UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Chapter 11
	)	
SII LIQUIDATION COMPANY,	)	Case No. 10-60702-rk
	)	
Debtors.	)	Judge Russ Kendig
______________________________________	)	
	)	
JOHN B. PIDCOCK, not individually but as the creditor trustee of the SCHWAB INDUSTRIES, INC. CREDITOR TRUST,	)	
	)	Adversary Case No. 12 - ______
Plaintiff,	)	
	)	
v.	)	
	)	
JERRY A. SCHWAB, DONNA L. SCHWAB, DAVID A. SCHWAB and MARY LYNN HITES,	)	
	)	
Defendants.		

ADVERSARY COMPLAINT

John B. Pidcock, not individually but solely as the creditor trustee (the "*Creditor Trustee*") of the Schwab Industries, Inc. Creditor Trust (the "*Creditor Trust*") appointed in the above-captioned chapter 11 bankruptcy cases, by his undersigned counsel, states as follows for his Adversary Complaint against Jerry A. Schwab, Donna L. Schwab, David A. Schwab and Mary Lynn Hites (collectively, the "*Defendants*"):

NATURE OF THE ACTION

1. This Complaint is based upon events that transpired prior to and during the chapter 11 cases of Schwab Industries, Inc., Medina Cartage Co., Medina Supply Company, Quality Block & Supply, Inc., O.I.S. Tire, Inc., Twin Cities Concrete Company, Schwab Ready-Mix, Inc., Schwab Materials, Inc. and Eastern Cement Corp., (collectively, the "*Debtors*").

During that period, certain insiders of the Debtors took actions, and received substantial pre-petition transfers, which give rise to myriad claims for millions of dollars in damages to the Debtors, their estates and creditors.

2. Prior to the commencement of these chapter 11 cases, the Debtors produced, supplied and distributed ready-mix concrete, concrete block, cement and related supplies to commercial, governmental and residential contractors throughout Northeast Ohio and Southwest Florida. As of the Petition Date (defined below), the Debtors employed approximately 350 workers who were stationed across Ohio and Florida either at the Debtors' Dover, Ohio headquarters, at one of twenty ready-mix plants (13 in Ohio and 7 in Florida) or three Ohio plants that produced concrete block.

3. In addition to the operations in Ohio and Florida as described above, through Debtor Eastern Cement Corp., the Debtors held exclusive access to a deep-water terminal at Port Manatee, Florida on the Gulf of Mexico. The strategic positioning of Port Manatee allowed the Debtors to both: (a) efficiently distribute imported cement and aggregates throughout Florida; and (b) export material throughout the Gulf of Mexico region.

4. Prior to the Petition Date, KeyBank National Association ("*KeyBank*"), Bank of America, N.A. and The Huntington National Bank (collectively, the "*Pre-Petition Lenders*") provided a senior secured credit facility (the "*Facility*") to the Debtors pursuant to that certain Amended and Restated Credit Agreement dated as of October 18, 2007. As of the Petition Date, the total indebtedness owed to the Pre-Petition Lenders pursuant to the Facility was $59,703,781 (consisting of $8,582,950 with respect to the Revolving Loan, $19,125,245 with respect to Term Loan A and $31,995,586 with respect to Term Loan B).

5. As security for the obligations of the Debtors under the Facility, the Debtors entered into that certain Security Agreement, dated as of October 18, 2007, granting KeyBank, as agent, on behalf of all the Pre-Petition Lenders, a security interest in substantially all of the Debtors' assets.

6. In fiscal year 2006, the Debtors had revenues exceeding $208 million. During fiscal year 2007 and thereafter, however, the Debtors' operations suffered. The decrease in sales negatively impacted the Debtors' working capital availability and cash flows.

7. The Debtors sought additional financing from numerous possible lending sources, but those efforts, the Debtors claim, were unsuccessful. The Debtors asserted that their inability to obtain additional financing necessitated the filing of the bankruptcy cases.

8. Moreover, during the bankruptcy cases, the Defendants made a number of decisions and engaged in certain conduct regarding the administration of the Debtors' estates (the "*Estates*") that detrimentally affected the recoveries from the auction of the Estates' assets and potential distributions to the Debtors' unsecured creditors.

THE PARTIES

9. Plaintiff John B. Pidcock was appointed as the Creditor Trustee of the Creditor Trust pursuant to the December 15, 2010 Order (the "*Confirmation Order*") confirming the *First Amended Joint Plan of Liquidation Dated October 26, 2010* (the " *Joint Plan*") in the above-captioned chapter 11 cases.

10. Defendant Jerry A. Schwab ("*Jerry*") was the Chairman and Director of the Debtors. Jerry owned 824 shares of Debtor Schwab Industries, Inc. ("*SII*"), a corporation organized under the laws of the State of Ohio, which constituted forty-five percent (45%) of

SII's shares. Jerry retired from his officer position in October 2009, but remained a director of the Debtors as of the Petition Date (defined below).

11. Defendant Donna L. Schwab ("*Donna*") was the Vice Chairman, Secretary, Treasurer and Director of the Debtors. Donna owned 123 shares of SII, which constituted 6.7% of SII's shares. Jerry and Donna are married. Donna retired from her officer position in October 2009, but remained a director of the Debtors as of the Petition Date (defined below).

12. At all times relevant hereto, Defendant David A. Schwab ("*David*") was the President and Director of the Debtors. David owned 505 shares of SII, which constituted 27.6% of SII's shares. David is the son of Jerry and Donna.

13. At all times relevant hereto, Defendant Mary Lynn Hites ("*Mary*") was a Director of the Debtors. Mary owned 379 shares of SII, which constituted 20.7% of SII's shares. Mary is the daughter of Jerry and Donna.

JURISDICTION AND VENUE

14. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334.

15. This Adversary Complaint is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F), (H) and (O).

16. Venue is proper in this District pursuant to 28 U.S.C. § 1409.

RELEVANT FACTUAL HISTORY

A. Overview of the Debtors' Corporate Structure

17. SII owned one hundred percent (100%) of the stock of Debtors Medina Cartage Co. (an Ohio corporation), Medina Supply Co. (an Ohio corporation), Quality Block & Supply, Inc. (an Ohio corporation), Twin Cities Concrete Company (an Ohio corporation), O.I.S. Tire, Inc. (an Ohio corporation) and Schwab Materials, Inc. (a Florida Corporation).

18. Debtor Schwab Materials, Inc. owned one hundred percent (100%) of the stock of Debtor Schwab Ready-Mix, Inc. ("*SRM*"), a Florida corporation.

19. Debtor SRM owned one hundred percent (100%) of the stock of Debtor Eastern Cement Corp. ("*ECC*"), a Florida corporation.

B. The Chapter 11 Bankruptcy Cases

20. On February 28, 2010 (the "*Petition Date*"), the Debtors each filed a voluntary petition for chapter 11 relief under the Bankruptcy Code (the "*Bankruptcy Cases*") in the United States Bankruptcy Court for the Northern District of Ohio (the "*Court*").

