

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

-----X  
In re: : Chapter 11  
: :  
SCHWAB INDUSTRIES, INC., *et al.*, : Case no. 10-60702  
: (Jointly Administered)  
Debtors. :  
: Judge Russ Kendig  
-----X

**OBJECTION OF ALLEN CONCRETE PUMPING AND ALLEN CONCRETE &  
MASONRY, INC. TO (1) APPROVAL OF DEBTORS' FIRST AMENDED  
DISCLOSURE STATEMENT WITH RESPECT TO FIRST AMENDED JOINT PLAN  
OF LIQUIDATION OF SCHWAB INDUSTRIES, INC., ET AL. PURSUANT TO 11  
U.S.C. § 1125, AND (2) CONFIRMATION OF DEBTORS' FIRST AMENDED JOINT  
PLAN OF LIQUIDATION DATED OCTOBER 26, 2010**

Allen Concrete Pumping (“ACP”) and Allen Concrete & Masonry, Inc. (“Allen Concrete,” and together with ACP, the “Allen Concrete Entities”),<sup>1</sup> by and through their undersigned counsel, hereby object to approval of the Debtors’ first amended joint disclosure statement and to confirmation of the Debtors’ revised joint plan of reorganization. In support hereof, the Allen Concrete Entities state as follows:

**BACKGROUND**

1. Allen Concrete and Debtor Schwab Ready-Mix, Inc. are each fifty percent (50%) owners in a Florida general partnership (the “Partnership”) known as Allen Concrete Pumping, which provides concrete pumping services to concrete subcontractors, as subject to a Partnership Agreement made as of August 30, 1989 (the “Partnership Agreement”).

---

<sup>1</sup> The address for Allen Concrete is 6301 Shirley Street, Naples, Florida 34109, and the address for ACP is c/o Allen Concrete at the same address.

2. In connection with certain of the Debtors' obligations pursuant to the Partnership Agreement, Allen Concrete filed a secured claim against Debtor Schwab Ready-Mix, Inc. in the amount of \$300,772.50, plus undetermined amounts and additional obligations. [Claim No. 16.]

3. Also in connection with certain of the Debtors' obligations pursuant to the Partnership Agreement, ACP filed a secured claim against Debtor Schwab Ready-Mix, Inc. in the amount of \$394,729.00, plus undetermined amounts and additional obligations. [Claim No. 15.] (The secured claims of Allen Concrete and ACP are somewhat overlapping, and there shall be only one recovery for duplicative amounts.)

4. ACP and Allen Concrete also filed a Request for Allowance and Payment of Administrative Expense Claim and Motion to Compel Assumption or Rejection by Debtors of Partnership Agreement for Allen Concrete Pumping [Docket No. 427] which was subject to a Supplement [Docket No. 587] (collectively, the "ACP Administrative Expense Claim Motion") filed by ACP and Allen to include the administrative claim period through July 13, 2010, seeking recovery of inter-partnership loans and partnership advances to the Debtors in the amount of \$63,863.80 through July 13, 2010 and additional partnership liabilities of \$62,874.41 allocable to the Debtors, from the Debtors' February 28, 2010 Petition Date through July 13, 2010, for a total administrative expense claim through July 13, 2010 of \$126,738.21.<sup>2</sup> Ongoing post-petition obligations of the Debtors to ACP and Allen Concrete continue to accrue, primarily with respect to the concrete pumping equipment of ACP.

5. The pre-petition and post-petition claims of ACP and Allen Concrete constitute secured claims against the Debtors (irrespective of the treatment of the Partnership Agreement for ACP as an executory contract) based on the terms of the Partnership Agreement, applicable

---

<sup>2</sup> An October 5, 2010 hearing concerning the ACP Administrative Expense Claim Motion was cancelled upon the request of counsel for ACP and Allen Concrete so that settlement options could be further explored.

Florida law concerning general partnerships, the possessory liens of ACP and Allen Concrete in the equipment of ACP, and the doctrines of recoupment and setoff.

6. The Debtors filed their First Amended Disclosure Statement with Respect to First Amended Joint Plan of Liquidation of Schwab Industries, Inc. *et al.* Pursuant to 11 U.S.C. § 1125 [Docket No. 657] (the “Disclosure Statement”) on October 26, 2010. The Debtors also filed their First Amended Joint Plan of Liquidation Dated October 26, 2010 [Docket No. 655] (the “Plan”) on October 26, 2010. Pursuant to an Order dated October 27, 2010 [Docket No. 659], the Court set a “Joint Disclosure Statement and Confirmation Hearing” for December 9, 2010 concerning the Disclosure Statement and the Plan.

