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

OMNIBUS REPLY TO OBJECTIONS TO: (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 omnibus reply to objections (the "*Reply*") to objections to: (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 has been overwhelmingly accepted by the Classes entitled to vote on the Plan. The other Classes are either unimpaired under the Plan or, with respect to Equity Security Interests (the holders of which have not filed any objections to the Plan), are deemed to have rejected the Plan.

[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.

2. Despite the near-unanimous approval of the Plan from Impaired Classes and the fact that the Plan is the product of arm's-length negotiations among the Debtors, the Committee, the Pre-Petition Lenders and other significant Creditors, five purported Creditors have filed objections to the Plan and/or Disclosure Statement (collectively, the "*Objections*").

3. Two of the Objections were filed by purported holders of Priority Tax Claims (that are disputed by the Plan Proponents) – the Internal Revenue Service (the "*IRS*") and the State of Ohio, Department of Taxation and the Ohio Bureau of Workers' Compensation (collectively, "*Ohio*"). Two other Objections were filed by holders of purported Administrative and/or Secured Claims (that are disputed by the Plan Proponents) – Oldcastle Materials, Inc. ("*Oldcastle*") and Allen Concrete Pumping ("*ACP*") and Allen Concrete & Masonry, Inc. ("*ACM*," and collectively with ACP, "*Allen Concrete*"). The final Objection was filed by a pre-petition Creditor of the Debtors that failed to file a Claim against the Debtors – Timothy Taylor ("*Taylor*").

4. All of the Objections should be overruled for the reasons stated herein. Based on the overwhelming support of the Plan by the voting Impaired Classes and the satisfaction of section 1125 of the Bankruptcy Code and each confirmation standard as provided in section 1129 of the Bankruptcy Code, the Bankruptcy Court should approve the Disclosure Statement and confirm the Plan.

THE IRS OBJECTION

5. The Objection filed by the IRS is a mere "laundry list" attack on the Plan. Without citing any authority for any of its numerous objections, the IRS simply seeks to place roadblock after roadblock to confirmation of the Plan. In fact, most of the IRS's objections are inappropriate and could have been spared had the IRS read the plain language of the Plan and the

Disclosure Statement that were provided to it. Instead, the IRS chose to cause the Plan Proponents to expend resources that could otherwise go to pay Allowed Claims to counter each of the numerous one-line objections, which the Plan Proponents have done, with – unlike the IRS – adequate detail and citation to authority. The IRS's efforts to derail the Plan Proponents' efforts to confirm the Plan should not be sanctioned by this Court.

I. The Plan Proponents Dispute the IRS's Claim.

6. As an initial matter, the Plan Proponents dispute the IRS's Claims for over $10 million in taxes due. In addition, the Plan Proponents believe that the Debtors are entitled to a federal tax refund of $5,389,269.

II. The "Gift" from the Pre-Petition Lenders Does Not Violate the Bankruptcy Code.

7. In connection with the sale of the Debtors' Core Assets to Oldcastle, the Committee and the Pre-Petition Lenders reached a global settlement on multiple issues, which settlement was documented in the Core Sale Order approved by this Court. In consideration for the Committee's efforts provided during the administration of the Cases and support of the sale process, the Pre-Petition Lenders agreed to provide the Committee with cash consideration in amounts equal to: (i) $850,000 as a base carve-out for the General Unsecured Creditors; (ii) fifteen percent (15%) of the net sale proceeds received by the Pre-Petition Lenders in excess of $51 million based on a sharing formula appended to the Core Sale order; and (iii) $1,333,000 to satisfy certain fees and expenses of the Committee's Professionals incurred during the Cases (collectively, the "*Unsecured Creditors Gift*").

8. In Cases in which the General Unsecured Creditors may have otherwise received no distributions, the Unsecured Creditors Gift represents a huge victory for the General Unsecured Creditors. This victory is reflected by the near-unanimous voting results for the Plan.

And notably, the Unsecured Creditor Gift has absolutely no effect on distributions available to other Creditors – including holders of Priority Tax Claims. The gift came from proceeds of the Pre-Petition Lenders' collateral and not from assets of the Estates.

9. Regardless, the IRS argues that the Unsecured Creditors Gift to holders of General Unsecured Claims violates "the rules of distribution among unsecured creditors." (IRS Obj., at ¶ 2.) However, the weight of authority provides that a class of creditors may "gift" a portion of the distributions it is entitled to, especially under circumstances similar to those in these Cases – where the class making the gift has a perfected security interest and distributions to the complaining class are not affected.

