UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Chapter 11
	)	
SCHWAB INDUSTRIES, INC., *et al.*,[1]	)	Case No. 10-60702-rk
	)	(Jointly Administered)
Debtors.	)	
	)	Judge Russ Kendig

MEMORANDUM OF LAW IN SUPPORT OF: (I) APPROVAL OF 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 (II) CONFIRMATION OF FIRST AMENDED JOINT PLAN OF LIQUIDATION DATED OCTOBER 26, 2010

The above-captioned debtors and debtors-in-possession (collectively, the "*Debtors*") and the Official Committee of Unsecured Creditors (the "*Committee*," and together with the Debtors, the "*Plan Proponents*"), hereby submit this memorandum of law (the "*Memorandum*") in support of: (i) approval of the First Amended Disclosure Statement with Respect to the 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*"); and (ii) confirmation of the First Amended Joint Plan of Liquidation Dated October 26, 2010 (Docket No. 655) (the "*Plan*").[2]

INTRODUCTION

1. The Plan is a liquidation plan resulting from the cooperative efforts by the Committee and the Debtors to reach a fair, equitable and expeditious resolution of the various complex issues pending in the Debtors' chapter 11 cases (the "*Cases*"). The Plan provides for the orderly liquidation of the Debtors' remaining assets and the prosecution of significant causes

[1] The Debtors in these 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] Terms not otherwise defined herein shall have the meaning ascribed to such terms in the Plan or the Disclosure Statement.

of action against third parties. As the Debtors' remaining assets are liquidated and collected, the Creditor Trustee will make distributions to Creditors after establishing appropriate reserves.

2. The bulk of the Debtors' assets were sold to Oldcastle and Resource Land Holdings, LLC pursuant to the Core Sale Order. Other Non-Core assets have been liquidated as well. The Creditor Trustee will liquidate the remaining assets of the Debtors, in addition to pursuing Avoidance Actions and Miscellaneous Causes of Action and objecting to Claims, with the aim of substantially decreasing the Claim pool, thereby increasing distributions to Creditors holding Allowed Claims. In addition, the Creditor Trustee will distribute various funds to the appropriate Creditor groups, including: (i) distributing the Settlement Amount (of at least $850,000, representing a "gift" from the Pre-Petition Lenders) pro rata, to the holders of Allowed Class 3 General Unsecured Claims; (ii) distributing the 503(b)(9) Fund to holders of Allowed 503(b)(9) Claims (any excess funds in the 503(b)(9) Fund will be used to pay Allowed Administrative Claims); and (iii) distributing the Administrative Expense Fund to holders of Allowed Administrative Claims. Moreover, any proceeds of Causes of Action (which the Plan Proponents believe will be significant) will be distributed to holders of Allowed Claims pursuant to the priority scheme set forth in the Bankruptcy Code.

3. The Plan also provides for a structured dismissal of the Cases if it is determined that the Creditor Trustee will be unable to generate sufficient cash proceeds from the liquidation of the Creditor Trust Assets to pay holders of Allowed Administrative Claims, Allowed Priority Tax Claims and Allowed Priority Claims in full. Pursuant to such a dismissal, the Creditor Trustee will be charged with, among other things, dissolving SII in the Ohio state courts, prosecuting Causes of Action in this Court and distributing the Debtors' assets as set forth in the Plan.

4. In the Plan Proponents' opinion, the Plan represents the best opportunity under the circumstances for the Debtors' many Creditors to maximize their recovery with respect to their Claims, as well as to resolve the many open issues related to the Cases. The Plan is supported by the affirmative vote of KeyBank, as agent to the Debtors' Pre-Petition Lenders. In the absence of the Creditor Trust generating sufficient proceeds to pay Allowed Administrative Claims, Allowed Priority Tax Claims and Allowed Priority Claims in full, the Plan Proponents believe that the structured dismissal provided for in the Plan will result in greater distributions to all Creditors than in a chapter 7 case. *The Debtors' Creditors have echoed this opinion in overwhelmingly voting to accept the Plan as presented by the Plan Proponents.*

THE PLAN

5. The primary objectives of the Plan are to: (i) transfer the Debtors' remaining assets to a Creditor Trust charged with liquidating these assets, reconciling claims, and making distributions to the Debtors' Creditors; and (ii) maximize value to all Creditor groups on a fair and equitable basis under the priorities established by the Bankruptcy Code and applicable law.

6. The Plan Proponents believe that the Plan provides holders of Allowed Claims with a substantially greater recovery than the recovery they would receive without approval of the Plan, or upon conversion of these Cases to a chapter 7 liquidation.

7. ***Acceptance of the Plan.*** This Plan was formulated by the Plan Proponents after extensive negotiations among the Debtors, the Committee, the Pre-Petition Lenders and other significant creditors, including the Pension Benefit Guaranty Corporation. As a result of these negotiations, the Plan has received overwhelming support from Creditors who have voted to accept the Plan. *See Declaration of Patrick M. Leathem of the Garden City Group, Inc. Regarding the Methodology for the Tabulation of Ballots Accepting or Rejecting the First*

Amended Joint Plan of Liquidation Dated October 26, 2010, filed December 6, 2010 (the "*Tabulation Report*").

8. ***Reply to Objections to the Plan.*** The Plan Proponents' reply to objections to confirmation of the Plan is being filed contemporaneously herewith and is incorporated herein by reference.

ARGUMENT

I. THE DISCLOSURE STATEMENT SHOULD BE APPROVED.

9. The Plan Proponents request that the Disclosure Statement be approved as providing "adequate information" in accordance with section 1125 of title 11 of the United States Code (the "*Bankruptcy Code*"). For the reasons described herein, the Plan Proponents submit that such approval is warranted and appropriate.

10. Under section 1125 of the Bankruptcy Code, a plan proponent must provide the creditors and interest holders with "adequate information" regarding the proposed plan:

> "[A]dequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan[.]

11 U.S.C. § 1125(a)(1). Thus, a disclosure statement must, as a whole, provide "adequate information so that an informed determination can be made whether to accept or reject a reorganization plan." *In re 266 Washington Assocs.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992).

11. The Court has broad discretion in determining whether a disclosure statement contains adequate information. *See In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) ("Congress left vague the standard for evaluating what constitutes adequate

information so as to permit a case-by-case determination based on the prevailing facts and circumstances."); *see also Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop.)*, 150 F.3d 503, 518 (5th Cir. 1998); *Tex. Extrusion Corp. v. Lockhead Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("The determination is largely within the discretion of the bankruptcy court."); *Kirk v. Texaco, Inc.*, 82 B.R. 678, 682 (S.D.N.Y. 1988) ("The legislative history could hardly be more clear in granting broad discretion to bankruptcy judges under § 1125(a)[.]"). This particular point is underscored in the legislative history of section 1125 of the Bankruptcy Code:

> Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case, such as the cost of preparation of statements, the need for relative speed in solicitation and confirmation[.]