#### **TREATMENT OF CLAIMS OF ACP AND ALLEN CONCRETE UNDER THE PLAN AND DISCLOSURE STATEMENT**

7. Neither the Plan nor the Disclosure Statement addresses the claims of Allen Concrete. The assertion of claims by ACP is referenced in the documents only generally. Section 7.4 of the Plan provides as follows: “**7.4 ACP Resolution.** The terms of the resolution of ACP’s alleged Claims are set forth on **Schedule 7.4** to this Plan.” Schedule 7.4 to the Plan states that such schedule is “to be filed prior to the Voting Deadline,” thereby allowing for ongoing settlement discussions among ACP, Allen Concrete, the Debtors, the Creditors’ Committee, KeyBank and other parties in interest. To date, the Debtors have not filed a proposed Schedule 7.4, so the treatment of the claims of ACP (as well as the claims of Allen Concrete) remains unknown, and is apparently based on other Plan provisions.

8. After it became apparent that an overall deal would not be reached by the December 3, 2010 objection deadline, the Allen Entities proposed the following Schedule 7.4 so that resolution of the matter could be deferred to a date after the Plan confirmation:

Schedule 7.4 to Plan. ACP and Allen Concrete & Masonry, Inc. (“Allen Concrete”) agree to resolve all of their asserted and other existing administrative and secured claims in the Debtors’ Cases based solely on recoveries from the sale -- or the transfer to Allen Concrete or its nominee – of Debtors’ 50% partnership interest in ACP (owned by SRM) or the assets thereof (collectively, the “ACP Recovery”) as may subsequently be agreed in writing by ACP, Allen Concrete, the Creditor Trustee and KeyBank, or as determined by order of the Bankruptcy Court absent agreement among the parties. Notwithstanding anything contained in the Plan, ACP and Allen Concrete shall retain all of their rights and asserted bases for recovery on various types of claims against the Debtors, with the source of recovery on secured and administrative claims limited to the ACP Recovery, but allowing for the possibility of a general unsecured claim of ACP and/or Allen Concrete against the Debtors to the extent of any deficiency, and without any other types of claims maintained by ACP and Allen Concrete except for defensive purposes only to prevent payment to the Debtors or the Creditor Trustee of any asserted liabilities. All parties reserve all rights regarding the allowed amount of the claims asserted by ACP and Allen Concrete (subject to application of prior bar dates) and regarding the disposition of the Debtors’ 50% partnership interest in ACP and the disposition of the assets of ACP in their entirety, whether through auction or sale, in whole or part, or other disposition. Notwithstanding anything contained in the Plan or confirmation thereof, ACP and/or Allen Concrete shall be able to file a motion for relief from stay or other action with the Bankruptcy Court seeking resolution of claim issues and matters concerning the Debtors’ interest in ACP at any time after February 1, 2011. Further notwithstanding anything contained in the Plan, ACP and Allen Concrete shall not be required to file or assert Other Administrative Expense Claims or other claims in the Debtors’ cases but yet may still be able to recover on such obligations (including but not limited to Other Administrative Expense Claims arising after July 12, 2010), and the Creditor Trustee shall not have the right to liquidate the Debtors’ interest in ACP absent advance notice to ACP and Allen Concrete, and after hearing and further order of the Bankruptcy Court.

9. As of the date of the filing of this Objection, no agreement has been reached regarding (a) an overall resolution of the claims of ACP and Allen Concrete, or (b) the text of Schedule 7.4 in the Plan, which would amount to a complete reservation of rights of the parties, except that recovery on the secured claims and administrative claims of ACP and Allen Concrete would be limited to the “ACP Recovery” with the exception of any possible general unsecured deficiency claim – a significant concession of the Allen Concrete Entities.

## OBJECTION

10. The Disclosure Statement should not be approved because it does not contain “adequate information” pursuant to Bankruptcy Code Section 1125(a)(1), and the Plan should not be confirmed because (i) it fails to address the existence and proper disposition and secured status of the possessory lien and other types of claims asserted by ACP and Allen Concrete, and (b) the Plan is otherwise non-confirmable as a matter of law under Bankruptcy Code Section 1129(a). A debtor has the burden of proving that a proposed plan is confirmable and that it meets the requirements of section 1129 of the Bankruptcy Code. *Bishara v. Gulfstar Indus. (In re Gulfstar Indus.)*, 236 B.R. 75 (Bankr. M.D. Fla. 1999); *In re Immenhausen Corp.*, 172 B.R. 343 (Bankr. M.D. Fla. 1994). For the reasons noted herein, the Debtors cannot satisfy such burden.

