UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re	:	Case No. 10-60702
	:	
	:	Joint Administration Pending
SCHWAB INDUSTRIES, INC., *ET AL.*,	:	
	:	Chapter 11
Debtors.	:	
	:	Judge Russ Kendig

OBJECTION OF KEYBANK NATIONAL ASSOCIATION, AS ADMINISTRATIVE AGENT FOR THE LENDERS, WITH RESPECT TO DEBTORS' MOTION SEEKING ENTRY OF AN ORDER (I) AUTHORIZING POST-PETITION SECURED SUPERPRIORITY FINANCING PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 361, 362, 363(C), 363(E), 364(C)(1), 364(C)(2), 364(C)(3), 364(D) AND 364 (E), (II) GRANTING ADEQUATE PROTECTION PURSUANT TO SECTIONS 361, 363 AND 364 OF THE BANKRUPTCY CODE, (III) MODIFYING THE AUTOMATIC STAY AND (IV) SETTING A FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001

KeyBank National Association, for itself as a secured lender, and as Administrative Agent (the "Agent") for secured lenders The Huntington National Bank and Bank of America, N.A. (collectively with KeyBank National Association, the "Lenders"), hereby objects (the "Objection") to the *Debtors' Motion Seeking Entry of an Order (i) Authorizing Post-Petition Secured Superpriority Financing Pursuant to Bankruptcy Code Sections 105, 361, 362, 363(c), 363(e), 364(c)(1), 364(c)(2), 364(c)(3), 364(d) and 364(e), (ii) Granting Adequate Protection Pursuant to Sections 361, 363 and 364 of the Bankruptcy Code, (iii) Modifying the Automatic Stay and (iv) Setting a Final Hearing Pursuant to Rule Bankruptcy 4001* (the "Motion").

For and as its Objection, the Agent respectfully states the following:

BACKGROUND

1. On February 28, 2010 (the "Petition Date"), the above-captioned debtors (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") and thereafter continued to operate and manage their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. No official statutory committee of unsecured creditors, trustee or examiner has been appointed in the Debtors' chapter 11 cases.

3. As described in the Motion, the Debtors are party to that certain Amended and Restated Credit Agreement, dated as of October 18, 2007, by and among the Debtors, as borrowers, Agent and Lenders, and together with all agreements, documents, and instruments delivered in connection therewith, including, without limitation, all Loan Documents and Related Writings, as defined therein (collectively, the "Pre-Petition Loan Documents"). The Debtors' obligations under the Pre-Petition Loan Documents are secured by valid, enforceable, properly perfected first priority liens (the "Pre-Petition Liens") on substantially all of the Debtors' real and personal property (collectively, the "Pre-Petition Collateral"). As of the Petition Date, the aggregate principal amount outstanding under the Pre-Petition Loan Documents was approximately $57 million.

4. Over the course of several months preceding their bankruptcy filing, the Debtors defaulted on their obligations under the Pre-Petition Loan Documents, which defaults included violations of financial covenants contained therein and the failure to make required principal and interest payments. On January 13, 2010, the Agent provided formal notice to the Debtors of additional defaults that had occurred under the Pre-Petition Loan Documents and advised the

Debtors that the Pre-Petition Lenders were exercising their right to decline to make any further loans under the Pre-Petition Loan Documents and reserving all of their rights and remedies under the Pre-Petition Loan Documents and applicable law (the "Reservation of Rights").

5. In response to the Reservation of Rights, the Debtors advised the Agent and Lenders of the possibility that the Debtors would file petitions for relief under chapter 11 of the Bankruptcy Code. Debtors requested that the Lenders consider terms and conditions pursuant to which the Debtors' would be authorized to use the Lenders' cash collateral, as defined in section 363 of the Bankruptcy Code, and the Lenders would provide post-petition debtor in possession financing under the applicable provisions of the Bankruptcy Code. For several weeks prior to the Petition Date, Agent, on behalf of certain Lenders, and the Debtors engaged in discussions and negotiations concerning specific terms. Indeed, Agent provided Debtors a proposed term sheet for debtor-in-possession financing that would allow the Debtors to execute a marketing and sale strategy in chapter 11 that was designed by the Debtors' advisors to maximize the value of their assets, which term sheet was ultimately never formally accepted or rejected by Debtors until their bankruptcy filing.