10. In the recent case of *In re DBSD North America, Inc.*, 419 B.R. 179 (Bankr. S.D.N.Y. 2009), *aff'd*, 2010 U.S. Dist. LEXIS 33253 (S.D.N.Y. Mar. 24, 2010), the bankruptcy court held that:

> The Gifting Doctrine permits creditors, if they wish, to "gift" part of the distributions to which they'd otherwise be entitled to junior classes or interests, even if that gift results in unequal distributions to classes that would otherwise be *pari passu*, or if the gift makes distributions to a class when a more senior class has not been paid in full. . . . [U]nderlying the Gifting Doctrine, as it has evolved, is the concept that if the creditor class is entitled to property from the estate – as particularly is the case when a class of secured creditors holds a perfected security interest in the property – it may generally do whatever it wishes with such property, including transferring it to other holders of claims or interests.

Id. at 210-11; *see also Official Unsecured Creditors' Committee v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1313 (1st Cir. 1993) ("The Code does not govern the rights of creditors to transfer or receive nonestate property. While the debtor and the trustee are not allowed to pay nonpriority creditors ahead of priority creditors, creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including to share them with other creditors."); *In re Worldcom, Inc.*, 2003 WL 23861928, at *61 (Bankr. S.D.N.Y. Oct. 31, 2003) ("The greater

value received by the members of the [trade claims committee] as a result of the Contributions does not violate the Bankruptcy Code, because the Contributions are the result of other creditors . . . voluntarily sharing their recoveries under the Plan with the members of the [trade claims committee]. The greater value received by the members of the [trade claims committee] is not the result of the Debtors' distribution of estate property to such creditors. Creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including sharing them with other creditors, so long as recoveries received under the Plan by other creditors are not impacted.").

11. Cases that did not permit the use of the gifting doctrine found gifting inappropriate based on facts not present here, such as the gift not coming from a class of creditors with a perfected security interest or forcing the gift to come from the complaining class. *See, e.g., In re Armstrong World Indus., Inc.*, 432 F.3d 507, 514 (3d Cir. 2005) (finding that the absolute priority rule was violated where an unsecured creditor class would receive and automatically transfer warrants to the holder of equity interests in the event that its co-equal class rejected the plan).

12. However, here, where the gift came from a perfected secured creditor, the argument in favor of the use of gifting is especially strong. *See, e.g., SPM Mfg. Corp.*, 984 F.2d at 1312 ("If a lien is perfected and not otherwise invalidated by law, it must be satisfied out of the assets it encumbers before any proceeds of the assets are available to unsecured claimants, including those having priority (such as priority tax creditors)."); *DBSD North America, Inc.*, 419 B.R. at 211 ("[W]hen the gift comes from a class with one or more duly perfected secured creditors, the rationale for the doctrine is particularly strong, as the secured creditor class has a property interest in the property it has elected to gift, and if it were to enforce its security interest,

the property would never become part of the estate to be subject to distribution to unsecured creditors under a plan."); *In re World Health Alternatives, Inc.*, 344 B.R. 291, 299 (Bankr. D. Del. 2006) ("Such a carve out does not offend the absolute priority rule or the Bankruptcy Code's distribution scheme because the property belongs to the secured creditor – not the estate."); *In re Union Fin. Servs. Group, Inc.*, 303 B.R. 390, 423 (Bankr. E.D. Mo. 2003) ("There is no unfair discrimination in a Plan provision that allows the Senior Secured Lenders voluntarily to assign to unsecured creditors cash collateral proceeds that otherwise would rightfully belong to the secured creditors[.]"); *see also In re Journal Register Co*, 407 B.R. 520 (Bankr. S.D.N.Y. 2009) (authorizing gift from secured lenders to unsecured trade creditors).

13. Here, the proceeds of the Core Asset Sale that were distributed to the Pre-Petition Lenders with respect to their Claims were proceeds of assets subject to their perfected security interests. All of the proceeds were rightfully theirs and in the absence of the Unsecured Creditor Gift, the Pre-Petition Lenders could have kept all of the proceeds for themselves. The fact that the Pre-Petition Lenders voluntarily paid $850,000 (plus potentially more, pursuant to the sharing formula) to the General Unsecured Creditors will have no impact on distributions available to other Creditors, including the IRS.

