

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

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In re : Case No. 10-60702
 :
 : Joint Administration Pending
SCHWAB INDUSTRIES, INC., *ET AL.*, :
 :
 : Chapter 11
Debtors. :
 : Judge Russ Kendig
-----X

**OBJECTION OF KEYBANK NATIONAL ASSOCIATION,
AS ADMINISTRATIVE AGENT FOR THE LENDERS,
TO 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**

KeyBank National Association, for itself as a secured lender, and as Administrative Agent (the "Agent") for secured lenders The Huntington National Bank and Bank of America, N.A. (collectively with KeyBank National Association, the "Lenders"), hereby objects (the "Objection") to the *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* (the "Motion to Vacate") and *Memorandum in Support* thereof (the "Memorandum in Support").

For and as its Objection, the Agent respectfully states the following:

SUMMARY OF ARGUMENT

1. In its Motion to Vacate, FLSmidth Inc. ("FLS") has asked this Court to grant its request for extraordinary relief – the entry of an order vacating the *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 "Sale Order"). To maintain proper perspective, it is worthwhile to note that FLS is not seeking to vacate a default judgment, but rather a critical and prominent order entered by the Court only after expansive notice, extensive negotiations and the conclusion of a thorough and comprehensive evidentiary hearing. In stark contrast to the astounding breadth and scope of the relief sought by FLS – the unwinding of fully consummated sale transactions upon which hundreds of creditors and parties in interest relied – the facts upon which the Motion to Vacate is premised are conspicuously scant in number, anemic in character and fall well short of the exceptional circumstances necessary to be awarded such relief.

2. With respect to evidence bearing on the answer to the single determinative question – whether non-Debtor assets were conveyed to OldCastle Materials, Inc. ("OldCastle") pursuant to the Sale Order – FLS principally relies upon a misstatement regarding the ownership of certain accounts receivable of Debtor Eastern Cement Corporation ("ECC") allegedly made by counsel to the Debtors during a conversation with counsel to FLS concerning the failed payment of obligations owed to FLS by Eastern Portland Cement Corporation ("EPC") and Debtor ECC under a settlement agreement with FLS. Motion to Vacate, ¶ 26. As noted in the Motion to

Vacate, Debtors' counsel subsequently addressed the misunderstanding and made clear to counsel to FLS that the accounts receivable at issue belonged to Debtor ECC, were subject to the Agent's security interest and were sold to OldCastle pursuant to the Sale Order. Motion to Vacate, ¶ 32. Despite these and further unequivocal representations of Debtors' counsel, FLS elected to use the original miscommunication as the principal basis for seeking to unwind the sale of substantially all of the Debtors' assets to OldCastle and completely disrupt and undermine the well-settled expectations of the Debtors' creditors and other parties in interest. In the context of a motion seeking to vacate an order of the Court, a misunderstanding such as this is woefully insufficient to meet the burden of proof for establishing the existence of exceptional circumstances warranting this form of extraordinary relief. Moreover, as set forth herein, FLS will not be able to satisfy this heavy burden given that all of the relevant facts and circumstances lead to the inescapable conclusion that all of the assets sold to OldCaste in accordance with the Sale Order, including the accounts receivable in question, belonged to the Debtors.

3. In further support of the Motion to Vacate, FLS maintains that Debtor ECC used non-Debtor EPC as a mere instrumentality such that EPC was its alter ego and, therefore, under the doctrine of veil piercing Debtor ECC is liable for the obligations incurred by non-Debtor EPC. Motion to Vacate, ¶ 11; Memorandum in Support, P. 3. As explained below, however, even if this Court were to conclude that the facts and circumstances concerning the relationship between Debtor ECC and non-Debtor EPC lead to a finding that EPC was Debtor ECC's alter ego, the legal result of such a finding would be to disregard their corporate separateness and treat them as a single entity. In this situation, the domineering and controlling parent corporation and sole shareholder, Debtor ECC, if it did in fact use non-Debtor EPC as its mere instrumentality, would be the surviving and recognizable legal entity. As such, any assets of non-Debtor EPC as alter ego would be considered the assets of Debtor EPC as dominating parent corporation. By

virtue of parent corporation Debtor ECC's bankruptcy filing, the property of subsidiary and alter ego non-Debtor EPC would constitute property of Debtor ECC's bankruptcy estate. Thus, there is simply no set of facts or legal theories that provide adequate grounds for granting FLS the extraordinary form of relief requested by the Motion to Vacate and it should be denied accordingly.

