Newhart, informing him that FLS would take steps to compel payment of the full amount of the Note plus interest and asked Mr. Newhart if he would accept service of process. (Brancato Affidavit; Exhibit K). The letter was sent by e-mail to Mr. Newhart that same day.

26. On or about June 10, 2010 Christopher Peer, Esq. (co-counsel for Debtors) attempted to reach Mr. Brancato by phone. Mr. Brancato returned Mr. Peer's call on June 14, during which Mr. Peer stated that ECC's assets were sold to "Old Castle" and the sale included what Mr. Peer called "EASTERN PORTLAND's receivables." Mr. Peer justified the sale of the EASTERN

PORTLAND receivables on the basis that, according to his clients, EASTERN PORTLAND was “a d/b/a of Eastern Cement”.

27. The sale of assets to which Mr. Peer referred apparently was initiated on or about April 5, 2010, when Schwab filed the Sale Motion. Based on Mr. Peer’s statement to Mr. Brancato on June 14, the Sale Motion included EASTERN PORTLAND’s receivables. However, nowhere in the Sale Motion was any reference made to those receivables.

28. On May 28, 2010, this Court issued the Sale Order granting the Sale Motion and authorizing and approving the sale of substantially all the Debtors’ assets free and clear of liens, claims, and interest in accordance with terms identified in Debtors’ proposed “asset purchase agreement” (“APA”):

29. The Sale Order provided at page 24:

E. Authorization to Sell Assets. Each of the APAs are hereby approved. The Assets constitute property of the Debtors’ estates pursuant to section 541(a) of the Bankruptcy Code. (Emphasis added). Debtors are hereby authorized and directed to sell all of their rights, title and interests in and to the Assets to the buyers in accordance with the terms and subject to the conditions of the APAs, pursuant to the Final Bidding Procedures Order, any other orders of this Court, and section 363 and 365 of the bankruptcy Code.

30. Nothing in the Sale Motion, the proposed APA or other documents that Debtors filed in these proceedings alerted this Court, the creditors or the bidders at auction that the non-debtor assets of EASTERN PORTLAND were included in the assets to be sold.

31. On June 28, 2010:

a. ECC amended its Schedule F to list FLS as an unsecured creditor; and,
b. ECC amended Item 13 of Schedule B to read, “Eastern Portland Cement Corp. dba Eastern Cement Corp. 100% of Common Stock Ownership,” thereby representing that EASTERN PORTLAND does business as ECC. This is inconsistent with ECC’s present position that it did business as “EASTERN PORTLAND.”

32. Following further communications between Messrs. Brancato and Peer (Brancato Affidavit; Exhibits L, M, N), Larry Oscar (Debtors' co-counsel) called Mr. Brancato on July 9, stating that, according to David Schwab (his client's principal):

- a. EASTERN PORTLAND never operated as a business;
- b. EASTERN PORTLAND was used by ECC as a d/b/a;
- c. There were receivables of ECC that had been generated by EASTERN PORTLAND as a d/b/a; and
- d. The receivables in question were subject to the Key Bank financing arrangements that are part of these bankruptcy proceedings.

33. Mr. Schwab's statements contradicted positions that EASTERN PORTLAND and ECC had represented to the MD FL and FLS and testimony and statements by Key Bank:

- a. "Eastern Portland Cement Corporation" was not established as a fictitious name under FL Stat. §865, et seq. It was incorporated as a separate Florida corporation. (Brancato Affidavit, Exhibit A). Under FL Stat. §865.09 (7), a corporation may lawfully engage in business under a name other than its own only if the fictitious name differs from the corporation's name as registered.
- b. ECC unconditionally represented to the MD FL that EASTERN PORTLAND was not a party to the Key Bank financing arrangements.
- c. Mr. Schwab signed the FLS-EASTERN PORTLAND-ECC Settlement Agreement and the Note on behalf of ECC as a separate party and legal entity.
- d. Key Bank testified under oath that EASTERN PORTLAND was not and never had been a borrower from Key Bank.
- e. Key Bank did not file a financing statement or perfect a security interest in any of EASTERN PORTLAND's assets, and a UCC search confirmed that, as of June 9,

2010, there were no UCC filings over the previous 5 years against any of EASTERN PORTLAND's assets.

34. Because ECC represented to the MD FL during the FL Litigation that it was separate and distinct from EASTERN PORTLAND, it was not responsible for EASTERN PORTLAND's breaches or defaults, and EASTERN PORTLAND was not a party to the financing arrangements between Key Bank and Schwab Industries, ECC is estopped from asserting before this Court that (i) it owned the EASTERN PORTLAND receivables or any other EASTERN PORTLAND assets that were sold under this Court's May 28, 2010 Order or (ii) any of the Key Bank financing arrangements in these proceedings included and encumbered EASTERN PORTLAND's assets .

35. Because EASTERN PORTLAND is a separate and distinct legal entity and not a debtor in these proceedings, none of its assets constituted property of ECC's or the other Debtors' estates pursuant to section 541(a) of the Bankruptcy Code. Accordingly, the Debtors had no authority to sell EASTERN PORTLAND's assets within the context of a Section 363 Bankruptcy Code sale.

36. For the same reasons, this Court lacked jurisdiction over EASTERN PORTLAND's assets, and, therefore, it had no power or legal authority to approve the sale of EASTERN PORTLAND's receivables or any other EASTERN PORTLAND assets that the Debtors might have mingled among the assets that were sold. Accordingly, the Sale Order is void as a matter of law.

37. The "up streaming" of EASTERN PORTLAND's accounts into ECC's estate and the subsequent sale of those accounts and proceeds derived therefrom were done without notice to FLS in violation of FLS' right of due process.

REQUESTED RELIEF

38. For these reasons, FLS moves this Court under FRCP 60(b)(3), (4) and/or (6) (via Bankruptcy Rule 9024), 11 U.S.C. § 105(a), and/or this Court's inherent equitable powers to do the following:

a. Vacate the Sale Order;

b. Direct the purchasers of the assets to return and deposit into the Registry of the U.S. Bankruptcy Court all assets that they purchased under the Sale Order or, if some of those assets have been liquidated or sold, the proceeds from such liquidations or sales;

c. Direct ECC to provide to this Court and to FLS within 15 days from the date of this Order:

i. an accounting of all assets obtained by ECC from EASTERN PORTLAND on and after September 6, 2006 (the date of the contract between FLS and EASTERN PORTLAND), including, but not limited to, all monies representing accounts and accounts receivable due from third persons to EASTERN PORTLAND and all accounts and accounts receivable due from EASTERN PORTLAND to ECC;

ii. an accounting of the disposition of all EASTERN PORTLAND assets and proceeds therefrom received by ECC on and after September 6, 2006;

iii. a complete itemization and quantification of all EASTERN PORTLAND receivables and any other EASTERN PORTLAND assets that were sold pursuant to the May 28 Order;

d. Direct the return of the recovered EASTERN PORTLAND assets (or, as the case may be, the proceeds from their liquidation/sale) to EASTERN PORTLAND; and,

e. Retain jurisdiction over the parties subject to this Order to ensure the final return of all the EASTERN PORTLAND assets (or, as the case may be, the proceeds from their liquidation/sale) to EASTERN PORTLAND.

Respectfully submitted,

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Date: July 27, 2010

CERTIFICATE OF SERVICE

I, Gregory D. Swope, hereby certify that the Motion of FLSMIDTH, Inc., for an Order to Vacate, was electronically filed and electronically transmitted on or about July 27, 2010 via the Court's CM/ELF system to the following who are listed on the Court's Electronic Mail Notice List:

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