

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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

**OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO
DEBTORS' MOTION FOR A REVISED BIDDING PROCEDURES ORDER
APPROVING (1) EXECUTED STALKING HORSE ASSET PURCHASE AGREEMENT;
(2) PROPOSED BREAK-UP FEE AND EXPENSE REIMBURSEMENT; (3) REVISED
BIDDING PROCEDURES; (4) THE FORM AND MANNER OF SERVICE OF NOTICE
OF THE SALE HEARING AND AUCTION; AND (5) THE FORM AND MANNER OF
SERVICE OF NOTICE OF THE ASSUMPTION AND ASSIGNMENT OF
CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

The Official Committee of Unsecured Creditors (the “*Committee*”) appointed in the above-captioned, jointly-administered bankruptcy cases, by and through its counsel, hereby submits this objection (the “*Objection*”)² to the motion (the “*Motion*”) of Schwab Industries, Inc. and its affiliated debtors (collectively, the “*Debtors*”) for the entry of a revised bidding procedures order approving, among other things: (1) an executed stalking horse asset purchase agreement with Cement Resources LLC (“*Cement Resources*”); (2) a proposed break-up fee and expense reimbursement for Cement Resources; and (3) significant revisions of the bidding procedures previously approved with respect to a sale of substantially all of the Debtors’ assets (the “*Bid Procedures*”), and states:

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).

² The Committee reserves all rights to raise additional sale objections following the conclusion of any auction for the Assets. Terms not otherwise defined herein shall have the meaning ascribed to them in the Motion and the Bid Procedures.

INTRODUCTION

1. To this point, the Committee has been cautiously optimistic about the Debtors' sale process. Based on the bids and expressions of interest received, as well as the high level of interest demonstrated by a number of potential strategic and financial buyers, the Committee believes there could be a robust auction resulting in substantial value to these estates – perhaps in an amount sufficient to fully satisfy the claims of the pre-petition secured lenders as well as the debtor-in-possession lender, and resulting in a surplus for the benefit of unsecured creditors.

2. The Motion, however, jeopardizes that favorable outcome. The proposed stalking horse bidder for the Debtors' assets – Cement Resources – has conditioned its bid upon a wholesale rewriting of the Bid Procedures that will stifle competitive bidding and calls into question the legitimacy of the sale process. Indeed, Cement Resources apparently now requires a series of modifications to the Bid Procedures, each of which will have a negative effect on the auction process and, thus, cause irreparable harm to these estates and creditors.

3. *Excessive, and unnecessary, bid protections.* Under the modified Bid Procedures, Cement Resources will be entitled to a break-up fee (the “*Break-Up Fee*”) equal to four percent (4%) of the cash purchase price, plus a \$750,000 expense reimbursement (the “*Expense Reimbursement*”). Both of these bid protections are far in excess of what is permitted in this District, and coupled with a minimum bid increment of \$250,000, will surely act as a disincentive to competing bidders who are already actively participating in the process. That the Debtors did not consult with the Committee regarding these bid protections, in violation of the Bid Procedures, is telling.

4. The Committee questions whether the selection of Cement Resources as the “stalking horse” is appropriate in the present case. Along with the Cement Resources bid, the Debtors have received two additional binding, non-contingent bids for components of the

Debtors' assets that, when viewed collectively, are for substantially all of the Debtors' assets (the "Basket Bids"), have a combined value to the estates of **\$11.9 million** in excess of the Cement Resources bid and require no Break-Up Fee or Expense Reimbursement. In light of these Basket Bids, the Committee submits that not only would the selection of Cement Resources as stalking horse be inappropriate, but that stalking horse status should be awarded to the Basket Bids given their vastly superior offer.³

5. *Elimination of basket bidding.* Under the modified Bid Procedures, competing bidders must submit bids for *all* of the Debtors' assets, rather than for individual components of the assets (or "basket bidding") under the Bid Procedures currently in effect. Given that, to date, Cement Resources is the only potential bidder seeking to purchase all of the Debtors' assets in a single transaction, this modification eliminates from consideration any bids for less than all of the Debtors' assets (including the two binding Basket Bids referenced above), and virtually ensures that the value of the Debtors' assets will not be maximized for creditors.

6. *Significant acceleration of the auction process.* Cement Resources has mandated significantly shortened auction and sale process – with no apparent justification other than to prevent competitive bidding. Whereas the auction of the Debtors' assets currently is scheduled for June 2, 2010, Cement Resources now demands that the auction would be held ***over two weeks earlier – on May 17, 2010*** - with other deadlines, including the Qualified Bid deadline – similarly being accelerated.

