

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

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

**PENSION BENEFIT GUARANTY CORPORATION’S LIMITED OBJECTION TO DEBTORS’ 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 UNEXPIRED LEASES; AND (5) GRANTING RELATED RELIEF**

The Pension Benefit Guaranty Corporation (“PBGC”), a creditor in the above captioned bankruptcy proceeding, hereby files this Limited Objection to the above inscribed motion (the “Bidding Procedures Motion”) (Docket No. 245) of Schwab Industries, Inc. *et al.* (the “Debtors”). PBGC’s objection is limited to the Debtors’ proposed bidding procedures.

**PRELIMINARY STATEMENT**

Debtors’ Bidding Procedures Motion and the proposed bidding procedures fail to mention the defined benefit pension plan sponsored by the Debtors. According to the most recent information provided by the Debtors to PBGC, the pension plan is underfunded by approximately \$3.2 million. Prospective bidders may wish to assume the pension plan.

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: 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).

However, without sufficient information concerning the amount of liabilities owed to the pension plan, prospective bidders cannot submit informed and competitive bids.

Furthermore, assumption of the pension plan will significantly reduce claims against the Debtors' estates and benefit the morale of employees. Therefore, the Court should require the Debtors to modify the Bidding Procedures to provide prospective bidders with adequate information concerning the amount of liabilities owed by the Debtors to the pension plan, and provide credit to any prospective bidder for the value of liabilities owed to the pension plan if the bidder agrees to assume the pension plan.

### **BACKGROUND**

1. PBGC is a wholly-owned United States government corporation, and an agency of the United States, that administers the defined benefit pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, ("ERISA"), §§ 1301-1461 (2006). PBGC guarantees the payment of certain pension benefits upon the termination of a single-employer pension plan covered by Title IV of ERISA. When an underfunded plan terminates, PBGC generally becomes trustee of the plan and, subject to certain statutory limitations, pays the plan's unfunded benefits with its insurance funds. *See* 29 U.S.C §§ 1321-1322, 1343, 1361.

2. Schwab Industries, Inc., one of the debtors in this jointly administered bankruptcy case, sponsors the Schwab Industries, Inc. Employees' Pension Plan (the "Pension Plan"). The Pension Plan is a defined benefit plan covered by Title IV of ERISA. *See* 29 U.S.C. § 1321. The other Debtors are members of the Pension Plan's controlled group within the meaning of 29 U.S.C. § 1301(a)(13), (14).

3. The Pension Plan provides retirement benefits to approximately 821 participants, 360 of which are active employees of the Debtors. If the Pension Plan were to terminate, the Debtors and any other members of the Pension Plan's controlled group would become liable to PBGC for the unfunded benefit liabilities of the Pension Plan, and incur termination premiums. *See* 29 U.S.C §§ 1301(a)(18), 1306(a)(7), 1362(a)-(b). According to information provided by the Debtors, as of May 1, 2009, the Pension Plan is underfunded by approximately \$3,200,000.

4. On February 28, 2010 (the "Petition Date"), Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code. The cases are being jointly-administered pursuant to an order of this Court.

5. On April 5, 2010, Debtors filed the Bidding Procedures Motion, and attached to the motion as Exhibit "B," the *Procedures for Solicitation and Selection of Highest and Best Qualified Bidder in Connection With Sale of Substantially All the Assets of Schwab Industries, Inc., et al* (the "Bidding Procedures"). Also attached to the Bidding Procedures Motion is Exhibit "A," which apparently will contain the proposed form Asset Purchase Agreement (the "APA"). However, the document is blank. Debtors state that they intend to supplement the exhibit.

6. Neither the Bidding Procedures Motion nor the proposed Bidding Procedures mention the Pension Plan. Without information concerning the amount of liabilities owed to the Pension Plan, prospective bidders cannot make a reasonable determination as to the value of the assets Debtors are selling. Further, it is not known whether prospective bidders are even required to state if they intend to assume the Pension Plan.

## **PROPOSED MODIFICATIONS TO THE BIDDING PROCEDURES**

7. An optimal conclusion for the Debtors' estates and participants of the Pension Plan would be for the purchaser of the Debtors' assets to assume the Pension Plan. Not only would this allow employees to continue to accrue additional benefits and improve employee morale, the assumption of the Pension Plan would significantly reduce PBGC's claims against the Debtors' estates.

8. The Debtors should encourage bidders to assume the Pension Plan, or at the very least disclose sufficient information regarding the Pension Plan, so prospective bidders can submit informed and competitive bids. To do this, the Bidding Procedures should require all prospective bidders to state in their bids whether they intend to assume the Pension Plan. The Bidding Procedures should also provide that the Debtors will give credit for the value of the liabilities of the Pension Plan to any bidder that agrees to assume the Pension Plan. Accordingly, the successful bid for the Debtors' assets will be the one that provides the greatest, total amount of consideration to the Debtors, including any pension liabilities transferred to the purchaser.

9. PBGC has discussed its concerns with counsel for Debtors, and has provided proposed language to be included in the Bidding Procedures that PBGC believes would allow prospective bidders to submit informed and competitive bids. The proposed language that was provided to the Debtors is attached as *Exhibit I*.

**WHEREFORE**, PBGC requests that:

- A. PBGC's Limited Objection be sustained.
- B. The Bidding Procedures be modified as follows:
  - 1. The Bidding Procedures must provide prospective bidders with adequate information concerning the extent of liabilities owed by the Debtors to the Pension Plan;
  - 2. The Bidding Procedures must require all prospective bidders to state in their bids whether they intend to assume the Pension Plan; and
  - 3. The Bidding Procedures must provide credit to any prospective bidder for the value of liabilities owed to the Pension plan if the bidder agrees to assume the Pension Plan.
- C. The Court grant such other and further relief to PBGC as the Court deems appropriate.

Dated: Washington, DC  
April 13, 2010

Respectfully submitted,

/s/ Jon M. Chatalian  
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