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# **KEYNOTE: WAR STORIES ON INCREASING SALES, PROTECTING FUTURE RECEIVABLES AND SURVIVING BANKRUPTCY**

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## **Presenters:**

**Bruce S. Nathan, Esq.  
Lowenstein Sandler LLP**

Telephone: (212) 262-6700

Facsimile: (973) 422-6851

[bnathan@lowenstein.com](mailto:bnathan@lowenstein.com)

**Wanda Borges, Esq.  
Borges & Associates, LLC**

Telephone: (516) 677-8200, x 225

Facsimile: (516) 677-0806

[wborges@borgeslawllc.com](mailto:wborges@borgeslawllc.com)

**Lowenstein  
Sandler**

**Borges & Associates, LLC**

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# **WAR STORIES ON INCREASING SALES, PROTECTING FUTURE RECEIVABLES AND SURVIVING BANKRUPTCY**

## **UCC REMEDIES: ADEQUATE ASSURANCE WAR STORY**

**Prepared By:  
Bruce S. Nathan, Esq.  
Lowenstein Sandler LLP**

# WAR STORIES ON INCREASING SALES, PROTECTING FUTURE RECEIVABLES AND SURVIVING BANKRUPTCY

## UCC REMEDIES: ADEQUATE ASSURANCE WAR STORY

**Prepared By: Bruce S. Nathan, Esq.  
Lowenstein Sandler LLP**

ABC Co. had pending supply contracts with XYZ Co., a financially distressed manufacturer of widgets. ABC was obligated under its supply agreements with XYZ to provide credit terms of 60 days from XYZ's receipt of goods under the contracts. ABC had a claim against XYZ on account of goods sold and delivered in the amount of approximately \$8 million and additional exposure of \$2 million based on a potential damage claim if XYZ refused to accept delivery of specially produced goods. Lowenstein represented ABC Co. in this matter.

XYZ suffered substantial losses over several years, which accelerated alarmingly in 2010. As of July 1, 2010, XYZ had a revolving credit facility on which XYZ owed \$136 million that was secured by a first lien on XYZ's assets. XYZ also owed approximately \$1.9 billion to lenders holding a first lien on XYZ's assets and approximately \$1.2 billion to lenders holding a second lien on XYZ's assets, as well as additional unpaid funded and other debt.

In June 2010, XYZ's CEO and Chairman of the Board both resigned and were replaced by interim appointees. In August 2010, XYZ announced its second quarter operating results, which showed a net loss of approximately \$300 million.

ABC was concerned about the continued risk of extending 60 plus day credit terms to XYZ, particularly where there were questions about XYZ's ability to pay the interest owing on its first and second lien debt through the balance of 2010. Bottom line, ABC was concerned that XYZ would run out of liquidity in the second half of 2010 or in 2011 and as a result, be forced into Chapter 11 bankruptcy.

On August 20, 2010, ABC sent XYZ a letter in which ABC raised grounds for insecurity about XYZ's ability to pay for goods that ABC had previously and thereafter sold and delivered on credit terms to XYZ. The grounds for insecurity noted in the letter referred to articles in *Debtwire* and *Bloomberg* that suggested an upcoming restructuring; a real threat that XYZ would run out of cash in 2010 or 2011; a significant drop in XYZ's EBITDA from 2009 to 2010; the fact that XYZ was quickly burning through its availability on its loan facility and cash; and the very thin liquidity cushions that XYZ faced during the balance of 2010 and continuing through 2011.

In addition, ABC's letter provided excerpts from XYZ's 10-Q report for the second quarter of 2010 that showed significant losses in the first 6 months of 2010 compared to 2009; the risk of a short-term liquidity crunch with respect to cash and funds available under XYZ's credit facility; and other adverse financial developments. ABC also offered excerpts from XYZ's 10-K report for 2009 in which XYZ cautioned that it could not assure that its business would generate sufficient cash flow from operations or future borrowings under its revolving credit facility to enable it to pay its indebtedness and meet other liquidity needs. ABC's letter also

referred to the resignation of XYZ's CEO and Chairman of the Board in June, 2010 and their replacement by interim appointees.