7. In considering the above, the Committee asks one simple question: how can these modifications be viewed as anything other than a blatant attempt to predetermine the result of the

³ Alternatively, given the existence of multiple firm offers for substantially all of the Debtors' Assets, the selection of *any* stalking horse – and the consequent granting of bid protections – may be unnecessary. Indeed, the existence of multiple qualified bids for the Debtors' assets compels the Committee to conclude that a "naked" auction for the Debtors' assets offers another excellent opportunity for the Debtors to maximize the value of their assets for the benefit of creditors.

auction process? Cement Resources has provided absolutely no justification for these material and potentially harmful modifications to the Bid Procedures, other than self-serving statements that it will not participate in the auction process without them. In reality, the Committee can only conclude that Cement Resources – with the cooperation of the Debtors, its directors and officers (i.e., the Schwab family) and KeyBank National Association (the “*Agent*”) – seeks to manipulate the auction process for their own benefit.⁴

8. That this Court should call into question the intentions of Cement Resources and these other parties is further evidenced by the following:

- Despite the Debtors’ statements in the Motion, Cement Resources’ proposed stalking horse bid is not the highest and best bid received by the Debtors. In fact, the Basket Bids, when viewed collectively, yield a significantly higher present value than that of Cement Resources’ “bulk” bid. That these bids exceed Cement Resources’ bid has been acknowledged by the Debtors and their professionals.⁵ If this is the case, why are the Debtors moving forward with Cement Resources’ bid – and the harmful Bid Procedures modifications that accompany it? It may be related to Cement Resources’ negotiations with the Schwab family with respect to a transaction that will allow the Schwabs to continue managing the business post-sale, and may further allow them to receive a minority share of Cement

⁴ In fact, as set forth in the Motion, Cement Resources originally requested that the auction process be changed to a private sale despite the fact that there has been significant interest in the sale of the Debtors’ assets.

⁵ These acknowledgements have been set forth in a series of reports concerning the sale process provided by Western Reserve Partners (“*WRP*”), the Debtors’ investment banker, to the Committee’s professionals. These acknowledgements actually show the Basket Bids valued at \$3.5 million higher than Cement Resources’ bid before one Basket Bidder increased its offer by over \$8.4 million this weekend. This increase contains two components: (1) \$5.7 in additional value to the estates, and (2) \$2.7 million in savings from avoiding the Break-Up Fee and Expense Reimbursement if Cement Resources was awarded stalking horse status). The Committee will provide its complete analysis of the various bids received in this case through live testimony at the May 11, 2010 hearing on the Motion (the “*Hearing*”).

Resources' equity post-closing (the "*Schwab Consideration*"). This possible transaction does not justify a substantial modification of the Bid Procedures in a manner that chills competitive bidding and potentially renders the auction a non-event.

- Interference by the Debtors with a competitive bidding process has manifested itself in other ways. Simply put, the Committee cannot support a process that does not provide *all* interested parties will equal opportunity to due diligence materials in an open, timely fashion.
- Cement Resources has rewritten the Bid Procedures with the intent of creating obstacles for other bidders. For instance, in determining the value of Qualified Bids at auction, the Debtors are now required to consider the following: (i) "anti-competitive" concerns; and (ii) the impact of such bids on "the Debtors' employees and other stakeholders." While these considerations appear benevolent at face value, they in fact underscore an attempt to block one particular bidder from becoming qualified to participate at auction.

9. The current Bid Procedures were the product of substantial negotiation and compromise among the Debtors, the Pre-Petition Lenders and the Committee, and were designed to balance the need of the Debtors and the Pre-Petition Lenders to quickly close a sale of substantially all of the Debtors' assets with the requirement that the value of such assets be maximized for the benefit of all creditors. Now, for no apparent reason other than their own self-interest, the Debtors wish to push through the modified Bid Procedures on an expedited basis. The Committee submits that the Bid Procedures require no such modification, and in fact, such modification will make the auction process a sham and cause irreparable harm to unsecured creditors. The Motion should therefore be denied.

BACKGROUND

A. The Chapter 11 Cases

10. On February 28, 2010 (the “*Petition Date*”), Schwab Industries, Inc. and its affiliated debtors and debtors-in-possession (collectively, the “*Debtors*”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “*Bankruptcy Code*”) in the United States Bankruptcy Court for the Northern District of Ohio (the “*Court*”).

11. The Debtors are currently operating and managing their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Committee was appointed on March 9, 2010.

