

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
AT CANTON**

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 In re: : Chapter 11
 :
 SCHWAB INDUSTRIES, INC., *et al.*,¹ : Case No. 10-60702
 : (Jointly Administered)
 Debtors. :
 : Judge Russ Kendig
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DEBTORS’ OBJECTION TO MOTION OF FLSMIDTH, INC. FOR AN ACCOUNTING, CLARIFICATION OF THE SALE ORDER 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

Schwab Industries, Inc (“SII”), Medina Cartage Co. (“MCC”), Medina Supply Company (“MSC”), Quality Block & Supply, Inc. (“QBS”), O.I.S. Tire, Inc. (“OIS”), Twin Cities Concrete Company (“TCC”), Schwab Ready-Mix, Inc. (“SRM”), Schwab Materials, Inc. (“SMI”) and Eastern Cement Corp. (“ECC”, and together with SII, MCC, MSC, QBS, OIS, TCC, SRM and SMI, the “Debtors”), the debtors and debtors in possession in the above-captioned Chapter 11 cases (the “Cases”), by and through their undersigned counsel, hereby object (the “Objection”) to the Motion² filed FL Smidth, Inc (“FLS”) as set forth more fully below. In support of this Objection, Debtors respectfully state as follows:

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor’s tax identification number are: Schwab Industries, Inc. (2467); Medina Cartage Co. (9373); Medina Supply Company (3995); Quality Block & Supply, Inc. (2186); O.I.S. Tire, Inc. (7525), Twin Cities Concrete Company (9196); Schwab Ready-Mix, Inc. (8801); Schwab Materials, Inc. (8957); and Eastern Cement Corp. (7232).

² For purposes of this Objection “Motion” shall mean and refer to the *Motion of FLSmidth, Inc. for an Accounting, Clarification of the Sale Order 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 CLEVELAN - 3045340.1*

PRELIMINARY STATEMENT

1. After much consideration and diligence, Debtors' sale of substantially all their assets to Oldcastle and RLH was approved by the Court on May 28, 2010. The sales of substantially all Debtors' assets to Oldcastle and RLH closed on June 2, 2010. Oldcastle and RLH have been operating the businesses using those assets since closing.

2. Despite its statements indicating the contrary, FLS had notice of the Sale, the sale process, the Auction, the Sale Hearing and the Sale Order (each as defined below). FLS also had knowledge of the Cases, the Debtors' Chapter 11 filing and of the Debtors' assets, including the accounts receivable of Debtor ECC.

3. Despite this knowledge and notice, FLS now seeks to unwind the Sale of Debtor assets — properly marketed, auctioned, approved by this Court and closed — which saved jobs and provides opportunity to hundreds of employees, vendors, creditors and citizens in Northeast Ohio, Southwest Florida and beyond.

4. The Motion is procedurally late, based on inaccuracies and is lacking in merit. It should be denied in its entirety.

BACKGROUND

Bankruptcy Case

5. On February 28, 2010 (the "Petition Date"), Debtors commenced the Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Cases are being jointly administered pursuant to an Order of this Court.

6. Debtors are continuing in possession of their properties and assets and are operating as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

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. [Docket No. 564] Capitalized terms used in this Objection that are not subsequently defined herein have the meanings ascribed to them in the Motion.

No trustee or examiner has been appointed in the Cases.

7. On March 9, 2010, the United States Trustee appointed an official committee of unsecured creditors (the "Committee").

8. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334. Venue of this case in this district is proper pursuant to 28 U.S.C. §§1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

9. On or about April 16, 2010 Debtors (including ECC) filed their required schedules and statements of financial affairs (collectively, the "Schedules") [Docket No. 17 in Case No. 10-60710]. The Schedules for ECC reported \$2,155,878 of accounts receivable as assets of ECC on the Petition Date (the "ECC Accounts Receivable"). The Schedules also reported that ECC is the parent entity for Eastern Portland Cement Corporation ("EPC").

10. The debt owed from ECC to FLS was the result of a settlement reached within a few days before the Petition Date. Because of the myriad tasks being asked of Debtors' management and accounting personnel at that time, Debtors inadvertently omitted ECC's debt emanating from this settlement agreement from ECC's records, and the \$125,000 debt owed from ECC to FLS (the "FLS Debt") was inadvertently omitted from the Schedules.

11. In the course of Sale related diligence, Debtors became aware that the FLS Debt was omitted from the Schedules and that FLS may have not received notice of certain activities in the Cases. At that time FLS was added to applicable service lists.

12. On June 28, 2010 Debtors amended the Schedules (the "Amended Schedules") [Docket No. 497]. The Amended Schedules properly reported the FLS Debt as a General Unsecured Claim on Schedule F. The Amended Schedules also included a typographical error where ECC reported that both it owned 100% of EPC and that EPC owned 100% of ECC. This typographical error was corrected on July 19, 2010 when Debtors further amended their

Schedules and Amended Schedules to reflect that ECC owns 100% of EPC [Docket No. 21 in Case No. 10-60710].

Sale of Substantially All Assets of the Debtors

13. On April 5, 2010, seeking to sell substantially all their assets, Debtors filed their *Motion for 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) Waiving the Fourteen-Day Stay Period Provided by Bankruptcy Rule 6004(H); and (4) Granting Related Relief* (the “Sale Motion”) [Docket No. 241].

