



MAJOR CONCRETE SUPPLIER ANNOUNCES LOSSES AND ADDRESSES DEBT RESTRUCTURING EFFORTS

U.S. Concrete, Inc. (NASDAQ:RMIX), a Houston-based company, currently services the construction industry in several major markets in the U.S. through its two business segments: (1) ready-mixed concrete and concrete-related products, and (2) precast concrete products. **This Client Alert reports their latest financial information and restructuring efforts and explains how you may protect your rights while doing business with construction industry suppliers going through financial stress.**

REPORTED FINANCIAL CONDITION

In its press release and Form 8-K report filed March 10, 2010, U.S. Concrete announced a 30.9% decrease in revenues in its 2009 4Q. It also reported a 2009 4Q net loss attributable to stockholders of \$16.7 million (or \$0.46) per diluted share. On a yearly basis, 2009 revenue decreased by 29.1% to \$534.5 million as compared to \$754.3 million for the year ended in 2008. A net loss attributable to stockholders of \$88.2 million (or \$2.44) per diluted share was also reported. Company officials cited the continued decrease in demand for its products and the significant slowdown in the construction industry as reasons for the declines in revenues.

In an earnings call on March 10, 2010, the company advised that adjusted EBITDA for 2009 was \$25.3 million, down from \$40.5 million in 2008. Excluding a gain on acquisition of subordinated notes, EBITDA in 2009 was \$17.9 million. Cap Ex is down to \$13.8 million in 2009 from \$27.8 million in 2008. The company continues to divest assets to generate liquidity. Cash flow from operations was \$8 million in 2009, down from \$29.7 million in 2008. Free cash flow in 2009 was \$4.2 million, down from \$6.3 million in 2008. The company expects to generate a “significant cash burn in 2010 irrespective of our cost savings programs.” On February 19, 2010, the company announced it has retained the financial advisors Lazard Freres & Co. LLC and Alix Partners to help restructure its debt.

Net debt at the end of 2009 was \$292.3 million. Availability under the company’s revolving credit facility has dropped from \$45.3 million in December 2009 to less than \$25 million in February 2010 to meet the need for additional letters of credit and to reflect a decrease in borrowing base caused by significant reduced sales volumes. While the company reports that it is exploring strategies to strengthen its balance sheet and is negotiating with its secured lenders, the CFO cautions in the press release that “Absent a successful restructuring, there is substantial doubt about our ability to continue to operate as a going concern.”

U.S. Concrete stock is currently trading at less than a dollar per share and could face delisting by NASDAQ. The company has until September 7, 2010 to regain compliance.

EXPERIENCE TYPICAL OF INDUSTRY

The experience of U.S. Concrete is typical of many suppliers of materials and services in the construction industry. Companies who are suppliers to companies in this financially stressed industry may want to consider ways to protect themselves in the event of counterparty insolvency.

ADDRESS RISK BY TAKING IMMEDIATE ACTION

We remind our clients involved in the construction industry to be proactive and develop an internal response in consultation with legal counsel knowledgeable in supply chain/vendor issues and creditors' rights matters. By doing so, you will be well positioned to identify and evaluate your rights and remedies under existing agreements and applicable commercial law. Such law may include the Uniform Commercial Code (the "UCC"), the statute governing virtually all domestic sales transactions, and if applicable, the Bankruptcy Code.

Some action items that may require immediate attention include:

- ◆ Identifying the documents that constitute the agreement between the parties, including supply agreements, correspondence, amendments, purchase orders, invoices, shipping documents, and the like;
- ◆ Reviewing the operative documents and focusing on provisions setting forth the rights and remedies available to the parties in case of a counterparty default or other credit event;
- ◆ Evaluating the credit risk;
- ◆ Negotiating and preparing revised contract provisions, including, by way of example, contractual affiliate offset rights, where appropriate;
- ◆ Crafting purchase order protocols;
- ◆ Negotiating security agreements;
- ◆ Identifying potential preference and fraudulent transfer exposure and adopting a strategy to minimize such risk;
- ◆ Preparing guaranties and other documentation providing for enhanced vendor/creditor protections; and
- ◆ Pursuing litigation remedies, if necessary, to protect a vendor's or a customer's interests.