B. Current Bid Procedures

12. Pursuant to the Sale Motion, the Debtors seek authority, pursuant to section 363 of the Bankruptcy Code, to sell their “core” assets, including substantially all of their real property, machinery and equipment, the Port Manatee deep water port facility, and its potential aggregates quarry located in Florida currently operated as an orange grove.

13. The Debtors propose to sell the assets through a competitive auction process (“*Auction*”) pursuant to a set of Bid Procedures approved by this Court on April 16, 2010. The Bid Procedures provide, among other things, for: (1) a mechanism for the identification of “stalking horse” bidders (“*Stalking Horse Bidders*”) and the execution of asset purchase agreements with those bidders; (2) procedures related to the submission of competing bids; (3) requirements for such bids to be deemed “Qualified” to participate at auction; and (4) a process and procedure for the auction of the Debtors’ assets, provided that more than one Qualified Bid is received.

14. The Bid Procedures, in their current form, contemplate an aggressive timeline for the auction and sale of the Debtors’ assets that was agreed to by the Debtors, the Pre-Petition

Lenders and the Committee. Pursuant to the Bid Procedures, the following key dates and deadlines govern the process (all times Eastern Standard Time):

- Qualified Bid Deadline – May 28, 2010 at 5:00 p.m.
- Auction (if more than one Qualified Bid received) – June 2, 2010 at 10:00 a.m.
- Sale Hearing – June 3, 2010 at 10:00 a.m.
- Sale Closing – no later than June 21, 2010

15. The Bid Procedures, in their current form, provide for several bid protections for Stalking Horse Bidders to induce participation in the Auction process. Among these protections is the proposed Break-Up Fee, set forth in the Bid Procedures as follows:

In the event that a Stalking Horse Bidder(s) is named and designated, Debtors may, with the consent of the Agent, and in consultation with the Committee, negotiate a reasonable Stalking Horse Protection Fee(s) [the Break-Up Fee] payable to such Stalking Horse Bidder(s) in the event that such Stalking Horse Bidder(s) are not the Successful Bidder(s) (whether as initial Successful Bidder or as successor by Reserve Bidder(s)). Stalking Horse Protection Fee(s) shall be approved by the Court. Any Stalking Horse Protection Fee(s) negotiated shall be memorialized in the respective Stalking Horse Notice. At the Auction, any Qualified Bidder wishing to enter a bid in excess of the Stalking Horse Bid must enter an amount equal to the Stalking Horse Bid plus the Stalking Horse Protection Fees, plus any minimum Bid amount to advance their bid(s).

In no event shall a Stalking Horse Protection Fee(s) be payable to any Stalking Horse Bidder unless approved by the Court, until the assets considered in such Stalking Horse Bidder's Stalking Horse APA have been indefeasibly sold and transferred to a party other than such Stalking Horse.

Bid Procedures, § H.

16. Accordingly, the Debtors (with the consent of the Agent and in consultation with the Committee) were granted considerable latitude in negotiating a Break-Up Fee with potential stalking horse bidders for the Debtors' assets. The Committee, however, noted in its *Limited*

Objection and Reservation of Rights to the Sale Motion that **any such Break-Up Fee must comply with applicable law in this District.**

17. The Bid Procedures also provide for considerable flexibility in considering a number of alternative transactions designed to maximize the aggregate value of the Debtors' assets. Among other things, the Bid Procedures permit the Debtors to entertain bulk bids for the assets as a whole and basket bids (based upon the categorization of the Debtors' assets into four major categories: (1) the Ohio ready-mix assets; (2) the Florida ready-mix assets; (3) the Port Manatee deep water port; and (4) the Florida potential aggregates quarry currently being operated as an orange grove (the "*Orange Grove*").⁶

18. The Bid Procedures further require the Debtors and their investment banker, WRP, to provide "reasonable" access to potential bidders of some or all of the Debtors' assets in furtherance of due diligence, including: (i) the data room established by WRP; (ii) books, records, personnel and professionals; and (iii) on-site access to the Debtors' facilities.

C. Status of Sale Process

19. Since the entry of the Bid Procedures Order, the Debtors (as well as the Committee) have engaged in discussions with dozens of potential bidders for all or portions of the Debtors' assets. The results of these discussions have been quite encouraging – parties have expressed serious interest in placing bids and have conducted detailed due diligence and, by the initial stalking horse bid deadline of April 28, 2010, several parties submitted non-binding letters of intent to the Debtors.

⁶ Presumably, the decision to allow basket bidding was premised upon the Debtors' initial conclusion that it generally creates greater value for the estates than selling assets as a whole block. Based upon the standalone nature of the Debtors' various asset holdings, as well as the terms of the basket bids received to date, the Committee agrees with this conclusion.

