

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

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In re: : Chapter 11
 :
SCHWAB INDUSTRIES, INC., *et al.*, : Case no. 10-60702
 : (Jointly Administered)
 :
Debtors. :
 : Judge Russ Kendig
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OBJECTION OF ALLEN CONCRETE & MASONRY, INC. TO (A) DEBTORS' 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 [DOCKET NO. 241], AND (B) DEBTORS' MOTION FOR ORDER (1) AUTHORIZING THE AUCTION SALES OF CERTAIN NON-CORE ASSETS, FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES; (2) WAIVING THE FOURTEEN-DAY STAY PERIOD PROVIDED BY BANKRUPTCY RULE 6004(H); AND (3) GRANTING RELATED RELIEF [DOCKET NO. 242]

Allen Concrete & Masonry, Inc. ("Allen Concrete"), by and through its undersigned counsel, hereby objects to (a) the *Debtors' 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 [Docket No. 241], and (b) to Debtors' Motion for Order (1) Authorizing the Auction Sales of Certain Non-Core Assets, Free and Clear of Liens, Claims, Interests and Encumbrances; (2) Waiving the Fourteen-Day Stay Period Provided by Bankruptcy Rule 6004(H); and Granting Related Relief [Docket No. 242] (collectively, the "Sale Motions"). In support of this Objection to the Sales Motions, Allen Concrete states as follows:¹

BACKGROUND

1. Allen Concrete and Debtor Schwab Ready-Mix, Inc. are each fifty percent (50%) owners in a Florida general partnership (the "Partnership") known as Allen Concrete Pumping ("ACP"), which provides concrete pumping services to concrete subcontractors. A copy of the Partnership Agreement for Concrete Pumping (the "Partnership Agreement") is attached hereto as Exhibit A.

2. In connection with certain of Debtors' obligations pursuant to the Partnership Agreement, Allen Concrete has filed a secured claim against Debtor Schwab Ready-Mix, Inc. in the amount of \$300,772.50, plus undetermined amounts and additional obligations. [Claim No. 16.]

3. Also, in connection with certain of Debtors' obligations pursuant to the Partnership Agreement, ACP filed a secured claim against Debtor Schwab Ready-Mix, Inc. in

¹ Although Debtors have filed their *Notice of Suspension of Auction Sale of Non-Core Personal Property Assets Identified as Excess Machinery and Equipment Through Cincinnati Industrial Auctioneers on or Around May 20, 2010 [Docket No. 399]*, the non-core asset sale motion remains pending before the Court and the Debtors previously reserved the right to re-designate assets as core or non-core assets. Accordingly, in order to protect and preserve all rights, Allen Concrete has set forth herein its Objection to both Sale Motions in an abundance of auction.

the amount of \$394,729.00, plus undetermined amounts and additional obligations. [Claim No. 15.]

OBJECTIONS TO SALE OF DEBTORS' INTERESTS IN ACP

4. Pursuant to the Sale Motions, the Debtors seek to sell substantially all of their assets (including Debtor Schwab Ready-Mix, Inc.'s fifty percent (50%) partnership interest in ACP) to a prospective bidder or bidders.

5. Previously, Allen Concrete filed its *Objection to Debtors' Motion for a Revised Bidding Procedures Order Approving (1) Executed Stalking Horse Asset Purchase Agreement; (2) Proposed Break-Up Fee and Expense Reimbursement; (3) Revised Bidding Procedures; (4) the Form and Manner of Service of Notice of the Sale Hearing and Auction; and (5) the Form and Manner of Service of Notice of the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* [Docket No. 355] and *Supplement to Debtors' Motion for a Revised Bidding Procedures Order* [Docket No. 385].

6. In the *Agreed Order Approving Motion for a Revised Bidding Procedures Order Approving (1) Executed Stalking Horse Asset Purchase Agreement; (2) Proposed Break-up Fee and Expense Reimbursement; (3) Revised Bidding Procedures; (4) the Form and Manner of Service of Notice of the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Which Revises Order (1) Approving Auction and Bidding Procedures and an Auction Date; (2) Scheduling Date and Time for Sale Hearing; (3) Approving the Form and Manner of Service of Notice of the Sale Hearing and Auction Pursuant to Bankruptcy Rules 2002, 6004 and 6006; (4) Approving the Form and Manner of Service of Notice of the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (5) Granting Related Relief* [Docket No. 408] (the "Agreed Procedures Order"), the objections filed

by Allen Concrete to the bidding procedures have been preserved and adjourned to the sale hearing. *See* Agreed Procedures Order, ¶ 9, p. 5.

