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

IN RE: **SCHWAB INDUSTRIES, INC., et al.**, Debtors.	CHAPTER 11 CASE NO. 10-60702 (Jointly Administered) JUDGE RUSS KENDIG

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

AND NOW comes moving party FLSMIDTH INC. ("FLS"), by and through its counsel, and hereby replies to the objections filed by Debtors, OldCastle Materials, Inc. ("OldCastle") and KeyBank National Association (acting as agent for lenders The Huntington National Bank and Bank of America) ("KeyBank"), as follows:

INTRODUCTON

Debtors did not deny any of the facts that FLS asserted and verified in its Motion. OldCastle simply joined in Debtors' objections and, likewise, did not place any of the facts in the Motion in controversy. Remarkably, KeyBank's objections are replete with unverified assertions of fact that were attributed to but never alleged by Debtors, and all such assertions, therefore, must be disregarded. Thus, there is no issue of fact that (i) Debtors included assets of non-debtor Eastern Portland Cement Corporation ("Eastern Portland") among the assets of debtor Eastern Cement ("ECC") that were sold under this Court's May 28, 2010 Order ("Sales Order"); (ii) this was done without prior notice to FLS or this Court; (iii) disclosure of the upstreaming of Eastern Portland's assets into ECC's assets was not made until after the Sales Order was issued and the closing date on the sale; and (iv) neither FLS nor this Court had any reason to know of the upstreaming prior to actual disclosure. On the basis of the uncontested facts of record, FLS' motion must be granted.

I. BY THEIR SILENCE, DEBTORS AND OLDCASTLE ADMIT ALL FACTS ALLEGED IN FLS' MOTION.

Debtors and OldCastle rest their objections entirely on the Schedules and other documents that Debtors filed before the Sales Order was issued, the Sales Order itself and FLS' "failure" to object to the sale until after the Sales Order was issued. Significantly, Debtors do not deny that (i) they included Eastern Portland's assets in the ECC's assets that were offered for sale, (ii) Eastern Portland's assets were, in fact, sold to OldCastle along with the Debtors' assets under the Sales Order, (iii) this was done without FLS' or this Court's knowledge, (iv) Debtors did not disclose to FLS that upstreaming had occurred until June 14, 2010 (which they confirmed on July 9, 2010), and (v) neither FLS nor this Court had any reason to know of or suspect that upstreaming had occurred prior to actual disclosure. OldCastle merely joins in the Debtors' Objections and likewise does not dispute any of the facts in FLS' Motion.

Indeed, if the Schedules filed by Debtors somehow placed FLS on notice of the upstreaming of Eastern Portland's assets, it stands to reason that OldCastle also was on notice. OldCastle, however, avers no such thing in its Objections and for good reasons. The very Schedules on which Debtors and OldCastle rely said not a single word about Eastern Portland's assets and provided no information that would have led OldCastle (let alone FLS) to surmise or conclude that the Debtors' estates included anything more than assets that were owned by the Debtors themselves. Surely, if OldCastle saw anything during its presumably extensive due diligence inspection of Debtors' records suggesting that Eastern Portland's assets were included in the Debtors' estates, it would have prudently inquired in order to avoid purchasing property which it knew or had reason to know belonged to a non-debtor. Thus, OldCastle seeks to impute a greater degree of awareness to FLS than OldCastle claims for itself, and that argument simply cannot stand.

The bona fides of FLS' Motion stand uncontroverted, and the record before this Court amply demonstrates that grounds exist under Bankruptcy Rule 9024 to vacate the Sales Order, direct that an accounting be done to determine the identity and extent of the Eastern Portland assets that were sold under the Sales order and to provide all further relief requested by FLS.

II. THE UNVERIFED ALLEGATIONS IN KEYBANK'S OBJECTIONS ARE ATTRIBUTED TO AND CONTRADICTED BY DEBTORS AND CANNOT BE CONSIDERED.