20. Only one of those bids – from Cement Resources – contemplates the purchase of substantially all of the Debtors’ assets. Cement Resources’ bid, as set forth in the asset purchase agreement (the “APA”) attached to the Motion, includes the following key terms:

- *Purchase Price:* \$48,350,000 cash, plus a reimbursement to the Pre-Petition Lenders of up to \$2,000,000 in additional debtor-in-possession financing through the closing of the sale.
- *Excluded Assets:* Certain “non-core” assets having an estimated value of \$675,000; all other assets to be sold to Cement Resources pursuant to the APA.
- *Assumption of 503(b)(9) Claims and Trade Payables:* Cement Resources has agreed to assume approximately \$602,000 worth of section 503(b)(9) claims, as well as up to \$750,000 in post-petition trade payables of the Debtors.
- *Break-Up Fee and Expense Reimbursement:* Under the APA, Cement Resources will be entitled to a Break-Up Fee equal to four percent (4%) of the cash purchase price, plus an Expense Reimbursement in the amount of up to \$750,000, in the event that a competing bid is selected as the Successful Bid at auction.
- *Mining Rights:* Under the APA, Cement Resources will grant the Debtors the right to receive, on a cumulative basis, annual earn-out payments equal to twenty percent (20%) of cumulative net profits attributable to (i) the mining of the Debtors’ orange grove/aggregates quarry, or (ii) the sale of any such validly permitted and approved mining rights on the property.
- *Assignment and Assumption of Executory Contracts:* The APA permits Cement Resources to direct the Debtors to assume and assign the Acquired Contracts. Cement Resources is liable for Cure Costs incurred with respect to the Acquired Contracts.

21. The Debtors, in consultation with its financial advisor and counsel, estimate the total value of the Cement Resources transaction (net of the Break-Up Fee and Expense Reimbursement) to be in the amount of \$52,136,522. The Committee generally does not disagree with this calculation.

22. In addition to the Cement Resources bid, several other binding bids have now been received for portions of the Debtors’ assets. The Committee will provide testimony at the hearing to support a \$61,418,205 valuation for the Basket Bids, exclusive of the \$2.7 million

savings to the estates by avoiding the Break-Up Fee and Expense Reimbursement. *Accordingly, the Basket Bids exceed the Cement Resources bid by at least \$11.9 million.* Notwithstanding this reality, the Debtors, with the consent of the Agent and without consulting with the Committee, have selected the Cement Resources bid as the highest and best bid and have granted Cement Resources stalking horse status and, as described below, agreed to modified Bid Procedures that effectively eliminate the estates' ability to entertain competing bids.

D. Proposed Modified Bid Procedures

23. Section 10.1(f) of the Cement Resources APA states that the failure of the Debtors to obtain an order approving a set of modified Bid Procedures by May 7, 2010 constitutes a Termination Event thereunder. The existence of this Termination Event has prompted the filing of this Motion. Pursuant thereto, the Debtors seek approval of what is tantamount to a wholesale rewriting of the Bid Procedures, which rewriting was apparently mandated by Cement Resources.

24. Among other things, the "new" Bid Procedures proposed by Cement Resources contain the following material modifications of the existing Bid Procedures approved by this Court almost three weeks ago:

- *Break-Up Fee/Expense Reimbursement/Initial Overbid.* As set forth above, the Debtors have agreed to provide Cement Resources with a Break-Up Fee equal to four percent (4%) of the cash purchase price, plus an Expense Reimbursement of \$750,000. Additionally, the Bid Procedures are being modified to increase the initial overbid from \$100,000 to \$250,000 (plus the Break-Up Fee and Expense Reimbursement). Accordingly, a competing bidder bidding for substantially all of the Debtors' assets must overbid Cement Resources by *almost \$3 million* – equivalent to six percent (6%) of the cash purchase price offered by Cement Resources – in order to become a Qualified Bidder.⁷
- *Bid Must Be for All Assets.* Under the modified Bid Procedures, the Debtors will no longer be permitted to entertain basket bids. Only bids for *all* of the assets

⁷ *As noted above, the Basket Bids contain no Break-Up Fee or Expense Reimbursement, which results in a direct savings to the estates of just over \$2.7 million.*

proposed to be purchased by Cement Resources under the APA are eligible to be Qualified.