BACKGROUND

4. On February 28, 2010 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") and thereafter conducted a sale process pursuant to section 363 of the Bankruptcy Code and bidding procedures approved by this Court.

5. On March 9, 2010, the office of the United States Trustee appointed an official committee of unsecured creditors (the "Committee") to represent the interests of the Debtors' unsecured creditors in the Chapter 11 Cases.

6. As set forth in the Sale Order, the sale process culminated in the sale of substantially all of the Debtors' assets, including real and personal property of Debtor ECC, to OldCastle and Resource Land Holdings, LLC in accordance with the specific terms and conditions of the Sale Order. The Debtors are continuing to administer the Chapter 11 Cases as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

7. Prior to the initiation of the Chapter 11 Cases, the Debtors became indebted to, and granted certain security interests to, the Agent and the Secured Lenders pursuant to that certain Amended and Restated Credit Agreement (as amended, restated or otherwise modified, from time to time, the "Pre-Petition Credit Agreement"), dated as of October 18, 2007, by and among the Debtors, the Agent and the Secured Lenders, and all collateral, security, pledge and ancillary documents executed in connection therewith, including, without limitation, that certain

Security Agreement (the "Security Agreement"), dated as of October 18, 2007, by and among the Debtors and the Agent, the Loan Documents and Related Writings (as such terms are defined in the Pre-Petition Credit Agreement), all of which shall hereinafter be collectively referred to as the "Pre-Petition Loan Documents ").

8. As security for the payment and performance of the loans and other financial accommodations extended to the Debtors under the Pre-Petition Loan Documents, the Debtors granted to the Agent, for the benefit of the Secured Lenders, security interests, liens and mortgages in substantially all of their property and all proceeds thereof (collectively, the "Pre-Petition Collateral"). A copy of the Security Agreement evidencing the grant of such security interests is attached hereto as Exhibit A and incorporated herein.

9. The Agent duly perfected its security interests in and liens and mortgages upon the Pre-Petition Collateral by filing financing statements, recording mortgages, and taking certain other actions. A copy of the UCC-1 financing statement filed by the Agent to duly perfect its security interests in all of the personal property of Debtor ECC is attached hereto as Exhibit B. A detailed summary of the equipment, accounts receivable, other personal property and real property of Debtor ECC in which the Agent maintained a valid and enforceable first-priority security interest and that was sold to OldCastle pursuant to the Sale Order is contained in the Debtor ECC's Schedules and attached hereto as Exhibit C. In addition, a copy of the Amended and Restated Mortgage, Assignment of Rents, Security Agreement, Fixture Filing and Spreader Agreement filed by the Agent to record its mortgage on the leasehold interest of Debtor ECC in the deep water port terminal located in Manatee County, Florida where Debtor ECC conducted business operations is attached hereto as Exhibit D.

10. Based upon information made available to the Agent prior to and following the Petition Date, non-Debtor EPC did not employ any individuals, maintain any deposit accounts,

issue any checks or other payments, possess a federal tax identification number, file any federal or state tax returns during all times relevant to the Motion to Vacate or own or lease any real property, or conduct any business operations. *See* Debtors' consolidated federal tax returns for fiscal year 2008 attached hereto as Exhibit E; Draft Consolidated Audited Financial Statements and Other Financial Information for April 30, 2009 and 2008 attached hereto as Exhibit F; schedule of Debtor ECC's bank accounts attached hereto as Exhibit G; redacted w-2 forms issued by Debtor ECC to its employees attached hereto as Exhibit H; and checks issued by Debtor ECC to purchase materials attached hereto as Exhibit I.

11. On July 27, 2010, nearly two months following entry of the Sale Order, FLS filed the Motion to Vacate and Memorandum in Support seeking entry of an order vacating the Sale Order on grounds that the Debtors' allegedly sold assets of non-Debtor EPC to OldCastle pursuant to the Sale Order.