H.R. Rep. No. 595, at 408-09 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6364-65. Accordingly, the determination of the adequacy of information in a disclosure statement must be made on a case-by-case basis, focusing on the unique facts and circumstances of each case. *See, e.g., Cardinal Congregate I*, 121 B.R. at 765; *In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 170-71 (Bankr. S.D. Ohio 1988).

12. More specifically, the Disclosure Statement contains information that is relevant and material to the decision of a creditor whether to vote to accept or reject the Plan. Among other things, the Disclosure Statement contains information with respect to: (i) the history of the Debtors; (ii) the events preceding the Debtors' chapter 11 filings; (iii) the Debtors' pre-petition restructuring efforts; (iv) the commencement of the Cases; (v) events during the Cases; (vi) the terms of the Plan; (vii) the legal effects of the Plan; (viii) the classification and treatment of Claims and Interests under the Plan; (ix) the provisions governing distributions under the Plan; (x) the means for implementing the Plan; (xi) the contemplated administration of the Debtors'

Estates by the Creditor Trustee and the Oversight Committee following the confirmation of the Plan; (xii) a description of Causes of Action that may be maintained by the Creditor Trustee under the Plan; (xiii) alternatives to confirmation of the Plan; (xiv) certain risk factors to consider that may affect the Plan; (xv) voting procedures and confirmation requirements for the Plan; and (xvi) the Federal income tax consequences of the Plan.

13. The Plan Proponents respectfully submit that the Disclosure Statement complies with all aspects of section 1125 of the Bankruptcy Code. The Disclosure Statement addresses the information set forth above in a manner that provides holders of Impaired Claims and Interests that are entitled to vote to accept or reject the Plan with adequate information within the meaning of section 1125 of the Bankruptcy Code and therefore should be approved.

II. THE PLAN MEETS EACH REQUIREMENT FOR CONFIRMATION UNDER SECTION 1129(a) OF THE BANKRUPTCY CODE.

14. Section 1129 of the Bankruptcy Code provides that the Court shall confirm a plan only if all of the requirements of section 1129(a) of the Bankruptcy Code and, if applicable, section 1129(b) of the Bankruptcy Code, are met. *See, e.g.*, *In re Laurel Glen Apartments of Asworth, Ltd.*, 139 B.R. 199, 202 (Bankr. S.D. Ohio 1991) ("The provisions of 11 U.S.C. § 1129(a) are mandatory and the Court will require that a record be made at the confirmation hearing to show that each requirement has been met."). As set forth below, both the Plan meets, and the Plan Proponents have satisfied, all the requirements of section 1129(a) of the Bankruptcy Code.

A. The Plan Complies with the Applicable Provisions of Title 11 (11 U.S.C. § 1129(a)(1)).

15. Section 1129(a)(1) of the Bankruptcy Code provides that the "court shall confirm a plan only if the plan complies with the applicable provisions of this title." As explained in its legislative history, section 1129(a)(1) "requires that the plan comply with . . . Sections 1122 and

1123, governing classification and contents of plan." H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also In re Gillette Assocs., Ltd.*, 101 B.R. 866, 872 (Bankr. N.D. Ohio 1989). Accordingly, in determining whether a plan complies with section 1129(a)(1) of the Bankruptcy Code, the Court must consider whether the plan properly classifies all claims and interests required to be classified and whether the plan contains the elements required by section 1123 of the Bankruptcy Code.

1. Section 1122 of the Bankruptcy Code

16. Section 1122 provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

17. Section 1122(a) prohibits the inclusion of dissimilar claims in the same class, but does not require that all similar claims be placed in one class. *See, e.g., Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 585 (6th Cir. 1986) ("[B]y its express language, [section 1122(a) of the Bankruptcy Code] only addresses the problem of dissimilar claims being included in the same class."). Importantly, a plan proponent is afforded significant flexibility in classifying claims under section 1122(a) of the Bankruptcy Code so long as there is reasonable basis for the classification structure. *See, e.g., id.* at 586 ("Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.") (footnote omitted); *see also In re Bryson*

Props., XVIII, 961 F.2d 498, 502 (4th Cir. 1992) (stating that section 1122 of the Bankruptcy Code grants some flexibility in classification of unsecured claims as long as a debtor does not "gerrymander" or artificially impair classes of claims in order to obtain an impaired accepting class); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060-61 (3d Cir. 1987); *In re Snyders Drug Stores, Inc.*, 307 B.R. 889, 893 (Bankr. N.D. Ohio 2004) (same).

18. The Plan satisfies these requirements. Articles II and III of the Plan provides for the classification (or designation in the case of unclassified Claims) of Claims and Interests into distinct Classes containing only substantially similar Claims and Interests based upon: (i) their security position, if any; (ii) their legal priority against the Debtors' assets; and (iii) other relevant criteria. These Classes are as follows:

- *Unclassified Claims*: Professional Fee Claims; Other Administrative Expense Claims; and Priority Tax Claims
- *Unimpaired Classes of Claims*: Class 1: Priority Claims; and Class 2b: Other Secured Claims
- *Impaired Classes of Claims*: Class 2a: Secured Claims of the Pre-Petition Lenders; and Class 3: General Unsecured Claims
- *Impaired Classes of Claims and Interests Not Entitled To Vote on Plan*: Class 4: Equity Security Interests

19. Here, the Plan's classification structure is proper and in accordance with section 1122(a) of the Bankruptcy Code. Separate classification of Class 1 non-tax Priority Claims is proper because such claims differ in legal and factual nature as priority claims under section 507(a) of the Bankruptcy Code. Separate classification of secured claims is necessary, in that Class 2a Secured Claims of the Pre-Petition Lenders will be paid in accordance with the

settlement set forth in the Core Sale Order. To the extent any such Claims exist, Class 2b Other Secured Claims will either be paid in full on or as soon as reasonably practicable after the Effective Date, or will receive the collateral securing their Claims. Class 4 Equity Security Interests are Impaired, and have been deemed to reject the Plan by virtue of their members receiving no distributions thereunder. The classification structure embodied in the Plan thus complies with section 1122 of the Bankruptcy Code.

2. Section 1123(a) of the Bankruptcy Code

20. Section 1123(a) of the Bankruptcy Code identifies seven requirements for the contents of a plan filed by a corporate debtor.[3] Specifically, this section requires that a plan: (i) designate classes of claims and classes of interests; (ii) specify any class of claims or interests that is not impaired under the plan; (iii) specify the treatment of any class of claims or interests that is impaired under the plan; (iv) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest; (v) provide adequate means for the plan's implementation; (vi) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and (vii) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the director, officer or trustee under the plan. *See* 11 U.S.C. § 1123(a).

