

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

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	:	Chapter 11
In re:	:	
	:	Case No. 10-60702
SCHWAB INDUSTRIES, INC., ¹	:	
	:	Judge Russ Kendig
Debtor.	:	
	:	Joint Administration Pending
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	:	Chapter 11
In re:	:	
	:	Case No. 10-60703
MEDINA CARTAGE CO.,	:	
	:	Judge Russ Kendig
Debtor.	:	
	:	Joint Administration Pending
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	:	Chapter 11
In re:	:	
	:	Case No. 10-60704
MEDINA SUPPLY COMPANY,	:	
	:	Judge Russ Kendig
Debtor.	:	
	:	Joint Administration Pending
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	:	Chapter 11
In re:	:	
	:	Case No. 10-60705
QUALITY BLOCK & SUPPLY, INC.,	:	
	:	Judge Russ Kendig
Debtor.	:	
	:	Joint Administration Pending
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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).

In re: : Chapter 11
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O.I.S. TIRE, INC., : Case No. 10-60706
: :
Debtor. : Judge Russ Kendig
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In re: : Chapter 11
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TWIN CITIES CONCRETE COMPANY, : Case No. 10-60707
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Debtor. : Judge Russ Kendig
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In re: : Chapter 11
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SCHWAB READY-MIX, INC., : Case No. 10-60708
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Debtor. : Judge Russ Kendig
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SCHWAB MATERIALS, INC., : Case No. 10-60709
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Debtor. : Judge Russ Kendig
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In re: : Chapter 11
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EASTERN CEMENT CORP., : Case No. 10-60710
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Debtor. : Judge Russ Kendig
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**MOTION OF DEBTORS AND DEBTORS IN POSSESSION FOR ORDER
AUTHORIZING DEBTORS TO PAY SALES AND USE TAXES,
FRANCHISE TAXES AND OTHER TAXES**

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 move the Court pursuant to sections 105(a), 503(b), 507(a)(8) and 541(d) of title 11 of the United States Code, (the “Bankruptcy Code”), for entry of an order, substantially in the form of the proposed order attached hereto as Exhibit A, granting this Motion in its entirety and (a) authorizing, but not directing, the Debtors to pay (i) the prepetition Taxes² and Fees to the relevant Taxing Authorities in the ordinary course of business, as such payments are due and owing or before due and owing; and (ii) any Taxes and Fees subsequently determined upon audit to be owed for periods prior to the Petition Date; (b) directing the Debtors’ banks and other financial institutions, when requested by the Debtors in their sole discretion, to honor and process checks and transfers related to payment of Taxes and Fees; and (c) granting the Debtors such other and further relief to which they are justly entitled, and authorizing the Debtors to pay sales and use taxes, franchise taxes, trust fund taxes, and other tax related obligations where non-payment creates potential personal liabilities for the Debtors’ employees (the “Motion”). In support of this Motion, the Debtors rely upon the *Affidavit of David R. Exley in Support of Chapter 11*

² All capitalized terms not defined in this introductory paragraph are subsequently defined herein.

Petitions and First-Day Motions (the “Exley Affidavit”), filed concurrently herewith and respectfully states as follows:

BACKGROUND

1. On the date hereof (the “Petition Date”), Debtors commenced the Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Debtors have concurrently filed a motion seeking to jointly administer their estates.

2. Debtors are continuing in possession of their properties and assets and are operating and managing their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee, examiner, or official committee of unsecured creditors has been appointed in the Cases.

3. 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).

Debtors and Debtors’ Businesses

4. Debtors’ businesses produce, supply and distribute ready-mix concrete, concrete block, cement and related supplies to commercial, governmental and residential contractors throughout Northeast Ohio and Southwest Florida. Debtors employ approximately 350 workers (all of whom are non-union) who are stationed across Ohio and Florida either at Debtors’ Dover, Ohio headquarters or at one of twenty ready-mix plants (13 in Ohio and 7 in Florida) or three Ohio plants which produce concrete block.

5. With more than 40 years experience in the construction industry, Debtors have built a reputation of success and quality. Debtors’ competitive advantages flow from their attention to timeliness and an emphasis on geographic positioning of its locations near to

interstates and high traffic areas to allow for expedient delivery of materials, concrete, concrete block and cement.