21. On December 15, 2010, the Court entered the Confirmation Order, thereby confirming the Joint Plan, which was proposed jointly by the Official Committee of Unsecured Creditors (the "*Committee*") and the Debtors. Pursuant to the Joint Plan and the *Schwab Industries, Inc. Creditor Trust Agreement* (the "*Creditor Trust Agreement*") entered into between the Debtors, the Committee and the Creditor Trustee appointed under the Joint Plan, most of the remaining property of the Debtors' estates vested in the Creditor Trust, pursuant to which the Creditor Trustee is in the process of liquidating such assets, pursuing various causes of action and distributing all resulting proceeds to the Debtors' creditors in accordance with the Joint Plan.

C. Events Leading Up to the Filing of the Debtors' Bankruptcy Cases

1. The Debtors' Financial Condition

22. At all times relevant hereto, the Debtors' financial condition was continually deteriorating.

23. Beginning in 2007, the Debtors' sales steadily declined as follows: for fiscal year ending April 30, 2007, the Debtors had approximately $197,000,000 in sales; for fiscal year ending April 30, 2008, the Debtors had approximately $144,000,000 in sales; for fiscal year ending April 30, 2009, the Debtors had approximately $103,000,000 in sales. The decrease in

sales was significantly sharper for the Debtors' Florida operations. This decrease in sales negatively impacted the Debtors' working capital availability and cash flows.

24. The Debtors were also in default under the Facility at least as early as March 13, 2008 as set forth in the Forbearance Agreement between the Debtors and the Pre-Petition Lenders. Defaults under the Facility continued to occur as set forth in subsequent forbearance agreements between the Debtors and the Pre-Petition Lenders dated May 30, 2008, September 15, 2008, March 25, 2009, October 2, 2009, November 13, 2009, November 20, 2009 and December 8, 2009.

25. The Debtors' poor financial condition is also evidenced by the Pre-Petition Lenders' request that the Debtors retain (a) the services of a turnaround management company in early 2008 and (b) the services of an investment banking firm charged with marketing the Debtors' businesses for sale.

2. Excessive Salaries, Benefits and Expenses by the Defendants

26. The Defendants continued to draw high salaries and benefits at a time when the Debtors were in severe financial distress.

27. Although they retired from their officer positions, Donna and Jerry continued to receive valuable supplemental retirement benefits.

28. In 2009, salaried employees working for the Debtors located in Florida experienced salary reductions by as much as ten percent (10%) on two occasions. According to David, the first reduction occurred shortly after April 30, 2009, the second at some point prior to the Petition Date.

29. However, salaried employees based in Ohio did not have their salaries reduced. Indeed, David gave himself a substantial raise in 2009, despite rapidly declining sales and repeated defaults under the Facility.

30. To illustrate the disparity in the salaries being earned, the below chart demonstrates that, within the one (1) year prior to the Petition Date, nine "non-Schwab family officers" received the following payments from the Debtors:

			Purpose				
			Salary	Country Club	Apartment Rental	Miscellaneous	**TOTAL**
Schwab Industries	Charles H. Kiko	Chief Financial Officer	$114,187.50	--	–	--	**$114,187.50**
Schwab Industries	Clinton E. Randles	Vice President Ohio Operations	$114,705.76	--	–	--	**$114,705.76**
Schwab Industries	David Moreland	Executive Vice President	$129,080.66	--	–	$263.74	**$129,344.40**
Schwab Industries	David R. Exley	Vice President Administration	$81,999.82	--	–	--	**$81,999.82**
Schwab Industries	Jeffrey L. Raper	Vice President Finance	$102,999.55	--	–	--	**$102,999.55**
Schwab Ready-Mix	David Lantrip	Senior Vice President	$174,078.00	--	–	--	**$174,078.00**
Schwab Ready-Mix	Richard H. Hire	Senior Vice President	$179,550.00	--	–	--	**$179,550.00**
Eastern Cement	Lawrence LaPointe	Vice President Sales	$124,384.00	--	–	--	**$124,384.00**
Eastern Cement	Mark T. Newhart	President	$200,000.50	$7,750.00	$14,815.96	--	**$222,566.46**
		TOTAL	**$1,220,985.79**	**$7,750.00**	**$14,815.96**	**$263.74**	**$1,243,815.49**

31. Starting on December 17, 2009, the Debtors reduced the weekly salary of Charles Kiko, who is based in Ohio, from $3,750 to as low as $2,437.50, or by 35%.

32. Starting on November 20, 2009, Lantrip's salary decreased from $3,420 a week to $3,078 a week, or by 10%.

33. The same modification was also made to Hire's salary on November 27, 2009.

34. On the other hand, during the one (1) year period prior to the Petition Date, the following payments were made to Jerry, Donna and David by SII:

	SII Transfers			
	David A. Schwab	Donna Schwab	Jerry A. Schwab	
	President	Vice Chairman	Chairman	**TOTAL**
Salary	$660,000.00	$118,565.76	$495,833.31	**$1,274,399.07**
Life Insurance	$414.00	--	$2,781.00	**$3,195.00**
Tax Services	$1,463.00	--	$3,855.00	**$5,318.00**
Vehicle	$1,860.66	--	$1,382.81	**$3,243.47**
Supplemental Retirement	--	$50,000.00	$200,000.00	**$250,000.00**
TOTAL	**$663,737.66**	**$168,565.76**	**$703,852.12**	**$1,536,155.54**

35. In addition, during the one (1) year period prior to the Petition Date, the following payments were made to Jerry, Donna and David by SRM:

	SRM Transfers			
	David A. Schwab	Donna Schwab	Jerry A. Schwab	
	President	Vice Chairman	Chairman	**TOTAL**
Vehicle	$29,350.00	$17,950.00	$16,400.00	**$63,700.00**
TOTAL	**$29,350.00**	**$17,950.00**	**$16,400.00**	**$63,700.00**

36. According to the Statement of Financial Affairs for SII, David's monthly salary was $41,666.67 from March 2009 through June 2009. Starting in July 2009, David's salary increased by 48% to $61,666.67 per month.

37. Both Donna and Jerry retired from their officer positions prior to the Petition Date. Donna and Jerry each began receiving monthly payments in the form of supplemental retirement from SII.

D. Post-Petition Activity

1. Failure To Secure Refunds on Insurance Policies

38. Pursuant to an Irrevocable Trust Agreement (the "*Trust Agreement*"), Jerry, as settler, established the Schwab Irrevocable Trust #1 (the "*Schwab Trust*") on April 1, 1992.

39. Huntington Trust is the trustee of the Schwab Trust (the "*Trustee*") and, under the Trust Agreement, was bestowed significant authority with respect to the management and investment of Schwab Trust assets.

40. The Schwab Trust holds, among other assets, three life insurance policies (collectively, the "*Policies*") issued prior to the Petition Date on the lives of the Debtors' majority shareholders, Jerry and Donna (the "*Insureds*").

41. The Schwab Trust also established an advisory committee (the "*Advisory Committee*"), consisting of David, Mary and Ron Manse, which was entrusted with all duties with respect to the maintenance of the Policies, including the designation of the Trustee as beneficiary, the payment of premiums, the pledging of the Policies and the exercise of available options or elections.

42. On April 1, 1992, SII and the Trustee entered into that certain Split Dollar Agreement (the "*Split Dollar Agreement*").