14. Accordingly, the Court should – again – approve of the Unsecured Creditor Gift and hold that it does not violate any provisions of the Bankruptcy Code.

III. The Plan Provides that Priority Tax Claims Will Be Paid in Full and According to Section 1129(a)(9)(C) of the Bankruptcy Code.

15. The IRS further argues that the Plan "fails to provide for payment of the Internal Revenue Service's unsecured priority claim, plus interest, within five years from the [Petition Date], as required under [section] 1129(a)(9)(C) [of the Bankruptcy Code]." (IRS Obj., at ¶ 4.)

16. However, the Plan and the Disclosure Statement very clearly provide that Allowed Priority Tax Claims will be paid in full and pursuant to section 1129(a)(9)(C) of the Bankruptcy Code. Plan, at § 5.2.1 ("Distributions of the Net Proceeds from the Creditor Trust shall be made by the Creditor Trustee in accordance with the Creditor Trust Agreement (and in accordance with sections 507(a)(8) and 1129(a)(9)(C) of the Bankruptcy Code) to the holders of Allowed Priority Claims[.]"); Disclosure Statement, at § IV.B (providing, in the summary chart, that Priority Tax Claims are expected to be paid 100% of their Allowed Claims).

17. Further, the Plan provides that if there are not sufficient Creditor Trust Assets to pay Priority Tax Claims in full by the Effective Date, the Plan will not become effective and, instead, the Creditor Trustee will dismiss the Cases. Plan, at § 7.20 ("If, prior to the Effective Date, the Creditor Trustee determines . . . that the Creditor Trust will be unable to 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, it may . . . file a notice of dismissal of the SII Case.").

18. Accordingly, the Plan does provide for payment in full of Allowed Priority Tax Claims and will make distributions to the IRS in compliance with section 1129(a)(9)(C) of the Bankruptcy Code. Otherwise, the Plan will not become effective and the Cases will instead be dismissed.

IV. The Plan Adequately Defines the Effective Date of the Plan.

19. The IRS objects to the Plan on the basis that "it does not clearly define an effective date for the plan." (IRS Obj., at ¶ 5.)

20. However, there is no requirement in the Bankruptcy Code or otherwise (and none cited by the IRS) that requires the Plan Proponents to establish a specific date for the Effective Date in order to confirm the Plan.

21. Moreover, the Plan does establish an outside date for the Effective Date to occur prior to dismissal pursuant to Section 7.20 of the Plan. *See* Plan, at § 1.34 (defining "Effective Date" as "a date not greater than 180 days after the Confirmation Date, unless extended by the Creditor Trustee[.]").

V. The Plan and the Disclosure Statement Adequately Describe the 503(b)(9) Fund and the Administrative Expense Fund.

22. The IRS further objects to the Plan on the basis that "it fails to adequately describe the nature of 'set aside funds,' specifically the 503(b)(9) fund and the 'Administrative Fund.'" IRS Obj., at ¶ 6.

23. Both the Plan and the Disclosure Statement discuss the origin and the purposes of both the 503(b)(9) Fund and the Administrative Expense Fund. For example, the Plan defines both funds. *See* Plan, at § 1.2 (defining the "503(b)(9) Fund" as "the $500,000 in Cash provided by Oldcastle to pay 503(b)(9) Claims") and § 1.23 (defining the "Administrative Expense Fund" as "the $900,000 in Cash provided by Oldcastle under the Core Sale order to pay Allowed Administrative Claims").

24. The Disclosure Statement describes how Oldcastle contributed such funds to the Estates pursuant to the Core Sale Order as follows:

> As part of the consideration paid to the Estates for the Core Assets, Oldcastle has transferred or will transfer $500,000 (the 503(b)(9) Fund) and $900,000 (the Administrative Expense Fund) to the Debtors' counsel to fund distributions to holders of Allowed 503(b)(9) Claims and unpaid Allowed Administrative Claims, respectively. To the extent not otherwise used to fund payments to holders of Allowed 503(b)(9) Claims and unpaid Allowed Administrative Claims prior to the Confirmation Date, any such

> remaining funds shall be transferred to the Creditor Trust pursuant to the Plan and the Creditor Trustee shall have authority to determine the allocation of the funds remaining in the 503(b)(9) Fund and the Administrative Expense Fund.