7. Allen Concrete objects to the Sale Motions to the extent resulting in the sale or transfer (or other disposition) of the Debtors' fifty percent (50%) ownership interest in ACP. Specifically, as further provided below, Allen Concrete objects to the Sale Motions (a) to the extent the applicable bidding procedures as implemented do not honor Allen Concrete's and ACP's right of first refusal to purchase, (b) unless the consent of Allen Concrete is obtained prior to any sale of Debtor Schwab Ready-Mix, Inc.'s partnership interest in ACP, (c) because the Partnership Agreement constitutes an executory contract which must be assumed and assigned to effect the transfer of the Debtors' interests in ACP, (d) to the extent the cure amount due pursuant to the Partnership Agreement is not satisfied, and (e) to the extent the secured claims of Allen Concrete and ACP and the resulting possessory liens are not recognized and satisfied upon sale.

(a) Bidding Procedures as Implemented Must Honor Right of First Refusal

8. The Partnership Agreement affords Allen Concrete and ACP with the right of first refusal to purchase Debtor Schwab Ready-Mix, Inc.'s partnership interest in ACP. Specifically, Section 20 of the Partnership Agreement provides in relevant part as follows:

Disposition of Interest of Partner. A Partner may dispose of his Partnership interest by means of sale, transfer, exchange or gift to any Partner. However, a Partner may not sell all or any part of his Partnership interest to any other person who is not already a Partner, except on the following conditions:

- 20.1. The interest shall first be offered in writing to the Partnership for redemption at the price and on the terms on which it is proposed to be sold, hereafter called "the price" and "the terms," and the Partnership shall have a period of thirty (30) days to accept or reject the offer in whole or in

part, at the price (prorated, if the offer is accepted in part) and on the terms.

- 20.2 If the offer to redeem is rejected in whole or in part by the Partnership, the interest, or the remaining interest, of the Partner shall next be offered for sale in writing to the other Partner or Partners for a period of twenty (20) days next following expiration of the thirty (30) day period. The offer to sell to the other Partner or Partners shall be prorated in accordance with the ratio of the Partnership percentages of each Partner to the total Partnership percentages of all the Partners other than the one making the offer, on the terms and at prices (as to each offeree) determined by prorating the price. If not all the remaining interest is disposed of under the apportionment, each Partner desiring to purchase a portion of the remaining interest shall be entitled to purchase the “portion” that remains undisposed of as his Partnership percentage bears to the Partnership percentages of all other Partners desiring to purchase portions of the remaining interest.
- 20.3 If none or only a portion of the interest of the Partner desiring to sell the same is redeemed or purchased in accordance with Paragraphs 20.1. and 20.2., then the Partner may sell his interest or the remainder of it to a third person or third persons during the three (3) month period following the expiration of the twenty (20) day period referred to in Paragraph 20.2., but at a price not lower than “the price” (prorated if only a portion), and on terms no more favorable than “the terms.” After the expiration of the three (3) month period, no portion of the interest shall be sold without first being reoffered to the Partnership and the remaining Partners in accordance with Paragraphs 20.1. and 20.2.

Partnership Agreement, § 20.

9. Courts have consistently held that provisions in a partnership agreement providing a right of first refusal to purchase interests or other assets remain enforceable even when one of the parties to the agreement is a debtor in bankruptcy. *See generally, Northrop Grumman Tech. Servs., Inc. v. Shaw Group Inc. (In re The IT Group, Inc.)*, 302 B.R. 483, 488 (D. Del. 2003); *In re Six*, 190 B.R. 958, 961 (Bankr. M.D. Fla. 1995); *In re Todd*, 118 B.R. 432, 435 (Bankr. D.S.C.

1989) (stating that the court should not sell the property without honoring the first right of refusal since to do so “would violate one of the fundamental precepts of bankruptcy law, that a trustee should not have rights to property which the debtor does not have”); *In re Baquet*, 61 B.R. 495, 500 (Bankr. D. Mont. 1986).