43. Pursuant to the Split Dollar Agreement, SII agreed to pay to the respective insurers the annual premium under the Policies. The Trustee remained the sole owner and beneficiary of the Policies, subject to a collateral assignment to be executed by the Trustee in favor of SII. The collateral security interest was limited to the amount of premiums contributed by SII.

44. On April 16, 2009, pursuant to three separate Assignments of Life Insurance Policy as Collateral (collectively, the "*Assignments*"), the Policies were assigned to KeyBank in accordance with an Amended and Restated Credit Agreement, dated October 18, 2007, among the Pre-Petition Lenders and the Debtors.

45. Among the rights assigned to KeyBank included the sole right to obtain one or more loans or advances on the Policies, either from the Insurer or, at any time, from other persons, and to pledge or assign the Policies as security for such loans or advances.

46. In accordance with the order authorizing the Debtors to use the Pre-Petition Lenders' cash collateral, entered in the Bankruptcy Cases on April 15, 2010 (the "*Cash Collateral Order*") (Docket No. 280), the Debtors' authorization to use the cash collateral of the Pre-Petition Lenders, and any and all obligations of the Pre-Petition Lenders thereunder, would immediately cease in the event that the Debtors failed to obtain, "on or before April 28, 2010, a refund in an amount not less than $3.0 million of the life insurance premiums advanced by Schwab Industries, Inc. for certain life insurance policies on the lives of Jerry and Donna Schwab that are held by that certain Schwab family trust (the "*Insurance Refund*")."

47. As represented by the Debtors, the proceeds of the Insurance Refund constituted necessary funding for the operation of the Debtors' businesses and for the ongoing sale process with respect to substantially all of the Debtors' assets. The Insurance Refund was therefore a key component of the Pre-Petition Lenders' willingness to permit the Debtors to use their cash collateral pursuant to the Cash Collateral Order.

48. However, rather than terminate the Policies and obtain the Insurance Refund as required by the Cash Collateral Order, the Defendants instead attempted to borrow $3 million against the Policies from the Trustee.

49. To that end, on April 2, 2010, one of the members of the Advisory Committee directed the Trustee to borrow funds from the cash value of the Policies in order to provide an advance or a loan to the beneficiaries of the Schwab Trust (the "*Life Insurance Loan*"). Pursuant to the Cash Collateral Order requirement, this advance or loan would then be turned over to the Debtors' Estates.

50. On April 15, 2010, KeyBank sent a letter to the Trustee, noting that the Schwab Trust intended to borrow $3 million against the cash surrender value of the Policies and remit

such proceeds to SII as a partial satisfaction of the Schwab Trust's reimbursement obligations to SII (and in satisfaction of the Insurance Refund requirement). KeyBank acknowledged and consented to the loan.

51. By e-mail correspondence dated April 22, 2010, the Trustee denied the Life Insurance Loan request, noting various deficiencies in the request by the Advisory Committee and the acknowledgment and consent by KeyBank.

52. Based on the Debtors' immediate need for the Insurance Refund proceeds to prevent a termination event under the Cash Collateral Order, to operate the Debtors and to avoid the need to obtain a post-petition loan, the Committee inquired as to the Debtors' failure to timely propose an alternative transaction that would satisfy the Trustee's concerns. For example, the Advisory Committee could request that the Trustee terminate the Policies (as originally contemplated and required by the Cash Collateral Order), which would result in a refund of approximately $3 million of premiums to SII. Alternatively, KeyBank could have requested the Life Insurance Loan from the Trustee directly, as authorized by the Assignments. The Advisory Committee – without explanation – failed to seek out these alternatives.

53. Because of the cash shortfall caused by the Defendants' refusal to terminate the Policies and obtain the Insurance Refund, the Debtors were required to obtain a post-petition loan from the Pre-Petition Lenders.

54. The Debtors secured the new loans from the Pre-Petition Lenders by granting them liens on substantially all of the Debtors' assets, including previously unencumbered assets, subordinated only to the priming liens of the Debtors' post-Petition Date lender, EFO Financial Group, LLC (as succeeded in interest by Naples Lending Group, L.C.).

55. Upon information and belief, the failure of the Defendants to secure the Insurance Refund: (a) preserved the value of the Policies for the Schwab Trust beneficiaries (including, most notably, David and Mary); and (b) avoided certain adverse tax consequences to the Schwab Trust beneficiaries.

56. Key to the Defendants' promise to secure the Insurance Refund was that those funds would provide the Debtors with cash flow to operate the businesses through the closing of the sale of the Debtors' assets.

57. The Defendants' utter refusal to secure the Insurance Refund was in violation of the Cash Collateral Order.

58. In fact, during the May 11, 2010 hearing before the bankruptcy court, the Debtors' counsel admitted that there was a breach of the Cash Collateral Order.

59. The Defendants' failure to secure the Insurance Refund precipitated a chain of events that had a detrimental impact on the auction and the sale process, thus resulting in a lower recovery for the Estates. The Pre-Petition Lenders' new loan to the Debtors required an accelerated time frame for the auction of the Debtors' assets, which most likely led to less interest and lower offers for the assets, to the detriment of the Debtors' unsecured creditors. If the Debtors had obtained the $3 million Insurance Refund as contemplated by the Cash Collateral Order, it is unlikely the Debtors would have sought a post-petition loan and thus, the need to accelerate the timeframe of the auction would have been obviated.

60. Hundreds of thousands of professional fee dollars were also needlessly spent addressing the many issues created by the Defendants' poor decision-making.

61. The Defendants were also involved in substantial self-dealing by: (a) seeking to obtain the Insurance Policy Loan rather than the Insurance Refund, as required by the Cash

Collateral Order – a move that would have preserved millions of dollars of death benefits for the Defendants at the Estates' expense; and (b) abandoning their obligation to obtain any type of insurance proceeds altogether and, instead, proposing to grant liens on unencumbered assets to the Pre-Petition Lenders. Rather than pursue the Insurance Refund as required by the Cash Collateral Order – which could harm the Defendants' self interests – the Defendants were instead willing to grant the Pre-Petition Lenders' liens in all of the Debtors' unencumbered assets, at the expense of the Debtors' unsecured creditors who otherwise may have received the benefit of the liquidation of the unencumbered assets. The Defendants chose to protect their interests – at all costs – rather than do what was best for the Debtors' Estates and unsecured creditors.

62. The Defendants stood to benefit by obtaining the post-petition loan rather than the Insurance Refund. Keeping the Policies active would benefit the Defendants (and only the Defendants) by preventing adverse tax consequences by the termination of the Policies and by preserving the $7 million payout to the beneficiaries upon the death of the insureds. With these incentives to do anything that would preserve the Policies for their benefit – at the expense of all other parties – the Defendants acted solely in accordance with their own self-interests and contrary to the interests of those to whom they owed fiduciary duties – the Debtors and their creditors.

2. Sale In the Bankruptcy Cases

63. On April 5, 2010, the Debtors filed a motion seeking 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 their Florida "Orange Grove" property.

64. The Debtors proposed to sell the assets through a competitive auction process (the "*Auction*") pursuant to court-approved bidding procedures.