Disclosure Statement, at § VI.A.5.a. The Disclosure Statement further provides that the asset purchase agreement pursuant to which Oldcastle purchased the Core Assets (the "*Oldcastle APA*") provided that the Debtors and Oldcastle were to determine the allocation of these funds within sixty (60) days of the closing date of the Core Asset Sale. *Id.* at § VI.A.5.a n.3. If the parties were not able to determine such allocation within this timeframe, the Oldcastle APA provided that the Bankruptcy Court would determine the allocation. *Id.* Given the establishment of the Creditor Trust and the transfer of all assets of the Debtors to the Creditor Trust, the Plan Proponents seek approval of the Bankruptcy Court for the Creditor Trustee to determine the allocation of the 503(b)(9) Fund and the Administrative Expense Fund following consultation with, and subject to the approval of, the Oversight Committee. *Id.* at § VII.A.3 and 4. Accordingly, both the Plan and the Disclosure Statement adequately and thoroughly describe the 503(b)(9) Fund and the Administrative Expense Fund.

OLDCASTLE'S OBJECTION

25. Oldcastle's Objection contains two arguments: (i) the 503(b)(9) Fund cannot become property of the Creditor Trust and is subject to Oldcastle's undocumented reversionary interest; and (ii) the Plan must provide to pay Oldcastle's Administrative Claims in full on the Effective Date because Oldcastle does not agree to treatment different than that provided in section 1129(a)(9)(A) of the Bankruptcy Code.

26. Both of these arguments should be overruled. Oldcastle already paid the entire 503(b)(9) Fund to the Estates and failed to provide for any mechanism to obtain a return on any of the unused funds. Thus, the remaining 503(b)(9) Fund will become property of the Creditor

Trust seven (7) days after the Confirmation Date. In addition, in the absence of Oldcastle's agreement to different treatment, the Plan Proponents will agree to pay Oldcastle's *Allowed* Administrative Claims on the Effective Date. However, it should be noted that the Plan Proponents dispute Oldcastle's Administrative Claims in their entirety and, therefore, unless the parties settle or the Court fully adjudicates the parties' disputes, it is possible that Oldcastle's Administrative Claims will not be "Allowed" on the Effective Date.

I. Oldcastle Retained No Residual Rights to the 503(b)(9) Fund.

27. As provided in the Disclosure Statement and in Oldcastle's Objection, Oldcastle agreed to fund up to $500,000 with respect to Allowed 503(b)(9) Funds. Disclosure Statement, at § VI.A.5.a; Oldcastle Obj., at ¶ 3. However, as clearly provided in the Oldcastle APA, Oldcastle's right to determine the allocation of the 503(b)(9) Fund expired within sixty (60) days after the closing of the Core Asset Sale. After the expiration of the 60-day deadline, "the allocation shall be determined by the Bankruptcy Court." Oldcastle APA, at § 2.4(b)(4). Accordingly, Oldcastle has lost its ability to designate the allocation of the 503(b)(9) Fund and the Plan and Disclosure Statement seek approval to permit the Creditor Trustee to determine such allocation. Disclosure Statement, at § VI.A.5.a.

28. Neither the Core Sale Order nor the Oldcastle APA provide any mechanism for Oldcastle to obtain a return of any monies funded to the 503(b)(9) Fund once it was paid to the Debtors. Oldcastle and the Debtors did not set up an escrow account or otherwise provide for a procedure for Oldcastle to receive any of the 503(b)(9) Fund monies paid to the Debtors. Though Oldcastle calls the Debtors' counsel's account where it deposited the 503(b)(9) Fund an "Escrow Account," no escrow agreement (or any type of agreement) was executed to provide for the return of any funds so deposited.

29. Given that Oldcastle funded the entire $500,000 to the 503(b)(9) Fund currently held by the Debtors' counsel and that Oldcastle has voluntarily given up its right to designate the allocation of the 503(b)(9) Fund (due to the expiration of the 60-day deadline set forth in the Oldcastle APA), any remainder of the 503(b)(9) Fund may be used by the Creditor Trustee to fund other Plan payments upon payment in full of all Allowed 503(b)(9) Claims after reconciliation of such Claims.

30. In addition, an amount in excess of $500,000 of 503(b)(9) Claims has been filed against the Estates and the Creditor Trustee has yet to begin his reconciliation of such Claims. It will not be until 503(b)(9) Claims are reconciled that it will be determined whether there will be any funds remaining in the 503(b)(9) Fund after payment in full of Allowed 503(b)(9) Claims. While the Debtors believe many of the 503(b)(9) Claims will ultimately not be Allowed, there is no guarantee that the Claims filed will be reduced below $500,000. *See* Disclosure Statement, at § VII.B.1.c.

