UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Chapter 11
	)	
SCHWAB INDUSTRIES, INC., *et al*.,[1]	)	Case No. 10-60702-rk
	)	(Jointly Administered)
Debtors.	)	
	)	Judge Russ Kendig

JOINDER AND OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS 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 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

The Official Committee of Unsecured Creditors (the "*Committee*") appointed in the above-captioned, jointly-administered bankruptcy cases, by and through its counsel, hereby submits its objection ("*Objection*") 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 Higher or Better Offers Pursuant to Bankruptcy Code Sections 363 and 365; (2) Approving the Assumption and Assignment of Certain Executory*

[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).

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 ("*Motion*"). The Committee further submits its joinder (the "*Joinder*") to the objection (the "*Debtors' Objection*") of the above-captioned debtors and debtors-in-possession (the "*Debtors*") to the Motion. In support of its Objection and Joinder, the Committee states:

PRELIMINARY STATEMENT[2]

Flsmidth, Inc.'s ("*FLS*") attempt to clarify and/or vacate the terms of the Sale Order (defined below) is both procedurally improper and impermissible under title 11 of the United States Code ("*Bankruptcy Code*") and the Federal Rules of Bankruptcy Procedure ("*Bankruptcy Rules*"). The situation in which FLS finds itself is one of its own creation. Having failed to act diligently and timely in the assertion of its alleged property rights, it cannot now assert illusory arguments that the Sale Order (defined below) is void and ask this Court to shift the consequences of its inaction to the Debtors' creditors. On the surface, FLS's arguments paint a picture of a simple case concerning a dispute over ownership of certain accounts receivable ("*Receivables*") that were subject to the Sale (as defined below). Yet, FLS's contentions carry far greater implications in that they attempt to undermine the protections afforded to the bankruptcy sale process under the Bankruptcy Code.

First, the status of the Buyers (defined below) as good faith purchasers under section 363(m) of the Bankruptcy Code precludes this Court from modifying the Sale. Second, even if FLS is not foreclosed from attempting a modification or vacation of the Sale Order irrespective

[2] Capitalized terms used but not defined herein shall have the respective meanings assigned to them in the body of this Objection and the Motion.

of section 363(m), it has failed to set forth any ground that would meet the threshold for relief under Rule 60(b) of the Federal Rules of Civil Procedure ("*Rule 60(b)*"), as incorporated under Bankruptcy Rule 9024.

RELEVANT BACKGROUND

A. The Bankruptcy Case

1. On February 28, 2010 (the "*Petition Date*"), Schwab Industries, Inc. and its affiliated debtors and debtors-in-possession (collectively, "Debtors"), including Eastern Cement Corporation, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio ("*Court*").

2. As disclosed on ECC's Schedule B, it owns 100% of the common stock in non-debtor Eastern Portland Cement Corporation ("*Eastern Portland*"). Further, ECC disclosed on Schedule B that it has personal property representing accounts receivables valued at $2,155,878.

3. Although FLS was not disclosed as a creditor on ECC's originally filed bankruptcy schedules, it was listed when ECC amended Schedule B on June 28, 2010. However, despite this initial omission, FLS has had notice of ECC's bankruptcy filing as far back as, at least, May 20, 2010. *See* Motion, Exh. H.

4. FLS contends that it is a creditor of ECC and Eastern Portland by way of a confidential settlement agreement ("*Settlement Agreement*") dated "February, 2010" between the parties. The Settlement Agreement stems from litigation pursued by FLS in the Middle District of Florida against ECC and Eastern Portland.

B. The Sale Process

5. On April 5, 2010, seeking to sell substantially all their assets, the 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*").

6. Pursuant to the Sale Motion, the Debtors sought authority, pursuant to section 363 of the Bankruptcy Code, to sell their "core" assets, including substantially all of their real property, machinery and equipment, the Port Manatee deep water port facility, and its potential aggregates quarry located in Florida currently operated as an orange grove.

7. The Debtors proposed to sell the assets through a competitive auction process ("*Auction*") pursuant to a set of Bid Procedures approved by this Court on April 16, 2010. The Bid Procedures provided, among other things, for: (1) a mechanism for the identification of "stalking horse" bidders and the execution of asset purchase agreements with those bidders; (2) procedures related to the submission of competing bids; (3) requirements for such bids to be deemed "Qualified" to participate at auction; and (4) a process and procedure for the auction of the Debtors' assets, provided that more than one Qualified Bid is received.