65. In light of the bidding procedures, several parties expressed serious interest in placing bids and submitted non-binding letters of intent, as well as binding bids, to the Debtors.

66. The Debtors selected the bid from Cement Resources, LLC ("*Cement Resources*") (an entity owned and controlled by Atlas Holdings) as the "highest and best" bid and designated it the stalking horse bid, despite the fact that several other binding bids for portions of the Debtors' assets, when combined, substantially exceeded the Cement Resources offer.

67. After selecting Cement Resources as its stalking horse bidder, the Debtors moved to revise the original bidding procedures.

68. As noted by the Debtors in their motion seeking approval of the revised bid procedures order, Cement Resources had begun negotiations with the Defendants with respect to a transaction that would allow the Defendants: (a) to continue in the management of the business post-sale; and (b) to receive a potential minority share of Cement Resources' equity post-closing.

69. The Court did modify the bid procedures, but only after opposition from, and a settlement reached with, the Committee and the Pre-Petition Lenders.

70. The Debtors' investment banker, Western Reserve Partners, LLC ("*Western*"), estimated the total value of the proposed Cement Resources transaction (net of the break-up fee and expense reimbursement) to be $52,971,022.

71. Two additional binding bids were received for portions of the Debtors' assets that, when viewed collectively, greatly exceeded the Cement Resources stalking horse bid. Indeed, based upon Western's analysis, these bids had a combined economic value of $58,397,543 – thereby exceeding the Cement Resources bid by $5,426,521.

72. Notwithstanding the fact that these bids exceeded the Cement Resources bid by more than ten percent, and had no contingencies that would otherwise render them unacceptable, the Defendants had failed to qualify both such bids to participate at the Auction until just prior to the Auction, and continued to support the Cement Resources bid.

73. The only reasonable explanation for why the Defendants continued to back the lower Cement Resources bid is because the Defendants were conflicted, in that the Cement Resources transaction would result in significant personal benefit for the Defendants.

74. Despite the Defendants' backing of the lower Cement Resources bid, during the Auction, OldCastle Materials, Inc. ("*Oldcastle*") was designated as the "highest and best" bidder for the Debtors' assets commonly referred to as "Ohio Ready Mix," "Florida Ready Mix" and "Port Manatee" and Resource Land Holdings, LLC ("*RLH*") was designated as the "highest and best" bidder for the Debtors' assets commonly referred to as "Orange Grove" or "Corkscrew Quarry."

75. The Defendants tried once more to thwart a transaction with OldCastle and RLH in favor of Cement Resources, which would serve to personally benefit them. Notwithstanding the designation of the OldCastle and RLH bids as the highest and best and the Defendants' prior approval of those offers at the conclusion of the Auction, at the May 28, 2010 hearing to approve the sale, the parties were informed in open Court that the Defendants were "hopelessly deadlocked" as to which bid it preferred (2 votes for Cement Resources and 2 votes for OldCastle/RLH).

76. After several hours of argument, Cement Resources formally withdrew its bid for the Debtors' assets, thereby ending any potential issue between the competing bidders.

3. Additional Miscellaneous Pre-Sale Conduct

77. The Defendants engaged in other activities that interfered with the Auction process, including, without limitation, the following:

- The Defendants did not afford certain prospective bidders with full access to the data room used for due diligence purposes.
- The Defendants did not allow certain prospective bidders access to the Debtors' premises for a full inspection and investigation of the assets involved in the sale.
- Upon information and belief, the Defendants contacted the Federal Trade Commission (the "*FTC*"), claiming (without any basis) that the sale to OldCastle would result in anti-competitive markets, precipitating the FTC's counsel to contact Committee counsel.

78. These activities may have resulted in decreased interest in and fewer bids for the Debtors' assets, and can only be construed as an attempt to block bidders other than Cement Resources from the Auction, thereby decreasing the ultimate net proceeds received by the Estates with respect to the sale of the Debtors' core assets but preserving potentially valuable perks for the Defendants.

COUNT I

Breach of Fiduciary Duties Owed to Bankruptcy Estates (Both the Debtors and Creditors)

(Against All Defendants)

79. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 78 of this Adversary Complaint as though fully set forth herein.

80. A chapter 11 debtor's directors, officers and managing employees have obligations to maximize the value of the estate, and have the burden of ensuring that resources that flow through the debtor are used to benefit unsecured creditors and other parties in interest.

81. In addition, a debtor-in-possession is bound by the duty of loyalty, including the obligation to refrain from self-dealing, to avoid conflicts of interest and the appearance of impropriety, to treat all parties to the case fairly and to maximize the value of the bankruptcy estate.

82. The Defendants breached their fiduciary obligations owed to the Estates by the following:

- The Defendants pursued Cement Resources as the stalking horse bidder for the Debtors' assets, despite the fact that Cement Resources' offer was not the highest and best offer. The Defendants pursued the Cement Resources offer because it had the potential to result in a continuing role in management and a potential minority share of Cement Resources' equity post-closing. The Defendants even continued to back the Cement Resources bid after the Auction where all other parties (including the Debtors) concluded that OldCastle and RLH represented the highest and best bids for the Debtors' assets.

- The Defendants failed to terminate the Policies and obtain the Insurance Refund, which resulted in the need to accelerate the time frame for the Auction, which in turn, depressed bids for the Debtors' assets. The Defendants failed to terminate the Policies because they wished to preserve the value of the Policies for the Schwab Trust beneficiaries (i.e., David and Mary) and to avoid certain adverse tax consequences to the Schwab Trust beneficiaries, despite the harm that those actions would cause to the Estates and creditors.

- Needlessly encumbering previously unencumbered Estate assets – through the post-petition loan extended by the Pre-Petition Lenders – by failing to obtain the Insurance Refund in accordance with the Cash Collateral Order.

- The Defendants attempted to sabotage the sale of the Debtors' assets in multiple other ways, such as by not affording certain parties full access to the data room, not permitting certain parties on the Debtors' premises to inspect the assets being sold, and, upon information and belief, contacting the FTC in an attempt to block the OldCastle bid (even though it was the highest and best bid when combined with the RLH bid).

83. The Defendants' breaches of fiduciary duties to the Debtors proximately caused damages to the Debtors (and their creditors) based on the depletion of funds and other assets from the Debtors' Estates that may otherwise have been available to satisfy the claims of the

Debtors' unsecured creditors. As things stand now, the Debtors' unsecured creditors may only stand to receive a small percentage of the amounts they are owed.

84. Accordingly, the Defendants are subject to liability based on their breach of fiduciary duties owed to the Debtors and their creditors.

COUNT II

Avoidance of Preferential Transfers Pursuant to Sections 544 and 547 of the Bankruptcy Code and Section 1336.05(B) of the Ohio Revised Code

(Against Jerry A. Schwab, Donna L. Schwab and David A. Schwab)

85. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 84 of this Adversary Complaint as though fully set forth herein.

86. At all relevant times, each Defendant was an insider of the Debtors pursuant to section 101(31) of the Bankruptcy Code and section 1336.01 of the Ohio Revised Code.

87. Upon information and belief, prior to the Petition Date, the Debtors were indebted to the Defendants for services rendered by the Defendants as more fully discussed below.