14. To facilitate the sale(s) contemplated in the Sale Motion, on May 14, 2010, the Court entered the *Agreed Order Granting Motion for a Revised Bidding Procedures Order Approving (1) Executed Stalking Horse Asset Purchase Agreement; (2) Proposed Break-Up Fee and Expense Reimbursement; (3) Revised Bidding Procedures; (4) the Form and Manner of Service of Notice of the Sale Hearing and Auction; and (5) the Form and Manner of Service of Notice of the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* (the “Revised Bidding Procedures Order”) [Docket No. 406] which amended and modified certain bidding procedures and dates for auctions and hearings on the Sale Motion by, among other things, setting (i) an auction for substantially all Debtors’ assets for May 27, 2010 (the “Auction”); and (ii) a hearing on the Sale Motion for May 28, 2010 (the “Sale Hearing”).

15. On May 18, 2010, Debtors served all creditors and parties in interest, including FLS, with the Revised Bidding Procedures Order (along with revised notices detailing the terms of the Revised Bidding Procedures Order) [Docket No. 426].

16. On May 27, 2010, as scheduled pursuant to the Revised Bidding Procedures Order, Debtors conducted the Auction, which lasted more than thirteen (13) hours. The Auction resulted in (i) Oldcastle Materials, Inc. (“Oldcastle”) being designated the highest and best bidder for the Debtors’ assets commonly referred to as “Ohio Ready Mix”, “Florida Ready Mix” and “Port Manatee”; and (ii) Resource Land Holdings, LLC (“RLH”, and together with Oldcastle, “Buyers”) being designated the highest and best bidder for the Debtors’ assets commonly referred to as the “Orange Grove” or “Corkscrew Quarry.”

17. On May 28, 2010, as scheduled pursuant to the Revised Bidding Procedures Order, the Court conducted the Sale Hearing — a hearing to authorize the sale of substantially all of Debtors’ assets based upon the results of the Auction. At the conclusion of the Sale Hearing the Court announced its approval of the sales to the Buyers, and the Court entered the *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 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* (the “Sale Order”) [Docket No. 455].

18. On June 3, 2010, Debtors served the Sale Order on FLS [Docket No. 464].

19. On June 2, 2010, Debtors and each of Oldcastle and RLH closed their respective sales contemplated and ordered in the Sale Order (the “Sale”).

20. Almost two months later, on July 27, 2010, FLS filed the Motion seeking, among other things, to vacate the Sale Order.

OBJECTIONS

21. No basis exists to vacate the sale as after notice to FLS and an opportunity for FLS to be heard, the Court approved and the Debtors closed the Sales. (Sale Order, generally.)

22. First, FLS had notice of the Auction and the Sale Hearing and took no steps to contest the approval of the Sales.

23. Second, the Sale Order specifically waived the statutory fourteen (14) day stay period in place under Rule 6004(h) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) to allow the Sales to be consummated shortly following entry of the Sale Order. (Sale Order at ¶¶ 28 & HH) Waiver of the stay period acknowledges the value created by immediate consummation of the Sales. Indeed, the Sales were consummated promptly, and any party on notice of the Sales, including FLS, was obligated to act promptly, which FLS failed to do.

24. Third, the fourteen day appeal period established by Bankruptcy Rule 8002(a) expired more than a month before FLS filed the Motion. Fed R. Bankr. P. 8002(a). The Motion is a backdoor attempt to appeal the Sale Order, and must be denied as untimely.

25. Fourth, Oldcastle and RLH each is a good faith purchaser for value. (Sale Order at ¶¶ 18 & O.) It is undeniable that Oldcastle and RLH each completed its purchase of the Debtors’ assets in good faith and as such the Sales cannot be disturbed. 11 U.S.C. § 363(m). The Sales cannot justifiably be reversed or vacated.

26. Last, FLS cannot realistically claim relief from judgment pursuant to Rule 9024 of the Bankruptcy Rules is warranted. In pertinent part, Rule 9024 follows Rule 60 of the Federal Rules of Civil Procedure providing that:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed R. Civ. P. 60(b) (incorporated through reference to Bankruptcy Rule 9024).

27. Simply, in completing the sale of their assets and obtaining the Sale Order, none of the factors or conditions listed in Rule 9024 remotely apply to give FLS cause for the relief sought in the Motion.

28. More specifically,

- a. No mistake, inadvertence, surprise, or excusable neglect occurred as Debtors sold their assets;
- b. No new evidence has been uncovered as the ECC Accounts Receivable were owned by ECC;
- c. No fraud occurred in consummating the Sales;
- d. The Sale Order is not void, and in fact has been fully consummated to the benefit of all parties;
- e. Prong (5) is not applicable to the instant situation; and
- f. No reason exists to justify the Motion.

29. Moreover, FLS was provided timely notice of the Cases, the Revised Bidding Procedures Order governing the Sale, the Auction, the Sale Hearing and the Sale Order. FLS cannot possibly justify asking for relief pursuant to Bankruptcy Rule 9024 when it had ample previous opportunities to make its concerns known well before consummation of the Sales.

RESERVATION OF RIGHTS

30. Debtors reserve the right (a) to amend, supplement, or otherwise modify this Objection as they deem necessary or proper; and (b) to submit such other and further responses to object to the relief requested in the Motion at or before any hearing(s) thereon.

WHEREFORE, Debtors respectfully request that the Court (a) deny the Motion in its entirety; and (b) grant Debtors such other and further relief to which they are justly entitled.

Dated: September 15, 2010

Respectfully submitted,

/s/ Christopher W. Peer

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