6. On the evening of the Petition Date, Agent was advised of the Debtors' bankruptcy filing and that the Debtors would be seeking authority to obtain debtor in possession financing from a third party. Later that evening, Agent was provided a copy of the Motion. Based upon Agent's review of the Motion during the course of the last 24 hours, it has become clear to the Agent that the Motion is fundamentally flawed and suffers from legal and procedural infirmities.

7. As described in greater detail below, (i) due process requires that Agent and Lenders be provided more than 24 hours notice of the expansive relief requested in the Motion

and have a meaningful opportunity to respond to the Motion and protect their interests, (ii) Debtors have no equity cushion in the Pre-Petition Collateral and, as such, cannot rely on an alleged equity cushion to serve as the basis for providing the Lenders with adequate protection under section 364(d) of the Bankruptcy Code, (iii) the DIP Lender (as defined in the Motion) is not entitled to irrevocable priming liens and superpriority administrative expense claims through an interim order over the objection of the Lenders, and (iv) the Commitment (as defined in the Motion) of the DIP Lender to provide debtor in possession financing is illusory, as it allows the DIP Lender to terminate the Commitment for "any reason whatsoever" in its sole and absolute discretion. For these reasons, the Agent files this Objection and requests that the Court enter an Order denying the Motion in its entirety.

DUE PROCESS REQUIRES A MEANINGFUL OPPORTUNITY TO RESPOND

8. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections." Owens-Corning Fiberglass Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.), 759 F.2d 1440 (9th Cir. 1985) (holding notice received one day prior to hearing insufficient) quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Given the complexity and purported finality of the relief requested in the Motion, which seeks to grant the DIP Lender with permanent priming liens and superpriority administrative expense claims for all advances made pursuant to the interim order up to the maximum amount of approximately $18.3 million at the expense of the Lenders, 24 hours notice is inadequate and does not pass due process muster. Agent and Lenders must be afforded a meaningful opportunity to discover factual information relevant to the relief requested and develop an appropriate response to

protect their interests. In short, the Court is not required to rely solely on the evidence assembled by the Debtors to evaluate the Motion and due process requires the Lenders be provided a meaningful opportunity to present their case as to why the relief requested therein should be denied.

DEBTORS ARE INCAPABLE OF PROVIDING LENDERS ADEQUATE PROTECTION

9. Pursuant to section 364(d)(1):

> [t]he court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if –
>
> (A) the trustee is unable to obtain such credit otherwise; and
>
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(d)(1). "The concept of adequate protection was designed to ensure that the secured creditor receives the value for which he bargained." In re Martin, 761 F.2d 472, 474 (8th Cir. 1985). As bankruptcy courts and Circuit Courts have noted, any proposal by a debtor of adequate protection for a prepetition secured creditor as part of a superpriority postpetition financing arrangement should provide the prepetition creditor "with the same level of protection it would have had if there had not been post-petition superpriority financing." In re Swedeland Dev. Grp., Inc., 16 F.3d 552, 564 (3d Cir. 1994); *see also*, *In re Mosello*, 195 B.R. 277, 288 (Bankr. S.D.N.Y. 1996). Moreover, "[g]iven the fact that super priority financing displaces liens on which creditors have relied in extending credit, a court that is asked to authorize such financing must be particularly cautious when assessing whether the creditors so displaced are adequately protected." In re First South Sav. Assoc., 820 F.2d 700 (5th Cir. 1987).

10. Under the "equity cushion" theory, unless a debtor has equity in a property sufficient to shield the creditor from either the declining value of the collateral or an increase in the claim from the accrual of interest or expenses, the creditor is not adequately protected. In re James River Assoc., 148 B.R. 790 (E.D. Va. 1992). In determining whether adequate protection exists by virtue of an equity cushion, case law has almost uniformly held that an equity cushion of at least 20% or more constitutes adequate protection. In re Kost, 102 B.R. 829 (D. Wyo. 1989) citing In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 19800 (holding 65% adequate); In re Nashua Trust Co., 73 B.R. 423 (Bankr. D.N.J. 1987) (holding 50% adequate); In re Ritz Theatres, 68 B.R. 256 (Bankr. M.D. Fla. 1987) (holding 38% adequate).