88. During the one (1) year period immediately preceding the Petition Date, SII and SRM made payments totaling $693,087.66 (collectively, the "*David Transfers*") to David.

89. For the one (1) year period immediately preceding the Petition Date, SII made, at a minimum, the following David Transfers to David:

Date of Transfer	Purpose of Transfer	Amount of Transfer
March 1, 2009	Salary	$41,666.67
April 1, 2009	Salary	$41,666.67
May 1, 2009	Salary	$41,666.66
June 1, 2009	Salary	$41,666.67
July 1, 2009	Salary	$61,666.67
August 1, 2009	Salary	$61,666.66

Date of Transfer	Purpose of Transfer	Amount of Transfer
September 1, 2009	Salary	$61,666.67
October 1, 2009	Salary	$61,666.67
November 1, 2009	Salary	$61,666.66
December 1, 2009	Salary	$61,666.67
December 31, 2009	Vehicle	$1,860.66
December 31, 2009	Life Insurance	$414.00
December 31, 2009	Tax Services	$1,463.00
January 1, 2010	Salary	$61,666.67
February 1, 2010	Salary	$61,666.66

90. For the one (1) year period immediately preceding the Petition Date, SRM made, at a minimum, the following David Transfers to David:

Date of Transfer	Purpose of Transfer	Amount of Transfer
May 14, 2009	2006 Cadillac Escalade	$29,350.00

91. During the one (1) year period immediately preceding the Petition Date, SII and SRM made payments totaling $186,515.76 (collectively, the "*Donna Transfers*") to Donna.

92. For the one (1) year period immediately preceding the Petition Date, SII made, at a minimum, the following Donna Transfers to Donna:

Date of Transfer	Purpose of Transfer	Amount of Transfer
March 1, 2009	Salary	$16,666.67
April 1, 2009	Salary	$16,666.67
May 1, 2009	Salary	$16,666.66
June 1, 2009	Salary	$16,666.67
July 1, 2009	Salary	$16,666.67
August 1, 2009	Salary	$16,666.66
September 1, 2009	Salary	$16,666.67
October 1, 2009	Supplemental Retirement	$10,000.00
November 1, 2009	Supplemental Retirement	$10,000.00
December 1, 2009	Supplemental Retirement	$10,000.00

Date of Transfer	Purpose of Transfer	Amount of Transfer
December 31, 2009	Vehicle	$1,899.09
January 1, 2010	Supplemental Retirement	$10,000.00
February 1, 2010	Supplemental Retirement	$10,000.00

93. For the one (1) year period immediately preceding the Petition Date, SRM made, at a minimum, the following Donna Transfers to Donna:

Date of Transfer	Purpose of Transfer	Amount of Transfer
May 14, 2009	2006 Cadillac STS	$17,950.00

94. During the one (1) year period immediately preceding the Petition Date, SII and SRM made payments totaling $720,252.12 (collectively, the "*Jerry Transfers*" and, collectively with the David Transfers and the Donna Transfers, the "*Transfers*") to Jerry.

95. For the one (1) year period immediately preceding the Petition Date, SII made, at a minimum, the following Jerry Transfers to Jerry:

Date of Transfer	Purpose of Transfer	Amount of Transfer
March 1, 2009	Salary	$70,833.33
April 1, 2009	Salary	$70,833.33
May 1, 2009	Salary	$70,833.33
June 1, 2009	Salary	$70,833.33
July 1, 2009	Salary	$70,833.33
August 1, 2009	Salary	$70,833.33
September 1, 2009	Salary	$70,833.33
October 1, 2009	Supplemental Retirement	$40,000.00
November 1, 2009	Supplemental Retirement	$40,000.00
December 1, 2009	Supplemental Retirement	$40,000.00
December 31, 2009	Vehicle	$1,382.81
December 31, 2009	Life Insurance	$2,781.00
December 31, 2009	Tax Services	$3,855.00
January 1, 2010	Supplemental Retirement	$40,000.00
February 1, 2010	Supplemental Retirement	$40,000.00

96. For the one (1) year period immediately preceding the Petition Date, SRM made, at a minimum, the following Jerry Transfers to Jerry:

Date of Transfer	Purpose of Transfer	Amount of Transfer
May 14, 2009	2006 Cadillac DTS	$16,400.00

97. The Transfers were transfers to, or for the benefit of, the Defendants.

98. At the time of the Transfers, the Defendants were each creditors of one of the Debtors.

99. The Transfers were for, or on account of, antecedent debts owing by one or more of the Debtors to the Defendants before such Transfers were made as set forth in the charts above.

100. The Debtors making the Transfers to the Defendants were insolvent on the date each of the Transfers was made.

101. Insolvency within the ninety (90) days preceding the Petition Date is presumed pursuant to section 547(f) of the Bankruptcy Code.

102. In addition, the Debtors' insolvency before the Petition Date is readily apparent based on the following:

- The sharp decline in the Debtors' sales: for fiscal year ending April 30, 2007, the Debtors had approximately $197,000,000 in sales; for fiscal year ending April 30, 2008, the Debtors had approximately $144,000,000 in sales; for fiscal year ending April 30, 2009, the Debtors had approximately $103,000,000 in sales. The decrease in sales was significantly sharper for the Debtors' Florida operations. The decrease in sales negatively impacted the Debtors' working capital availability and cash flows.

- The Debtors were in default under the Facility at least as early as March 13, 2008 as set forth in the Forbearance Agreement between the Debtors and the Pre-Petition Lenders. Defaults under the Facility continued to occur as set forth in subsequent forbearance agreements between the Debtors and the Pre-Petition Lenders dated May 30, 2008, September 15, 2008, March 25, 2009, October 2, 2009, November 13, 2009, November 20, 2009 and December 8, 2009.

- The Pre-Petition Lenders required the Debtors to retain the services of a turnaround management company in early 2008.

103. The Transfers were made within one (1) year before the Petition Date.

104. Each of the Defendants had reasonable cause to believe that the Debtors were insolvent at the time of each of the Transfers based upon the knowledge and information available to the Defendants in their capacities as directors and officers of the Debtors.

105. The Transfers enabled the Defendants to receive more than they would have received if: (a) these cases were cases under chapter 7 of the Bankruptcy Code; (b) the Transfers had not been made; and (c) the Defendants had received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

106. By reason of the foregoing, the Transfers to the Defendants constitute avoidable preferences within the meaning of section 547(b) of the Bankruptcy Code and section 1336.05(B) of the Ohio Revised Code, made applicable by section 544 of the Bankruptcy Code.

107. The Creditor Trustee continues to investigate those Transfers made by the Debtors to the Defendants within the one (1) year period prior to the Petition Date, and reserves the right to amend this Complaint to set forth such additional Transfers.

COUNT III

Avoidance of Fraudulent Transfers Pursuant to Section 548(a)(1)(A) of the Bankruptcy Code

(Against Jerry A. Schwab, Donna L. Schwab and David A. Schwab)

108. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 107 of this Adversary Complaint as though fully set forth herein.

109. At all relevant times, each Defendant was an insider of the Debtors pursuant to section 101(31) of the Bankruptcy Code.

110. During the two (2) year period immediately preceding the Petition Date, the Debtors made substantial payments to the Defendants, which, at a minimum, consist of the Transfers.