21. The Plan fully complies with each requirement of section 1123(a) of the Bankruptcy Code as described above. Section 1123(a)(1) of the Bankruptcy Code requires a plan to designate classes of claims and interests, other than claims of a kind specified in sections

[3] Section 1123(a)(8) of the Bankruptcy Code applies only in cases "in which the debtor is an individual" and is therefore inapplicable in these Cases. *See* 11 U.S.C. § 1123(a)(8).

507(a)(2) (administrative expense claims), 507(a)(3) (claims arising during the "gap" period in an involuntary case) and 507(a)(8) of the Bankruptcy Code (tax claims). Article III of the Plan designates Classes of Claims and Interests, other than those specified in sections 507(a)(2), (3) and (8) of the Bankruptcy Code, fulfilling section 1123(a)(1) of the Bankruptcy Code. Unclassified Claims (Administrative Claims and Priority Tax Claims) are designated in Article II of the Plan. Article IV of the Plan designates which Classes are unimpaired, while Article V specifies the treatment of all the Classes, meeting the requirements set forth in sections 1123(a)(2) and 1123(a)(3) of the Bankruptcy Code. Section 1123(a)(4) of the Bankruptcy Code requires that each claim or interest within a class receives the same treatment. The Plan treats each Class individually and no Claim within a Class receives different treatment than other Claims in that Class, satisfying section 1123(a)(4) of the Bankruptcy Code.

22. The Plan also meets the requirements of section 1123(a)(5) of the Bankruptcy Code. Article VII and various other provisions of the Plan discuss the means for Plan implementation, including, but not limited to: (i) the establishment of the Creditor Trust and the appointment of the Creditor Trustee; (ii) the vesting of the Debtors' assets in the Creditor Trust; (iii) granting and preserving in the Creditor Trust the right to administer the Debtors' Estates for the benefit of the holders of Claims entitled to payment from the Creditor Trust; (iv) substantive consolidation of each Debtor's Estate into SII's Estate; (v) the distribution of funds to holders of Claims entitled to payment from the Creditor Trust; (vi) granting the Creditor Trustee standing to prosecute the Causes of Action; (vii) rejection of all remaining executory contracts and unexpired leases; (viii) cancellation of all Equity Security Interests; and (ix) the post-confirmation retention of jurisdiction by this Court as necessary in connection with the implementation and consummation of the Plan.

23. Section 1123(a)(6) of the Bankruptcy Code requires that a plan prohibit the issuance of nonvoting equity securities. The Plan provides that the existing securities of the Debtors will be cancelled (Plan, § 5.7) and that all assets of the Estates vest in the Creditor Trust (Plan, § 7.2). Further, the Creditor Trust is established and maintained for the sole purpose of liquidating and distributing assets of the Estates and proceeds thereof in accordance with Treasury Regulation section 30.1.7701-4(d), and resolving and administering Claims, with no objective to continue or engage in the conduct of a trade or business. (Creditor Trust Agreement, Recital I.) As such, the provisions of section 1123(a)(6) of the Bankruptcy Code are not applicable to the Plan and should be deemed satisfied.

24. Section 1123(a)(7) of the Bankruptcy Code requires that a plan contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director or trustee under the plan and any successor to such officer, director or trustee. As a fundamental matter, the Plan furthers the interests of creditors by providing a reliable mechanic to efficiently liquidate the Debtors' remaining assets, and for the Creditor Trustee to make pro rata distributions of net proceeds to holders of Allowed Claims. For these reasons, among many others, the Plan is in the best interests of Creditors and public policy, satisfying section 1123(a)(7). The Plan further complies with section 1123(a)(7) because no officers or directors are being selected under the Plan.

3. Section 1123(b) of the Bankruptcy Code

25. Section 1123(b) identifies various discretionary provisions that may be included in a plan of reorganization. For example, a plan may impair or leave unimpaired any class of claims, secured or unsecured, or interests, or provide for the rejection or assumption of executory

contracts or unexpired leases pursuant to sections 1123(b)(1) and 1123(b)(2). A plan also may provide for, among other things: "(i) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; (ii) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest; or (iii) the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. §§ 1123(b)(3)(A)-(B), 1123(b)(4). The plan may also modify the rights of holders of secured claims or of holders of unsecured claims and the plan may include other appropriate provisions not inconsistent with the Bankruptcy Code. 11 U.S.C. §§ 1123(b)(5)-(6).

26. The Plan, in fact, implements several discretionary sections noted in section 1123(b). The Plan does leave Impaired several classes of Claims and Interests and provides that all executory contracts and unexpired leases that were not previously assumed or rejected will be rejected as of Plan confirmation. All of these provisions are allowed under section 1123(b) and do not violate any provisions of the Bankruptcy Code. Therefore, section 1123 of the Bankruptcy Code is satisfied.

27. Accordingly, the Plan fully complies with the applicable provisions of the Bankruptcy Code and, therefore, meets the requirements of section 1129(a)(1) of the Bankruptcy Code.

B. The Plan Proponents Have Complied with the Applicable Provisions of Title 11 (11 U.S.C. § 1129(a)(2)).

28. Section 1129(a)(2) requires that the proponent of a plan comply with applicable provisions of the Bankruptcy Code. The legislative history indicates that the principal purpose of this section is to ensure compliance with the disclosure and solicitation requirement set forth in section 1125. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977), S. Rep. No. 989, 95th

Cong. 2d Sess. 126 (1978) (providing that section 1129(a)(2) "requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as § 1125 regarding disclosure"); *see also In re Revco, D.S., Inc.*, 131 B.R. 615, 622 (Bankr. N.D. Ohio 1990) (holding that section 1129(a)(2) was satisfied when the plan proponent complied with section 1125).

29. Section 1125(b) states that acceptance or rejection of a plan may not be solicited after the commencement of the case under this title unless at the time of or before such solicitation there is transmitted to such holder the plan or summary of the plan and a disclosure statement approved by the court. The Plan Proponents complied with section 1125(b) as follows:

- For efficiency, the Plan Proponents are seeking approval of the Disclosure Statement simultaneously with confirmation of the Plan, as contemplated in the Court's *Order: (A) Approving Solicitation and Notice Procedures with Respect to Approval of Disclosure Statement and Confirmation of Proposed Plan of Liquidation; (B) Approving Form of Ballots and Notices in Connection Therewith; (C) Conditionally Approving the Disclosure Statement; and (D) Scheduling Certain Dates and Deadlines with Respect Thereto* (Docket No. 659) (the "*Solicitation Procedures Order*"). Nonetheless, pursuant to the Solicitation Procedures Order, the Court conditionally approved the Disclosure Statement, finding that "(a) the Plan and Disclosure Statement were drafted cooperatively by the Debtors and the Committee; (b) the Pre-Petition Lenders and Oldcastle have reviewed both the Plan and Disclosure Statement; and (c) each of the Pre-Petition Lenders, Oldcastle, the Debtor and the Committee support both the Plan and the Disclosure Statement."