REMEDIES AND WORKOUT STRATEGIES

The statutory remedies generally available to sellers of goods who are concerned about the financial condition of a buyer, before and after a monetary default, include:

- ◆ "Adequate assurance" (UCC § 2-609) remedies;
- ◆ "Anticipatory repudiation" (UCC § 2-610) remedies;
- ◆ Termination or modification of credit terms;
- ◆ Reclamation;
- ◆ Stoppage of goods in transit;
- ◆ Identification and salvage of goods;
- ◆ Resale of goods;

- ◆ Damages for non-acceptance of goods or repudiation of the contract, including loss of profit;
- ◆ Action for the price of the goods; and
- ◆ Possible cancellation of the contract.

If there are discussions between the vendor and its financially distressed customer, either before or after a payment default, the vendor may consider the following forms of credit enhancement:

- ◆ Price increases and accelerated payment terms;
- ◆ Guaranties and other credit support;
- ◆ Payment of legal fees by the customer;
- ◆ Reporting requirements; and
- ◆ A purchase money security interest in the goods being sold by the vendor to the customer.

Any “workout” agreement should be reduced to written form in consultation with counsel as there are risks associated with consensual pre- or post-default “workout” agreements, which could be subject to judicial scrutiny or challenge in the event of a bankruptcy filing or similar proceeding. Courts and creditors may focus on issues including:

- ◆ Whether the transaction constitutes a fraudulent conveyance in favor of the vendor;
- ◆ Whether the transaction constitutes a preferential transfer to the vendor; and
- ◆ Whether the transaction constitutes some sort of overreaching or fraud by the vendor.

If a buyer is financially unable to make the concessions sought by the vendor, and the exercise of remedies is not a good option, third party credit support for the buyer’s obligations to the seller may be the only answer.

The concept of third party credit support refers to guaranties and other types of transactions where a third party agrees to be financially responsible for the obligations of the buyer. Forms of third party credit support include:

- ◆ Standby and commercial letters of credit;
- ◆ Performance bonds;
- ◆ Suretyship obligations;
- ◆ Credit insurance; and
- ◆ Guaranties (secured or unsecured).

Guaranties may be provided by affiliates (such as a parent or a shareholder) or non-affiliates (such as a bank) of the buyer. Legal issues regarding third party credit support that must be of concern to sellers of goods include:

- ◆ The Statute of Frauds – any guaranty must be in writing and signed by the guarantor;
- ◆ *Ultra vires* – does the entity providing the credit support have the authority to do so under its governance documents;
- ◆ Failure of consideration, fraud, or duress;

- ◆ Fraudulent transfers – did the guarantor receive “fair value” or “reasonably equivalent value” in exchange for a guaranty;
- ◆ Failure to satisfy conditions precedent to enforcement;
- ◆ Alteration of the debt or collateral; and
- ◆ Failure to notify the guarantor of the sale of personal property collateral, as required by the UCC or as otherwise required by the governing documents.

IN THE EVENT OF BANKRUPTCY

Sellers of goods will need to consider an array of bankruptcy-specific issues and action items, including:

- ◆ The automatic stay in Section 362 of the Bankruptcy Code, which prohibits the exercise of creditor remedies upon the filing of a bankruptcy petition by a debtor entity;
- ◆ Preparing and filing proofs of claims;
- ◆ Seeking critical vendor status;
- ◆ Focusing on financing and operational issues;
- ◆ Defending preference and/or fraudulent transfer claims;
- ◆ Monitoring the bankruptcy case;
- ◆ Responding to claims objections;
- ◆ Prosecuting administrative, priority, and secured claims where such status is available;
- ◆ Effecting setoff rights;
- ◆ Considering creditor committee participation; and
- ◆ Assessing any plan of reorganization or liquidation proposed by or on behalf of the buyer/debtor.

In addition, unique issues affecting sellers include the debtor’s treatment of a supply agreement as an executory contract that enables it to compel continued sales notwithstanding the debtor’s pre-bankruptcy payment defaults. Options to address these issues include:

- ◆ Request an early assumption or rejection;
- ◆ Demand adequate assurance;
- ◆ Consider whether a safe harbor (*e.g.*, 11 U.S.C. § 556, forward contracts) may apply that would eliminate the applicability of the automatic stay;
- ◆ Renegotiate;
- ◆ Assert administrative priority status where appropriate (11U.S.C. §502(b)(9));
- ◆ Assert secured claim status where appropriate;
- ◆ Monitor for assumption, which can occur via motion or through configuration of a plan of reorganization or liquidation;
- ◆ Watch for estoppel notices; and
- ◆ Watch for purported sale of the contract to a third party under Section 363 of the Bankruptcy Code.

CONCLUSION

A proactive and well-counseled provider of goods will be best positioned to survive and thrive when the economy returns to better health.

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