

**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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MOTION TO STRIKE COMMITTEE OBJECTION

Pursuant to that certain *Agreed Order Granting 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* entered on May 14, 2010 [Docket No. 408] (the “Final Bidding Procedures Order”), Debtors (the “Debtors”) hereby move pursuant to 11 U.S.C. Section 107(b) and Bankruptcy Rule 7012 and Federal Rule of Civil Procedure 12(f), for an Order enforcing the Final Bidding Procedures Order and striking the Committee’s Objection to the proposed Section 363 asset sale [Docket No. 434] (the “Objection”) for making false statements in the Objection that needlessly expose Debtors, their estates and the bidding process to immediate and irreparable harm.

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).

As these false statements have already caused the Stalking Horse Bidder to insist Debtors take action that undermines the process contemplated in the Final Bidding Procedures Order by prematurely revealing Debtors' valuation analysis, Debtors respectfully request that the Court strike the Objection under Section 107 and Rule 12(f).

A proposed Order for the Court's consideration is attached hereto as Exhibit 1.

Respectfully submitted,

/s/ Daniel A. DeMarco

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Counsel for Debtors

MEMORANDUM OF LAW

On May 14, 2010, this Court entered the Final Bidding Procedures Order, to which the Committee stipulated, in which this Court approved bid procedures that included a process for qualifying bids. Taken together, the Court's rulings meant that the Debtor could not "reject" a bid, and that bids would be qualified only after their submission prior to a May 24 deadline *and* only after an opportunity for bidders to remediate any non-conforming aspects of their bids by a May 25 deadline. The fundamental purpose of the Final Bidding Procedures Order was to permit Debtors to seek to maximize value and its provisions are designed to protect Debtors' proprietary commercial information and minimize the possibility of action, by any bidder or party in interest, that would chill the bidding.

On May 21, 2010, the Committee filed its Objection [Docket No. 434] to the sale. The Committee makes many statements and arguments Debtors dispute. None of those statements or arguments would cause Debtors to seek this extraordinary relief, except that the Objection includes three (3) separate and distinct demonstrably false statements (some repeated several times) that not only threaten to chill bidding, but which actually have, in a matter of hours, caused adverse consequences to Debtors' estates. These three statements are:

1. Debtors have rejected bids (*see* Objection paragraph 31).
2. Debtors have refused to qualify any bidders (*see* Objection paragraph 22).
3. Debtors have valued the Stalking Horse Bid and other "basket bids",

which "basket bids" have a higher value than the Stalking Horse Bid (*see* Objection paragraphs 13 and 21).

Each of these statements is false. Debtors promptly notified Committee counsel that these three statements are false, that they threaten the integrity of the bidding process and demanded that the Objection be withdrawn immediately. Committee counsel refused.

Debtors would expect that Committee counsel would not make the statements they made in the Objection without a good faith basis in fact. Although Debtors are certain that they have not rejected bids, have not refused to qualify any bidders, and have not valued the Stalking Horse Bid and other “basket bids” as alleged, Debtors acted prudently by inquiring of Committee counsel, please tell us “what bid the Debtors rejected” and “what bid the Debtors have failed or refused to qualify.” Committee counsel has failed and refused to respond to these simple and direct questions.

Falsely Claiming Bids are Rejected or Not Qualified Harms the Bid Process.

Section 107(b) of the Bankruptcy Code permits the Bankruptcy Court to “protect” the Debtors’ proprietary “commercial information”. 11 U.S.C. Section 107(b)(1). Further, Section 107(b) of the Bankruptcy Code permits the Bankruptcy Court to “protect” the Debtors from any “scandalous matter contained in a paper filed in a case.” 11 U.S.C. Section 107(b)(2). Bankruptcy Rule 7012 incorporates Federal Rule of Civil Procedure 12(f), which permits the Court to strike “from a pleading” any “immaterial, impertinent or scandalous matter”.

Committee counsel plainly knows that these statements, that Debtors have rejected bids or Debtors have refused to qualify any bidders, are utterly false. It is difficult, however, to conceive of two statements that are more likely than these to chill bidding, to discourage bidders and to cause bidders to forego the opportunity to bid. These statements are precisely the “scandalous” matters subject to protection under Section 107 and subject to the Court’s power to strike under Rule 12(f).

Fortunately, if the Court acts promptly, these adverse effects may be avoided. As the Court is aware, the bid deadline is 5:00 PM on May 24, bids may be remediated until May 25 and the auction does not commence until May 27. Striking the Objection and enjoining the Committee immediately will lift the cloud which Committee counsel have placed on the bidding with these false statements, and will best protect the Debtors' estates and the integrity of the bidding process.

Falsely Claiming Bids How Bids Have Been Valued Harms the Bid Process.