11. Notwithstanding the general guidelines observed by most courts, the determination of whether an equity cushion constitutes adequate protection must also take into account the rate at which the equity cushion will be eroded by interest, depreciation and other costs, as well as whether periodic payments are made to prevent or mitigate the erosion of the cushion. In re Liona Corp., N.V., 68 Bankr. 761, 767 (Bankr. E.D. Pa. 1987). Thus, even in situations in which a significant equity cushion existed, the courts have required to the debtor to remit current interest payments to the secured creditor in order to provide adequate protection. In re Lee, 11 B.R. 84 (Bankr. E.D. Pa. 1981) (requiring payment of current interest despite existence of 41% equity cushion).

12. Under section 364(d)(2), the Debtors have the burden of proof on the issue of adequate protection. The Debtors have failed to satisfy that burden of proof. With respect to the Debtors' assertions that an equity cushion exists and may serve as a basis of adequate protection for the Lenders, the Agent does not believe that the Debtors will be able to establish that any equity cushion actually exists in this case. As set forth on the summary of the appraisals that

were prepared at the Debtors' direction in September 2009, which is attached hereto as Exhibit A, the orderly liquidation value of the Pre-Petition Collateral (excluding the Farm located in Lee County, Florida) results in a collateral shortfall of approximately $8.4 million. When priming liens securing the $18.3 million of postpetition obligations under the Commitment are included, the shortfall reaches approximately $26.7 million.[1] In order to demonstrate an equity cushion of at least 20% with respect to the Pre-Petition Obligations, the amount of excess equity must be equal to at least $11.4 million. For the Debtors to establish a sufficient minimum equity cushion, the orderly liquidation value of the Farm located in Lee County, Florida would have to equal or exceed $38 million. Given the fact that the estimated value of the Farm is only $33.6 million, the Debtors are incapable of providing the Lenders with the adequate protection to which they are entitled under section 364(d) of the Bankruptcy Code.

IRREVOCABLE PRIMING LIENS MAY ONLY BE AWARDED BY FINAL ORDER

13. As set forth in the Motion and required by the express terms of the Commitment, the Debtors are seeking approval of a debtor in possession facility involving extensions of credit in three phases that include: (i) initial advance of $3.5 million to be made upon entry of the Interim Order (as defined herein), (ii) subsequent advance of $3.5 million to be made after entry of the Interim Order and satisfaction of various conditions precedent, some of which are described below, and (iii) a final advance of up to approximately $18.3 million to be made upon the later of entry of the Interim Order and completion of certain due diligence. "Interim Order" is defined in the Commitment as an order entered by the Court which shall:

[1] All liens encumbering the property are appropriate for purposes of the analysis of the equity cushion in connection with determining whether adequate protection exists. *See, Nantucket Investors II v. California Fed. Bank. (In re Indian Palms Assocs.)*, 61 F.3d 197 (3d Cir. 1995) ("classic test for determining equity under section 362(d)(2) focuses on a comparison of the total liens against the property and the property's current value").

> (i) have a copy of the Commitment attached thereto and incorporated by reference;
>
> (ii) contain a finding of good faith under section 364(e) of the Bankruptcy Code;
>
> (iii) provide for the validity of the Loan (as defined therein) and the terms of the collateralization (which include priming liens and superpriority administrative expense claims) notwithstanding any subsequent reversal or modification of the Interim Order on appeal;
>
> (iv) be in form and substance acceptable to the DIP Lender, in its sole and absolute discretion; and
>
> (v) has not been appealed, modified, stayed, vacated or reversed.

Commitment, Paragraph A, Pp. 2 and 3. Failure to obtain entry of the Interim Order results in the DIP Lender being relieved of its obligations to make any advances pursuant to the Commitment.

