

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

In re:)	
)	Chapter 11
SCHWAB INDUSTRIES, INC., <i>et al.</i> ¹)	
)	Case No. 10-60702-rk
Debtors.)	(Jointly Administered)
)	
)	Judge Russ Kendig

LIMITED OBJECTION AND RESERVATION OF RIGHTS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS’ MOTIONS WITH RESPECT TO THE BIDDING PROCEDURES AND SALE OF CORE ASSETS

The Official Committee of Unsecured Creditors (the “Committee”) appointed in the above-captioned bankruptcy cases, by and through its proposed counsel, hereby files this limited objection and reservation of rights (the “Limited Objection”) to the Debtors’ (A) *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 and Better Offers, Pursuant to Bankruptcy Code Sections 363 and 365; (2) Approving the Assumption 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) (the “Sale Motion”) and (B) *Motion for an 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*

¹ The Debtors are Schwab Industries, Inc. (“SIF”), Medina Cartage Co. (“MCC”), Medina Supply Company (“MSC”), Quality Block & Supply, Inc. (“QBS”), O.I.S. Tire, Inc. (“OIS”), Twin Cities Concrete Company (“TCC”), Schwab Ready-Mix, Inc. (“SRM”), Schwab Materials, Inc. (“SMI”) and Eastern Cement Corp. (“ECC”).

Unexpired Leases; and (5) Granting Related Relief (Docket No. 245) (the “*Bid Procedures Motion*” and, together with the Sale Motion, the “*Motions*”), and states:

PRELIMINARY STATEMENT

While the Committee does not oppose the vast majority of the relief sought in the Motions, and indeed, supports the Debtors’ efforts to sell its core assets through a robust, competitive auction process, the mechanics of the proposed break-up fee (the “*Break-Up Fee*”) referenced in the Motions present certain problematic issues. While the Committee is optimistic that it will be able to resolve such issues with the Debtors and the Pre-Petition Lenders consensually in advance of the hearing on the Bid Procedures Motion, the Committee submits this Limited Objection in order to reserve its rights with respect thereto.

BACKGROUND

A. The Chapter 11 Cases

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

2. The Debtors are currently operating and managing their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Committee was appointed on March 9, 2010.

B. The Sale Motions

3. Pursuant to the Sale Motion, the Debtors seek 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.

4. The Debtors propose to sell their core assets through a competitive auction process (“*Auction*”) pursuant to a set of proposed bidding procedures (the “*Bid Procedures*”). The Bid Procedures provide, among other things, for: (1) a mechanic for the identification of “stalking horse” bidders (“*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 and auction; and (4) a process and procedure for the auction of the Debtors’ assets, provided that more than one Qualified Bids are received. The Committee believes that this process is appropriate under the circumstances, is in the best interests of the estates and unsecured creditors and supports the sale of the Debtors’ core assets at auction.

5. The Bid Procedures provide for certain protections for Stalking Horse Bidders to induce participation in the Auction process. Among these protections includes the proposed Break-Up Fee, which is detailed in the Bid Procedures as follows:

In the event that a Stalking Horse Bidder(s) is named and designated, Debtors may, with the consent of the Agent, and in consultation with the Committee, negotiate a reasonable Stalking Horse Protection Fee(s) [the Break-Up Fee] payable to such Stalking Horse Bidder(s) in the event that such Stalking Horse Bidder(s) are not the Successful Bidder(s) (whether as initial Successful Bidder or as successor by Reserve Bidder(s)). Stalking Horse Protection Fee(s) shall be approved by the Court. Any Stalking Horse Protection Fee(s) negotiated shall be memorialized in the respective Stalking Horse Notice. At the Auction, any Qualified Bidder wishing to enter a bid in excess of the Stalking Horse Bid must enter an amount equal to the Stalking Horse Bid plus the Stalking Horse Protection Fees, plus any minimum Bid amount to advance their bid(s).

In no event shall a Stalking Horse Protection Fee(s) be payable to any Stalking Horse Bidder unless approved by the Court, until the assets considered in such Stalking Horse Bidder’s Stalking Horse APA have

been indefeasibly sold and transferred to a party other than such Stalking Horse.

Bid Procedures, § H.

6. While the Committee does not oppose the granting of a break-up fee to Stalking Horse Bidders – indeed, the Committee recognizes that such protections are routinely granted in section 363 sale processes – the lack of detail regarding the Break-Up Fee causes the Committee some concern. Because no stalking horse bids (“*Stalking Horse Bids*”) have been filed as of the date of this Limited Objection, the amounts of any Break-Up Fees proposed to be paid to any such stalking horse bidders are unknown at this time, and in addition, the Bid Procedures Motion does not provide the source of funds that will be used to pay any such Break-Up Fees, to the extent they become due through the Auction.