KeyBank's Objections are remarkable for asserting unverified facts that are attributed to the Debtors but which the Debtors themselves not only never alleged but contradicted:

- At Paragraph 2, Pages 2 and 3 of its objections, KeyBank asserted that "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" and that "[a]s 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". It further asserted at Paragraph 15, Page 7, that the so-called "misstatement of Debtors' counsel … was fully corrected and addressed well in advance of the Motion to Vacate." There are several problems with KeyBank's assertions. First, there was no mistake or misstatement, and neither Debtors nor their attorneys ever corrected or retracted Messrs. Peer's or Oscar's statements to FLS' in-house counsel that Eastern Portland's receivables were included among the ECC assets that were sold to OldCastle. (Supplemental Affidavit of Mark F. Brancato, Paragraph 1). Second, KeyBank's assertions are unverified and unsupported in any way by the very persons to whom the statements were attributed- i.e., Debtors' counsel. Third, the Motion says nothing about a 'misunderstanding" or a "correction". To the contrary, the Motion states that Debtors' counsel twice stated and confirmed (once on June 14, 2010 and again on July 9, 2010) that Eastern Portland's receivables were included in the sale of assets because Eastern Portland was ECC's "dba". (See, Motion, Paragraphs 26 and 32).

- KeyBank claimed at Paragraph 10, Pages 5 and 6 of its Objections that Eastern Portland "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." Once again, it is telling that Debtors said nothing of the kind and that KeyBank produced no testimony, documents, affidavits or other sources of fact to support its unverified assertions. For those reasons alone, the assertions must be disregarded. To be sure, the documents, deposition testimony and other facts asserted in and appended to the Motion show that Eastern Portland obviously

conducted business, as, among other things, it signed a contract with FLS and sued FLS for allegedly breaching that contract and it issued and signed the Promissory Note that was co-signed by ECC. A Google search of "Eastern Portland Cement Corporation" uncovered a bill of lading stating that Eastern Portland was the consignee of a shipment of cement that was due for arrival on March 17, 2007. (Supplemental Affidavit of Mark F. Brancato, Exhibit B). Significantly, Eastern Portland on at least one occasion appears to have invoiced for payments of invoices that were due and directed that payment be made to ECC. (Supplemental Affidavit of Mark F. Brancato, Exhibit C.) It is difficult to fathom how those documents are not indicative of Eastern Portland conducting business operations, and that Eastern Portland did have accounts receivable of its own. Moreover, Eastern Portland's Vice Chairman, David Schwab, testified during his deposition in the FL Litigation that Eastern Portland "sells cement", it had a sales force, it had bank accounts, it had employees, and it had past due accounts on which it endeavored to collect. (Supplemental Affidavit of Mark F. Brancato, Exhibit A, Pages 28- 29, 36-38, 44, 46-47, 49).

III. ALTER EGO IS NOT THE BASIS OF FLS' MOTION TO VACATE.

Consistent with its misapprehension and mischaracterization of the facts and FLS' Motion, KeyBank argues in its Objection that FLS predicates its Motion and entitlement to relief on the alter ego doctrine. Even a cursory review of the Motion shows that is simply incorrect. Contrary to KeyBank's contention, FLS' Motion asserts copious facts demonstrating that State of Florida records show Eastern Portland and ECC are separate and distinct companies; Eastern Portland held itself out as a separate operating company capable of contracting and suing in its own name; and that ECC consistently and forcefully asserted in the FL Litigation that Eastern Portland was a separate and distinct company and ECC was not responsible for Eastern Portland's defaults. FLS, furthermore, expressly argued at Paragraph 34 of its Motion that,

because of the positions that ECC took before the MD FL in the FL Litigation, it must be "estopped from asserting before this Court that (i) it owned the EASTERN PORTLAND assets that were sold under this Court's May 28, 2010 Order or (ii) any of the Key Bank financing arrangements in these proceedings included and encumbered EASTERN PORTLAND's assets." In other words, FLS maintains that ECC should be estopped from asserting that it treated Eastern Portland as an alter ego.

IV. THE INADEVERTENT AUTHORIZTION OF THE SALE OF A NON-DEBTOR'S ASSETS IS GROUNDS FOR VACATING THE SALES ORDER.

KeyBank is in error in arguing in its Objection that orders and judgments can be vacated under FRCP 60(b) for jurisdictional defects only in cases in which the judgment lacked even an "arguable basis" for jurisdiction. Unlike the matter before this Court, the issues in the cases cited by KeyBank are distinguishable, as they dealt with circumstances in which the moving party was apprised of the contents of the subject motion - consenting to the order (United States v. Boch Oldsmobile), or failing to object (United States Aid Funds, Inc., v. Espinoza). Neither of those circumstances exists here.