(a) Disclosure Statement Lacks Adequate Information

11. The Disclosure Statement does not mention Allen Concrete and does not provide an indication of the anticipated recovery on the claims of ACP and Allen Concrete. The Disclosure Statement also fails to provide specific information regarding the types of claims asserted by ACP and Allen Concrete against the Debtors. While perhaps such claims might be among the “Other Secured Claims” in Class 2b, the Debtors state that allowed secured claims in Class 2b are estimated at “\$0.00 as of the Effective Date.” Disclosure Statement, p. 10. A disclosure statement is fatally defective and deficient if it “fails to identify, indicate the amount of, or classify claims.” *In re New Haven Radio, Inc.*, 18 B.R. 977, 979-80 (Bankr. D. Conn. 1982). “[A] proper disclosure statement must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution.” *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). The

Disclosure Statement does not contain adequate information as required by Bankruptcy Code Section 1125(a)(1) and should not be approved.

(b) The Plan Fails to Meet the Requirements of Bankruptcy Code Section 1129(a)(3)

12. The Debtors' plan is merely a vehicle to benefit the Debtors' secured lenders and has not been proposed in good faith. The Plan seeks to enhance the recovery of the Debtors' secured lenders at the expense of ACP and Allen Concrete and others that maintain secured claims having priority in payment. The Plan provides for a minimal distribution on unsecured claims at best. Accordingly, the Plan will not result in a meaningful dividend to parties other than the Debtors' secured creditors. Since the Plan has not been proposed in good faith as required by Bankruptcy Code Section 1129(a)(3), confirmation should be denied.

(c) The Plan Fails to Meet the Requirements of Bankruptcy Code Section 1129(a)(2)

13. Bankruptcy Code Section 1129(a)(2) provides, in pertinent part, that “[t]he court shall confirm a plan only if all of the following requirements are met . . . (2) [t]he proponent of the plan complies with the applicable provisions of this title.” 11 U.S.C. § 1129(a)(2). The Plan is deficient in numerous respects, including by failing (i) to specify the treatment of any class of claims that is impaired under the Plan as required by Bankruptcy Code Section 1123(a)(3), or (ii) to provide ACP and Allen Concrete and other similarly situated claimants with “adequate information” about the Plan as required under Bankruptcy Code Section 1125. The claims of Allen Concrete are not addressed and Schedule 7.4 – the sole source of information regarding the treatment of ACP’s claim – has not even been filed! Section 7.5 of the Plan inappropriately references the “dissolution of ACP,” a non-debtor – an outcome that cannot be effected without the involvement of ACP and Allen Concrete and compliance with applicable Florida partnership

law. Accordingly, because the Debtors have not complied with applicable provisions of this title,” the Plan is non-confirmable under Bankruptcy Code Section 1129(a)(2).

14. The Plan fails to afford priority to secured claims based on possessory lien rights and fails to provide for the treatment of certain claims, and otherwise contains inadequate information because, as set forth above, the Debtors fail to address therein the types of claims asserted by ACP and Allen Concrete, rendering the Plan incomplete and inaccurate.

(d) The Plan Fails to Meet the Requirements of Bankruptcy Code Section 1129(a)(7)

15. Bankruptcy Code Section 1129(a)(7) provides, in pertinent part:

(a) The court shall confirm a plan only if all of the following requirements are met:

\*\*\*

(7) With respect to each impaired class of claims or interests –

(A) each holder of a claim or interest of such class –

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date[.]

11 U.S.C. § 1129(a)(7)(A).

16. As previously indicated, the Plan fails to address payment of ACP’s and Allen Concrete’s claims, or otherwise provide a mechanism for resolution of ACP’s and Allen Concrete’s possessory lien claims and set-off and recoupment claims, among other secured claims and rights of recovery. Certainly, ACP and Allen Concrete would receive the appropriate value for their secured claims – which they are *not* receiving under the current Plan – if the Debtors’ cases were converted to a cases under Chapter 7 of the Bankruptcy Code. Accordingly, because ACP and Allen Concrete would receive less value on account of their claims under the

Plan than they would receive if the Debtors' assets were liquidated, the Plan is non-confirmable under Bankruptcy Code Section 1129(a)(7)(A) and should not be confirmed.