111. The Transfers constitute a transfer of interests in the Debtors' property.

112. The Transfers were made by the Debtors to or for the Defendants' benefit.

113. The Transfers were made with actual intent to hinder, delay or defraud the Debtors' creditors. The Defendants intended to hinder, defraud and delay the Debtors' creditors based on the following:

- Among other things, the Debtors did not receive adequate consideration for the payment of David's increased salary and Donna's and Jerry's supplemental retirement payments. The services provided to the Debtors by David did not increase or change in any way to justify the almost 50% increase in salary while the Debtors were insolvent and decreasing other employees' salaries. In addition, no justification has been given for the substantial retirement benefits given to Donna and Jerry.

- The Debtors were insolvent at the time of the Transfers based on the following:

  - The sharp decline in the Debtors' sales: for fiscal year ending April 30, 2007, the Debtors had approximately $197,000,000 in sales; for fiscal year ending April 30, 2008, the Debtors had approximately $144,000,000 in sales; for fiscal year ending April 30, 2009, the Debtors had approximately $103,000,000 in sales. The decrease in sales was significantly sharper for the Debtors' Florida operations. The decrease in sales negatively impacted the Debtors' working capital availability and cash flows.

  - The Debtors were in default under the Facility at least as early as March 13, 2008 as set forth in the Forbearance Agreement between the Debtors and the Pre-Petition Lenders. Defaults under the Facility continued to occur as set forth in subsequent forbearance agreements between the Debtors and the Pre-Petition Lenders dated May 30, 2008, September 15, 2008, March 25, 2009, October 2, 2009, November 13, 2009, November 20, 2009 and December 8, 2009.

  - The Pre-Petition Lenders required the Debtors to retain the services of a turnaround management company in early 2008.

- The Transfers were made to insiders of the Debtors as discussed in Count XI below.

114. The Transfers were made by the Debtors with the Defendants' knowledge that their actions would hinder, delay or defraud the Debtors' creditors.

115. The Transfers constitute avoidable fraudulent transfers pursuant to section 548 of the Bankruptcy Code.

116. Accordingly, the Creditor Trustee may avoid any Transfers made to or on behalf of the Defendants for the benefit of the Estates.

117. The Creditor Trustee continues to investigate those Transfers made by the Debtors to the Defendants within the two (2) year period prior to the Petition Date, and reserves the right to amend this Complaint to set forth such additional Transfers.

COUNT IV

Avoidance of Fraudulent Transfers Pursuant to Section 544 of the Bankruptcy Code and Section 13306.04(A)(1) of the Ohio Revised Code

(Against Jerry A. Schwab, Donna L. Schwab and David A. Schwab)

118. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 117 of this Adversary Complaint as though fully set forth herein.

119. At all relevant times, each Defendant was an insider of the Debtors pursuant to section 1336.01 of the Ohio Revised Code.

120. During the four (4) year period immediately preceding the Petition Date, the Debtors made substantial payments to the Defendants, which, at a minimum, consist of the Transfers.

121. As of the Petition Date, unsecured creditors existed that are entitled to avoid the Transfers under applicable non-bankruptcy law pursuant to section 544(b) of the Bankruptcy Code.

122. The Transfers constitute a transfer of interests in the Debtors' property.

123. The Transfers were made by the Debtors to or for the Defendants' benefit.

124. The Transfers were made with actual intent to hinder, delay or defraud the Debtors' creditors. The Defendants intended to hinder, defraud and delay the Debtors' creditors based on the following badges of fraud (*see* Ohio Rev. Code § 1336.04(B)(1)-(9)):

- *Inadequate Consideration*: Among other things, the Debtors did not receive adequate consideration for the payment of David's increased salary and Donna's and Jerry's supplemental retirement payments. The services provided to the Debtors by David did not increase or change in any way to justify the almost 50% increase in salary while the Debtors were insolvent and decreasing other employees' salaries. In addition, no justification has been given for the substantial retirement benefits given to Donna and Jerry.

- *Debtors' Insolvency*: The Debtors were insolvent at the time of the Transfers based on the following:

  - The sharp decline in the Debtors' sales: for fiscal year ending April 30, 2007, the Debtors had approximately $197,000,000 in sales; for fiscal year ending April 30, 2008, the Debtors had approximately $144,000,000 in sales; for fiscal year ending April 30, 2009, the Debtors had approximately $103,000,000 in sales. The decrease in sales was significantly sharper for the Debtors' Florida operations. The decrease in sales negatively impacted the Debtors' working capital availability and cash flows.

  - The Debtors were in default under the Facility at least as early as March 13, 2008 as set forth in the Forbearance Agreement between the Debtors and the Pre-Petition Lenders. Defaults under the Facility continued to occur as set forth in subsequent forbearance agreements between the Debtors and the Pre-Petition Lenders dated May 30, 2008, September 15, 2008, March 25, 2009, October 2, 2009, November 13, 2009, November 20, 2009 and December 8, 2009.

- *Transfers to Insiders*: The Transfers were made to insiders of the Debtors as discussed in Count XI below.

125. The Transfers were made by the Debtors with the Defendants' knowledge that their actions would hinder, delay or defraud the Debtors' creditors.

126. The Transfers constitute avoidable fraudulent transfers pursuant to section 13306.04(A)(1) of the Ohio Revised Code, as incorporated by section 544(b)(1) of the Bankruptcy Code.

127. Accordingly, the Creditor Trustee may avoid any Transfers made to or on behalf of the Defendants for the benefit of the Estates.

128. The Creditor Trustee continues to investigate those Transfers made by the Debtors to the Defendants within the four (4) year period prior to the Petition Date, and reserves the right to amend this Complaint to set forth such additional Transfers.

COUNT V

Avoidance of Fraudulent Transfers Pursuant to Sections 544 and 548(a)(1)(B) of the Bankruptcy Code and Section 1336.05(A)(1) of the Ohio Revised Code

(Against Jerry A. Schwab, Donna L. Schwab and David A. Schwab)

129. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 128 of this Adversary Complaint as though fully set forth herein.

130. At all relevant times, each Defendant was an insider of the Debtors pursuant to section 101(31) of the Bankruptcy Code and section 1336.01 of the Ohio Revised Code.

131. During the two (2) to four (4) year period immediately preceding the Petition Date, the Debtors made substantial payments to the Defendants, which, at a minimum, consist of the Transfers.

132. As of the Petition Date, unsecured creditors existed that are entitled to avoid the Transfers under applicable non-bankruptcy law pursuant to section 544(b) of the Bankruptcy Code.

133. The Transfers constitute a transfer of interests in the Debtors' property.

134. The Transfers were made to or for the Defendants' benefit.

135. One or more of the Debtors did not receive reasonably equivalent value in exchange for such Transfers, based on the following:

- The Debtors did not receive reasonably equivalent value in exchange for the payment of David's increased salary. The services provided to the Debtors by David did not increase or change in any way to justify the almost 50% increase in salary while the Debtors were insolvent and decreasing other employees' salaries or terminating the employment of other employees.
- The Debtors did not receive reasonably equivalent value in exchange for the payment of Donna's and Jerry's supplemental retirement payments. No justification has been given for the substantial retirement benefits given to Donna and Jerry while the Debtors' businesses were in decline and Donna and Jerry had ceased to provide services to the Debtors.