10. To the extent that the Sale Motions seek to sell the Debtors’ interests in ACP, any resulting sales cannot be approved unless the bidding procedures as implemented recognize and afford ACP and Allen Concrete the right of first refusal to purchase Debtor Schwab Ready-Mix, Inc.’s interest in ACP, as established pursuant to the terms of the Partnership Agreement.²

(b) Consent of Allen Concrete Required

11. Section 16 of the Partnership Agreement provides that no partner, without the consent of all of the other partners, shall “[s]ell, assign, pledge, or mortgage his interest in the Partnership.” Partnership Agreement, § 16.5.

12. The Debtor Schwab Ready-Mix, Inc. is bound by the terms of the Partnership Agreement. As such, to the extent that the Sale Motions seek to sell the Debtors’ interests in ACP, the Debtors cannot do so without obtaining the consent of Allen Concrete. Allen Concrete has not provided its consent to the sale of the Debtors’ interest in ACP.

13. The Partnership Agreement relates to the personal services of all partners involved, with Allen Concrete constructing buildings and Debtor Schwab Ready-Mix, Inc. providing ready-mix concrete. Given the long standing Partnership since 1989 and the reliance of Allen Concrete on the personal services of Debtor Schwab Ready-Mix, Inc., Allen Concrete cannot be forced to accept any new partner absent Allen Concrete’s consent, as required pursuant

² Prior to exercising their first rights of refusal, there must be a specific sale value attributable to the fifty percent (50%) partnership interest of the Debtors in ACP, which value is necessary and required to be communicated to Allen Concrete and ACP in order for Allen Concrete and ACP to properly evaluate whether to exercise any right of first refusal to purchase.

to the Partnership Agreement and based on the provisions of Bankruptcy Code Section 365 dealing with personal service contracts.

(c) Partnership Agreement Constitutes an Executory Contract

14. The Partnership Agreement constitutes an executory contract under Section 365 of the Bankruptcy Code.³ In determining whether a contract is executory, the Sixth Circuit Court of Appeals has applied the “functional approach.” *In re Sentle Trucking Corp.*, 93 B.R. 551, 557 (Bankr. N.D. Ohio 1988); *In re Magness*, 972 F.2d 689, 694 (6th Cir. 1992). The functional approach involves a court looking backwards to see if there are material unfulfilled obligations extending into the future, and then determining if the rejection of the agreement might reasonably benefit the bankrupt debtor’s estate. *Phar-Mor, Inc. v. Strouss Bldg. Associates*, 204 B.R. 948, 954 (N.D. Ohio 1997). Numerous courts have found partnership agreements to be executory. *See generally, In re LeRoux*, 167 B.R. 318, 320 (Bankr. D. Mass. 1994); *In re Cardinal Indus., Inc.*, 116 B.R. 964, 973 (Bankr. S.D. Ohio 1990); *In re Heafitz*, 85 B.R. 274, 282-284 (Bankr. S.D.N.Y. 1988); *In re Newlin*, 370 B.R. 870 (Bankr. M.D. Ga. 2007).

15. In this case, the Partnership Agreement contains material unfulfilled obligations extending into the future for the Debtor Schwab Ready-Mix, Inc., and the rejection of the Partnership Agreement would confer a benefit upon the Debtors’ bankruptcy estate. This is evident by the Debtors’ fifty percent (50%) obligation to pay the outstanding partnership liabilities as more fully set forth in the Partnership Agreement.

³ Despite this fact, the Debtors have failed to include the Partnership Agreement in the Debtors’ *Notice of (I) Potential Assumption and Assignment of Executory Contracts (II) Requirement to Provide Information as to Cure Amounts, and (III) Process for Determining Cure Amounts with Respect to Executory Contracts to be Assumed and Assigned* [Docket No. 410] (the “Notice”), and Allen Concrete hereby objects to the Notice for the reasons stated herein.

(d) Cure Amount Must be Satisfied

16. Any cure obligations due under the Partnership Agreement must be satisfied prior to, or upon assumption of the Partnership Agreement. To the extent that the Sale Motions seek to sell the Debtors' interests in ACP, the Partnership Agreement for ACP must be first assumed by the Debtors and then assigned to the prospective purchaser in order to allow for the transfer of the fifty percent (50%) interest of Debtor Schwab Ready-Mix, Inc. in ACP.

17. Any party purchasing the Debtors' interests in ACP must then immediately pay inter-partnership loans and partnership advances in an amount of approximately \$291,468.50 through *June 30, 2010*, and must also assume fifty percent (50%) of all outstanding partnership liabilities (payable on a going-forward basis when due), in an additional amount of approximately \$46,183.65,⁴ for a total "cure amount" of **\$337,651.65** ("Allen Concrete Claim")⁵ pursuant to Bankruptcy Code Section 365.