- The Disclosure Statement, Plan, Solicitation Procedures Order, notice regarding the joint hearing on approval of the Disclosure Statement and confirmation of the Plan, plus ballots or notices regarding non-voting status, as appropriate, were served upon all necessary parties by November 5, 2010, via U.S. mail, in accordance with the Solicitation Procedures Order. *See Certificate of Service* (Docket No. 673).

30. The service of the Plan and Disclosure Statement by the Plan Proponents to all necessary parties fulfills the requirements set forth in section 1125 and expressly complied with the Solicitation Procedures Order.

31. Section 1126 specifies the requirements for acceptance of the Plan. Pursuant to section 1126, only holders of Allowed Claims in Impaired Classes that will receive or retain

property under the Plan on account of their Claims may vote to accept or reject the Plan. As set forth in the Disclosure Statement and the Tabulation Report, the Plan Proponents solicited acceptances of the Plan from holders of all Claims that were not the subject of an objection as of the Record Date in each of the Impaired Classes that are to receive distributions under the Plan, namely, Classes 2a and 3. Classes 1 and 2b are unimpaired and, thus, are conclusively presumed to have accepted the Plan. Class 4 will receive no property under the Plan and is conclusively presumed to have rejected the Plan. Accordingly, the Plan Proponents did not solicit acceptances from the holders of Claims or Interests in such Classes. Based upon the foregoing, the requirements of section 1129(a)(2) have been satisfied, with the exception of the approval of the Disclosure Statement, which (the Plan Proponents submit) should occur at the Confirmation Hearing.

C. The Plan Has Been Proposed in Good Faith (11 U.S.C. § 1129(a)(3)).

32. Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). A plan is considered proposed in good faith if there is a "reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Madison Hotel Assocs.*, 749 F.2d 410, 424-25 (7th Cir. 1984); *see also Gillette Assocs.*, 101 B.R. at 873. The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the formation of the plan and the principles of the Bankruptcy Code. *See B.M. Brite v. Sun Country Dev. (In re Sun Country Dev.)*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Jandous Elec. Constr. Corp.*, 115 B.R. 46, 52 (Bankr. S.D.N.Y. 1990). Indeed, to find that a plan does not comply with section 1129(a)(3) of the Bankruptcy Code generally requires "misconduct in bankruptcy proceedings, such as fraudulent misrepresentations or serious

nondisclosures of material facts to the court." *In re River Will. Assocs.*, 161 B.R. 127, 140 (Bankr. E.D. Pa. 1993), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995).

33. The Plan easily satisfies the requirements of "good faith." No methods forbidden by law were used in preparing, soliciting or developing this Plan. The Plan also was proposed by the Debtors and the Committee, together, to further the objectives of the Bankruptcy Code – maximizing the value of the Debtors' assets and then implementing a fair, pro rata distribution of the Debtors' assets to parties entitled to distributions under the Plan. Moreover, the Plan is the result of extensive arm's-length negotiations among the Debtors, the Committee, the Pre-Petition Lenders and various other Creditors. These arm's-length negotiations provide independent evidence of the Plan Proponents' good faith in proposing the Plan. *See, e.g., In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 274 (Bankr. S.D. Ohio 1996) (finding that the plan was proposed in good faith when, among other things, it was based on extensive arm's-length negotiations). The Plan Proponents' good faith in proposing the Plan is further evidenced by the overwhelming support of the Plan by holders of Claims entitled to vote on the Plan. *See* Tabulation Report. For these reasons, the Plan has been filed and proposed in good faith, and the requirements of section 1129(a)(3) of the Bankruptcy Code have been satisfied.

D. All Payments To Be Made by the Debtors or the Plan Proponents Have Been Approved or Will Be Approved by the Court as Reasonable (11 U.S.C. § 1129(a)(4)).

34. Section 1129(a)(4) of the Bankruptcy Code requires that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). In essence, this provision requires that any and all fees promised or

received in connection with or in contemplation of a chapter 11 case by professionals in their representation of the estate of a debtor must be disclosed and subject to the court's review. *See Johns-Manville*, 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986).

35. Pursuant to the *Order Granting Motion of Debtors and Debtors in Possession for an Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* (Docket No. 201) and that certain *Order Amending Order Granting Motion of Debtors and Debtors in Possession for an Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* (Docket No. 530), payment of certain fees and expenses of Professional Persons has been authorized on an interim basis. All such fees and expenses, as well as all other accrued fees and expenses of Professional Persons through the Confirmation Date, remain subject to final review for reasonableness by the Court under section 330 of the Bankruptcy Code.

36. In addition, according to Section 7.9 of the Plan, all payments with respect to fees relating to Professional Persons shall be made according to the standards established by the Bankruptcy Code. Accordingly, the fees would be subject to approval by the Court as reasonable and the requirements of section 1129(a)(4) of the Bankruptcy Code are met. *See, e.g., In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988).

E. The Plan Satisfies the Disclosure Requirements (11 U.S.C. § 1129(a)(5)).

37. Section 1129(a)(5) of the Bankruptcy Code provides:

> (A)(i) The Proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
>
> (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity

security holders and with public policy; and

> (B) The proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

11 U.S.C. § 1129(a)(5). The Debtors will be dissolved and will therefore no longer exist after confirmation of the Plan, thereby alleviating the need to identify those individuals serving as a director, officer or voting trustee of the Debtors.

38. Additionally, the Creditor Trust Agreement identifies John B. Pidcock as the initial Creditor Trustee. Mr. Pidcock is affiliated with Conway MacKenzie, Inc., the Committee's financial advisor. Mr. Pidcock is therefore familiar with the Debtors' books and records. The Creditor Trustee will be overseeing the liquidation of the Debtors, with all duties of a trustee under Ohio law, which is in the best interests of the Creditors and within public policy, as described above and in the Disclosure Statement and Plan. Therefore, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

F. The Plan Does Not Contemplate a Rate Change Subject to Regulatory Approval (11 U.S.C. § 1129(a)(6)).

39. Neither the Plan Proponents nor the Plan contemplate any rate changes subject to regulatory approval and thus, section 1129(a)(6) is not applicable in these Cases.

G. The Plan Satisfies the Best Interest of Creditors Test (11 U.S.C. § 1129(a)(7)).

40. Section 1129(a)(7) requires that a plan be in the best interest of creditors and stockholders. Specifically, section 1129(a)(7) provides that each holder of a claim or interest of such impaired class has either accepted the plan or the value the impaired class would receive is greater than the value they would receive under a chapter 7 liquidation.