- *Further Acceleration of Sale and Auction Process.* The modified Bid Procedures materially accelerate an already accelerated sale and auction process in the following manner:
 - Qualified Bid Deadline – May 13, 2010 (currently May 28, 2010)
 - Auction – May 17, 2010 (currently June 2, 2010)
 - Sale Hearing – May 19 or 20, 2010 (currently June 3, 2010)

Notably, the failure of the Debtors to strictly adhere to each of the above deadlines constitute a Termination Event under the APA, and allow Cement Resources to abandon the transaction without penalty or further obligation to the estates.

- *Additional Modifications.* The Debtors and Cement Resources propose to further modify the Bid Procedures such that in determining the value of Qualified Bids at auction, the Debtors are now required to consider the following: (i) “anti-competitive” concerns; and (ii) the impact of such bids on “the Debtors’ employees and other stakeholders.”

THE PROPOSED MODIFIED BID PROCEDURES SHOULD BE DENIED

25. The Committee submits that the proposed modifications to the Bid Procedures are premised upon a single purpose: avoidance of a robust auction process. Simply put, there is no justification – other than perhaps pacifying Cement Resources from “walking away” – for a wholesale modification of the Bid Procedures at this advanced stage of the sale process.⁸ These modifications were designed to chill competitive bidding, will discourage the active participation of potential bidders that seek to purchase individual components of the Debtors’ assets and will result in substantially diminished aggregate value to these estates. Moreover, the modifications will ensure that the auction process will not generate a surplus – after satisfaction of secured claims – for the benefit of unsecured creditors.

⁸ This seems to be an empty threat, given the higher and better Basket Bids that have already been received.

26. Indeed, the proposed modified Bid Procedures contradict the underlying policies of section 363 of the Bankruptcy Code: to maximize the value of assets for the estates, and to ensure the highest and best aggregate bid(s) for the Debtors' assets. *See In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *11 (Bankr. D. Del. Apr. 2, 2001) (The purpose of a § 363(b) sale is to transform assets ... into cash in an effort to maximize value"). *See also In re General Motors Corp.*, 407 B.R. 463, 496-97 (Bankr. S.D.N.Y. 2009) (citing *Trans World Airlines*).

27. The Debtors have a fiduciary duty to maximize value of their estates for all parties in interest, including unsecured creditors. *In re Biderman Indus. U.S.A. Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997). The concerns raised in this Objection lead the Committee to conclude that, if approved as proposed, the modified Bid Procedures will chill competitive bidding on the assets and that the Debtors will have failed to satisfy their fiduciary duty toward creditors in these cases.

A. The Break-Up Fee and Expense Reimbursement are Unnecessary Given the Basket Bids, and Are Grossly Excessive

28. Given the Basket Bids, the Committee questions the necessity of granting *any* bid protections to Cement Resources. The granting of bid protections can serve a valuable purpose, particularly in a situation where a stalking horse bidder is necessary to generate additional interest in a debtor's assets from potential competing bidders. Here, however, not only have additional bidders already come to the table with highly qualified bids, those bids are *higher and better* than that of Cement Resources. It would be a perverse result, and contrary to the spirit and intent of section 363, if an inferior bidder were granted bid protections worth millions of dollars, in order to prevent the consideration of "higher and better" bids. Given this reality, the Committee suggests that rather than granting Cement Resources stalking horse protections, the

Basket Bidders should be selected as the stalking horse bidder and both parties should proceed to Auction. Alternatively, the Debtors could conduct a “naked” auction with Cement Resources, the Basket Bidders and any other bidders that submit Qualified Bids in advance of auction. Either approach will both promote a robust auction (in that the barriers to entry imposed by the bid protections, including the excessive initial overbid and the bulk bidding requirement, will no longer exist) and eliminate a substantial obligation of these estates should Cement Resources be outbid at auction.

29. Assuming this Court is willing to entertain granting Cement Resources “stalking horse” protections, however, the proposed Break-Up Fee and Expense Reimbursement – which equal in the aggregate 5.6% of the total consideration offered by Cement Resources – are excessive in light of controlling precedent and more than double the generally recognized maximum in this District. The legal precedent establishing this fact is overwhelming: courts in this District have limited the approval of break-up fees and expense reimbursements to those deemed to be reasonable, and what has been deemed “reasonable” is considerably less than what is being requested by Cement Resources.⁹

⁹ See, e.g., *In re Blackhawk Automotive Plastics, Inc.*, Case No. 07-42671 (Bankr. N.D. Ohio Feb. 29, 2008) (break-up fee of less than 2% of the purchase price approved); *In re SAI Holdings Limited*, Case No. 06-33227 (Bankr. N.D. Ohio Mar. 20, 2007) (break-up fee of up to 3% of the purchase price approved); *In re Air Enters., Inc.*, Case No. 05-52467 (Bankr. N.D. Ohio June 13, 2005) (break-up fee of approximately 1.8% of the purchase price approved); *In re RMA Mgmt., Inc.*, Case No. 05-43959 (Bankr. N.D. Ohio Jul. 22, 2005) (break-up fee of approximately 2.6% of the purchase price, plus expense reimbursement of 1.1% of the purchase price, approved); *In re Sight Resources Corp.*, Case No. 04-14987 (S.D. Ohio 2004) (break-up fee of less than 1% of the purchase price approved).