136. In addition: (a) the Debtors were insolvent on the date that the Transfers were made or became insolvent as a result of the Transfers; (b) the Debtors were engaged in business or a transaction, for which any property remaining with the Debtors was an unreasonably small capital; or (c) the Debtors intended to incur, or believed that they would incur, debts that would be beyond their ability to pay as such debts matured.

137. The Debtors' insolvency at the time of the Transfers is readily apparent based on the following:

- The sharp decline in the Debtors' sales: for fiscal year ending April 30, 2007, the Debtors had approximately $197,000,000 in sales; for fiscal year ending April 30, 2008, the Debtors had approximately $144,000,000 in sales; for fiscal year ending April 30, 2009, the Debtors had approximately $103,000,000 in sales. The decrease in sales was significantly sharper for the Debtors' Florida operations. The decrease in sales negatively impacted the Debtors' working capital availability and cash flows.
- The Debtors were in default under the Facility at least as early as March 13, 2008 as set forth in the Forbearance Agreement between the Debtors and the Pre-Petition Lenders. Defaults under the Facility continued to occur as set forth in subsequent forbearance agreements between the Debtors and the Pre-Petition Lenders dated May 30, 2008, September 15, 2008, March 25, 2009, October 2, 2009, November 13, 2009, November 20, 2009 and December 8, 2009.

- The Pre-Petition Lenders required the Debtors to retain the services of a turnaround management company in early 2008.

138. By reason of the forgoing, the Transfers are avoidable pursuant to section 548(a)(1)(B) of the Bankruptcy Code and section 1336.04(A)(2) of the Ohio Revised Code, as incorporated by section 544(b)(1) of the Bankruptcy Code.

139. The Creditor Trustee continues to investigate those Transfers made by the Debtors to the Defendants within the four (4) year period prior to the Petition Date, and reserves the right to amend this Complaint to set forth such additional Transfers.

COUNT VI

Recovery of Avoided Transfers Pursuant to Section 550 of the Bankruptcy Code

(Against Jerry A. Schwab, Donna L. Schwab and David A. Schwab)

140. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 139 of this Adversary Complaint as though fully set forth herein.

141. The Defendants were either: (a) the initial transferee of the Transfers or the entity for whose benefit the Transfers were made; or (b) an immediate or mediate transferee of an initial transferee.

142. The Transfers, to the extent they are avoided pursuant to sections 544, 547 or 548 of the Bankruptcy Code, may be recovered by the Creditor Trustee pursuant to section 550 of the Bankruptcy Code.

COUNT VII

Disallowance of Defendants' Claims Pursuant to Section 502(d) of the Bankruptcy Code

(Against Jerry A. Schwab and Donna L. Schwab)

143. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 142 of this Adversary Complaint as though fully set forth herein.

144. The Defendants are transferees of transfers avoidable pursuant to sections 544, 547 or 548 of the Bankruptcy Code.

145. As a result of the Defendants' receipt of the Transfers as alleged herein and pursuant to section 502(d) of the Bankruptcy Code, the Court should disallow any and all claims of the Defendants against the Debtors, whether asserted in proofs of claim or scheduled on the Debtors' Schedules of Assets and Liabilities, until and unless the Defendants pay to the Creditor Trustee the amount of the Transfers for which the Defendants are liable to the Creditor Trustee pursuant to sections 544, 547, 548 and 550 of the Bankruptcy Code.

COUNT VIII

Recovery of Illegal Dividends or Distributions from Transferees

(Against Jerry A. Schwab, Donna L. Schwab and David A. Schwab)

146. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 145 of this Adversary Complaint as though fully set forth herein.

147. Pursuant to Ohio Rev. Code § 1701.33(C), no dividend or distribution on shares of any class can be paid to the holders of shares of any class of equity when the corporation is

insolvent or there is reasonable ground to believe that by such payment the corporation would be rendered insolvent.

148. The Debtors' insolvency before the Petition Date is apparent as early as March 2008 based on the following:

- The sharp decline in the Debtors' sales: for fiscal year ending April 30, 2007, the Debtors had approximately $197,000,000 in sales; for fiscal year ending April 30, 2008, the Debtors had approximately $144,000,000 in sales; for fiscal year ending April 30, 2009, the Debtors had approximately $103,000,000 in sales. The decrease in sales was significantly sharper for the Debtors' Florida operations. The decrease in sales negatively impacted the Debtors' working capital availability and cash flows.

- The Debtors were in default under the Facility at least as early as March 13, 2008 as set forth in the Forbearance Agreement between the Debtors and the Pre-Petition Lenders. Defaults under the Facility continued to occur as set forth in subsequent forbearance agreements between the Debtors and the Pre-Petition Lenders dated May 30, 2008, September 15, 2008, March 25, 2009, October 2, 2009, November 13, 2009, November 20, 2009 and December 8, 2009.

- The Pre-Petition Lenders required the Debtors to retain the services of a turnaround management company in early 2008.

149. Upon information and belief, one ore more of the Transfers to the Defendants were actually dividends or distributions paid to the Defendants as holders of shares of a class of equity in SII.

150. Such Transfers were made while the Debtors were insolvent and were thus made in violation of Ohio Rev. Code § 1701.33(C).

151. Upon information and belief, Defendants knowingly received such Transfers as dividends or distributions in violation of Ohio Rev. Code § 1701.33(C).

152. The Defendants, as recipients of Transfers that they knew were in violation of applicable law, are liable to the Creditor Trustee pursuant to Ohio Rev. Code § 1701.95(D).

153. The Creditor Trustee continues to investigate those Transfers made by the Debtors to the Defendants while the Debtors were insolvent and reserves the right to amend this Complaint to seek to recover such additional Transfers.

COUNT IX

Recovery of Illegal Dividends or Distributions from Directors

(Against All Defendants)

154. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 153 of this Adversary Complaint as though fully set forth herein.

155. Pursuant to Ohio Rev. Code § 1701.95(A)(1)(a), directors of a corporation are liable if they vote for or assent to any payment of dividend or distribution that is contrary to applicable law.

156. Any Transfers made to the Defendants as dividends or distributions while the Debtors were insolvent violates Ohio Rev. Code § 1701.33(C).

157. Upon information and belief, all Transfers made to the Defendants as dividends or distributions while the Debtors were insolvent were voted for, or assented to, by the Defendants, as directors of the Debtors.

158. Pursuant to § 1701.95(2)(a), the Defendants, as directors of the Debtors, are jointly and severally liable for all such Transfers that were dividends or distributions in violation of applicable law.

159. The Creditor Trustee continues to investigate those Transfers made by the Debtors to the Defendants while the Debtors were insolvent and reserves the right to amend this Complaint to seek to recover such additional Transfers.

COUNT X

Equitable Subordination of Claims

(Against Jerry A. Schwab and Donna L. Schwab)

160. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 159 of this Adversary Complaint as though fully set forth herein.

161. Under section 510(c) of the Bankruptcy Code, a court may, under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim or interest to all or part of another allowed claim or interest.