II. The Creditor Trustee Will Pay Oldcastle's Administrative Claims in Full on the Effective Date to the Extent Oldcastle Has Allowed Administrative Claims.

31. Oldcastle objects to its Administrative Claims being paid other than "on the Plan's Effective Date" as being in violation of section 1129(a)(9)(A) of the Bankruptcy Code Oldcastle Obj., at § 15.

32. However, section 1129(a)(9)(A) of the Bankruptcy Code only requires the payment of the "*allowed* amount of such claim" on the effective date (unless the holder agrees to different treatment). 11 U.S.C. § 1129(a)(9)(A) (emphasis added). Oldcastle's Administrative Claims have not been allowed at this time. In fact, the *Motion of Oldcastle Materials, Inc. for Allowance of Administrative Claims* (Docket No. 680) will be the subject of a preliminary objection filed by the Committee, and it is anticipated that the Creditor Trustee will

independently raise objections to Oldcastle's Administrative Claims. Accordingly, Oldcastle's Administrative Claims are not "allowed claims" that must be paid in full by the Effective Date.

33. However, to the extent Oldcastle has Allowed Administrative Claims on the Effective Date, the Creditor Trustee will pay such claims in full at that point, as required by section 1129(a)(9)(A) of the Bankruptcy Code, in the absence of Oldcastle's agreement to different treatment.

TIMOTHY TAYLOR OBJECTION

34. Mr. Taylor is a former employee of the Debtors who holds an alleged disability pension claim. He objects to the approval of the Disclosure Statement on the basis that the Plan Proponents "failed to include him on its Disclosure Statement" and that he "and his counsel were wrongfully excluded as interested parties."

35. However, Mr. Taylor was included as an "interested party" in that he received a copy of the Plan, Disclosure Statement and Joint Hearing Notice. *See Certificate of Service* (Docket No. 673). Though Mr. Taylor indicates in his objection that he holds a pre-petition Claim against the Debtors, he has no Claims scheduled against any of the Debtors, nor did he file a Claim against any of the Debtors. The Debtors have acknowledged that they inadvertently failed to schedule Mr. Taylor's claim on their Schedules of Assets and Liabilities. Given this inadvertent failure, Mr. Taylor is welcome to assert his claims and seek leave to file a proof of claim notwithstanding the passage of the Bar Date. These issues, however, are outside the purview of the Plan confirmation process and should not delay or impede upon the Plan Proponents' efforts, and Mr. Taylor's objection should therefore be overruled.

OHIO DEPARTMENT OF TAXATION AND BUREAU OF WORKERS' COMPENSATION OBJECTION

36. Ohio objects to confirmation of the Plan and the adequacy of the Disclosure Statement solely on the ground that the "Debtors appear to have left open a mechanism for a structured dismissal without payment in full of priority tax claims." Ohio further argues that "[u]nless or until Debtors can unequivocally propose to pay priority tax claims in full, Debtors have not proposed a confirmable plan."

37. Contrary to Ohio's argument, however, the structured dismissal provisions set forth in the Plan were specifically included to provide an efficient and equitable alternative to the Plan becoming effective if the Creditor Trust did *not* have sufficient assets to pay Allowed Administrative Claims, Allowed Priority Tax Claims and Allowed Priority Claims in full as required by section 1129(a)(9) of the Bankruptcy Code. Ohio's arguments wrongfully presuppose that the dismissal of the Cases – rather than the Plan becoming effective – must satisfy section 1129 of the Bankruptcy Code.

38. Accordingly, the Court should overrule Ohio's Objection.

ALLEN CONCRETE PUMPING AND ALLEN CONCRETE & MASONRY, INC. OBJECTION

39. Allen Concrete objects to approval of the Disclosure Statement and confirmation of the Plan on the following grounds: (1) neither the Plan nor the Disclosure Statement addresses ACM's claims, and incompletely addresses ACP's claims; (2) the Plan fails to meet the "good faith" requirement of section 1129(a)(3); (3) the Plan fails to meet the requirements of section 1129(a)(2); (4) the Plan fails to meet the requirements of section 1129(a)(7); and (5) the Plan fails to meet the requirements of section 1129(a)(8), (b)(1) and (b)(2). Each of these objections are meritless, and are premised upon Allen Concrete's erroneous assumptions concerning the validity and priority of its claims against the Estates and its repeated misreadings

of the Plan and Disclosure Statement. Accordingly, the Allen Concrete Objection should be overruled in its entirety.