6. As a result of its reputation and relationships, Debtors benefit from many longstanding and continuing relationships with all levels of government. Projects from federal, state and municipal agencies, in Ohio and Florida, provide a material portion of Debtors' work.

7. In addition to those operations in Ohio and Florida described above, through Debtor ECC, Debtors hold exclusive access to a deep-water terminal at Port Manatee on the Gulf of Mexico. The strategic positioning of Port Manatee allows Debtors to both (i) efficiently distribute imported cement and aggregates throughout Florida; and (ii) export material throughout the Gulf of Mexico region.

8. Their geographic advantages, existing relationships, reputation and import/export capabilities, uniquely situate Debtors to take advantage of opportunities resulting from Federal stimulus money over the next few years.

Individual Debtors

9. Debtor SII is an Ohio corporation headquartered in Dover, Ohio which serves as the holding company of the other Debtors. As the parent organization, SII owns, either directly or through another Debtor, all the equity interests of the other Debtors. SII is owned entirely by four members of the Schwab family.

10. Debtor MCC is an Ohio corporation headquartered in Dover, Ohio. MCC operates certain transportation systems which support the other Ohio Debtors. MCC is a wholly owned subsidiary of SII.

11. Debtor MSC is an Ohio corporation headquartered in Dover, Ohio. MSC operates eight (8) ready-mix plants in Northeast Ohio. MSC is a wholly owned subsidiary of SII.

12. Debtor TCC is an Ohio corporation headquartered in Dover, Ohio. TCC operates three (3) ready-mix plants in Northeast Ohio. TCC is a wholly owned subsidiary of SII.

13. Debtor OIS is an Ohio corporation headquartered in Dover, Ohio. OIS' operations have been substantially wound down and OIS is administering its remaining assets and liabilities. OIS is a wholly owned subsidiary of SII.

14. Debtor QBS is an Ohio corporation headquartered in Dover, Ohio. QBS operates two (2) ready-mix plants and a block plant in Northeast Ohio. QBS is a wholly owned subsidiary of SII.

15. Debtor SRM is a Florida corporation with a mailing address in Dover, Ohio. SRM operates seven (7) ready-mix plants along the gulf coast of Florida. SRM is a wholly owned subsidiary of SII.

16. Debtor SMI is a Florida corporation with a mailing address in Dover, Ohio. SMI wholly owns both ECC and a 2,100 acre plot of land (the "Orange Grove") on the gulf coast of Florida near Fort Myers that has been identified as a primary future source of aggregates (mineral materials such as sand or stone, used in making concrete) that can be mined once proper approvals are obtained. The Orange Grove is currently profitable, producing fruit and other perishables sold to third parties. SMI is a wholly owned subsidiary of SRM.

17. Debtor ECC is a Florida corporation with a mailing address in Dover, Ohio. ECC operates a modern 40,000 metric ton terminal in Port Manatee, the largest deep water port near the Panama Canal. Located on the Gulf of Mexico, Port Manatee provides outstanding access for Debtors to export and import cement and aggregates to other non-American markets. ECC uses this port access to support the sales efforts of Debtors both directly and indirectly. Specifically, ECC sells 40% of cement imported through ECC directly to SRM, and sells all

other imported cement to independent companies that do not directly compete with Debtors. ECC is a wholly owned subsidiary of SMI.

Events Leading to the Chapter 11 Filing

18. Debtors are leaders in the production, supply and distribution of ready-mix concrete, concrete block, cement and related supplies to commercial, municipal and residential contractors throughout Northeast Ohio and Southwest Florida. In fiscal year 2006, they provided more than \$208 million worth of product to their customers.

19. During fiscal year 2007 and thereafter, as a result of the nationwide real estate crash and the consequential dramatic slow down in the construction industry, Debtors' operations, particularly in Southwest Florida (where real estate and new construction has steeply declined), suffered.³ The decrease in sales negatively impacts Debtors' working capital availability and cash flows.

20. As of December 31, 2009, Debtors report a book value of total assets of \$104,915,117, with cash of \$672,698 and total "working capital"⁴ assets of \$15,854,211.