(e) The Plan Fails to Meet the Requirements of Bankruptcy Code Sections 1129(a)(8), (b)(1) and (b)(2)

17. Bankruptcy Code Section 1129(a)(8) provides, in pertinent part, that “(a) [t]he court shall confirm a plan only if all of the following requirements are met . . . (8) [w]ith respect to each impaired class of claims or interests – (A) such class has accepted the plan; or (B) such class is not impaired under the plan.” 11 U.S.C. § 1129(a)(8). For the reasons noted herein, ACP and Allen Concrete would not presently vote to accept the Plan (and were not even afforded ballots), and are impaired thereunder; therefore, the requirements of Bankruptcy Code Section 1129(a)(8) are not satisfied.

18. *Notwithstanding the various waiver, injunction and other provisions of the Plan, ACP and Allen Concrete must not be deprived of their rights to assert and recover on their secured claims and to defend against any claims of the Debtors or the Creditor Trust. To confirm the Plan as written will deprive ACP and Allen Concrete of claim rights without due process.*

19. Bankruptcy Code Section 1129(b)(1) provides that a plan may be confirmed over the objection of a dissenting impaired class only if “the plan does not discriminate unfairly, and is fair and equitable.” 11 U.S.C. § 1129(b)(1). “Fair and equitable” under the Bankruptcy Code, as applied to secured claims, means that a non-consenting secured creditor must either: (i) retain its liens to the extent of its allowed claim, and receive cash payments totaling at least the value of the allowed claim and equal in value to, as of the effective date of the plan, the value of its interest in the property; or (ii) receive liens attaching to the proceeds of sale of its collateral

under a sale provided by the plan; or (iii) realize the indubitable equivalent of its claims. 11 U.S.C. § 1129(b)(2)(A).

20. Under no interpretation of the Plan does the Debtors' proposed treatment of ACP's and Allen Concrete's claims meet any of these criteria. *See* 11 U.S.C. § 1129(b)(1) and (b)(2). This is evidenced by the Plan's lack of treatment of such claims. While not addressing ACP's and Allen Concrete's possessory lien claims and set-off and recoupment claims, the Plan seeks to ultimately divest ACP and Allen Concrete of any secured claim. Moreover, the Plan expressly seeks to divest creditors and other parties in interest of the right to assert "any right of setoff, subordination or recoupment of any kind, directly or indirectly, against any obligation due the Debtors, the Creditor Trust" or others, or their respective properties or transferees, as provided pursuant to the injunction provisions in Section 7.16 of the Plan.

21. Notwithstanding the Plan's discharge, limitation of liability, and injunction provisions, the Plan must confirm that the Debtors and their officers are not released in any way from reimbursement, indemnification and other claims of any kind arising out of any possible litigation concerning ACP and its operations; and the Debtors and their officers must remain subject to all applicable civil and criminal actions and liabilities.

22. Accordingly, because ACP and Allen Concrete are non-accepting, impaired creditors under the Plan, and the Plan nonetheless fails to treat ACP and Allen Concrete fairly and equitably, the Plan is non-confirmable under Bankruptcy Code Sections 1129(a)(8), (b)(1) and (b)(2) and should not be confirmed.

### **RESERVATION OF RIGHTS**

23. ACP and Allen Concrete reserve the right to amend, supplement, or otherwise modify this objection to approval of Disclosure Statement and to confirmation of Plan as ACP

and Allen Concrete deem necessary or proper. ACP and Allen Concrete further reserve the right to assert and address matters pertaining to their claims and the disposition of the ACP Partnership Agreement in objecting to confirmation of the Debtors' Plan. Nothing contained herein is or shall be deemed a waiver of ACP's and Allen Concrete's rights to further object to approval of the Disclosure Statement or confirmation of the Plan on such other grounds as they deem necessary or proper, all of which rights are hereby expressly reserved.

WHEREFORE, ACP and Allen Concrete respectfully request that the Court (1) deny approval of the Debtors' Disclosure Statement and confirmation of the Plan unless and until the Debtors (a) amend the Disclosure Statement and Plan to address the concerns raised in this Objection so that the Plan is confirmable under Bankruptcy Code Section 1129; and (2) grant ACP and Allen Concrete all other just and proper relief.