14. The Debtors maintain in their Motion that section 364(e) of the Bankruptcy Code authorizes this Court to grant a priming lien in the Interim Order which lien shall remain inviolate even if this Court were to determine at the final hearing that the Lenders are not adequately protected. The Debtors have misread section 364(e). That section provides:

> The reversal or modification *on appeal* of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority lien, does not effect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the *pendency of the appeal*, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed *pending appeal*.

11 U.S.C. § 364(e) [emphasis added]. By the plain meaning of the statute, the protections available under section 364(e) apply to final as opposed to interim orders, as only final orders are subject to appeal. Interim orders, based on their preliminary nature, are, with respect to something as fundamental as a priming lien, subject to reversal or modification by the court

based on subsequently available information presented at a final hearing. Entry of an interim order authorizing postpetition financing on an expedited basis should not grant irrevocable priming liens, especially here, where the Lenders have not been provided an adequate opportunity to contest the Debtors' assertions that they can provide the Lenders with adequate protection.

COMMITMENT IS ILLUSORY AND PLACES BANKRUPTCY ESTATE AT RISK

15. Through the Motion seeking authorization to obtain postpetition financing under the Commitment, the Debtors are seeking to bargain away significant property rights, including those of the Lenders, in exchange for very little. As set forth in the section I of the Commitment:

> The Commitment is subject to and conditioned upon the receipt and satisfactory review of the due diligence materials, including, but not limited to, the items set forth in C. and F. of this Paragraph. *In addition, within twenty-one (21) business days following the later of (a) the Closing of the Interim Advance, or (b) following the Lender's receipt of the last item of due diligence materials required by it to have been furnished by the Borrower, the Lender, in its sole discretion, may choose to terminate this Commitment with respect to the Final Advance following the Full Due Diligence Review, for any reason whatsoever, and shall deliver to Borrower in writing notice of its election to withdraw and terminate the Commitment with respect to the Final Advance.*

Commitment, Section I, P. 13 [emphasis added]. Thus, at anytime after receiving all of the fees, expenses, priming liens and superpriority administrative expense claims to which it is entitled, the DIP Lender is permitted to walk away and leave the Debtors, Lenders and other creditors of the estate to face the consequences resulting therefrom. At best, assuming the Debtors can satisfy the numerous other respective conditions precedent for the two initial advances under the Commitment, the Debtors will obtain approximately $7 million of funds in order to operate for approximately 30 days.

16. Under the circumstances of this proposed debtor in possession credit facility, which involves significant uncertainty, instability and risk to the Debtors and their estates, the Lenders are not adequately protected. In the event the Commitment is terminated by the DIP Lender "in its sole and absolute discretion," the Debtors will be forced to conduct a fire-sale liquidation of the Pre-Petition Collateral, will not be able to realize maximum value and the only party to benefit from such scenario will be the DIP Lender with the benefit of its priming liens. Nothing with respect to this contemplated arrangement is fair, equitable or beneficial to the Debtors or their creditors. The Motion to approve the Commitment should be denied accordingly.

WHEREFORE, the Agent respectfully requests: (i) that the Motion be denied in its entirety; and (ii) that the Court grant to the Agent such other and further relief to which it may be justly entitled.

Respectfully submitted,

/s/ Alan R. Lepene
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ATTORNEYS FOR KEYBANK NATIONAL ASSOCIATION, AS ADMINISTRATIVE AGENT FOR THE LENDERS

