

**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.*,¹ : Case No. 10-60702
: (Jointly Administered)
Debtors. :
: Judge Russ Kendig
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**OBJECTION OF THE DEBTORS TO MOTION OF QUICKEN LOANS ARENA
PURSUANT TO 11 U.S.C. § 365 FOR AN ORDER COMPELLING THE ASSUMPTION
OR REJECTION OF A SUITE LICENSE AGREEMENT, OR IN THE ALTERNATIVE
GRANTING MOVANT LEAVE TO MITIGATE ITS DAMAGES**

Schwab Industries, Inc (“SII”), 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”, and together with SII, MCC, MSC, QBS, OIS, TCC, SRM and SMI, the “Debtors”), the debtors and debtors in possession in the above-captioned Chapter 11 cases (the “Cases”), by and through their undersigned counsel, hereby object (the “Objection”) to the entry of an order approving the Motion² filed by Cavaliers Operating Company, LLC dba Quicken Loans Arena (“Quicken”) as set forth more fully below. In support of this Objection, Debtors respectfully state as follows:

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor’s tax identification number are: Schwab Industries, Inc. (2467); Medina Cartage Co. (9373); Medina Supply Company (3995); Quality Block & Supply, Inc. (2186); O.I.S. Tire, Inc. (7525), Twin Cities Concrete Company (9196); Schwab Ready-Mix, Inc. (8801); Schwab Materials, Inc. (8957); and Eastern Cement Corp. (7232).

² “Motion” means and refers to the *Motion of Quicken Loans Arena Pursuant to 11 U.S.C. § 365 for an Order Compelling the Assumption or Rejection of a Suite License Agreement, or in the Alternative Granting Movant Leave to Mitigate Its Damages* [Docket No. 230]. Capitalized terms used in this Objection that are not subsequently defined herein have the meanings ascribed to them in the Motion.
CLE - 2660132.2

PRELIMINARY STATEMENT

1. Debtors object to the relief requested by Quicken in the Motion because it is prematurely requested, Debtors have not made (or been able to make) decisions with regards to any of their unexpired leases or executory contracts, and it impairs Debtors' ability to exercise their reasoned business judgment.

2. It is admitted by Quicken and Debtors that the Suite License Agreement (Founders' Program) for Gund Arena Suite 233 (as amended and extended from time to time, the "Lease") grants the holder of the Lease access to a suite at the Quicken Loans Arena (the "Arena") with premier access and location for events at the Arena. Debtors are in the process of marketing for sale substantially all their assets, including, potentially the Lease. The opportunity for a bidder to acquire the access and prestige of the Lease may attract attract bidders and result in material improvement of the bids.

3. Despite Debtors' belief that the Lease likely has value to their estates through the sale, Quicken's claimed urgency does not warrant the Court preventing Debtors from exercising their reasoned business judgment. Quicken claims that it has approximately a dozen suites similar to Suite 233 available for single game rental and that Quicken is uncertain that it will be able to rent any of these open suites, due to the current state of the economy in Northeast Ohio, despite excitement for Cleveland's basketball team and LeBron James.

4. The preservation of Debtors' business judgment, including the Lease among the assets to be transferred at the Sale, and the lack of any real urgency require that the Motion be denied so that the benefits, if any, of the Lease are used by Debtors to maximize their value for Debtors' estates and stakeholders. The Motion must be denied.

BACKGROUND

Bankruptcy Case

5. On February 28, 2010 (the "Petition Date"), Debtors commenced the Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Cases are being jointly administered pursuant to an Order of this Court.

6. Debtors are continuing in possession of their properties and assets and are operating and managing their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Cases.

7. On March 9, 2010, the United States Trustee appointed an official committee of unsecured creditors (the "Committee").

8. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334. Venue of this case in this district is proper pursuant to 28 U.S.C. §§1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

The Lease

9. On or about October 6, 1993, SII entered into the Lease. Pursuant to the Lease, SII has access to use Suite 233 at the Arena and to acquire tickets for virtually all "Events" (as that term is defined in the Lease) that occur at the Arena. In addition to premier seat location for all Events, the Lease, and use of Suite 233, grant SII numerous additional and ancillary benefits, including the right to parking passes, the right to additional and other premier tickets, and club access which may or may not be available to the general public.

10. On or about August 30, 2004, SII agreed to extend the term of the Lease through and including September 30, 2011.

11. The Lease also includes the right for SII (or an assignee) to renew or continue the Lease, subject to further agreement with Quicken.

Sale of Substantially All Assets of the Debtors

12. In connection with their agreement to permit Debtors' use of cash collateral, the Secured Lenders require Debtors to seek approval for the sale of substantially all their assets through a series of sales (both of core assets and of non-core assets, collectively, the "Asset Sales"). Motions to approve the procedures for the Asset Sales are scheduled for hearing on the same date as the hearing on the Motion.

13. The Lease is an asset that is contemplated to be available to bidders for assumption and assignment in connection with the Asset Sales.

14. Debtors anticipate that substantially all their assets (both core and non-core) will be sold and transferred to third parties no later than June 21, 2010.

15. Debtors expect that bidders will have an interest in having the Lease assumed and assigned through the Asset Sales.

OBJECTION

16. Debtors cannot be compelled to assume or reject the Lease at this time. Debtors are focused on marketing their assets for sale, including presenting the Lease as an unexpired lease available to be assigned.