21. Similarly, as of December 31, 2009, Debtors owe their Secured Lenders⁵ pursuant to that certain Amended and Restated Credit Agreement dated October 18, 2007 (i) \$8,582,950 on account of a certain revolving line of credit (the "Revolving Line of Credit"); (ii) \$19,125,245 on account of that certain "Term A" Loan (the "Term A Loan"); and (iii) \$31,995,586 on account of that certain "Term B" Loan (the "Term B Loan" and together with the Revolving Line of Credit and the Term A Loan, the "Secured Loans"). Upon information and belief, a first

³ For fiscal year ending April 30, 2007, Debtors had approximately \$197,000,000 in sales. For fiscal year ending April 30, 2008, Debtors had approximately \$144,000,000 in sales. For fiscal year ending April 30, 2009, Debtors had approximately \$103,000,000 in sales. Debtors' fiscal year ends each April 30. The decrease in sales was significantly sharper for Debtors' Florida operations.

⁴ "Working capital" assets are understood to be comprised of cash, accounts receivable, inventory and prepaid expenses.

⁵ The "Secured Lenders" are KeyBank, National Association, Bank of America, N.A. and The Huntington National Bank.

priority security interest in substantially all the personal property assets of Debtors and a first priority mortgage interest in substantially all the real property of the Debtors secures repayment of the Secured Loans.

22. Also, as of December 31, 2009, Debtors' financial statements report trade payables of \$13,390,149.

23. On or about January 13, 2010, the Secured Lenders notified Debtors of their default of certain obligations pursuant to the Secured Loans.

24. Debtors present cash needs are at their seasonal peak due to the slowdown in construction activity in winter and the inability to create concrete at certain temperatures.

25. Debtors have sought financing from numerous possible lending services, including key customers, such as National Lime and Stone Company, among others. Unfortunately, these efforts have been unsuccessful.

26. Debtors' unsuccessful efforts to obtain refinancing result in their current liquidity crisis. This liquidity crisis necessitates Debtors' petition for relief under Chapter 11 of the Bankruptcy Code.

THE TAXES AND FEES

27. In connection with the normal operation of their businesses, Debtors collect sales taxes from certain customers and income and other taxes from their employees on behalf of various local, state and federal taxing authorities (the "Taxing Authorities") for payment to such Taxing Authorities. Debtors also are liable to these Taxing Authorities for certain tax obligations, the non-payment of which could create potential personal liabilities for the Debtors' employees or other third parties (collectively, the taxes described above are referred to as the

“Trust Fund Taxes.”)⁶ The Taxing Authorities include federal government and state governments, as well as a number of local taxing authorities where Debtors conduct business.

28. The Trust Fund Taxes collected or owed by Debtors are paid over to the various Taxing Authorities on a periodic basis. As of the Petition Date, Trust Fund Taxes held for or owed to the Taxing Authorities by Debtors (for sales taxes and employer and employee portions of payroll taxes) totaled approximately \$115,118.

Sales and Use Taxes

29. Debtors collect and remit sales Taxes in connection with the sale of product to their customers. Generally, sales Taxes collected from customers are remitted to the Taxing Authorities in the month following their collection. Debtors also may be responsible for remitting use Taxes on account of the purchase of various supplies and office equipment. Use taxes typically arise if a supplier does not have business operations in the state in which it is supplying goods and does not charge state taxes. Debtors’ records indicate that they owe approximately \$61,165 with respect to Sales and Use Taxes as of the Petition Date.

Franchise and Minimum Business Operating Taxes

30. Debtors pay franchise CAT Taxes based on the capital employed in Debtors’ businesses. Payment of such Taxes allows Debtors to continue operating their business in Ohio. Debtors’ records reflect that they owe approximately \$49,162 with respect to franchise Taxes as of the Petition Date.

31. Debtors estimate that when other prepetition production taxes are accrued, Debtors will owe approximately \$40,483 in prepetition CAT taxes as of the Petition Date.

⁶ Nothing contained in this Motion should be construed as impairing, or should be deemed to impair, the Debtors’ rights to contest the validity or amount of any Taxes that may be alleged to be due; and Debtors expressly reserve all of their rights with respect thereto.

Real Estate and Personal Property Taxes

32. Debtors pay personal property Taxes to each Ohio county in which they maintain equipment or personal property. Debtors' records reflect that they maintain personal property in the following Ohio and Florida counties: Carroll, Cuyahoga, Harrison, Lorain, Medina, Stark, Summit, Tuscarawas and Wayne Counties in Ohio, and Lee, Collier, Sarasota, Charlotte and Manatee Counties in Florida. Debtors typically pay such Taxes on a quarterly basis. Debtors' records reflect that they owe approximately \$191,664 with respect to personal property Taxes as of the Petition Date.