Dated: December 3, 2010

Respectfully submitted,

/s/ Michael P. Shuster

Michael P. Shuster (Ohio Bar No. 0064518)  
Rebecca Kucera Fisher (Ohio Bar No. 0071052)  
Tami Hart Kirby (Ohio Bar No. 0078473)  
PORTER WRIGHT ARTHUR & MORRIS LLP  
925 Euclid Avenue Suite 1700  
Cleveland, Ohio 44115  
216.443.9000 / 216.443.9011 Fax  
mshuster@porterwright.com  
tkirby@porterwright.com

*Attorneys for Allen Concrete & Masonry, Inc.  
and Allen Concrete Pumping*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 3, 2010, a copy of the foregoing *Objection of Allen Concrete Pumping and Allen Concrete & Masonry, Inc. to (1) Approval of Debtors' First Amended Disclosure Statement With Respect to First Amended Joint Plan of Liquidation of Schwab Industries, Inc., et al. Pursuant to 11 U.S.C. § 1125, and (2) Confirmation of Debtors' First Amended Joint Plan of Liquidation Dated October 26, 2010* was filed electronically.

Notice of this filing will be sent by operation of this Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system. Additionally, the following parties will be served by first-class mail and electronic mail:

Debtors:  
Schwab Industries, Inc.  
c/o The Parkland Group, Inc.  
Attn: Laurence V. Goddard  
One Cleveland Center  
1375 East 9<sup>th</sup> Street, Suite 1350  
Cleveland, Ohio 44114  
Email: [lgoddard@parkland.com](mailto:lgoddard@parkland.com)

Counsel to Debtors:  
Lawrence E. Oscar, Esq.  
Daniel A. DeMarco, Esq.  
Christopher W. Peer, Esq.  
Hahn Loeser & Parks LLP  
200 Public Square, Suite 2800  
Cleveland, Ohio 44114  
Email: [leoscar@hahnlaw.com](mailto:leoscar@hahnlaw.com)  
[dademarco@hahnlaw.com](mailto:dademarco@hahnlaw.com)  
[cpeer@hahnlaw.com](mailto:cpeer@hahnlaw.com)

Counsel to the Committee:  
Aaron L. Hammer, Esq.  
Freeborn & Peters LLP  
311 S. Wacker Drive, Suite 3000  
Chicago, Illinois 60606-6677  
Email: [ahammer@freebornpeters.com](mailto:ahammer@freebornpeters.com)

Counsel to the Committee:  
Douglas L. Lutz, Esq.  
Frost Brown Todd LLC  
2200 PNC Center  
201 East Fifth Street  
Cincinnati, Ohio 45202-4182  
Email: [dlutz@fbtlaw.com](mailto:dlutz@fbtlaw.com)

Maria Giannirakis, Esq.  
Office of the United States Trustee  
H.M. Metzenbaum U.S. Courthouse  
201 Superior Avenue East, Suite 441  
Cleveland, Ohio 44114-1240  
Email: [maria.d.giannirakis@usdoj.gov](mailto:maria.d.giannirakis@usdoj.gov)

Counsel to the Administrative Agent for the  
Pre-Petition Lenders:  
Alan R. Lepene, Esq.  
Thompson Hine LLP  
3900 KeyCenter  
127 Public Square  
Cleveland, Ohio 44114  
Email: [Alan.Lepene@ThompsonHine.com](mailto:Alan.Lepene@ThompsonHine.com)

Counsel to EFO Financial Group, LLC  
Louis X. Amato  
EFO Financial Group, LLC  
9180 Galleria Court, Suite 600  
Naples, Florida 34109  
Email: [louisa@louamato.com](mailto:louisa@louamato.com)

Kate M. Bradley  
Marc Merklin  
Brouse McDowell, LPA  
388 S. Main Street, Suite 500  
Akron, Ohio 44311  
Email: [kbradley@brouse.com](mailto:kbradley@brouse.com)  
[mmerklin@brouse.com](mailto:mmerklin@brouse.com)

Scott J. Kelly  
Tucker Ellis & West LLP  
925 Euclid Avenue, Suite 1150  
Cleveland, Ohio 44115  
Email: [skelly@tuckerellis.com](mailto:skelly@tuckerellis.com)

Beth A. Buchanan  
9277 Centre Point Drive, Suite 300  
West Chester, Ohio 45069  
Email: [bbuchanan@fbtlaw.com](mailto:bbuchanan@fbtlaw.com)

/s/ Michael P. Shuster  
*One of the Attorneys for Allen Concrete &  
Masonry, Inc. and Allen Concrete Pumping*