41. The best interests test focuses on individual, rejecting, impaired holders of claims and interests, rather than an entire class or classes of claims or interests. *See Gillette Assocs.*, 101 B.R. at 874; *In re Future Energy Corp.*, 83 B.R. 470, 489 (Bankr. S.D. Ohio 1988). The analysis requires that each non-accepting claimant or interest holder receive as much under the plan as they would have if the debtor were liquidated under chapter 7. *See In re Best Prods. Co.*, 168 B.R. 35, 72 (Bankr. S.D.N.Y. 1994), *appeal dismissed*, 177 B.R. 791 (S.D.N.Y. 1995), *aff'd*, 68 F.3d 26 (2d Cir. 1995).

42. The "best interests" test applies only to "impaired" classes. Pursuant to section 1126(f), each holder of a Claim in a Class that is not Impaired is conclusively presumed to have accepted the Plan. Under the Plan, Classes 1 and 2b are unimpaired and conclusively presumed to have accepted the Plan, and therefore such Claims are not Impaired under section 1124. With respect to each Impaired Class of Claims and Interests (Classes 2a and 3 entitled to vote on the Plan, and Class 4 not entitled to vote and deemed to have rejected the Plan), the "best interests of creditors" test is satisfied as to those holders of Claims and Interests in such Impaired Classes that have not accepted the Plan.

43. The Disclosure Statement contains an analysis (the "*Liquidation Analysis*"), which provides an estimate of the funds available for distribution under the Plan. The Disclosure Statement addresses alternatives to the Plan, including conversion of the Cases to chapter 7. The Liquidation Analysis estimates that costs, expenses and fees would inevitably increase in a chapter 7 conversion, thereby reducing the funds available for distribution to Creditors. (Disclosure Statement, § X.C.2.) The Plan Proponents submit that the Plan satisfies the "best interests" test as to each Impaired Class of Claims and Interests because the estimated percentage recovery to holders of Allowed Claims and Interests is equal to or exceeds the estimated

percentage recovery to such holders in a chapter 7 liquidation. Specifically, the additional costs associated with a chapter 7 trustee and its professionals (which would be satisfied on a priority basis) would significantly reduce the funds available for distribution to Creditors. Moreover, a chapter 7 trustee would not have historical knowledge of the Debtors' business affairs, and thus would incur substantial delay and additional expense to complete a lengthy due diligence of the Debtors' affairs. Given the time that would be required for a chapter 7 trustee to complete due diligence and for his or her professionals to get up to speed, distributions to holders of Allowed Claims most likely would be delayed. Moreover, pursuant to the Plan, the initial Creditor Trustee has agreed to forego compensation. Accordingly, the holders of Allowed Claims will receive greater and more prompt distributions under the Plan than they would receive through a chapter 7 liquidation. The Plan, therefore, is in the best interests of each Impaired Claim holder that has voted to reject the Plan.[4]

44. In the context of the erosion of the asset value available for distribution and the expected delay associated with a chapter 7 case, confirmation of the Plan provides each holder of an Allowed Claim or Interest in the Impaired Classes with a recovery that is equal to or greater than the amount that such holder would receive in a chapter 7 liquidation. Accordingly, if the only evidence on record indicates that each non-accepting member of an Impaired Class will receive at least as much under the Plan as it would receive in a chapter 7 liquidation, the Plan satisfies the best interest of creditors test. *See, e.g.*, *Best Prods. Co.*, 168 B.R. at 72.

[4] Holders of Class 4 Interests will not receive any distribution under the Plan or under a chapter 7 liquidation and Class 4 will therefore receive an amount "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." 11 U.S.C. § 1129(a)(7)(A)(ii).

H. All Classes Are Either Not Impaired or Accept the Plan (11 U.S.C. § 1129(a)(8)).

45. Section 1129(a)(8) requires that each class of claims either accept the plan or such class is not impaired under the plan. However, section 1129(b) provides that section 1129(a)(8) need not be satisfied as long as section 1129(b) is satisfied.

46. Based upon the tabulation of the ballots, as set forth in the Tabulation Report, the voting Impaired Classes of Claims (Classes 2a and 3) overwhelmingly voted in favor of the Plan by the requisite majorities with more than one-half in number and two-thirds in amount. In addition, Classes 1 and 2b are unimpaired and thus deemed to have accepted the Plan. Class 4 is deemed to have rejected the Plan. Accordingly, the Plan Proponents will seek confirmation of the Plan with respect to Class 4 Equity Security Interests pursuant to the applicable "cramdown" provisions of section 1129(b). In this case, section 1129(b) is satisfied as discussed below.

I. The Plan Provides for the Payment of Priority Claims (11 U.S.C. § 1129(a)(9)).

47. Section 1129(a)(9) requires that, unless the holders of a particular claim agree to a different treatment of such claim, certain priority claims must be paid in full on the effective date of a plan and that the holders of certain other priority claims must receive deferred cash payments. In particular, pursuant to section 1129(a)(9)(A), holders of claims of a kind specified in sections 507(a)(2) or 507(a)(3) must receive cash equal to the allowed amount of such claims on the effective date of the plan, unless such holders agree to different treatment. Section 1129(a)(9)(B) requires that each holder of a claim of a kind specified in sections 507(a)(1) or 507(a)(4)-507(a)(7) (*i.e.*, wage, employee benefit and deposit claims entitled to priority) must receive either deferred cash payments (if the class has accepted the plan) or cash as of the effective date (if they have rejected the plan), unless such holders agree to different treatment. Finally, section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section

507(a)(8), such as priority tax claims, must receive deferred cash payments, unless such holder agrees to different treatment.

48. The Plan satisfies the above requirements, in that all Allowed Administrative Claims, Allowed Priority Tax Claims and Allowed Priority Claims will be paid in full and in cash by the Creditor Trust within a reasonable time after the creation of appropriate reserves. (Plan, § 5). The Plan will also be amended to provide that Oldcastle will be paid in full with respect to its *Allowed* Administrative Claim on the Effective Date, given Oldcastle's objection to treatment different than as set forth in section 1129(a)(9). By not objecting to the treatment of their Claims, all other Creditors have agreed to the treatment set forth in the Plan.[5] Accordingly, the Plan satisfies the requirement set forth in section 1129(a)(9).

J. The Plan Has Been Accepted by at Least One Impaired, Non-Insider Class (11 U.S.C. § 1129(a)(10)).

49. Section 1129(a)(10) provides that if a class of claims is impaired under the plan, at least one impaired class must accept the plan, determined without including any acceptances by insiders. *See, e.g.*, *U.S. Truck Co.*, 800 F.2d at 584; *In re Lloyd*, 31 B.R. 283, 284 (Bankr. W.D. Ky. 1983); *In re Gagel & Gagel*, 30 B.R. 627, 629 (Bankr. S.D. Ohio 1983). Under the Plan, Class 2a Secured Claims and Class 3 General Unsecured Claims are Impaired and have overwhelmingly voted to accept the Plan, as determined without including any acceptances by any insider in such Classes. Accordingly, the requirements of section 1129(a)(10) are satisfied.