I. ACM's and ACP's Purported Claims are Adequately Disclosed in the Plan and Disclosure Statement.

40. Allen Concrete argues that because its Claims are not specifically mentioned in the Plan or the Disclosure Statement, the Plan Proponents therefore have failed to adequately disclose its Claims in the Disclosure Statement. This argument, on its face, is preposterous. Both ACM and ACP have asserted Administrative Claims and Class 2b Other Secured Claims[3] in proofs of claim filed with the Bankruptcy Court. The Disclosure Statement and the Plan both describe, in great detail, the treatment of both types of claims, leaving any holder of Allowed Claims little doubt as to the nature and timing of distributions it stands to receive. *See* Plan, at §§ 5.1 and 5.5. There are hundreds of Creditors in these cases, and Allen Concrete has not – and cannot – point to any requirement that each Creditor be specifically referenced by name in the Plan or the Disclosure Statement.

41. And while the Plan Proponents acknowledge that Schedule 7.4 to the Plan has not yet been filed, the Plan Proponents and Allen Concrete have been actively negotiating a resolution that would be acceptable to all parties but may be unable to finalize such resolution until after the Confirmation Date. One of the reasons for this is that an appraiser retained by Allen Concrete to value the subject assets was not able to complete its appraisal until December

[3] Throughout its Objection, Allen Concrete repeatedly argues that ACM and ACP each hold secured claims against the Debtors' Estates, based upon possessory lien rights created under Florida partnership law. And indeed, such lien rights may exist. However, Allen Concrete fails to recognize that those lien rights, if they in fact exist, are not held with respect to estate property, but rather, to property of ACP – *a non-Debtor entity*. None of the property of ACP is property of these Estates. Indeed, the Debtors' only interest in ACP is the 50% general partnership interest held by Debtor SRM. This interest does not result in Allen Concrete or ACP holding secured claims against SRM or any other Debtor. Additionally, the Plan Proponents submit that neither ACM nor ACP should be entitled to administrative expense priority because its post-Petition Date expenditures did not provide a benefit to these Estates. The Plan Proponents or their successors – including the Creditor Trustee – reserve all rights to raise these and other substantive objections to the claims of ACM or ACP in accordance with the Plan, the Confirmation Order and the Creditor Trust Agreement.

6, 2010, which therefore made a resolution prior to the voting deadline of December 3, 2010 impossible. The Plan Proponents remain hopeful that a full resolution of all outstanding matters with Allen Concrete can be reached shortly after the Confirmation Date, and the Creditor Trustee will seek approval of the Bankruptcy Court of any such resolution pursuant to Bankruptcy Rule 9019.

II. The Plan Has Been Proposed in Good Faith.

2. Allen Concrete's next argument – that the Plan has not been proposed in good faith – simply has no basis in reality. 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).

42. Here, there is simply no evidence that the Plan is plagued with misrepresentations or nondisclosures, or that any misconduct has been committed by the Plan Proponents. And to state that the Plan is a vehicle to maximize the Pre-Petition Lenders' recoveries at the expense of unsecured creditors fundamentally ignores the reality of these Cases. As this Court (and Allen

Concrete) is aware, the Pre-Petition Lenders voluntarily made the Unsecured Creditor Gift to the holders of General Unsecured Claims, and through the sharing formula set forth in Core Sale Order, the Estates may receive additional proceeds that will directly benefit unsecured creditors. Allen Concrete fails to note that in the absence of this valuable gift, given the Pre-Petition Lenders' substantially undersecured position, unsecured creditors would have stood to receive *no* distribution in these Cases. But based on the efforts of the Plan Proponents – which efforts are reflected in the Plan – unsecured creditors are guaranteed to receive something on account of their Claims. Additionally, the Plan does not alter the priority scheme set forth in the Bankruptcy Code, except as it relates to the Pre-Petition Lenders' gift, which is permissible for the reasons stated in the Plan Proponents' response to the IRS Objection.

43. Because the Plan was proposed in good faith, and represents unsecured creditors' best opportunity for a meaningful recovery from the Estates, Allen Concrete's Objection should be overruled.