The false statement that Debtors have valued the Stalking Horse Bid and other "basket bids" as alleged also imperils the auction and should be enjoined. First, although Debtors' professionals have begun an in-depth analysis of bids presented prior to May 21, and have endeavored to arrive at values for bids and asset components, and, in confidence, have shared their analyses with the Lenders and the Committee, Debtors have never valued the Stalking Horse Bid at the amount alleged in the Objection. Nor have Debtors ever valued the "basket bids" at the amount alleged in the Objection.

As a result of the Committee's false statements about these "valuations" by Saturday, May 22, Debtors had received a written demand from counsel for the Stalking Horse Bidder insisting that it be provided with the Debtors' valuations of all of the bids.

Debtors now face demands that threaten to constrain their ability to implement procedures that ensure fairness and design procedures for conducting the auction that maximizes bidding and the value of the assets. On Thursday, May 20, counsel and other representatives of Debtors, the Lenders and the Committee met, in person, and agreed that "valuations" would be communicated to bidders only by Debtors' investment bankers at Western Reserve Partners,

LLC as part of the auction process. It is truly disconcerting that on the very next day, the Committee counsel violated this agreement.

On Thursday, counsel for Debtors, the Lenders and the Committee had agreed that the integrity of the sale process was best served by a single channel of communication about bid valuations, to be provided as part of the auction process. The next day, the Committee counsel, through their Objection, reneged. Acting unilaterally, Committee counsel have revealed Debtors' proprietary commercial information (although in an amount and with characterizations that are false), created confusion in the market, fomented a sense by the Stalking Horse Bidder that it is being mistreated and disadvantaged, and triggered a demand by the Stalking Horse Bidder that will only serve to make it more difficult to work with that and all other bidders. The Objection has needlessly generated confusion and a perception of unfairness. The dissemination of false statements about the valuation of the bids cannot be tolerated.

These statements about valuation are precisely the "scandalous" matters subject to protection under Section 107 and subject to the Court's power to strike under Rule 12(f). More troubling is that these statements reveal Debtors' proprietary "commercial information" in violation of Section 107(b)(1).

Striking the Objection and enjoining the Committee immediately will lift the cloud which Committee counsel have placed on the bidding with these false statements, and will best protect the Debtors' estates and the integrity of the bidding process.

Conclusion

For these reasons, the Court should strike the Objection and enjoin the Committee from permitting its false statements from remaining on file where they may cause potential bidders to choose not to submit a bid or otherwise not seek to participate in the Auction, advance their bid

at the Auction, or take other steps a ready, willing and able bidder would take to acquire Debtors' assets.

Given the importance and time-sensitivity of this matter, Debtors respectfully requests that the Court order an emergency hearing to address these matters at the Court's earliest convenience. A proposed order reflecting that requested relief is attached hereto as Exhibit 1 for the Court's consideration and approval.

Respectfully submitted,

/s/ Daniel A. DeMarco

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EXHIBIT 1

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

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In re:	: Chapter 11
	:
SCHWAB INDUSTRIES, INC., <i>et al.</i> , ¹	: Case No. 10-60702
	: (Jointly Administered)
Debtors.	:
	: Judge Russ Kendig
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ORDER STRIKING COMMITTEE OBJECTION AND GRANTING RELATED RELIEF

Upon the Debtors' *MOTION TO ENFORCE FINAL BIDDING PROCEDURE ORDER AND FOR AN ORDER THAT COMMITTEE AND/OR ITS COUNSEL SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CONTEMPT OF THE FINAL BIDDING PROCEDURE ORDER* (the "Enforcement Motion"), the Court finds and concludes that the Enforcement Motion is well taken, that Debtors' bid process is at substantial risk of immediate and irreparable

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harm in that bidding may be chilled by the Committee's statements in its Objection to the proposed Section 363 sale [Docket No. 434], that the Objection contains statements that are scandalous, that the Objection made unauthorized disclosures of Debtors' proprietary commercial information, that the Objection violates 11 U.S.C. Section 107(b)(1) and (b)(2), that the Objection is subject to being struck pursuant to Bankruptcy Rule 7012 and Federal Rule of Civil Procedure 12(f), that the Court has the authority to issue this order under 11 U.S.C. Section 107(b), Rule 12(f) and Section 105(a), and it is therefore

ORDERED, ADJUDGED AND DECREED THAT:

1. The Committee's Objection shall be and is hereby struck and expunged from the files of this case.

2. The Committee is hereby enjoined, prior to the conclusion of the auction, from filing any pleading making any statement about rejecting any bid or refusing to qualify any bid or valuing any bid.

3. This order is without prejudice to the Committee filing an objection to the Section 363 Sale that does not make any statement about rejecting any bid or refusing to qualify any bid or valuing any bid or filing under seal any objection that discloses Debtors' proprietary commercial information, provided, however, such objection must be filed no later than 5:00 P.M. (E.T.) on May 25, 2010 in order to be deemed timely.

IT IS SO ORDERED.

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