30. In *In re Hupp*, this Court listed the following factors to be considered with respect to the approval of a break-up fee:

- Whether the fee requested correlates with a maximization of value to the debtor's estate;
- Whether the underlying negotiated agreement is an arms-length transaction between the debtor's estate and the negotiating acquirer;
- Whether the principal secured creditors and the official creditors committee are supportive of the concession;
- Whether the subject break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;
- Whether the dollar amount of the break-up fee is so substantial that it provides a "chilling effect" on other potential bidders;
- The existence of available safeguards beneficial to the debtor's estate;
- Whether there exists a substantial adverse impact upon unsecured creditors, where such creditors are in opposition to the break-up fee.

In re Hupp, 140 B.R. at 194. The *Hupp* court noted that "break-up fees ranging from one to two percent of the purchase price" have been authorized by courts in this District and other districts. *Id.* Recognizing the danger that a high break-up fee can chill bidding, the *Hupp* court also stated that "[i]n the bankruptcy context . . . the Court must be necessarily wary of any potential detrimental effect that an allowance of such a fee would visit upon the debtor's estate." *Id.*

31. Under the *Hupp* standards, as well as other decisions of this District, it is unquestionably the case that the Break-Up Fee and Expense Reimbursement are grossly excessive for a transaction of this size. Neither Cement Resources nor the Debtors provide any evidence that these bid protections correlate to a maximization of value; indeed, the Committee posits that they are intended to do the exact opposite – chill competitive bidding by creating an unreasonably high barrier to entry into the auction process. Given the Committee's concerns that the acceptance of the Cement Resources bid may be partially motivated by the Schwab

Consideration, it appears evident that the Break-Up Fee and Expense Reimbursement are intended to benefit insiders at the expense of unsecured creditors. In any event, under the circumstances, the Committee cannot support the bid protections being offered to Cement Resources.

32. The proposed order approving the Motion also provides that the Break-Up Fee and Expense Reimbursement will be payable not only in the event that a competing bidder other than Cement Resources is a Successful Bidder at auction, but also in the event that several other transactions occur – including a stock purchase and the confirmation of a chapter 11 plan (albeit in a reduced amount of two percent (2%) of the cash purchase price). This relief is highly unusual in the section 363 context and unwarranted. After all, the underlying purposes of bid protections such as break-up fees and expense reimbursements are to encourage bidders to participate as stalking horses, and to compensate stalking horses for their time and effort should they be outbid at auction. Bid protections are not designed to protect a stalking horse against contingencies that may arise outside of the section 363 auction process. Payment of the Break-Up Fee and Expense Reimbursement – if it is to be allowed by the Court – should therefore be limited solely to a situation in which Cement Resources is outbid at auction by a competing bidder.

B. Limiting Qualified Bids to Only Those for All of the Debtors' Assets Will Chill Bidding, and Will Disenfranchise Current Higher and Better Bids for Portions of the Debtors' Assets

33. Under the Bid Procedures currently in effect, the Debtors are armed with considerable flexibility in entertaining bids for the Debtors' assets as a whole, as well as for individual components of the Debtors' assets. This flexibility has proven to be worthwhile, in that the Debtors have received a number of bids – including the Basket Bids – and it is anticipated that additional bids may be received by the Qualified Bid deadline. In short, the

current Bid Procedures have promoted a competitive bidding process in the spirit of section 363 of the Bankruptcy Code.

34. In its review of the various bids received by the Debtors, the Committee has determined that the Basket Bids, in the aggregate, provide the estates with significantly more value in the aggregate than the proposed stalking horse bid of Cement Resources.¹⁰ The Debtors' investment banker, in fact, has agreed with the Committee's assessment. Nevertheless, the Debtors have chosen to move forward with the Cement Resources bid, citing, among other things, "anti-competitive concerns" and two contingencies¹¹ by one of the Basket Bidders. The antitrust concern, however, does not appear to be well-founded, and the two contingencies have now been overcome.