8. After selecting its stalking horse bidder, the Debtors moved to revise the original bidding procedures. The Court partially granted the Debtors' motion to modify the bid procedures in the Revised Bid Procedures Order, based upon a settlement reached between the Debtors, the Committee and the Pre-Petition Lenders. The parties agreed to, and the Court approved, a modified accelerated sale timeframe, providing for the Auction to be held on May 27, 2010 and for the sale approval hearing to be held on May 28, 2010.

9. 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).

10. The Auction was held, as scheduled, on May 27, 2010, and 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."

11. On May 28, 2010, the Court held a hearing to authorize the sale of substantially all of Debtors' assets based upon the results of the Auction. Accordingly, 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* ("*Sale Order*"). *See* Doc. No. 455.

12. More specifically, the Sale Order signed by this Court determined that:

- The Debtors may sell the Assets free and clear of any and all liens, claims, interests or Encumbrances in, upon or to the Assets because all creditors claiming an interest in the Assets either have consented to the Sale(s), have not objected to the proposed Sale(s) or withdrawn their objection(s) and are deemed to have consented pursuant to section 363(f)(2) of the Bankruptcy Code (p. 16-17, ¶22);

- All objections to the Sale were overruled (p. 23, ¶H);

- The APAs and the contemplated transactions were approved in all respects (p. 21-23, ¶¶A, E & F);
- The Assets constitute property of the Debtors' estates pursuant to section 541(a) (p. 22, E);
- The Sale vests or would vest good title to the Assets free and clear of any and all liens, claims, interests in the Buyers (p. 2 & 21, ¶A); and
- The Auction and the entire sale process were conducted in good faith within the meaning of section 363(m) of the Bankruptcy Code (p. 14, ¶16).

13. The Sales closed on June 2, 2010.

14. On June 3, 2010, the Debtors caused the Sale Order to be served on FLS.

15. FLS has not appealed the Sale Order nor moved to stay its effect. Additionally, based on information and belief, FLS elected not to participate in the Debtors' section 363 sale process despite having notice of the same.

C. The Motion

16. On July 27, 2010, FLS filed the Motion, requesting that this Court vacate the Sale Order pursuant to Rules 60(b)(3), (b)(4) and/or (b)(6), as incorporated in Bankruptcy Rule 9024, and section 105(a) of the Bankruptcy Code. According to FLS, the Assets included within the scope of the Sale Order erroneously include the Receivables, which FLS maintains are owned by non-debtor Eastern Portland.

ARGUMENT

17. As an initial matter, the Committee joins in the Debtors' Objection, and adopts each of the factual statements and arguments set forth therein in their entirety. In addition, the Committee lodges the following Objections to the Motion:

I. Section 363(m) Precludes Modification or Vacation of the Sale Order.

18. FLS primarily argues that the Sale Order should be vacated because "Eastern Portland is a separate and distinct legal entity and not a debtor in these proceedings, [therefore] 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." *See* Motion, ¶35. FLS contends that for these reasons, the Court lacked jurisdiction over the Receivables and it had no power or legal authority to approve a sale of the Receivables. Therefore, FLS maintains that the Sale Order is void as a matter of law. However, for the reasons stated below, the Committee submits that modification or vacation of the Sale Order would be improper in light of section 363(m) of the Bankruptcy Code.

19. FLS's argument attempts to gloss over the issues. Section 363(m) specifically prohibits modifications to sale orders if such modifications affect the validity of the sale of property that was purchased in good faith. Section 363(m) of the Bankruptcy Code provides, in relevant part:

> The reversal or modification on appeal of an authorization under subsection (b) . . . does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).[3]

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[3] Although the text of section 363(m) technically applies to a modification of an order on appeal only, a number of courts have nonetheless applied section 363(m) to motions filed with a bankruptcy court seeking modification of its own order. *See*, *e.g.*, *Kham & Nate's Shoes No. 2 v. First Bank*, 908 F.2d 1351, 1355 (7th Cir. 1990); *In re Pine Coast Enter., Ltd.*, 147 B.R. 30, 33 (Bankr. N.D. Ill. 1992). *See also In re Summit Ventures, Inc*., 161 B.R. 9, 11 (Bankr. D. Vt. 1993) (declining to undo sale and finding that principles of section 363(m) apply to Rule 60(b) motions in the absence of showing that purchaser was not a good faith purchaser). These courts reasoned that the "spirit" and purpose of section 363 (m) is to prevent "backtracking on promises with respect to bankruptcy sales in the absence of bad faith" which should apply with equal force to an appeal of a bankruptcy court order as