33. Debtors also own and operate significant real estate in Ohio and Florida. Debtors' real estate holdings are in the following Ohio and Florida counties: Carroll, Cuyahoga, Harrison, Lorain, Medina, Stark, Summit, Tuscarawas and Wayne Counties in Ohio, and Lee, Collier, Sarasota, Charlotte and Manatee Counties in Florida. Related to these real estate holdings, Debtors owe real estate taxes, which accrue in arrears (for both Ohio and Florida, but on different schedules. Debtors' records reflect that they owe approximately \$363,601 with respect to real estate taxes as of the Petition Date.

Business License Fees and Other Taxes

34. From time to time Debtors also are required to obtain business licenses and pay corresponding fees in certain jurisdictions in which they operate. These licenses or fees may be based on gross receipts or other bases determined by the taxing jurisdiction. Debtors' records reflect that they owe approximately \$-0- with respect to license fees as of the Petition Date.

35. Debtors estimate that the total amount of prepetition Taxes and Fees owing to the various Taxing Authorities is approximately \$-0-. If Debtors do not pay the Taxes and Fees, the respective Authorities may take actions that could have wide-ranging and adverse effect on Debtors' operations as a whole. In fact, Debtors' failure to pay the Taxes and Fees could have a

material adverse impact on Debtors' business operations in several ways: (a) the Taxing Authorities may initiate audits of Debtors, which would divert unnecessarily their attention away from the reorganization process; (b) the Taxing Authorities may attempt to suspend Debtors' operations, file liens, seek to lift the automatic stay, or pursue other remedies that will harm the estates; and (c) certain directors and officers might be subject to personal liability, which would likely distract those key employees from their duties related to Debtors' restructuring. Moreover, failure to pay the Taxes and Fees could jeopardize Debtors' ability to conduct business in certain jurisdictions.

REQUEST FOR RELIEF

36. Pursuant to this Motion, Debtors seek authority under Bankruptcy Code Sections 105(a), 503(b), 507(a)(8) and 541(d) to pay the prepetition Trust Fund Taxes⁷ to all relevant Taxing Authorities and in the ordinary course of business, as such payments become due. In addition, Debtors seek authority to pay all prepetition Trust Fund Taxes owed to the Taxing Authorities, including any Trust Fund Taxes subsequently determined upon audit to be owed for periods prior to the Petition Date, and Debtors request that the Court authorize Debtors' banks and financial institutions, when requested by Debtors in their sole discretion, to honor and process checks and transfers related to such relief.

BASIS FOR RELIEF

37. Section 105(a) of the Bankruptcy Code provides, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a). The purpose of section 105(a) is "to assure the Bankruptcy Court's

⁷ Debtors also seek separate authority to make payment of certain of the Trust Fund Taxes pursuant to the Motion of Debtors for Order (A) Authorizing Debtors to Pay Prepetition Wages, Salaries and Commissions to Employees, (B) Authorizing Debtors to Pay Prepetition Benefits and Continue Employee Benefit Programs, and (C) Directing Banks to Honor Prepetition Checks for Payment of Prepetition Employee Obligations (the "Prepetition Employee Obligation Motion"). While the relief requested in this Motion may be somewhat overlapping with the Prepetition Employee Obligation Motion, Debtors shall make only one full payment of taxes owing to any Taxing Authority.

power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction.” 2 *Collier on Bankruptcy* ¶105.01, at 105-1 (15th rev. ed. 2005). Thus, section 105 essentially codifies the Bankruptcy Court’s inherent equitable powers. See *Management Technology Corp. v. Pardo*, 56 B.R. 337, 339 (Bankr. D. N.J. 1985) (court’s equitable power derived from section 105).

38. Numerous courts rely upon section 105 equitable powers under the necessity of payment doctrine⁸ to authorize payment of a debtor’s prepetition obligations where, as here, such payment is necessary to effectuate the “paramount purpose” of chapter 11 reorganization - which is to prevent the debtor from going into liquidation and preserve the debtor’s potential for rehabilitation. See *In re Ionosphere Clubs, Inc. and Eastern Air Lines, Inc.*, 98 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)); *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981).