12. By this Objection and for the reasons that follow, the Agent submits that FLS has failed to present exceptional circumstances justifying the extraordinary relief available under Rule 60(b) of the Federal Rules of Civil Procedure as all relevant facts and circumstances clearly demonstrate that all of the assets sold to OldCastle pursuant to the Sale Order were property of the Debtors' bankruptcy estates.

LAW AND ARGUMENT

A. FLS HAS FAILED TO ESTABLISH EXCEPTIONAL CIRCUMSTANCES JUSTIFYING EXTRAORDINARY RELIEF UNDER FEDERAL RULE 60(B)

13. A motion pursuant to Rule 60(b) of the Federal Rules, made applicable to bankruptcy proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure, requires that the moving party establish "exceptional circumstances" to obtain the "extraordinary relief" the rule provides. *United States v. One Parcel of Property Located at Tracts 10 and 11 of*

Lakeview Heights, Canyon Lake, Comal Cty., Tex., 51 F.3d 117, 119 (8th Cir. 1995) (Rule 60(b) motion should be granted "only upon an adequate showing of exceptional circumstances"). In addition to the overarching requirement for the movant to prove the existence of exceptional circumstances applicable to Rule 60(b) generally, certain clauses of Rule 60(b) impose specific additional requirements based upon the particular grounds for relief respectively set forth therein. As detailed below, FLS has failed to meet its heavy burden of establishing exceptional circumstances justifying entry of an order vacating the Sale Order. Consequently, the Motion to Vacate should be denied in its entirety.

**FLS Has Failed to Present Clear and Convincing Evidence
that the Debtors' Made Misrepresentations or Engaged in Fraud**

14. To vacate an order based upon misrepresentations or fraud pursuant to Federal Rule 60(b)(3), the movant must establish the existence of the misrepresentations or fraud by clear and convincing evidence. *Di Vito v. Fidelity and Deposit Co. of Maryland*, 361 F.2d 936, 939 (7th Cir. 1966) ("conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support the belief do not serve to raise the issue of the existence of fraud, much less to carry the burden of resolving that issue"). As further clarified by this Court, the moving party seeking relief under Rule 60(b)(3) "must show that the other party engaged in 'deliberate or reckless behavior'". *In re Rupert*, 2007 Bankr. LEXIS, *4 (Bank. N.D. Ohio Feb. 8, 2007) [citation omitted].

15. Aside from the misstatement of Debtor's counsel concerning the accounts receivable of Debtor ECC and the nature of the relationship between Debtor ECC and non-Debtor EPC, which was fully corrected and addressed well in advance of the Motion to Vacate, there are no facts upon which FLS may rely to establish that the Debtors made any misrepresentations or fraudulent statements in connection with the marketing, sale or conveyance

of substantially all of their assets pursuant to the Sale Order. Numerous parties interested in the acquisition of the Debtor's assets completed extensive due diligence with the assistance of the Debtors' investment banker, Western Reserve Partners ("Western Reserve") and the Debtors' financial advisor, The Parkland Group ("Parkland"). All of these parties, including Western Reserve and Parkland, satisfied themselves that the real and personal property set forth on Debtor ECC's Schedules, including, among others, the accounts receivable at issue, did in fact belong to Debtor ECC. Moreover, notwithstanding the concerns expressed by FLS prior to the Petition Date that non-Debtor EPC was the alter ego of Debtor ECC, FLS never contacted the Debtors or filed any papers with this Court seeking clarification as to whether any of the assets on Debtor ECC's Schedules belonged to non-Debtor EPC. This is not surprising in light of the overwhelming evidence establishing that the accounts receivable and other assets belonged to Debtor ECC, including, without limitation, the fact that non-Debtor EPC did not own or lease any property, employ any persons, maintain any bank accounts, maintain any financing arrangement, file any tax returns or conduct any business operations. FLS has failed to present clear and convincing evidence that the Sale Order is the result of fraud or misrepresentations.

FLS has Failed to Present Evidence that the Court Lacked an Arguable Basis for Jurisdiction to Enter the Sale Order

16. A motion filed under Federal Rule 60(b)(4) seeking to vacate an order as void because of a jurisdictional defect may be granted if the movant can establish that the court that rendered the judgment lacked even an "arguable basis" for jurisdiction. *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) ("Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief for only the exceptional case in which the court that rendered the judgment lacked even an 'arguable basis' for jurisdiction.") citing *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657,

661 (1st Cir. 1990) ("[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and...only rare instances of a clear usurpation of power will render a judgment void.").