20. As noted by the Sixth Circuit Court of Appeals, "[s]ection 363(m) reflects a strong preference for safeguarding the finality of a sale in bankruptcy." *See Parker v. Goodman (In re Parker)*, 499 F.3d 616, 626 (6th Cir. 2007). "Finality is important because it minimizes the chance that purchasers will be dragged into endless rounds of litigation to determine who has what rights in the property." *Id*. (citing *In re Sax*, 796 F.2d 994, 998 (7th Cir. 1986)).

21. FLS's arguments in support of the Motion are not supported by those decisions that have addressed similar issues. In *Pittsburgh Food & Beverage, Inc. v. Ranallo*, 112 F.3d 645 (3d Cir. 1997), a bankruptcy trustee sought approval for the sale of assets of a debtor's wholly-owned subsidiary. The debtor filed a motion for stay of the order pending appeal, claiming that the property in question was not property of the estate, and thus that the bankruptcy court lacked jurisdiction over those assets and had no authority to enter the order. *See id.* at 647, 650. The bankruptcy court approved the sale and denied the debtor's motion for imposition of a stay of its order. *See id*. at 646-47. The debtor appealed and requested a stay. *See id.* On appeal, the Third Circuit Court of Appeals expressly rejected the debtor's jurisdictional argument and affirmed the dismissal of the appeal. *See id*. at 650. The Court of Appeals reasoned that "[s]ection 363(m) does not say that the sale must be proper under § 363(b); it says that the sale must be authorized under § 363(b)." *Id*. (quoting *Sax*, 796 F.2d 994, 997-98 (7th Cir. 1986)). Thus, where a bankruptcy court authorizes a sale under section 363(b), "section 363(m) patently protects, from later modification on appeal, an authorized sale where the purchaser acted in good faith and the sale was not stayed pending appeal." *Id*. at 651.

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well as to a bankruptcy court's modification of its own order. *See Pine Coast Enter.*, 147 B.R. at 33; *Kham & Nate's Shoes*, 908 F.2d at 1355. These courts further acknowledge that "a bankruptcy court's modifications of its own orders poses the same risks as does a reversal on appeal." *Id.*

22. In another case, the Seventh Circuit Court of Appeals similarly dismissed an appeal pursuant to section 363(m) that was filed by a creditor who asserted that a bankruptcy court lacked subject matter jurisdiction to conduct an asset sale. *See Sax*, 796 F.2d at 998. The court expressly declined to reach the merits of the creditor's appeal and stated:

> The appellants raise the jurisdictional argument as if it somehow negates or excuses their failure to obtain a stay. It does not. This appeal is moot because [the appellants] failed to obtain a stay, so we cannot reach the question of whether the bankruptcy court had jurisdiction to order and approve the sale. . . . The bankruptcy court made the determination that it had jurisdiction; an issue which it had jurisdiction to decide. . . . That decision stands unless it is appealed properly . . . . **Despite the maxim that 'subject matter jurisdiction can be raised at any time,' valid procedural rules cannot be ignored just because the jurisdictional decision is being challenged rather than the decision on the merits**.

Id. at 998 (emphasis added).

23. FLS's attempt to undermine the Sale Order is in direct contravention of the principles underlying section 363(m). Interestingly, FLS's arguments completely side-step the impact that section 363(m) has on its requested relief. This Court has already made detailed findings of fact concerning the Buyers' status as good faith purchasers, including that "the Auction and the entire sale process were conducted in good faith within the meaning of section 363(m) of the Bankruptcy Code." Sale Order, ¶16. This Court additionally found that the "Buyer(s) and Debtors [had] not engaged in any conduct that would cause or permit the Agreement to be avoided pursuant to section 363(n) of the Bankruptcy Code." *See id.* Moreover, this Court determined that the "Debtors and the Buyer(s) are entitled to the protections of section 363(m) of the Bankruptcy Code" in the absence of a stay pending appeal. *See id*. Nothing in the Motion calls these findings into question. There are no allegations in the Motion that the Buyers were not good faith purchasers of the Receivables.