39. Moreover, under section 105(a), this Court as well as other courts in this district have authorized debtors in possession to pay a variety of prepetition claims of creditors, including claims similar to the Trust Fund Taxes herein. See, e.g., *In re The Austin Company*, No. 0593363 (Bankr. N.D. Ohio Oct. 25, 2005); *In re Nexpak Corporation*, No. 04-63816 (RK) (Bankr. N.D. Ohio July 19, 2004); *In re LTV Steel Co.*, No. 00-43866 (WTS) (Bankr. N.D. Ohio Jan. 16, 2001); *In re Pittsburgh-Canfield Corp.*, No. 00-43394 (WTS) (Bankr. N.D. Ohio Nov. 17, 2000).

40. Debtors believe that some, if not all, of the Taxing Authorities will cause Debtors to be audited if the Trust Fund Taxes are not paid forthwith. Such audits will unnecessarily divert Debtors’ attention away from the reorganization and sale process.

⁸ This doctrine, first articulated by the United States Supreme Court in *Miltenberger v. Logansport, C.&S. W.R. Co.*, 106 U.S. 286, 311-312 (1882), recognizes the existence of judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.

41. In addition, the Trust Fund Taxes are entitled to priority status pursuant to 11 U.S.C. §507(a)(8) and thus, must be paid in full under any plan of reorganization. *See* 11 U.S.C. §1129(a)(9)(c). The payment of the Trust Fund Taxes at this time only affects the timing of payment and does not prejudice the rights of other creditors while preserving uninterrupted business operations.

42. Debtors further submit that some, if not all, of the Trust Fund Taxes constitute so-called “trust fund” taxes which are required to be collected from third parties and held in trust for payment to the Taxing Authorities. *See, e.g., Shank v., Washington State Dept. of Revenue (In re Shank)*, 792 F.2d 829, 830 (9th Cir. 1986) (sales tax required by state law to be collected by sellers from their customer is a “trust fund” tax); *DeChiaro v. New York State Tax Comm’n*, 760 F.2d 432, 433-34 (2d Cir. 1985) (same). Section 541(d) of the Bankruptcy Code excludes “property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest” from the debtor’s estate. Thus, to the extent these “trust fund” taxes are collected, they are not even property of Debtor’s estate under section 541(d).⁹ *See Beiger v. Internal Revenue Serv.*, 496 U.S. 53, 55-56, 59-61, 66-67 (1990) (holding that taxes such as excise taxes, FICA taxes and withholding taxes are property held by a debtor in trust for another and thus are not property of the estate); *McCafferty v. McCafferty*, 96 F.3d 192, 196 (6th Cir. 1996) (citing *Beiger* with approval and noting that “Section 541(d) has often been invoked as the basis for excluding from a bankruptcy estate assets held in constructive trust by a debtor in

⁹ 11 U.S.C. § 541(d) provides:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

favor of another.”) (citations omitted); *In re American Intl Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (holding that excise and withholding taxes are not property of the estate). Debtors, therefore, do not have any equitable interest in the Trust Fund Taxes. Accordingly, the Court should grant the Motion and authorize Debtors to pay the Trust Fund Taxes to the Taxing Authorities, as they come due and with respect to any unpaid prepetition obligations.

43. Even if the Trust Fund Taxes were not “trust fund” taxes in a particular jurisdiction, the payment of the Sales Taxes to the taxing authorities is necessary here because it is in the best interest of Debtors’ estates that the Trust Fund Taxes be paid on time so as to avoid administrative difficulties. Failure to pay the Trust Fund Taxes likely would cause taxing authorities to take precipitous action, including a marked increase in state audits, a flurry of lien filings, and significant administrative problems. Debtors submit that prompt and regular payment of the Trust Fund Taxes will avoid this unnecessary governmental action.

44. Furthermore, many states have laws providing that officers and directors of the collecting entity may be held personally liable for non-payment of sales and use taxes, payroll taxes, franchise taxes and certain other tax obligations. *See, e.g.*, Ohio Rev. Code §5739.33 (making officers and other responsible parties personally liable for the corporation’s failure to pay use taxes); Ohio Rev. Code §5741.99 (establishing penalties for corporation’s failure to pay use taxes). To the extent any accrued Trust Fund Taxes of Debtor were unpaid as of the Petition Date, Debtors’ officers and directors may be subject to lawsuits in such jurisdictions during the pendency of this proceeding. Such potential lawsuits would prove extremely distracting for Debtors, for the named officers and directors whose attention to Debtors’ reorganization process is required, and for this Court, which likely would be asked to entertain various motions seeking injunctions with respect to the potential state court actions. It is in the best interests of Debtors’

respective estates and the reorganization policy of the Bankruptcy Code to eliminate the possibility of these distractions and burdens.