17. In the reasonable exercise of their business judgment Debtors believe that marketing the Lease presents the highest and best use for the Lease in order to maximize the value of all their assets.

A. The Motion Prematurely Seeks to Undermine Debtors Ability to Exercise their Business Judgment.

18. It is a well founded axiom of bankruptcy law that a debtor-in-possession be able to exercise its business judgment to manage its own affairs. 11 U.S.C. § 1107. Courts have concurred that the ability for a debtor to use its business judgment extends to matters relating to assumption and rejection of executory contracts and unexpired leases. *See, e.g., NLRB v.*

Bildisco & Bildisco, 465 U.S. 513, 523 (1984); *Enterprise Energy Corp. v. United States (In re Columbia Gas Sys., Inc.)*, 50 F.3d 233, 238 (3rd Cir. 1995); *Sharon Steel Corp. v. National Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3rd Cir. 1989); *Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 951-52 (N.D. Ohio 1997) (the determination of whether to assume or reject an executory contract is generally left to the sound business judgment of the debtor).

19. In the instant case, Debtors have identified the Lease as a unique asset that they and their investment bankers may use to either (i) sell independently to an interested party; or (ii) be an additional benefit available to further entice interested bidders to bid more for Debtors' assets.

20. Until the Asset Sales are concluded and the interest in all Debtors' assets, including the Lease, is determined, it is premature to attempt to compel the Debtors to reach any determination on the highest and best use of the Lease.

B. Inclusion of the Lease in the Asset Sale is the Best Use of the Lease for Debtors' Estates

21. Debtors have not delayed in exercising their business judgment. Debtors' conclusion that the Lease is a unique asset militates in favor of allowing Debtors an opportunity to market the Lease.

22. Debtors seek added value to their estates. Granting the Motion would preclude the opportunity to monetize the Lease.

23. Quicken asserts that it may have cure claims related to the Lease. To the extent any such claims exist (Debtors expressly reserve the right to challenge any claims Quicken may assert or has asserted), pursuant to Section 365(b) of the Bankruptcy Code, any such arrearages properly due to Quicken pursuant to the Lease would need to be cured. 11 U.S.C. §365(b).

Quicken would benefit from testing the market for a bidder seeking assumption and assignment that will pay applicable cure costs.

24. Debtors' estates benefit from addressing decisions about assumption and rejection of the Lease in the sale process, which is already underway. Quicken benefits to the extent the Lease is assumed and assigned, which is a real possibility based on the premier Arena location and access provided pursuant to the Lease.

C. Quicken Fails to Satisfy Its Burden to Justify Compelling Debtors to Assume or Reject the Lease.

25. Debtors do not dispute Quicken's citation of *In re Adelpia Communications Corp., et al.*, 291 B.R. 283, 292 (Bankr. S.D.N.Y. 2003), for the proposition of when compelling assumption or rejection of an executory contract or unexpired lease is warranted. However, Quicken cannot meet and has not met the standard expressed in *Adelpia*. Debtors evaluate the *Adelpia* prongs as follows:

- a. **Nature of Interests at Stake:** The Lease is an asset of Debtors' estates, for which Debtors have identified a valuable use – namely to provide additional benefit for interested purchasers. Prong one of the *Adelpia* analysis weighs in favor of denying the Motion.
- b. **Balance of Harm:** Quicken has notified Debtors that they suspect that they have limited assurance that they will even be able to rent Suite 233 between now and June 21, 2010. If a bidder would bid more for Debtors' assets due to the inclusion of the Lease, Debtors would be irreparably harmed. Prong two of the *Adelpia* analysis weighs In favor of denying the Motion.
- c. **Good to Be Achieved:** Denying the Motion will promote greater "good" for more parties. In particular, (i) potential purchasers have another premium asset to consider; (ii) Secured Lenders and unsecured creditors may benefit from an increased purchase price or from an additional asset sale; and (iii) if assumed and assigned, Quicken will benefit from cure demands that need to be considered. Prong three of the *Adelpia* analysis weighs in favor of denying the Motion.
- d. **Litigation Safeguards:** Debtors state that this fourth prong of the *Adelpia* analysis is not applicable to the instant case.

- e. **Uncompensated Harm:** Again, if Quicken cannot establish that it will even rent Suite 233, it cannot claim that it has compensation that will be missed.³ Compelling assumption or rejection would result in harm to Debtors and their sales efforts. Prong five of the *Adelphia* analysis weighs in favor of denying the Motion.
- f. **Importance to the Debtors' Estates:** Debtors understand that the value brought from the Lease is not absolute, but if it plays any part in an increased bid by even a single bidder, it will enhance the value of all subsequent bids. Prong six of the *Adelphia* analysis weighs in favor of denying the Motion.

26. Quicken has not satisfied its burden for the relief sought in the Motion. It should be denied.

D. Reservation of Rights

27. Debtors reserve the right (a) to amend, supplement, or otherwise modify this Objection as they deem necessary or proper; and (b) to raise such other and further objections to the relief requested in the Motion at or before any hearing(s) thereon.

WHEREFORE, Debtors respectfully request that the Court (a) sustain this Objection and deny the relief sought in the Motion; and (b) grant Debtors such other and further relief to which it is justly entitled.

³ Mitigation on a game-by-game, event-by-event basis, to the extent permitted by this Court should not extend past the contemplated June 21, 2010 closing date or otherwise be allowed to interfere with the ability to assume and assign the Lease.

Dated: April 8, 2010

Respectfully submitted,

/s/ Christopher W. Peer

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