As a result of these adverse developments, ABC's letter invoked ABC's rights under Section 2-609 of the Uniform Commercial Code and demanded adequate assurance of XYZ's ability to timely and fully pay for goods that ABC had previously sold, and thereafter would sell to XYZ and to otherwise satisfy XYZ's obligations to ABC, including full payment of invoices for goods previously sold and delivered by ABC on credit terms. ABC further stated that in the event XYZ did not provide such adequate assurance to ABC within 30 days of the date of the letter, ABC reserved the right to revoke its credit terms, stop delivery of goods and/or switch to cash in advance terms.

XYZ responded to ABC's adequate assurance demand by inviting representatives of ABC to a meeting at XYZ's offices on August 27, 2010. XYZ argued that ABC had no grounds for insecurity to justify invocation of ABC's UCC right to demand adequate assurance of XYZ's ability to continue paying for ABC's goods. XYZ argued solvency both on a balance sheet and equitable basis (XYZ was current in payment to its creditors). XYZ also provided other supportive financial information that ABC had no grounds to be insecure about XYZ's ability to pay for ABC's goods.

ABC responded by letter dated September 7, 2010. In their letter, ABC stated that the information XYZ provided "fell short" of providing assurance of XYZ's ability to timely pay for ABC's goods sold or credit terms. ABC also stated that XYZ was insolvent. As a result, ABC announced its switch to cash in advance terms effective for sales on and after September 15, 2010.

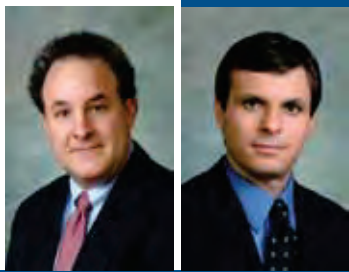
XYZ responded by letter dated September 15, 2010. XYZ disputed ABC's grounds for insecurity about XYZ's ability to pay ABC's invoices and ABC's right to switch to cash in advance terms despite its contractual obligation to provide credit terms to XYZ. XYZ also demanded that ABC retain the 60 day credit terms that it was contractually bound to provide to XYZ.

In the meantime, the parties commenced negotiations to address ABC's concerns. XYZ ultimately agreed to allow ABC to reduce ABC's credit terms to 15 days from the date of invoice. XYZ also agreed to post a standby letter of credit in the amount of \$1,650,000 in favor of ABC to secure ABC's sales of goods to XYZ.

XYZ ended up filing chapter 11 in the United States Bankruptcy Court in Delaware in September 2011. ABC's claim against XYZ was in the amount of approximately \$2, 1 million. The claim was reduced to \$450,000 after ABC's post-petition drawing on the letter of credit. Much of the remaining claim had priority status under Section 503(b)(9) because XYZ had received ABC's goods within 20 days of the filing. ABC's claim was ultimately paid in full as a result of XYZ's assumption of its agreements with ABC that was approved by the bankruptcy court. These agreements were executory contracts (governed by Section 365 of the Bankruptcy Code) that could be assumed or rejected in XYZ's bankruptcy case. One of the requirements under Section 365 for XYZ's assumption of the agreements was XYZ's full payment of all sums due under the agreements, including amounts due pre-petition.

## Using Public Information to Identify and React to the Early Warning Signs of a Financially Distressed Customer

Bruce Nathan, Esq. and Scott Cargill, Esq.



# Using Public Information to Identify and React to the Early Warning Signs of a Financially Distressed Customer

SELECTED TOPIC

The amount of public financial information about a customer that is available to a credit professional has increased exponentially over the last decade. The proliferation of public databases, reports filed with government agencies, proprietary news sources and web-based search functions has given credit professionals near instantaneous access to information that can assist them in making better informed credit decisions about a customer in the early stages of financial distress. The availability of this public information means that the announcement of a customer's bankruptcy filing should rarely come from out of the blue.