LIMITED OBJECTION AND RESERVATION OF RIGHTS

7. The Debtors have a fiduciary duty to maximize value of their estates for all parties in interest, including the Debtors’ unsecured creditors. *See In re Biderman Indus. U.S.A. Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997). To the extent that any Break-Up Fees are paid out of assets not sold pursuant to the Motions, or if the Break-Up Fees are in an amount that chills bidding, however, the Debtors will have failed to meet their fiduciary duty toward creditors in these cases.

8. The Committee therefore objects to the Motions to the extent they permit any proposed Break-Up Fees to be paid from the Debtors’ assets other than from proceeds of the sale(s) contemplated by the Motions. The Debtors should not saddle these estates with a significant administrative claim if Break-Up Fees are triggered in the Auction. *See, e.g., In re Hupp Indus., Inc.*, 140 B.R. 191, 196 (Bankr. N.D. Ohio 1992) (“A break-up fee should not be authorized as an administrative expense where it is ill-defined, not correlated to an actual

transactional cost or expense incurred by the negotiating bidder, and otherwise cannot be addressed under a specific provision of § 503(b).”). Therefore, in order to maximize the assets available for distribution to unsecured creditors, any Break-Up Fees must be paid solely out of the proceeds of the sale(s) contemplated by the Motions and the Bid Procedures should be modified accordingly.

9. Moreover, though the amount of the Break-Up Fees is currently unknown, an unjustifiably large Break-Up Fee may discourage the submission of competing bids, thereby failing to maximize the purchase price, to the detriment of the Debtors’ creditors and other parties-in-interest. Accordingly, courts in this district have limited the approval of break-up fees to those deemed to be reasonable. *See, e.g., In re Blackhawk Automotive Plastics, Inc.*, Case No. 07-42671 (Bankr. N.D. Ohio Feb. 29, 2008) (break-up fee of less than 2% of the purchase price approved); *In re SAI Holdings Limited*, Case No. 06-33227 (Bankr. N.D. Ohio Mar. 20, 2007) (break-up fee of up to 3% of the purchase price approved); *In re Air Enters., Inc.*, Case No. 05-52467 (Bankr. N.D. Ohio June 13, 2005) (break-up fee of approximately 1.8% of the purchase price approved); *In re RMA Mgmt., Inc.*, Case No. 05-43959 (Bankr. N.D. Ohio Jul. 22, 2005) (break-up fee of approximately 2.6% of the purchase price approved); *see also In re Sight Resources Corp.*, Case No. 04-14987 (S.D. Ohio 2004) (break-up fee of less than 1% of the purchase price approved).

10. In *In re Hupp*, the U.S. Bankruptcy Court for the Northern District of Ohio (the “District”) listed the following factors to be considered with respect to the approval of a break-up fee:

- Whether the fee requested correlates with a maximization of value to the debtor’s estate;

- Whether the underlying negotiated agreement is an arms-length transaction between the debtor's estate and the negotiating acquirer;
- Whether the principal secured creditors and the official creditors committee are supportive of the concession;
- Whether the subject break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;
- Whether the dollar amount of the break-up fee is so substantial that it provides a "chilling effect" on other potential bidders;
- The existence of available safeguards beneficial to the debtor's estate;
- Whether there exists a substantial adverse impact upon unsecured creditors, where such creditors are in opposition to the break-up fee.

In re Hupp, 140 B.R. at 194. The *Hupp* court noted that "break-up fees ranging from one to two percent of the purchase price" have been authorized by other courts. *Id.* Recognizing the danger that a high break-up fee can chill bidding, the *Hupp* court also stated that "[i]n the bankruptcy context . . . the Court must be necessarily wary of any potential detrimental effect that an allowance of such a fee would visit upon the debtor's estate." *Id.*

11. The Committee therefore submits that any Break-Up Fees agreed upon by the Debtors be consistent with those previously approved in cases in this District. To the extent that the Committee determines such Break-Up Fees to be excessive, it reserves the right to object to the underlying Stalking Horse Bid or to it being deemed a Qualified Bid under the Bid Procedures.

WHEREFORE, the Committee respectfully requests that the Court (a) modify the proposed order granting the Bid Procedures Motion to specifically provide that any Break-Up Fees be paid solely out of any Auction sale proceeds; (b) permit the Committee to file an objection to any proposed Break-Up Fees after the filing of the Stalking Horse Notices as may be appropriate; and (c) grant such other and further relief as is just and proper.

Dated: April 14, 2010

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

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