35. More troubling is that the Cement Resources bid is contingent upon the automatic disqualification of any potential bidder seeking to purchase less than all of the Debtors' assets. *See* APA, at § 10.1(g). The result of this provision will be to eliminate the Basket Bids, and to pave the road for Cement Resources' purchase of the Debtors' assets without interference from other potential purchasers. Additionally, Cement Resources has not provided the Committee with a compelling reason as to why it cannot apportion the value of its bid among the various categories of the Debtors' assets, which would allow parties to easily compare bids on an "apples to apples" basis and would promote a spirited basket bidding process.

36. Given this reality, the Committee cannot help but question the Debtors' business judgment and wonder why the Debtors would risk violating their fiduciary duties to these estates

¹⁰ As a fiduciary for these estates, the Committee must, and hereby notifies the Debtors that it will, make a full and complete disclosure of the Basket Bids and such other information as may be necessary to support its objection to the Court at the May 11, 2010 hearing on the Motion.

¹¹ It is worth noting that the Cement Resources bid is premised upon a far more significant contingency – the approval of the substantially amended Bid Procedures, which the Committee opposes for the reasons stated herein.

and creditors, and stifle competitive bidding, by agreeing to modify the Bid Procedures to limit Qualified Bids to only those encompassing a purchase of substantially all of the Debtors' assets. If the Debtors could establish that the assets were worth substantially more as a whole than in parts, the Committee could perhaps understand and support the Debtors' request, but in this case, the converse appears to be true. The Committee will be prepared to present evidence at the hearing on the Motion in support of its contention that basket bidding is warranted in these cases, and that the individual parts of the Debtors' assets may be worth more than the whole.

C. The Accelerated Process Proposed by the Debtors Runs Contrary to the Debtors' Business Judgment and Fiduciary Duties to These Estates and Creditors

37. The Debtors and Cement Resources have requested that the carefully prepared timetable negotiated by the Debtors, the Agent and the Committee be entirely discarded, and that the auction be conducted on an unreasonably aggressive timetable. The effect of this revised timetable would be that some potential competing bidders simply will not have enough time to complete due diligence and prepare the required bid documents.

38. No reasonable explanation exists for the proposed modifications to the auction and sale timetable. There are no real exigencies on the Debtors' part: the Agent has previously agreed to provide the Debtors with access to cash collateral through June 21, 2010 (Docket No. 280), the Debtors' businesses are performing significantly above budget and the loss of Cement Resources' bid will not spell doom for the Debtors' sale prospects (given the several other – and more qualified – bidders waiting in the wings).

39. The Debtors liken a request to accelerate an already expedited auction *by over two weeks* as nothing more than a “simple rescheduling.” This gross understatement will wreak havoc on the sale process and the ability of competing bidders to participate. The Committee is

prepared to present evidence at the hearing on the Motion that highly accelerated sale processes tend to result in less robust bidding and depressed sale prices and may do so in this case.

D. Certain Modifications to the Bid Procedures Appear to Be Targeted At Particular Potential Competing Bidders

40. Cement Resources has rewritten the Bid Procedures with the intent of rendering them ineffective to promote competitive bidding. For instance, in determining the value of Qualified Bids at auction, the Debtors are now required to consider the following: (i) “anti-competitive” concerns; and (ii) the impact of such bids on “the Debtors’ employees and other stakeholders.” While these considerations appear benevolent as to the Debtors’ employees, they may underscore a potential attempt to block bidders from becoming qualified to participate at auction if they are not interested in retaining the Schwab family in a controlling role. Moreover, if the Debtors truly have antitrust concerns with respect to any bidder, those concerns should be articulated and substantiated.

41. It is a violation of the intent and purpose of section 363 to tailor the Bid Procedures in a discriminatory manner that prevents individual (and otherwise qualified) parties from participating in a robust auction of the Debtors’ assets. *See In re Abbotts Dairies, Inc.*, 788 F.2d 143, 148-49 (3d Cir. 1986) (Court noted, in part, that purchaser’s lucrative offer of employment to debtors’ CEO and the timing of the motion to approve the sale was a situation “ripe for collusion and interested dealing between” the debtors and the purchaser which would have been to the disadvantage of prospective bidders); *In re Harwald Co.*, 497 F.2d 443, 444 (7th Cir. 1974) (Court noted under the Bankruptcy Act that implicit in the realization of the primary objective of minimizing injury to creditors is the assumption that a sale by public auction with competitive bidding will best maximize creditors’ returns). That a stalking horse bidder is the architect of that discriminatory process is even more troubling.