17. All of the relevant facts and circumstances establish that the personal and real property listed on Debtor ECC's schedules and sold to OldCastle in accordance with the Sale Order constitute property of Debtor ECC's bankruptcy estate. Debtor ECC generated the accounts receivable at issue by conducting business operations through its own employees at the deep water terminal port it leased from the Manatee County Port Authority, with funds borrowed from the Agent and Lenders. Debtor ECC's assets and liabilities as well as its profits and losses from these operations are set forth in the consolidated tax returns and consolidated financial statements attached hereto as Exhibits E and F. Furthermore, as explained below, even if any assets of non-Debtor EPC were conveyed to OldCastle, which was not the case, under the alter ego doctrine advanced by FLS any assets of subsidiary non-Debtor EPC would constitute property of parent corporation Debtor ECC's bankruptcy estate. Therefore, there can be no doubt that this Court had substantially more than an "arguable basis" for jurisdiction with respect to the Sale Order and FLS's request to have the Sale Order vacated as void under Rule 60(b)(4) is without merit.

Principles of Equity Mandate Denial of the Motion to Vacate the Sale Order

18. Only in rare instances in which relief under clauses (1)-(5) of Federal Rule 60(b) is unavailable may a movant seek to have an order vacated under the catch all provision of Rule 60(b)(6). *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1989) (Rule 60(b)(6) is applicable "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule."). In recognition of the broad and expansive nature of clauses (1)-(5) of Federal Rule 60(b), the Sixth Circuit has held that application of Federal Rule

60(b)(6) is reserved for "unusual and extreme situations where principles of equity *mandate* relief." *Id. See also, Lowe's Home Centers, Inc. v. LL&127, LLC*, 2005 U.S. Dist. LEXIS 30378, *3-4 (W.D. Mich. Nov. 17, 2005) ("Rule 60(b)(6) is available 'only to achieve substantial justice in exceptional or extraordinary circumstances.'") [citation omitted].

19. Relief under Rule 60(b)(6) is unavailable to FLS as a result of its reliance on precisely the same unfounded and unsupportable allegations upon which its request for relief under Rule 60(b)(3) and (4) are premised. Throughout the Motion to Vacate and Memorandum in Support, FLS repeatedly asserts that relief must be granted as a result of alleged misrepresentations of the Debtors concerning the ownership of the assets on Debtor ECC's Schedules, assets which FLS contends are not property of the estate or subject to the jurisdiction of this Court. If FLS could present clear and convincing evidence in support of these allegations, which it clearly will never be able to do given the overwhelming evidence to the contrary, exceptional circumstances under Rule 60(b)(3) or (4) might come into play. Such allegations, however, are not the proper basis for seeking relief under Rule 60(b)(6). Further, FLS was provided notice of the bankruptcy, Debtor ECC's Schedules and the sale and, as such, had ample opportunities to be heard and assert its rights in the Debtors' bankruptcy proceedings. Accordingly, FLS has failed to present compelling grounds – or for that matter, any grounds at all – for vacation of the Sale Order under Rule 60(b)(6).

B. IN THE EVENT THE COURT FINDS THAT NON-DEBTOR EPC IS THE ALTER EGO OF DEBTOR ECC, ANY ASSETS OF NON-DEBTOR EPC THAT MAY EXIST ARE DEEMED AS A MATTER OF LAW TO CONSTITUTE ASSETS OF DEBTOR ECC.

20. Under well-settled veil piercing jurisprudence, an aggrieved party may seek to pierce the subsidiary's corporate veil and hold the parent corporation liable where the parent corporation has dominated and controlled the subsidiary, such that the subsidiary is its alter ego and has no separate will or existence, for the purpose of perpetrating a fraud or other illegal act.

See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1121 (Fla. 1984). In such instances, because the parent and subsidiary have disregarded corporate separateness and operated as a single enterprise equitable principles allow the court to treat them as a single entity and cause the controlling parent to be responsible for all of the obligations incurred by the dominated subsidiary. As such, the creditors of the subsidiary are entitled to assert claims directly against the parent corporation.