(e) Secured Claims and Resulting Possessory Liens of Allen Concrete and ACP Must be Recognized and Satisfied Upon Sale

18. The Allen Concrete Claim also constitutes secured claims of ACP and Allen Concrete against the Debtors (irrespective of the treatment of the Partnership Agreement as an executory contract) based on the terms of the Partnership Agreement, applicable Florida law concerning general partnerships, the possessory liens of ACP and Allen Concrete, and the doctrines of recoupment and setoff as further set forth herein.

⁴ The amount of the outstanding liabilities will decrease, and the amount of inter-partnership loans and partnership advances will increase, to the extent Allen Concrete Partnership is required to pay certain liabilities in coming weeks.

⁵ Allen Concrete reserves all rights to modify and revise the amount of the Allen Concrete Claim, which will be *reduced* by approximately \$26,318.80 if the closing on the sale of the Debtors' interests in ACP occurs on or before May 31, 2010.

19. The Allen Concrete Claim constitutes a secured claim of Allen Concrete and ACP and otherwise results in possessory liens against the Debtors' share of the assets of ACP pursuant to application of the terms of the Partnership Agreement. *See* Partnership Agreement, §§ 9, 10, 12, 18 and 19. The secured obligations owing to Allen Concrete and ACP are further confirmed by applicable Florida law concerning partnerships. *See* Chapter 620 of the Florida Statutes. Florida courts have otherwise recognized the validity of possessory liens. *See, e.g., Seymour v. Adams*, 638 So. 2d (Fla. 5th DCA 1994).

20. The Sale Motions must recognize Allen Concrete's and ACP's right to credit bid the amount of the Allen Concrete Claim in accordance with Bankruptcy Code Section 363(k) and that the sale proceeds attributable to the Debtors' interests in ACP will be held in a separate escrow account pending resolution of the secured claims of Allen Concrete and ACP thereto.

21. Allen Concrete and ACP have a right of setoff and recoupment for the Allen Concrete Claim. Section 553 of the Bankruptcy Code preserves any rights of setoff that may exist between a creditor and debtor. *See also Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995) (holding that 11 U.S.C. § 553(a) "provides that, with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy"). This right of setoff is intended to avoid, "the absurdity of making A pay B when B owes A." *Id.* at 18 (1995) (*quoting Studley v. Boylston Nat. Bank*, 229 U.S. 523, 528 (1913)). "The right of setoff allows parties that owe mutual debts to each other to assert the amounts owed, subtract one from the other, and pay only the balance." *Darr v. Muratore*, 8 F.3d 854, 860 (1st Cir. 1993).

22. Section 553 of the Bankruptcy Code states in pertinent part, that:

(a) Except as otherwise provided in this section and in sections 362 and 353 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this

title against a claim of such creditor against the debtor that arose before the commencement of the case[.]

11 U.S.C. § 553(a). “In general, the right of setoff allows parties who have prepetition debts to each other to assert the amounts owed on these debts, subtract one from the other, and then pay only the balance.” *In re Johnson*, 216 B.R. 381, 385 (Bankr. N.D. Ill. 1997) (citations omitted).

23. The Allen Concrete Claim arose from the Partnership Agreement and, in part, prior to the Debtors filing for bankruptcy protection. Thus, mutuality among Allen Concrete, ACP, and Debtor Schwab Ready-Mix, Inc. is present. While Allen Concrete and ACP have a setoff right, before exercising such right, they would first seek necessary relief from the automatic stay pursuant to Bankruptcy Code Section 362(d)(1).

24. Additionally, Allen Concrete and ACP have a right of recoupment. Recoupment, unlike setoff, may be utilized to “net” amounts owed between parties in appropriate circumstances when the obligations all rise out of the same transaction or occurrence, regardless of whether the obligations arose prepetition, post-petition or both. The focus of recoupment is whether the obligations arose out of the same transaction or occurrence, so the prepetition or post-petition nature of the obligations is irrelevant. Although not expressly authorized by the Bankruptcy Code, the doctrine of recoupment has development under the common law and has long been applied in the bankruptcy context. *See United States Abatement Corp. v. Mobil Exploration & Producing United States, Inc. (In re United Abatement Corp.)*, 79 F.3d 393, 398 (5th Cir. 1996); *In re Holford*, 896 F.2d 175 (5th Cir. 1990) (holding that relief from the automatic stay is not necessary to pursue a recoupment claim).