E. The Debtors (and Cement Resources) Appear to Be Interfering With the Due Diligence Efforts of Competing Bidders

42. The Bid Procedures state that the Debtors must provide potential bidders with access to due diligence materials in the following manner:

Debtors shall provide any potential bidders for substantially all of the Debtors' Assets that have delivered to Debtors an executed confidentiality agreement in form and substance acceptable to Debtors (a "Potential Bidder") (i) reasonable access to the online data room maintained by Debtors' investment bankers, WRP (which shall include any Stalking Horse APAs, if any); (ii) reasonable access to Debtors' books, records, facilities, key personnel, officers, independent accountants and legal counsel for the purpose of conducting due diligence; and (iii) reasonable access to Debtors' facilities and locations. Subject to any order as may be entered by the Court, Debtors are not required to provide confidential or proprietary information to any party if Debtors reasonably believe that such disclosure would be detrimental to the interests and operations of Debtors or any of Debtors' affiliates.

43. Pursuant to the above paragraph, the Debtors are to provide "reasonable" access to the online data room maintained by WRP, books, records and personnel, and the Debtors' facilities. While the word "reasonable" is not defined in the Bid Procedures, the Committee submits that the "reasonable" access entails treating potential bidders in a fair and equitable fashion, and not unreasonably denying access to any potential bidder that has executed a confidentiality agreement.

44. The Committee has recently learned that the Debtors have prevented at least one potential competing bidder from full access to perform due diligence. If these allegations are indeed true, it would taint the entire auction and sale process, and serve as proof that the Debtors are violating their fiduciary duties by sabotaging potential bidders' reasonable efforts to investigate the Debtors' assets and businesses. Whatever the rationale for any such behavior, it offends all notions of equity and reasonableness, violates the letter and spirit of the Bid Procedures and cannot be sanctioned by this Court.

F. The Proposed Modified Bid Procedures May Be Motivated in Part by the Schwab Consideration

45. As set forth in the Motion, Cement Resources and certain members of the Schwab family have been in negotiations concerning the Schwab Consideration. The Committee is concerned that the Debtors' desire to substantially revise the Bid Procedures may be in part motivated by their desire to preserve the Schwab family's role in the Debtors' businesses. While an agreement to allow current management to operate the business post-sale is not *per se* evidence of bad faith or unfair dealing on the part of Cement Resources or the Debtors, *see generally Abbotts Dairies*, 788 F.2d at 148 and *In re Condere Corp.*, 228 B.R. 615, 632 (Bankr. S.D. Miss. 1998), the Committee is concerned that this arrangement will further suppress competitive bidding and unfairly promote Cement Resources' bid at the expense of all others.¹²

CONCLUSION

46. The overriding purpose of the Bid Procedures is to encourage active, widespread participation in the sale and auction process by a variety of strategic buyers. The proposed modified Bid Procedures, to the contrary, will undermine that process, and the motivation behind them may constitute bad faith and unfair dealing. The modified Bid Procedures will undoubtedly limit participation in the auction process by otherwise qualified parties, and will jeopardize any chance unsecured creditors may have to obtain a recovery in these cases.

47. Simply put, the Debtors have not tendered any support for the conclusion that: (1) Cement Resources' bid is higher and better than the Basket Bidders' aggregate bid and, thus, should be granted the requested stalking horse protections; (2) the Schwab Consideration is permissible or otherwise appropriate under the circumstances; (3) the Auction process be

¹² The Committee reserves the right to object to the sale of the Debtors' assets to Cement Resources, to the extent that the Schwab Consideration – if ultimately executed – can be categorized as bad faith conduct in violation of section 363(m) of the Bankruptcy Code, or as a collusive effort in violation of section 363(n) of the Bankruptcy Code. It may also be characterized as an impermissible *sub rosa* chapter 11 reorganization plan.

conducted in such a manner as to preclude “basket bidding” or otherwise modified for Cement Resources’ benefit; and (4) the Auction should be significantly accelerated from its originally scheduled date.

48. In order to meet their burden, the Debtors and Cement Resources must be prepared to present credible evidence concerning each of these issues at the May 11, 2010 hearing on the Motion. In the absence of satisfactory evidence concerning all of the above issues, the Committee submits that the relief requested in the Motion is not in the best interests of these estates, and should therefore be denied.

WHEREFORE, the Committee respectfully requests entry of an order:

- (a) denying the Motion in its entirety; and
- (b) granting such other and further relief as is just and proper.

Dated: May 9, 2010

**OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF SCHWAB
INDUSTRIES, INC., *et al.***

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