

**UNITED STATES BANKRUPTCY COURT
FOR THE 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 DEBTOR'S
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**

Allen Concrete & Masonry, Inc. ("Allen Concrete"), by and through its undersigned counsel, hereby objects to the *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. 344.] (the "Revised Procedures Motion"). In support of this Objection, Allen Concrete states as follows:

1. Allen Concrete and Debtor Schwab Ready-Mix, Inc. are each fifty percent (50%) owners in a Florida general partnership known as Allen Concrete Pumping ("Concrete

Pumping”), 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. 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.

3. The Partnership Agreement also affords Allen Concrete Pumping and Allen Concrete the right of first refusal to purchase Debtor Schwab Ready-Mix, Inc.’s partnership interest in Allen Concrete Pumping. Specifically, Section 20 of the Partnership Agreement provides relevant pertinent 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.

4. Courts have consistently held that provisions in a partnership agreement providing a right of first refusal to purchase interests or other assets remains 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).

5. Pursuant to the proposed Asset Purchase Agreement attached to the Revised Procedures Motion as Exhibit A (the “Asset Purchase Agreement”), the Debtors seek authority to sell substantially all of their assets – including “Transferred Partnerships” – to Cement Resources LLC or any other successful purchaser at auction. *See Revised Procedures Motion at Asset*

Purchase Agreement, § 2.1(k) (identifying as among the “Acquired Assets” “the Ownership Interests of the Sellers in the Transferred Partnerships”). “Transferred Partnerships” is defined to include Allen Concrete Pumping. Asset Purchase Agreement, Article 1 and Schedule 3.11.¹ In Schedule 3.11 to the Asset Purchase Agreement, the “Ownership Interests in Transferred Partnerships” are identified to include Allen Concrete Pumping as follows:

Allen Concrete Pumping: Allen Concrete Pumping currently conducts business as a concrete pumping operation. Allen Concrete Pumping is a customer of Schwab Ready-Mix, Inc. and supplies concrete to concrete subcontractors.

Asset Purchase Agreement, Sch. 3.11.

6. Pursuant to the Revised Procedures Motion, the Debtors seek approval of a Revised Bidding Procedures Order² (substantially in the form attached thereto as Exhibit E) that, among other things, approves the Revised Bidding Procedures at Exhibit B to the Revised Procedures Motion. See Revised Procedures Motion, ¶10, p. 23 and Exhibits B and E. The Revised Bidding Procedures require as a condition of a Qualified Bid that such bid must “propose *the purchase of all of the assets* of the Debtors that are identified for purchase under the APA.” Revised Procedures Motion, Exhibit B (emphasis added).

7. The Revised Bidding Procedures also fail to recognize the rights of first refusal of (a) Allen Concrete Pumping and (b) Allen Concrete to purchase Debtor Schwab Ready-Mix, Inc.’s interest in Allen Concrete Partnership, as established pursuant to the Partnership Agreement.³

¹ The Debtors misidentify the partnership as Allen Concrete Plumbing in the definition of “Transferred Partnerships” in Article 1 of the Asset Purchase Agreement.

² Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Revised Procedures Motion.

³ The Asset Purchase Agreement identifies issues concerning “Required Consents” with respect to Allen Concrete, whether express or by non-objection or by ruling of the Bankruptcy Court, in Schedule 6.6 thereto; but the Asset Purchase Agreement, Revised Procedures Motion and the proposed bidding procedures fail to identify and preserve the rights of first refusal of Allen Concrete Pumping and Allen

8. The stalking horse bid of Cement Resources, LLC and the proposed Revised Bidding Procedures also fail to allocate a specific sale value to the fifty percent (50%) partnership interest of the Debtors in Allen Concrete Pumping, which value is necessary and required in order for Allen Concrete and Allen Concrete Pumping to properly evaluate whether to exercise any right of refusal to purchase.⁴

9. Upon information and belief, neither Allen Concrete nor Allen Concrete Pumping received copies of any pleadings or notices in the Debtor's cases prior to May 2010.

10. Allen Concrete reserves all rights to supplement this Objection to the Revised Procedures Motion and to otherwise object to the proposed asset sale on various grounds.

WHEREFORE, based upon the foregoing, Allen Concrete respectfully requests that this Court (a) deny approval of the Revised Procedures Motion and the proposed Revised Bidding Procedures unless the bidding procedures are amended to (i) expressly take into account and preserve the rights of first refusal of Allen Concrete Pumping and Allen Concrete to purchase the Debtors' fifty percent (50%) interest in Allen Concrete Pumping, (ii) confirm that such parties constitute Qualified Bidders, (iii) indicate the specific amount to be paid by Cement Resources LLC for the Debtors' interest in Allen Concrete Partnership, and (iv) require that any bidder provide disclosure of the separate amount of its bid attributable to the Debtors' interest in Allen Concrete Pumping; and (b) provide all other just and proper relief.

Concrete to purchase Debtor Schwab Ready-Mix, Inc.'s fifty percent (50%) partnership interest in Allen Concrete Pumping.

⁴ The Debtors' Schedules indicate a value of \$208,916.06 for the interest of Schwab Ready-Mix, Inc. in Allen Concrete Pumping. See Sch. B, Item 14 for Schwab Ready-Mix, Inc.

Dated: May 5, 2010

Respectfully submitted,

/s/ Michael P. Shuster

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2010, a copy of the foregoing Objection of Allen Concrete & Masonry, Inc. to Debtor's 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 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. Any other parties requiring service will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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