21. In the event a parent corporation commences a bankruptcy proceeding, alter ego and veil piercing jurisprudence can have a significant impact on the administration of the parent corporation's bankruptcy estate. As observed in *F&C Services, Inc.*, "it is well established that property of the Debtor in the possession, custody and control of its alter ego comprises property of the estate at the commencement of the case." *F&C Services, Inc. v. Freehling*, 44 B.R. 863, 868 (Bank. S.D. Fla. 1984) citing 4A *Collier on Bankruptcy* para. 70.15 at 138-139 n.14 (14th ed. rev. 1978) (power of the Bankruptcy Court in the exercise of its equitable jurisdiction to disregard corporate entities where a corporation is no more than the alter ego of the bankrupt so as to treat the bankrupt's trustee as titleholder of the alter ego's property); *In re Crabtree*, 39 Bankr. 718 (Bank. E.D. Tenn. 1984) (bankruptcy court has the power to disregard separate corporate entities to reach assets to satisfy debts of the bankrupt corporation from assets of its non-debtor alter ego). *See also, In re Western World Funding, Inc.*, 52 B.R. 743, 783 (Bankr. D. Nev. 1985) ("Under the Nevada alter ego doctrine, the corporation has, in some sense, an equitable interest in the assets of its alter ego, because the *corporation and the alter ego are identical.*") [emphasis added.]; *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941) (holding property of alter ego was property of parent's bankruptcy estate).

22. In the Memorandum in Support, FLS states that "[w]hen, as here, a corporation is used (as ECC's [sic] position necessarily implies) as a mere instrumentality of another

corporation owning all or most of its stock, the former is considered the alter ego of the latter and the corporate veil will be pierced to hold the latter accountable for the debts and obligations of its instrumentality." Memorandum in Support, P. 3. Indeed, in the Motion to Vacate FLS states that during the course of the litigation with non-Debtor EPC it became aware of facts "indicating that ECC was using EASTERN PORTLAND as its alter ego" and "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." Motion to Vacate, ¶ 11. Further, FLS maintains through the foregoing assertions it was able to persuade Debtor ECC to execute the settlement agreement with FLS along with non-Debtor EPC. Motion to Vacate, ¶ 18. While FLS's theories and assertions in this regard do constitute grounds to hold Debtor ECC liable for debts and obligations incurred by non-Debtor EPC, including those owed to FLS, the ultimate consequence of such a finding would be that all of the assets of non-Debtor EPC would constitute property of Debtor ECC's bankruptcy estate.¹ Thus, even if non-Debtor EPC did in fact have assets, which the facts clearly reflect was never the case during all relevant times, all of those assets would be included as part of Debtor ECC's bankruptcy estate under the alter ego doctrine. Accordingly, the Motion to Vacate should be denied.

RESERVATION OF RIGHTS

23. Agent hereby expressly reserves the right to amend, supplement or otherwise modify the Objection and present additional facts, circumstances, legal authorities and other bases in opposition to the relief requested by FLS prior to the Court's final ruling upon the

¹ Due to the unintended consequences of the alter ego doctrine, FLS may attempt to retreat from this position. However, having premised its request for relief, in part, on the applicability of the alter ego doctrine, judicial estoppel precludes FLS from now "changing positions to meet the exigencies of the moment." See Memorandum in Support, P. 4 citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (Judicial estoppel operates to protect the integrity of the judicial process by stopping parties from deliberately changing positions to meet the exigencies of the moment).

Motion to Vacate.

WHEREFORE, the Agent respectfully requests: (i) that the Motion to Vacate be denied in its entirety; and (ii) that the Court grant to the Agent such other and further relief to which it may be justly entitled.

Respectfully submitted,

/s/ Alan R. Lepene

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ATTORNEYS FOR KEYBANK NATIONAL
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2010, a true and correct copy of the foregoing was served via the Court's ECF system upon those parties listed on the Electronic Mail Notice List and served via First Class Mail on the parties listed on the First Class Mail Notice List.

Electronic Mail Notice List

The following is the list of parties who were served electronically via the Court's CM/ECF system:

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