III. The Plan Complies with Section 1129(a)(2) of the Bankruptcy Code.

44. Allen Concrete next asserts that the Plan fails to comply with section 1129(a)(2) of the Bankruptcy Code, in that it: (i) fails to specify the treatment of Classes of Claims that are impaired under the Plan; and (ii) does not provide ACP and ACM with "adequate information" about the Plan. Again, both of these assertions are wholly without merit.

45. Section 1129(a)(2) of the Bankruptcy Code 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).

46. Here, and as set forth more fully in the *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 "*Confirmation Brief*"), the Plan Proponents have amply complied with section 1125 of the Bankruptcy Code. The Plan has been properly solicited and noticed, and those Creditors entitled to vote on the Plan have been provided with that opportunity in accordance with section 1125(b) and 1126 of the Bankruptcy Code and the Solicitation Procedures Order, which was approved by this Court. ACM and ACP, having asserted Administrative Claims and secured claims that would fall under Class 2b if ultimately allowed, are not entitled to vote to accept or reject the Plan, since Allowed Administrative Claims and Class 2b Claims are unimpaired thereunder.

47. Additionally, and notwithstanding the absence of Schedule 7.4, more than adequate information has been provided by the Plan Proponents concerning the treatment of Allen Concrete's purported Claims. To the extent that its asserted Administrative Claims are allowed, they will be paid in full in accordance with Section 5.1 of the Plan. To the extent that its asserted Class 2b Other Secured Claims are allowed, Section 5.5 provides that the Creditor Trustee will pay those Claims in cash as soon as practicable following the Effective Date, or will surrender the collateral securing such Claims. These provisions should leave Allen with no doubt as to how its purported Claims will be administered in the event that they are allowed.

Accordingly, its Objection under section 1129(a)(2) of the Bankruptcy Code should be overruled.

IV. The Plan Complies with Section 1129(a)(7) of the Bankruptcy Code.

48. Allen Concrete next argues that the Plan does not comply with the "best interests of creditors" test codified in section 1129(a)(7) of the Bankruptcy Code, in that the Plan fails to address the payment or resolution of ACP's and ACM's purported Claims. Again, this argument ignores the letter and spirit of section 1129(a)(7) of the Bankruptcy Code as well as the carefully-crafted provisions of the Plan relating to the reconciliation of Claims and the mechanism set forth therein for distributions to Creditors.

49. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and stockholders. Specifically, section 1129(a)(7) of the Bankruptcy Code 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.

50. Here, Allen Concrete asserts Administrative Claims, which are unimpaired under the Plan and unclassified, and Class 2b Other Secured Claims, holders of which are not entitled to vote on the Plan because they are unimpaired. Because Class 2b Claims are unimpaired under the Plan, and because Administrative Claims are unclassified, section 1129(a)(7) of the Bankruptcy Code does not apply to Allen Concrete. Moreover, Allen Concrete's assertion that it will not receive "appropriate value" for its purported secured claims is erroneous – if either ACM or ACP is found to have an allowed Class 2b Claim, it will be paid in full in cash up to the value of its collateral, or the Creditor Trustee will surrender the collateral. Accordingly, Allen

Concrete cannot argue that the Plan fails to satisfy the "best interests of creditors" test as to it, and its Objection should be overruled.

V. The Plan Meets the Requirements of Sections 1129(a)(8), (b)(1) and (b)(2) of the Bankruptcy Code.

51. Finally, Allen Concrete argues that because the Plan fails to meet the requirements of section 1129(a)(8), (b)(1) and (b)(2) of the Bankruptcy Code as to it, it is unconfirmable. Notably, each of these sections relate to the ability of a plan proponent to confirm a plan having impaired classes. As discussed above, to the extent Allen Concrete has valid Claims against the Estates, those Claims are either unclassified or fall into Classes that are unimpaired under the Plan *based on the proofs of claim it filed*. Because Allen Concrete's asserted Claims do not fall within Classes 2a, 3 or 4 – the only Impaired classes under the Plan – sections 1129(a)(8), (b)(1) and (b)(2) of the Bankruptcy Code are inapplicable to Allen. Accordingly, Allen's Objection should be overruled.

CONCLUSION

Based upon the foregoing, the Plan Proponents respectfully request that the Bankruptcy Court: (i) overrule the Objections; (ii) approve the Disclosure Statement and confirm the Plan notwithstanding the Objections; and (iii) grant the Plan Proponents such further relief as is just and proper.

Dated: December 6, 2010.

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