[5] In addition, as discussed below, if the Creditor Trustee does not believe that the Creditor Trust will generate sufficient proceeds to pay Allowed Administrative Claims, Allowed Priority Tax Claims and Allowed Priority Claims in full, the Effective Date will not occur and the Cases will be dismissed.

K. The Plan Is Feasible (11 U.S.C. § 1129(a)(11)).

50. Section 1129(a)(11) requires that plan confirmation is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

51. On its face, section 1129(a)(11) provides that liquidation may be contemplated in a plan. *See In re Pc Liquidation Corp.*, 383 B.R. 856, 866-67 (E.D.N.Y. 2008). To demonstrate feasibility, a debtor need only show a "reasonable probability" that the provisions of the plan can be performed. *See, e.g., In re Brotby*, 303 B.R. 177, 191 (Bankr. 9th Cir. 2003) (citing *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 787 F.2d 1352, 1364 (9th Cir. 1986)). "[T]he plan does not need to guarantee success, but it must present reasonable assurance of success." *In re Made in Detroit, Inc.*, 299 B.R. 170, 176 (Bankr. E.D. Mich. 2003); *Gillette Assocs.*, 101 B.R. at 882 (citing *U.S. Truck*, 800 F.2d at 589).

52. The purpose of the feasibility test is to protect against potentially unrealistic or speculative plans. A plan may not be based on "visionary promises." *Made in Detroit*, 299 B.R. at 176; *see also Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985). However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds. *See Gillette Assocs.*, 101 B.R. at 882.

53. As set forth in the Plan, on the Confirmation Date: (i) the Creditor Trust Assets shall vest in, and be transferred to, the Creditor Trust, for the benefit of all holders of Allowed Claims under the Plan; and (ii) the Creditor Trust, through the Creditor Trustee, is and shall be authorized and appointed to pursue Causes of Action and objections to Claims and otherwise

liquidate and distribute the Net Proceeds of such Creditor Trust Assets, for the benefit of all holders of Allowed Claims under the Plan.

54. Moreover, the Plan provides that if the Creditor Trustee determines that the Creditor Trust will not generate sufficient cash proceeds from the liquidation of Creditor Trust Assets to pay Allowed Administrative Claims, Allowed Priority Tax Claims and Allowed Priority Claims in full, the Creditor Trustee may file a notice of dismissal of the SII Case pursuant to section 1112(b) and conduct a state court liquidation of the Creditor Trust Assets. (Plan, § 7.20.).

55. The Plan Proponents believe that such a controlled dismissal – as opposed to a "straight" dismissal or conversion to a chapter 7 case – is in the best interests of all Creditors and the most efficient and cost-effective manner in which to resolve these Cases absent consummation of the Plan. Pursuant to a "structured" dismissal, the Creditor Trustee will be able to remain in control of the Debtors' assets, thereby avoiding the incurrence of the costs of a conversion to a chapter 7 case. In addition, the Creditor Trustee will reconcile Claims and make distributions to Creditors based on the priority schemes of the Bankruptcy Code and the Plan. Further, the Creditor Trustee will maintain standing to commence Avoidance Actions and Miscellaneous Causes of Action in the Bankruptcy Court, which will increase the proceeds available to distribution to Creditors.

56. A structured dismissal is appropriate under section 1112(b). Under section 1112(b), the Debtors' Cases may be dismissed "for cause." *See, e.g.*, *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984); *In re Blunt*, 236 B.R. 861, 864 (Bankr. M.D. Fla. 1999). Here, if the Creditor Trustee is unable to pay Allowed Administrative Claims in full,

cause for dismissal would be found pursuant to section 1112(b)(4)(M) (inability to effectuate substantial consummation of a confirmed plan).

57. Based on the inability to consummate the Plan, dismissal would be in the best interests of Creditors. *See, e.g.*, *In re Superior Sliding & Window, Inc.*, 14 F.3d 240, 243 (4th Cir. 1994); *In re Mazzocone*, 183 B.R. 402, 411 (Bankr. E.D. Pa. 1995), *aff'd*, 200 B.R. 568 (E.D. Pa. 1996). Dismissal would maximize the value of the Debtors' Estates because appointment of a chapter 7 trustee would impose significant and unnecessary additional administrative costs upon the Debtors' Estates that would dilute potential distributions to Creditors. Dismissal and subsequent liquidation proceedings in Ohio state court is preferred in this instance because the Creditor Trustee can more effectively and efficiently liquidate the Creditor Trust Assets than a chapter 7 trustee in all respects. In addition, it is unknown whether a chapter 7 trustee would pursue Avoidance Actions or Miscellaneous Causes of Action. In fact, the Plan Proponents believe that it would be highly unlikely for a chapter 7 trustee to pursue such Causes of Action in a situation in which the Estates are administratively insolvent. However, in a structured dismissal scenario, the Creditor Trustee will pursue such Causes of Action (as well as object to Claims in the state court dissolution proceeding), which should result in increased distributions to Creditors. Finally, the best interest of creditors' test is met where interested parties, other than the debtor, agree that dismissal is the proper disposition of the case. *See, e.g.*, *Mazzacone*, 183 B.R. at 411-12. Here, the Plan Proponents favor dismissal in the event of an absence of the ability to pay Administrative Claims, Priority Tax Claims and Priority Claims in full.

58. In addition, the Plan Proponents believe that approval of such a dismissal now is more efficient than requiring the Creditor Trustee to seek approval of the dismissal later.

Providing such approval now will permit the Creditor Trustee to dismiss the Cases quickly and without having to wait out a dismissal motion when time will be of the essence in liquidating the Creditor Trust Assets and distributing the proceeds to Creditors. Moreover, the Creditors' overwhelming support for the Plan indicates that they believe a dismissal will be in the best interests of all parties if the Creditor Trust is administratively insolvent, thereby making a separate motion seeking such relief unnecessary and a waste of Creditor Trustee resources.

59. Because the Plan Proponents believe that Creditors will be better off with a structured dismissal than a "straight" dismissal or conversion to a chapter 7 case, the feasibility requirement is thereby satisfied.

L. The Plan Provides for the Payment of Fees Under 28 U.S.C. § 1930 (11 U.S.C. § 1129(a)(12)).

60. Section 1129(a)(12) requires that, as a condition precedent to the confirmation of a plan, "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). The Plan provides that fees payable under 28 U.S.C. § 1930 will be paid by the Debtors through the Confirmation Date and by the Creditor Trustee after the Confirmation Date. (Plan § 9.2). The Plan therefore complies with section 1129(a)(12) of the Bankruptcy Code.

M. Sections 1129(a)(13) Through 1129(a)(16) of the Bankruptcy Code Are Not Applicable.

61. There are no retirement benefits owed by the Debtors in these cases and thus, section 1129(a)(13) does not apply. The Debtors are not required to pay domestic support obligations and therefore section 1129(a)(14) does not apply. None of the Debtors are individuals and therefore section 1129(a)(15) does not apply. The Debtors are "moneyed, business, or commercial corporation[s]" and section 1129(a)(16) is therefore inapplicable.