Exhibit A

Schwab Collateral Valuations

	Collateral Type	Address	City	County	State	Ownership	Comment	Schwab Orderly Liq. Value
1	RE	7290 Alico Road	Fort Myers	Lee	Florida	Schwab Ready Mix, Inc.		3,420,000
2	RE	2110 Pondella Road	Cape Coral	Lee	Florida	Schwab Ready Mix, Inc.		1,660,000
3	RE	1923 63rd Avenue East	Bradenton	Manatee	Florida	Schwab Ready Mix, Inc.		1,570,000
4	RE	6300 Shirley Street	Naples	Collier	Florida	Schwab Ready Mix, Inc.		1,350,000
5	RE	3333 Acline Road	Punta Gorda	Charlotte	Florida	Schwab Ready Mix, Inc.		1,100,000
6	RE	1404 Harlee Road		Manatee	Florida	Schwab Ready Mix, Inc.	Vacant land	1,100,000
1	RE	661 Front Street	Berea	Cuyahoga	Ohio	Medina Supply		1,000,000
2	RE	1516 Highland Road	Macedonia	Summit	Ohio	Medina Supply		850,000
3	RE	2301 Progress Street	Dover	Tuscarawas	Ohio	Schwab Industries Inc.?		840,000
4	RE	18413 Dover Road	Mt. Eaton	Wayne	Ohio	Quality Block & Supply		830,000
5	RE	340 Steels Corner Road	Cuyahoga Falls	Summit	Ohio	Medina Supply		800,000
6	RE	820 West Smith Street	Medina	Medina	Ohio	Medina Supply		715,000
7	RE	4500 Linwood Road	Placida	Charlotte	Florida	Schwab Ready Mix, Inc.		710,000
8	RE	1102 Alachua Street		Collier	Florida	Schwab Ready Mix, Inc.		680,000
9	RE	1501 Industria Parkway	Brunswick	Medina	Ohio	Medina Supply		650,000
10	RE	123 S. Jackson Road	Venice	Sarasota	Florida	Schwab Ready Mix, Inc.		610,000
11	RE	7725 Race Road	North Ridgeville	Lorain	Ohio	Medina Supply		600,000
12	RE	1151 West Bagley Road	Berea	Cuyahoga	Ohio	Medina Supply	Land only	490,000
13	RE	230 East Smith Road	Medina	Medina	Ohio	Medina Supply		425,000
14	RE	3251 Brightwood Road	Midvale	Tuscarawas	Ohio	OIS? Schwab Industries?	Sold?	410,000
15	RE	Steels Corner + Wyoga Lake	Cuyahoga Falls	Summit	Ohio	Medina Supply		400,000
16	RE	82799 Toot Road	Cadiz	Harrison	Ohio	Twin Cities Concrete Co.		400,000
17	RE	400 North State Road	Medina	Medina	Ohio	Medina Supply		400,000
18	RE	141 Tuscarawas Avenue	Dover	Tuscarawas	Ohio	Twin Cities Concrete Co.		370,000
19	RE	800 Progress Drive	Berea	Medina	Ohio	Medina Supply	Land only	340,000
20	RE	12523 Prospect Road	Strongsville	Cuyahoga	Ohio	Medina Supply		270,000
21	Leasehold	1817 Riverside Avenue NW	Massillon	Stark	Ohio	Medina Supply	Land owner: Oster Sand	270,000
22	RE	1031 Kensington Road NE	Center Township	Carroll	Ohio	Twin Cities Concrete Co.		260,000
23	RE	358 Stonecreek Road NW	New Philadelphia	Tuscarawas	Ohio	?		220,000
24	RE	820 Progress Drive	Medina	Medina	Ohio	Medina Supply		200,000
25	RE	300 North State Road	Medina	Medina	Ohio	Medina Supply		190,000
26	RE	1550 Timken Road	Wooster	Wayne	Ohio	Quality Block & Supply		170,000
27	RE	North State Road	Medina	Medina	Ohio	Medina Supply	Land only	130,000
28	RE	10232 Pifer Road	Wadsworth	Medina	Ohio	Medina Supply		100,000
		Subtotal RE						23,530,000
	Farm	18500 Corkscrew Road	Estero	Lee	Florida	Schwab Materials, Inc.		
	Leasehold	13250 Eastern Avenue		Manatee	Florida	Eastern Cement?		4,930,000
	Equipment	Various						14,246,850
	A/R	A/R Availability (2/6 BB)						3,761,216
	Inventory	Inventory Avail. (2/6 BB)						2,068,970

Total		48,537,036
O/S-2/26	Revolver	$5,831,969
	Term A	$19,126,245
	Term B	$31,995,586
		56,953,800
	Collateral Excess/Shortfall	(8,416,764)

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2010, a true and correct copy of the foregoing was served via the Court's ECF system upon those parties registered to receive notice thereby.

/s/ Curtis L. Tuggle
Counsel for KeyBank National Association

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