25. Here, Allen Concrete and ACP have setoff and recoupment claims as well as possessory lien claims resulting from the Allen Concrete Claim. Thus, Debtors’ cannot sell their Partnership interests without recognizing Allen Concrete’s and ACP’s secured claims and lien

claims accruing pursuant to the Partnership Agreement and under Florida law and otherwise based on the doctrines of recoupment and setoff.

26. Furthermore, Allen Concrete reserves all rights to supplement this Objection to the Sale Motions or to otherwise object to the proposed asset sale or assignment of the Partnership Agreement on various grounds.

LACK OF PRIOR NOTICE

27. Upon information and belief, neither Allen Concrete nor ACP received copies of any pleadings or notices in the Debtors' cases prior to May 2010.

RESERVATION OF RIGHTS

28. Allen Concrete reserves all rights to supplement and modify this Objection to Sale Motions at any time, through and including the date(s) of the applicable hearings thereon.

WHEREFORE, based upon the foregoing, Allen Concrete and ACP respectfully request that this Court (a) deny approval of any sale of the Debtors' interests in ACP that (i) does not expressly take into account and preserve the rights of first refusal of Allen Concrete and ACP to purchase the Debtors' fifty percent (50%) interest in ACP, (ii) is not subject to consent from Allen Concrete, (iii) that does not require the successful bidder to assume the Partnership Agreement and cure the Allen Concrete Claim through the date of closing, and (iv) that does not otherwise recognize the setoff and recoupment claims of Allen Concrete and ACP; and (b) provide Allen Concrete and ACP with all other just and proper relief.

Dated: May 21, 2010

Respectfully submitted,

/s/ Michael P. Shuster

Michael P. Shuster (Ohio Bar No. 0064518)

Tami Hart Kirby (Ohio Bar No. 0078473)

PORTER WRIGHT ARTHUR & MORRIS LLP

925 Euclid Avenue Suite 1700

Cleveland, Ohio 44115

216.443.9000 / 216.443.9011 Fax

mshuster@porterwright.com

tkirby@porterwright.com

Attorneys for Allen Concrete & Masonry, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2010, a copy of the foregoing *Objection of Allen Concrete & Masonry, Inc. to (a) Debtors' 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 [Docket No. 241], and (b) to Debtors' Motion for Order (1) Authorizing the Auction Sales of Certain Non-Core Assets, Free and Clear of Liens, Claims, Interests and Encumbrances; (2) Waiving the Fourteen-Day Stay Period Provided by Bankruptcy Rule 6004(H); and Granting Related Relief [Docket No. 242]* was filed electronically. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system. Additionally, the following parties will be served by first-class mail:

Debtors
c/o Laurence v. Goddard, Chief Restructuring
Officer
The Parkland Group
1375 East 9th Street, Suite 1350
Cleveland, Ohio 44114

Debtors
c/o Lawrence E. Oscar, Esq.
Daniel A. DeMarco, Esq.
Christopher W. Peer, Esq.
Hahn Loeser & Parks, LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114

Debtors
c/o David Cesar
Mark D. Kozel
The Parkland Group
1375 East 9th Street, Suite 1350
Cleveland, Ohio 44114

Debtors
c/o Alan R. Lepene, Esq.
Curtis L. Tuggle, Esq.
Thompson Hine LLP
127 Public Square, Suite 3900
Cleveland, Ohio 41114

Committee
c/o Douglas L. Lutz, Esq.
Frost Brown Todd LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202-4182

Cement Resources LLC
c/o GarMark Advisors LLC
One Landmark Square
6th Floor
Stamford, Connecticut 06901
Attn: Steven C. Pickhardt

Cement Resources LLC
c/o Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Attn: David G. Heiman, Esq.

Committee
c/o Aaron L. Hammer, Esq.
Freeborn & Peters LLP
311 South Wacker Drive, Suite 3000
Chicago, Illinois 60606

Cement Resources LLC
c/o Atlas Holdings FRM LLC
One Sound Shore Drive, Suite 203
Greenwich, Connecticut 06830
Attn: Timothy J. Fazio

/s/ Michael P. Shuster
*One of the Attorneys for Allen Concrete &
Masonry, Inc.*