III. THE PLAN MEETS EACH REQUIREMENT FOR CONFIRMATION UNDER SECTION 1129(b) OF THE BANKRUPTCY CODE.

62. Section 1129(a)(8), which requires all impaired Classes to accept the Plan, has not been satisfied with respect to Class 4 Equity Security Interests. Nonetheless, section 1129(b) provides an exception to section 1129(a)(8), allowing the Court to confirm a plan so long as one impaired class has accepted it, through a mechanism colloquially referred to as "cramdown." A plan may be confirmed without each class's affirmative acceptance if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interest that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Here, Classes 2a and 3 have accepted the Plan. Thus, the Court must approach confirmation with respect to holders of Interests in Class 4 under the cramdown provisions of section 1129(b).

A. The Plan Meets All Requirements for Confirmation Other Than Section 1129(a)(8) of the Bankruptcy Code.

63. As demonstrated above, the Plan meets all of the requirements of section 1129(a), except the requirement of section 1129(a)(8) with respect to Class 4 due to the deemed rejection of the Plan by such Class pursuant to section 1126(g).

B. The Plan Does Not Discriminate Unfairly.

64. Section 1129(b)(1) does not prohibit discrimination between classes under a plan of liquidation; it prohibits only discrimination that is "unfair." The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) only if similar claims are treated differently without a reasonable basis for the disparate treatment. *See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 228 (Bankr. D.N.J. 2000); *In re Future Energy Corp.*, 83 B.R. 470 (Bankr. S.D. Ohio 1988). The Plan does not discriminate unfairly against the rejecting Class. *See In re Snyders Drug Stores, Inc.*, 307 B.R. 889, 894-95 (Bankr. N.D. Ohio 2004) (applying four-part test to determine whether discrimination against a class is "unfair"); *In re*

Eagle-Picher Ind., Inc., 1996 U.S. Dist. LEXIS 17160 (S.D. Ohio Nov. 18, 1996); *In re Johns-Manville Corp.*, 68 B.R. 618, 637-38 (Bankr. S.D.N.Y. 1986). Equity interests are of a different legal nature than claims. As such, if Creditors are not being paid in full, and no similarly situated Equity Security Holders are receiving any distribution, the common stockholders have no basis to object as they are all being treated alike and cannot argue that they are victims of unfair discrimination. Class 4 is not unfairly discriminated against since no other Class with the same legal priority (*i.e.*, equity) is being treated differently under the Plan. Accordingly, no Class is unfairly discriminated against and section 1129(b)(1) is satisfied.

C. The Plan Is Fair and Equitable.

65. Section 1129(b)(2)(C) provides that with respect to a class of interests, a plan is fair and equitable if:

> (i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or
>
> (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

11 U.S.C. § 1129(b)(2)(C). There are no Interests junior to Class 4 receiving or retaining property under the Plan. In addition, no Class of Claims senior to Class 4 will receive more than full payment on account of Claims in such Class. The Plan therefore satisfies the cramdown standards. Accordingly, section 1129(b) is satisfied.

IV. SECTION 1129(c) OF THE BANKRUPTCY CODE IS SATISFIED.

66. The Plan is the only plan that has been filed in these Cases, and satisfies the requirements of sections 1129(a) and 1129(b). Accordingly, the requirements of section 1129(c) are satisfied.

V. SECTION 1129(d) OF THE BANKRUPTCY CODE IS SATISFIED.

67. No party in interest, including but not limited to any governmental unit, has requested that this Court deny confirmation of the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933, and the principal purpose of the Plan is not such avoidance. Accordingly, the Plan satisfies section 1129(d) of the Bankruptcy Code.

VI. ARTICLE VI OF THE PLAN SATISFIES THE REQUIREMENT FOR ASSUMPTION OR REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES.

68. Section 1123(b)(2) provides that a plan, subject to section 365, may provide for the assumption, rejection or assignment of any executory contract or unexpired lease of the debtor not previously rejected. Section 365(a), in turn, provides that a debtor-in-possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). A debtor's decision to reject an executory contract or unexpired lease must only satisfy the business judgment rule and will not be subject to review unless such decision is clearly an unreasonable exercise of judgment. *See In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n.16 (8th Cir. 1996); *see also In re Mkt. Square, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992); *In re Phar-Mor, Inc. v. Strauss Bldg. Assoc.*, 204 B.R. 948, 952 (N.D. Ohio 1997); *In re Structurelite Platics Corp.*, 86 B.R. 922, 295 (Bankr. S.D. Ohio 1988).

69. Article VI of the Plan complies with the requirements of section 365. Specifically, Section 6.1 of the Plan provides that, as of the Confirmation Date, all pre-petition

executory contracts and unexpired leases to which a Debtor is a party will be deemed rejected, except those contracts or leases already assumed or rejected during these Cases. Because the Debtors are liquidating, rejection of all remaining executory contracts makes good business sense. Section 6.2 of the Plan provides that proofs of claim for rejection of any executory contract or unexpired lease must be filed no later than thirty (30) days after the Confirmation Date. Any such claim not filed by that deadline will be forever barred. Accordingly, the requirements of section 365 are satisfied as to the rejection of executory contracts and unexpired leases under Article VI of the Plan.

70. For the foregoing reasons, the proposed rejections of all unassumed and unrejected executory contracts and unexpired leases pursuant to the Plan should be approved in connection with confirmation.

VII. THE INJUNCTION AND EXCULPATION IN THE PLAN ARE PROPER.

71. As of the Confirmation Date, pursuant to Section 7.16 of the Plan (the "*Injunction*"), any persons who hold any liens, claims or interests against the Debtors will be permanently enjoined from enforcing them other than as provided in the Plan and the Confirmation Order.

72. Absent the Injunction, parties could impair the successful implementation of the Plan. The Injunction is therefore essential to permit the Plan to be implemented in accordance with its terms and avoid adverse actions by third parties that could impair the ability for Creditors to achieve the benefits of the Plan.

73. Section 7.18 of the Plan exculpates the Committee, the Pre-Petition Lenders, the Creditor Trustee and the Debtors, and their respective members, officers, directors, shareholders, subsidiaries, affiliates, employees, advisors, attorneys, agents, successors and assigns from any

liability in connection with the Cases, the confirmation of the Plan or the Plan's implementation (the "*Exculpation*"). The Exculpation does not apply to fraud, willful misconduct or gross negligence, nor does it apply to any members of the Schwab Family.