162. Special scrutiny is given to the conduct of insiders who bear a close relationship with a debtor.

163. In this case, the Defendants are "insiders" of the Debtors under section 101(31) of the Bankruptcy Code.

164. Pursuant to the Debtors' Schedules of Assets and Liabilities, Jerry and Donna have claims against the Debtors in unknown amounts.

165. Jerry and Donna engaged in substantial inequitable conduct, including, without limitation:

- They approved a significant salary increase for David while the Debtors were insolvent, despite the fact that David provided no additional services to the Debtors in exchange for the increased salary.

- They actively and openly pursued Cement Resources as the stalking horse bidder for the Debtors' assets, despite the fact that Cement Resources' offer was not the highest and best offer. Jerry and Donna pursued the Cement Resources offer because it had the potential to result in a continuing role in management and a potential minority share of Cement Resources' equity post-closing.

- They failed to terminate the Policies and obtain the Insurance Refund, which resulted in the need to accelerate the time frame for the Auction, and which in turn, depressed bids for the Debtors' assets. Jerry and Donna failed to terminate

the Policies because they wished to preserve the value of the Policies for the Schwab Trust beneficiaries (i.e., David and Mary) and to avoid certain adverse tax consequences to the Schwab Trust beneficiaries, despite the harm that those actions would cause to the Estates and creditors.

- They attempted to sabotage the sale of the Debtors' assets in multiple other ways, such as by not affording certain parties full access to the data room, not permitting certain parties on the Debtors' premises to inspect the assets being sold, and, upon information and belief, contacting the FTC in an attempt to block the OldCastle bid (even though it was the highest and best bid when combined with the RLH bid).

166. At the time of this inequitable conduct, the Debtors were insolvent or in the zone of insolvency and, thus, Jerry and Donna – as the controlling insiders of the Debtors – owed fiduciary duties to the unsecured creditors of the Debtors.

167. The unsecured creditors of the Debtors, on the other hand, did not participate in Jerry and Donna's inequitable conduct toward the Debtors.

168. Jerry and Donna took unfair advantage of the Debtors by virtue of their insider position, equity in, and control over, the Debtors.

169. Jerry and Donna knew, or should have known, as a result of their control over the Debtors, that the Debtors would be unable to pay their obligations as they became due in the ordinary course.

170. Jerry and Donna's inequitable conduct resulted in a transfer of substantial value to Jerry and Donna or loss to the Estates, to the direct financial detriment of the unsecured creditors of the Debtors.

171. Allowing Jerry and Donna, the controlling insiders of the Debtors, to receive payment on their alleged claims prior to or *pari passu* with those of the Debtors' other unsecured creditors would be inequitable.

172. Equitable subordination of the claims of Jerry and Donna is consistent with the Bankruptcy Code because it redresses Jerry and Donna's improper conduct that directly harmed the Debtors' unsecured creditors.

<u>COUNT XI</u>

Declaration Regarding Insider Status

(Against All Defendants)

173. The Creditor Trustee repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 172 of this Adversary Complaint as though fully set forth herein.

174. An actual controversy exists between the parties as to, among other things, whether the Defendants received transfers avoidable under chapter 5 of the Bankruptcy Code and whether the Defendants' claims should be equitably subordinated.

175. Declarations regarding whether the Defendants were insiders of the Debtors will assist the Court in adjudicating certain claims set forth in this Adversary Complaint.

176. The Bankruptcy Code defines an "insider" as the: (a) director of the debtor; (b) officer of the debtor; (c) person in control of the debtor; (d) partnership in which the debtor is a general partner; (e) general partner of the debtor; or (f) relative of a general partner, director, officer, or person in control of the debtor. 11 U.S.C. § 101(31)(B).

177. Under Ohio law, an insider includes: (a) a director of the debtor; (b) an officer of the debtor; (c) a person in control of the debtor; (d) a partnership in which the debtor is a general partner; (e) a general party in a partnership; or (f) a relative of a general partner, director, officer or person in control of the debtor. Ohio Rev. Code § 1336.01.

178. Jerry was a director, officer and person in control of the Debtors and a relative of a director, officer or person in control of the Debtors in that he was the was the Chairman and Director of the Debtors, married to Donna and the father of David and Mary.

179. Donna was a director, officer and person in control of the Debtors and a relative of a director, officer or person in control of the Debtors in that she was the Vice Chairman, Secretary, Treasurer and Director of the Debtors, married to Jerry and the mother of David and Mary.

180. David was a director, officer and person in control of the Debtors and a relative of a director, officer or person in control of the Debtors in that he was the President and Director of the Debtors, the son of Jerry and Donna and the brother of Mary.

181. Mary was a director of the Debtors and a relative of a director, officer or person in control of the Debtors in that she was a Director of the Debtors, the daughter of Jerry and Donna and the sister of David.

WHEREFORE, the Creditor Trustee respectfully requests that the Court enter judgment against the Defendants and in favor of the Creditor Trustee:

(a). as to Count I, finding that the Defendants breached their fiduciary duties to the Debtors and the Debtors' creditors during the Bankruptcy Cases and are liable for damages in an amount to be determined at trial;

(b). as to Count II, avoiding the Transfers and directing that the amount of the Transfers made to the Defendants be paid by the Defendants to the Creditor Trustee;

(c). as to Count III, avoiding the Transfers and directing that the amount of the Transfers made to or on behalf of the Defendants be paid by the Defendants to the Creditor Trustee;

(d). as to Count IV, avoiding the Transfers and directing that the amount of the Transfers made to or on behalf of the Defendants be paid by the Defendants to the Creditor Trustee;

(e). as to Count V, avoiding the Transfers and directing that the amount of the Transfers made to or on behalf of the Defendants be paid by the Defendants to the Creditor Trustee;

(f). as to Count VI, directing that the amount of the Transfers made to the Defendants be paid by the Defendants to the Creditor Trustee pursuant to section 550(a) of the Bankruptcy Code;

(g). as to Count VII, pursuant to section 502(d) of the Bankruptcy Code, disallowing claims made by the Defendants unless and until any Transfers avoided pursuant to section 550(a) of the Bankruptcy Code are returned to the Creditor Trustee;

(h). as to Count VIII, finding that the Defendants, as transferees, are liable for all illegal dividends or distributions;

(i). as to Count IX, finding that the Defendants, as directors, are liable for all illegal dividends or distributions;

(j). as to Count X, equitably subordinating any and all claims held by Jerry and Donna against the Debtors to those claims held by the Debtors'

general unsecured creditors pursuant to section 510(c) of the Bankruptcy Code;

(k). as to Count XI, declaring that the Defendants were "insiders" of the Debtors pursuant to section 101(31) of the Bankruptcy Code;

(l). ordering that the Defendants shall pay all of the Creditor Trustee's costs and attorneys' fees herein;

(m). awarding the Creditor Trustee pre- and post-judgment interest; and

(n). ordering such other and further relief that the Court deems just and proper.

Dated: February 28, 2012

JOHN B. PIDCOCK, NOT INDIVIDUALLY BUT AS CREDITOR TRUSTEE OF THE SCHWAB INDUSTRIES, INC. CREDITOR TRUST

By: /s/ Richard S. Lauter
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