A creditor can now be much more proactive by using the robust array of publicly available information to identify early on the warning signs that suggest a customer may be heading towards a bankruptcy filing.

A credit professional dealing with a struggling customer can do more than merely attempt to extract value from a customer on the verge of insolvency, as was the case just a decade ago. A creditor can now be much more proactive by using the robust array of publicly available information to identify early on the warning signs that suggest a customer may be heading toward a bankruptcy filing and to monitor the customer's financial status months, if not years, in advance of the bankruptcy.



### Join Bruce for:

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**20070.** Bankruptcy 2012: What's Hot, What's Not!

Utilizing these warning signs can facilitate restricting credit terms; switching to cash in advance terms; obtaining a deposit or letter of credit, guarantee or other third-party support; or otherwise seeking to minimize the risk of exposure.

### Warning Signs Predicting a Future Customer Bankruptcy or Insolvency

There is no single warning sign that will definitively predict when a customer will stop timely paying invoices or file for bankruptcy. Rather, information about a customer must be considered on a cumulative basis over time. This is only possible when the creditor has a sense of what the "status quo" is for the customer's operations. What are the customer's working capital needs? What are its liquidity needs? When is its busy season? How is the customer financed? Does the customer have public debt or stock? What is the customer's industry or sub-industry? Who are its competitors? Who are its vendors?

With this baseline understanding of what “normal” is for the customer, a creditor can better appreciate information that may constitute “warning signs” of a financially struggling customer. For instance, if the customer operates a business that is cyclical in nature around the Christmas holiday season, it would be a warning sign if the customer were late in making payments or asking for an increase in its credit line at the end of January when the customer should be flush with cash. Fundamental questions must be asked about whether the customer’s business is generating sufficient cash to fund operations throughout the year, or whether the customer has grown to depend on financing to provide liquidity for its business. This may be an appropriate point to analyze the customer’s free cash flow and its leverage ratios and take a fresh look at the customer’s budget and business plan.

If the customer has issued public securities, there is a wealth of additional information, which may include warning signs that should not be ignored. Reviewing pricing information and trends in the customer’s stock and bonds will provide important insights about investors’ views of the customer’s business. Has the stock price moved in step with the broader markets, or has there been a steep drop in price that suggests issues with the customer or its industry? What are investors seeing in the customer that is causing them to sell or buy shares? Are there stock market analysts that report on the company? What are their recommendations for investing in the company? Have their investment views recently changed? Has the customer met analysts’ earnings expectations?

The downgrading of a customer’s publicly traded debt by a credit agency, such as Moody’s, Fitch or Standard & Poor’s, is potentially another warning sign of a customer in trouble. A downgrade from investment grade debt to “junk” status should especially set off alarm bells and prompt a creditor into a careful review of the customer’s account.

The creditor should also be checking whether its customer’s publicly traded bonds are secured or unsecured. If the bonds are secured and selling for less than face (or “par”) value, this is an indication that investors believe that bondholders are unlikely to receive a full recovery, despite their secured position, if the company files for bankruptcy. Since secured bondholders generally have a higher priority in the bankruptcy claims hierarchy than trade creditors with general unsecured claims, secured bonds trading at less than face value suggest that general unsecured trade creditors will receive no recovery in a bankruptcy. In addition, a customer’s unsecured bonds trading at a discount off their face value suggests that unsecured trade creditors will receive a lower or possibly no recovery on their claims if the customer files for bankruptcy.