Closer on point is the analysis of the Bankruptcy Court for the Northern District of Texas in *In re: Murchison*, 54 B.R. 721. (Bank N.D. TX 1985). In that case, the Bankruptcy Court authorized the sale of a non-debtor's assets to a third person. The debtor corporations had tenuous connections to the non-debtor. Murchison, one of the debtors, had various stock holdings in other entities, some of them also debtors, which then owned stock in a chain of other companies, including the non-debtor seller. The purchaser was concerned that the debtors' creditors might later assert a claim to the assets, and it wanted the sale to be "free and clear" of all liens. After the sale was consummated, Riggs Bank filed a motion to vacate the sale for

jurisdictional issues. The court granted the motion and vacated its order, holding that it lacked jurisdiction to approve the sale.

The court said "the specific issue – the most significant issue – is the threshold question of whether this court has jurisdiction over the sale of property owned by a non-debtor entity in which a debtor has a remote and fractional partnership or shareholder interest." Id at 724. The court went on to say that "The question becomes whether this, a court of limited jurisdiction, should extend itself beyond congressionally defined parameters for no reason other than to accommodate and placate a purchaser of property, or title company involved in a transaction, whose misperception of the effect and consequences of bankruptcy on a proposed sale produces an uncomfortable degree of anxiety and insecurity." Id. The court concluded that even if it assumed "strictly arguendo" that it could ignore the intervening corporations, "it is clear to this court it would nonetheless exceed its jurisdiction if it were to approve a sale of property held by [the non-debtor entity]." Id. Also, see, *In re: Manning*, 37 B.R. 755; *In re: Dreske*, 25 B.R. 268.

Especially pertinent to the facts of this case, the court emphasized, "Even where, as here, one hundred percent of a subsidiary stock is owned by the shareholder in question, that shareholder had not acquired, and has no property interest in, specific assets of the subsidiary." Id at 728. Thus, the court asked, "How, then, can it be said that the sale of an asset by a corporation is imputed to the shareholder? To the extent the property at issue here was an asset of [the non-debtor], how can it be said that the property was an asset of [the debtor], a mere shareholder? The clear answer is that the property in question was not an asset of either debtor. Consequently, this court had no authority to approve the sale. This court is and should be completely indifferent to the affairs of non-debtors involving assets which are not property of the estate." Id. The court concluded, "One may not bring a proceeding in a bankruptcy court to

dispose of assets which are not property of any estate which are being sold and purchased by non-debtors, simply because the selling entity is a corporate relative to the debtor." Id.

To the extent that all the objecting parties argue that FLS was too late in asserting its rights, they are in error. Motions under FRCP 60(b)(4) to vacate an order for lack of jurisdiction are not subject to time limitations imposed on motions under the other provisions of 60(b). "A void judgment can acquire no validity because of laches on the part of one who applies for relief from it." *11 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane,* Federal Practice and Procedures § 2862 at 324-325 (2nd Ed. 1995). A Rule 60(b)(4) motion "constitutes such exceptional circumstances as to relieve litigants from the normal standards of time when it is associated with the rule." *New York Life Insurance Company v. Brown*, 84 F.3d 137, 142-43 (5th Cir. 1996).

In *Jackson v. Fie Corporation*, 302 F.3d 515 (5th Cir. 2002), the Fifth Circuit permitted vacation of a judgment under Rule 60(b)(4) two years after a default judgment was taken. The court reasoned, "This contention [that waiting two years to file a motion is improper] is counter to logic, which compels the conclusion that – at least absent extraordinary circumstances - the mere passage of time cannot convert an absolutely void judgment into a valid one." Id. at 523. See, also, *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, 649 (5th Cir., 1988) ("This is one reason for our having held that there is no time limit on Rule 60(b)(4) motions and that the doctrine of laches has no effect"); *Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998).

In this case, even if the Court sees fit to hold FLS to a "reasonable time" to file its Motion, FLS filed its Motion a little over a month after it first learned that assets of Eastern Portland may have been sold through these proceedings. This was after FLS twice gave Debtors

an opportunity to notify this Court that it had inadvertently authorized the sale of those assets. Therefore, it cannot be argued that FLS's Motion is untimely.

V. CONCLUSION

For the foregoing reasons, Movant's Motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory D. Swope, hereby certify that the foregoing Reply of FLSMIDTH, Inc. to the Objections, was electronically transmitted on or about September 30, 2010, via the Court's CM/ECF system to the following who are listed on the Court's Electronic Mail Notice List:

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