45. For all of the foregoing reasons, Debtors believe that granting the relief requested herein is appropriate and in the best interest of their estates.

46. Nothing in this Motion or the Order should be construed to impair Debtors' ability to contest the amounts of the Trust Fund Taxes owing to the various Taxing Authorities.

NOTICE

47. Notice of this Motion has been provided to (i) the office of the United States Trustee for Region IX; (ii) each of Debtors' secured lenders (KeyBank, National Association, Huntington National Bank and Bank of America, NA); (iii) counsel for the Agent for Debtors' secured lenders; (iv) the additional creditors identified on the Debtors' consolidated list of thirty (30) largest unsecured creditors and (v) counsel for EFO Financial Group, LLC; (vi) each of the Debtors' depository banks; (vii) each known Taxing Authority; (viii) the Internal Revenue Service; and (ix) United States Department of Justice. In light of the nature of the relief requested, Debtors submit that no other or further notice is necessary.

[Remainder of page intentionally left blank]

WHEREFORE, the Debtors respectfully request that the Court enter an Order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein, and such other and further relief as the Court deems just and proper.

Dated: February 28, 2010
Cleveland, Ohio

Respectfully submitted,

/s/ Lawrence E. Oscar

Lawrence E. Oscar (0022696)

Daniel A. DeMarco (0038920)

Christopher B. Wick (0073126)

Christopher W. Peer (0076257)

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Proposed Counsel to the Debtors

EXHIBIT A

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
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EASTERN CEMENT CORP.,	:	Case No. 10-60710
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**ORDER AUTHORIZING DEBTORS AND DEBTORS IN POSSESSION TO
PAY SALES AND USE TAXES FRANCHISE TAXES
AND OTHER TAXES**

Upon consideration of the *Motion of Debtors and Debtors in Possession for Order Authorizing Debtors to Pay Sales and Use Taxes, Franchise Taxes and Other Trust Fund Taxes*, dated February 28, 2010 (the "Motion"), for entry of an order authorizing Debtors to pay Trust Fund Taxes to Taxing Authorities where non-payment creates potential personal liabilities for the Debtors' employees; and based upon the *Affidavit of David R. Exley in Support of Chapter 11 Petitions and First-Day Motions*, filed concurrently with the Motion; and after due deliberation and hearing, this Court finds that: (i) it has jurisdiction over the matters raised in the Motion under 28 U.S.C. §§157 and 1334; (ii) venue of this matter is proper under 28 U.S.C. §§1408 and 1409; (iii) this matter is a core proceeding under 28 U.S.C. §157(b)(2); (iv) the relief requested in the Motion is in the best interests of the Debtors, their estates, creditors, and other parties in interest; (v) adequate and proper notice of the Motion and the hearing thereon has been given and that no other or further notice is necessary; and (vi) good and sufficient cause exists for the granting of the relief requested in the Motion as set forth herein. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED in its entirety.
2. Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Motion.

3. Debtors are authorized, in Debtors' sole discretion, to payprepetition Sales and Use Taxes, CAT and Franchise Taxes, Real Estate and Personal Property Taxes and other Taxes to the appropriate Taxing Authorities in the ordinary course of the Debtors' businesses.

4. All applicable banks and other financial institutions shall be, and hereby are, authorized and directed to receive, process, honor and pay all checks drawn on Debtors' accounts, and all fund transfer requests, in order to pay any transfers, costs or expenses related to Trust Fund Taxes due to the Taxing Authorities, whether those checks were presented prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make such payments.

5. Nothing in the Motion or this Order shall be construed to impair Debtors' ability to contest the validity or amount of any Trust Fund Taxes owing to the Taxing Authorities, either prior to or after payment.

6. Nothing in the Motion or the Order shall be construed to impair Debtors' ability to challenge the priority of any Trust Fund Taxes.

7. This Order shall be immediately effective and enforceable upon entry.

IT IS SO ORDERED.

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Respectfully submitted,

/s/ Lawrence E. Oscar

Lawrence E. Oscar (0022696)

Daniel A. DeMarco (0038920)

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