24. The Motion amounts to nothing more but an improper collateral attack on the validity of the Sale Order irrespective of section 363(m). As noted, the Sale Order was entered on May 28, 2010. Under Bankruptcy Rule 8002(a), a notice of appeal must be filed "with the clerk within 14 days of the date of the entry of the judgment." Here, FLS failed to file a timely appeal of the Sale Order during the 14 day appeal period. FLS similarly failed to seek a stay of the Sale Order under Bankruptcy Rule 8005.

25. FLS cannot avoid the bar of section 363(m) under the guise of a motion for relief under Rule 60(b) by belatedly raising defenses that could have been raised before the Sale was consummated. Further, FLS cannot blame its inaction on any of the Debtors. FLS was well advised of ECC's bankruptcy status, and had notice of the Auction, Sale and Sale Order yet decided to sit on whatever rights it may have held in the Receivables. Therefore, the Sale of the Receivables to the Buyers is conclusively valid and FLS's arguments are precluded as a matter of law.

II. There Are No Extraordinary Circumstances Justifying Relief From the Sale Order Under Rule 60(b).

26. Even if the principles of section 363(m) do not foreclose FLS's attempt to vacate or modify the terms of the Sale Order, the motion fails to satisfy the threshold for relief under Rule 60(b), as incorporated herein under Bankruptcy Rule 9024. "Our legal system has a strong interest in the finality of adjudication." *In re Swing*, 171 B.R. 813, 815 (Bankr. S.D. Ohio. 1994). Relief under Rule 60(b) is only permitted in "unusual and extreme situations where principles of equity mandate relief." *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001).

27. Courts are cautioned against vacating a prior sale order under Rule 60(b) absent evidence of fraud, mistake or a like infirmity. *See In re Chung King, Inc.*, 753 F.3d 547, 549-50

(7th Cir. 1985). A section 363 sale is an *in rem* proceeding that transfers property rights that are good against the world, not merely against parties who participated in the proceedings. *See Regions Bank v. J.R. Oil Co.*, LLC, 387 F.3d 721, 731 (8th Cir. 2004); *Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012, 1017 (7th Cir. 1988).

28. Both the Federal Rules and court decisions interpreting the availability of relief under Rule 60(b) emphasize that such relief must be sought "within a reasonable time." *See* Fed. R. Civ. P. 60(c). Although Rule 60(b) provides that relief must be sought "not later than one year after the judgment, order or proceeding was entered or taken," a party is not afforded an absolute year in which to seek relief under Rule 60(b). *See Swing*, 171 B.R. at 815 (citing 7 James W. Moore's Fed. Prac., ¶ 60.22[4] (2d ed. 1993)). The Sixth Circuit Court of Appeals has determined with respect to the "reasonable time" requirement that relief may be sought under Rule 60(b) when the motion is filed prior to the time for taking an appeal. *See id*. (citing *Barrier v. Beaver*, 712 F.2d 231 (6th Cir. 1983)). *Accord Wayne United Gas Co. v. Owens-Ill Glass Co.* 300 U.S. 131, 137 (1937) ("We think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action.").

29. Furthermore, courts within the Sixth Circuit have held that:

> It is settled that a 60(b) motion "cannot be used to avoid the consequences of a party's decision . . . to forego an appeal from an adverse ruling." (citations omitted). This admonition applies with particular force to a motion based on legal error. The interests of finality of judgments and judicial economy outweigh the value of giving a party a second bite of the apple by allowing a 60(b) motion, after the appeal period has run, on the same legal theory that would have been asserted on appeal.

See Swing, 171 B.R. at 815 (citing *Pierce v. United Mine Workers of America Welfare*, 770 F.2d 449, 451-52 (6th Cir. 1985)).

30. FLS primarily challenges the validity of the Sale Order under Federal Rules 60(b)(3), (b)(4) and (b)(6) by arguing that the Sale Order is void because this Court lacked jurisdiction over the Receivables and that the Debtors committed a fraud upon the Court by erroneously asserting an interest in the Receivables. However, the Committee maintains that these arguments lack merit.