74. Courts have held that provisions like the Exculpation are appropriate when the parties are released or exculpated for acts or omissions in connection with or related to the chapter 11 cases, "the pursuit of confirmation of the Plan, the consummation of the Plan or the [a]dministration of the Plan or the property to be distributed under the Plan, except for willful misconduct or gross negligence." *In re PWS Holding Corp.*, 228 F.3d 224, 246 and 245-47 (3d Cir. 2000) (holding that release of, among others, debtors and creditor committees, including such parties as officers, directors, employees, professionals and advisors, was appropriate where it was activity related to the pursuit of the chapter 11 plan and excluded willful misconduct and gross negligence); *In re Granite Broad. Corp.*, 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (approving exculpation clause that excluded gross negligence and intentional misconduct).

75. It is generally accepted that, without protection from liability relating to, or in connection with, the prosecution of a chapter 11 case and a chapter 11 plan, at least from direct claims that may be held by a debtor or from standard exculpatory safe harbors, key personnel might be unwilling, or abandon efforts, to restructure a debtor's affairs. This realization has served as at least a partial basis for the approval of releases in other cases. *See Enron Corp.*, 326 B.R. at 503 (noting that exculpation is appropriate because "parties participated in the creation of the Plan under the guarantee that they would receive some limited protection for participating in one of the largest and most complex bankruptcy filings").

76. Given the efforts and contributions of the parties being exculpated, who worked in good faith to administer these Cases and to negotiate and prepare the Plan, the Exculpation is

appropriate and should be approved. Without the Exculpation, the implementation of the Plan would be hindered by the threat of potential liabilities of, and litigation against, the parties being exculpated. Moreover, the parties being exculpated should not be subject to liability for their good faith efforts to conclude these Cases and obtain confirmation of the Plan.

77. The appropriateness of the Exculpation is further demonstrated by the limited scope thereof. Specifically, the Exculpation carves out fraud, willful misconduct and gross negligence and does not apply to members of the Schwab Family. (Plan, § 7.18.) Accordingly, the Exculpation should be approved.

VIII. THE CONSOLIDATION OF THE DEBTORS BENEFITS ALL CREDITORS AND SHOULD BE APPROVED.

78. Section 7.1 of the Plan provides that the Plan shall "serve as, and shall be deemed to be, a motion for entry of an order substantively consolidating the Debtors." (Plan, § 7.1.2.) Specifically, the Plan provides for the following:

> On the Confirmation Date, and except as otherwise provided in the Plan: (i) all guaranties of any Debtor of the payment, performance or collection of another Debtor shall be deemed eliminated and cancelled; (ii) any obligation of any Debtor and all guaranties thereof executed by another Debtor or Debtors shall be treated as a single obligation and any obligation of two or more Debtors, and all multiple Claims against such entitles on account of such joint obligations, shall be treated and allowed only as a single Claim against the consolidated Debtors; and (iii) each Claim filed or to be filed against any Debtor shall be deemed filed against the consolidated Debtors and shall be deemed a single Claim against and a single obligation of the consolidated Debtors.

Such consolidation shall not (other than for purposes related to the Plan) cause any Debtor to be liable under the Plan for any Claim for which it is otherwise not liable, and the liability for any such Claim shall not be affected by the substantive consolidation of the Debtors' Estates. (Plan, § 7.1.1.)

79. The Bankruptcy Code contemplates that a consolidation may appropriately be used to effectuate a plan of liquidation. *See* 11 U.S.C. § 1123(a)(5)(C) (providing that "[n]othwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation, such as . . . consolidation of the debtor with one or more persons"). Whether by section 105(a), section 1123(a)(5)(C) or otherwise, there is little question that a bankruptcy court has the authority to order substantive consolidation. *See Cent. Claims Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.),* 192 B.R. 903, 904 (Bankr. S.D. Ohio 1996).

80. Indeed, it is well established that where consolidation is not employed by a plan proponent "offensively to achieve advantage over one group in the plan negotiation process," courts have the general equitable power to order such consolidations. *See, e.g., Union Sav. Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.),* 860 F.2d 515, 518-19 (2d Cir. 1988) (observing that, as an equitable remedy, consolidation is also used to afford creditors equitable treatment and thus may be ordered when the benefits to creditors therefrom exceed any harm suffered); *accord In re Owens Corning*, 419 F.3d 195, 215 (3d Cir. 2005).

81. Notably, in these Cases, not a single Creditor has objected to the consolidation proposed in the Plan. The Plan Proponents propose consolidation of the Debtors solely to facilitate the implementation of the Plan and are not seeking to improperly enhance or impair the recoveries of any Creditors. The consolidation of the Debtors' Estates is an important component of the Plan, which provides the best opportunity for a recovery from these Estates. It is therefore not surprising that the Plan, which includes consolidation, was overwhelmingly approved by Creditors entitled to vote thereon. *See* Tabulation Report.

82. Here, consolidation will eliminate multiple and duplicative Claims and joint and several liability Claims, and will afford payment of Allowed Claims against each of the Debtors from a common fund. Moreover, substantive consolidation will promote judicial economy, minimize the costs of administration of the Debtors' Cases and effectuate equitable distributions to the Creditors of the Estates, and is therefore appropriate and should be approved. *See, e.g.*, *In re Baker & Getty Fin. Servs., Inc.*, 78 B.R. 139, 141 (N.D. Ohio 1987).

CONCLUSION

Based upon the foregoing, the Plan Proponents respectfully submit that: (i) the Disclosure Statement contains "adequate information" within the meaning of section 1125 of the Bankruptcy Code and should be approved; (ii) the Plan complies with and satisfies all of the requirement of section 1129 of the Bankruptcy Code and should be confirmed; and (iii) the Court should grant the Plan Proponents such further relief as is just and proper.

Dated: December 6, 2010.

/s/ Daniel A. DeMarco Lawrence E. Oscar (0022696) Daniel A. DeMarco (0038920) Christopher W. Peer (0076257) HAHN LOESER & PARKS LLP 200 Public Square, Suite 2800 Cleveland, Ohio 44114 Telephone: 216-621-0150 Facsimile: 216-241-2824 E-mail: leoscar@hahnlaw.com dademarco@hahnlaw.com cpeer@hahnlaw.com *Counsel for the Debtors and Debtors-in-Possession*	/s/ Aaron L. Hammer Aaron L. Hammer, Esq. Richard S. Lauter, Esq. Thomas R. Fawkes, Esq. FREEBORN & PETERS LLP 311 South Wacker Drive, Suite 3000 Chicago, Illinois 60606-6677 Telephone: 312-360-6000 Facsimile: 312-360-6520 E-mail: ahammer@freebornpeters.com rlauter@freebornpeters.com tfawkes@freebornpeters.com *Counsel to the Official Committee of Unsecured Creditors*

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Chapter 11
	)	
SCHWAB INDUSTRIES, INC., *et al.*,[1]	)	Case No. 10-60702-rk
	)	(Jointly Administered)
Debtors.	)	
	)	Judge Russ Kendig
	)	

TABLE OF CONTENTS

Page

[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).

Page

Page