31. In *Nanak Resorts, Inc. v. Haskins Gas Serv., Inc. (In re Rome Family)*, 2010 WL 1381093 (Bankr. D. Vt. Mar. 31, 2010), the bankruptcy court addressed an issue similar to the instant situation. In *Rome Family*, a defendant filed an adversary proceeding seeking a declaration that it owned certain property that was erroneously included in assets offered for sale under section 363. Although the debtor failed to specifically list the asset in the sale notice, the bankruptcy court determined that relief under Rule 60(b)(4) on account of an allegedly void judgment could not be afforded to the defendant. The court specifically noted that although the notice of sale did not alert the defendant to the possibility that the property at the heart of the dispute may have been a part of the bankruptcy sale, the notice "indubitably put the [d]efendant on notice that there would be a sale" and that parties-in-interest ought to have at least considered whether the property was subject to the sale in light of the nature of the sale. *See* 2010 WL 1381093, *5. Based on these facts, the bankruptcy court concluded that the notice was sufficient "to prompt a reasonable party to verify its understanding as to the ownership of [property] and inquire about the scope of the sale." *See id.* at *5. As stated by the bankruptcy court:

> The Defendant argues, in the alternative, that the notice received was so inadequate as to warrant it having relief under Rule 60(b)(6). It is significant to this Court's analysis that neither the parties nor the Court knew of the ownership misunderstanding at the time the property was being marketed for sale, and that legal ownership of the System could have been determined prior to consummation of the sale, if a party had raised the issue. The Defendant seeks relief from the

> Sale Order now though it was within its power, and within the scope of reasonable action, for the Defendant to have raised the question of the System's ownership as soon as it learned of the sale. The Court takes this into account as it weighs the Defendant's right to have received more conspicuous notice against the parade of negative consequences that would flow from granting the Defendant's Motion to Vacate.
>
> It is true that the Debtor had a responsibility to list all assets, and that if the Debtor was claiming an owner-ship interest in the System it should have declared that interest in the schedules and statement of financial affairs; it is also true that the Trustee had a duty to conspicuously state in the notice of sale whether the System was being sold. *In re Woodson*, 839 F.2d 610, 616 (9th Cir. 1988). However, the Defendant also had a duty to act in a commercially reasonable fashion when it received the notice of sale. While the Defendant may not have had an affirmative duty to conduct an independent investigation of what was being sold, failure to do so carried risks.
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> In balancing the equities, the Court considers the economic harm that will befall the Defendant if the Court leaves the sale intact, on the one hand, and the importance of maintaining the sanctity of final orders to the effective operation of the bankruptcy system and the goal of maximizing distributions to creditors, on the other. (citation omitted). As Judge Posner so eloquently put it, "[u]nless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankruptcy firms-and the principal losers (pun intended) will be unsecured creditors." *Met-L-Wood Corp*., 861 F.2d at 1019. As in that case, the moving party here has been sedulous in its efforts to remedy the injustice it perceives to have been wrought by this sale.
>
> In exercising its judicial discretion, the Court "must balance the necessity of liberally construing Rule 60(b) so that final orders reflect the true merits of a case and the need for preserving the finality of judgments or orders." *Id*. (citing Wright & Miller, Federal Practice and Procedure: Civil § 2852. The presumption must be in favor of finality. The party seeking Rule 60(b) relief must demonstrate not only "a factual basis to support relief but also that the harm to the movant truly outweighs the necessity for finality." *Id*. at 619. The Defendant has had its day in court to present its case and has neither rebutted that presumption in general nor shown that the harm it would suffer under the facts and circumstances of this case outweighs the need to preserve the finality of the Sale Order.

2010 WL 1381093, *6.

32. It cannot be disputed that FLS had notice of the bankruptcy case, as well as the Auction and Sale, prior to their occurrence. FLS received reasonable and adequate notice of each step of the sale process and could have objected to the Sale and asked this Court to

recognize its alleged claim. FLS could have contacted the Debtors to determine if the Receivables were a part of the Assets being sold but instead elected to forego these numerous opportunities to air its grievances.

33. Further, the Motion is untimely. The Sales closed on June 2, 2010. Having received notice of the Auction, Sale and Sale Order, FLS had sufficient time to have its claimed redressed by this Court before the Buyers' rights in the Receivables vested based on their status as good faith purchasers under section 363(m). Any modification or vacation of the Sale Order at this late date would be to the detriment of the Debtors' creditors, and indeed, would wreak havoc on the Debtors' and the Committee's continuing efforts to orderly liquidate these estates and bring these chapter 11 cases to a close. FLS should not be allowed to come into this Court with unclean hands and upend the Debtors' bankruptcy cases merely because it decided not to press its claim within a timely manner.

34. For the foregoing reasons, and as set forth in the Debtors' Objection, the relief requested in the Motion should be denied in its entirety.

Date: September 15, 2010

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF SCHWAB INDUSTRIES, INC., *et al.*

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