A credit professional should consider its struggling customer’s key financial challenges over the next 12 to 18 months. How much availability will the customer have under its revolving credit facility? When does its financing line mature? Has the customer breached any loan covenants? Is the customer operating under a forbearance agreement with its lender? Will the

customer’s bank renew its financing line and continue lending? Is the bank charging a higher interest rate to the customer, representing an increased risk of default? Has the customer recently pledged additional collateral to its lender or other creditors (e.g., a second mortgage against its real estate; liens against its inventory and receivables; liens in its equipment)? For customers with outstanding corporate bonds, when are the interest and principal payments due? When do the bonds mature? What are the customer’s plans for raising the cash needed to pay the interest and principal?

**Information about a customer must be considered on a cumulative basis over time. This is only possible when the creditor has a sense of what the “status quo” is for the customer’s operations.**

Another telltale sign of financial distress is a sudden change in the leadership of a company and increased reliance upon outside insolvency advisers. Did the customer recently replace its chief executive officer or chief financial officer, or did either or both resign? Have there been replacements or additions to the board of directors? Was an insolvency professional added to the board? What reasons has the customer given for these changes? Has the company installed a “Chief Restructuring Officer” or a “Crisis Manager” or retained a turnaround consultant? Similarly, the company’s retention of a law firm known for its bankruptcy practice, and/or an investment bank known in the insolvency field, generally provides another early warning sign that a bankruptcy filing is likely, though not necessarily imminent. The bankruptcy filing of a complex business often requires weeks or months of pre-bankruptcy planning, and the insolvency professionals retained by a prospective debtor are usually tasked with preparing the groundwork at the company for a smooth transition into Chapter 11.

Understanding what actions the customer’s stockholders and bondholders are taking is also a key source of information. Are the shareholders attempting to replace the board of directors? Have the bondholders formed into one or more “ad hoc” groups to negotiate with the customer? Have the bondholders retained a financial advisor and/or law firm specializing in corporate restructuring? Is the customer in default of any of the covenants contained in the bond indenture? If so, this may be a strong indication that these investors believe there is a good possibility that the customer is heading toward a bankruptcy filing.

Finally, there are the warning signs from the customer that directly impact the creditor and usually appear at the later stages of financial distress: late payments; post-dated or held checks; checks drawn against insufficient funds; requests for increases in its credit line; the customer’s loss of trade support from other vendors; and the loss of credit insurance or put

coverage that protect against the risk of the customer's insolvency. While no one individual sign is conclusive (and some could be indicative of a company either experiencing a brief downturn or the consequence of an expansion of the business) it helps to place these events in the more global context of the other warning signs that are being exhibited.

### Locating Sources of Customer Information

A credit professional today has access to many sources of information not previously available that can be used to assist in credit decisions to minimize the risk of payment default concerning high exposure accounts, new accounts and/or accounts where the customer has an unproven payment history. A credit professional can conduct an Internet search for a defined term, such as a customer's name, that will search internet databases and provide an email containing the search results. Generally, the user can set the frequency for when the search results are delivered. For example, a search may be performed for any publicly available website or news article that mentions "ABC Construction Corporation" and an email delivered every day, every week or "as it happens" containing the link to the website in which the name of the company appears. One of the more popular services is Google Alerts ([www.google.com/alerts](http://www.google.com/alerts)), which allows a user to enter multiple queries and have each of the search results delivered at varying frequencies depending on user preference. There is no charge for this service.

The creditor should also be checking whether its customer's publically traded bonds are secured or unsecured. If the bonds are secured and selling for less than face (or "par") value, this is an indication that investors believe that bondholders are unlikely to receive a full recovery, despite their secured position, if the company files for bankruptcy.

Such an alert system is useful for both large and small customers, and often provides access to local news websites that may report on activities involving a customer in situations where such information would be omitted from national news articles. For instance, the local newspaper in a town where a customer's plant is located may run an extensive news story on its website about layoffs at the plant, resignations by members of management, the sale of the customer's real property and the continued viability of the company. By contrast, these events may not be significant enough to warrant coverage by national financial news outlets and may otherwise go unnoticed by the credit professional.

The customer's own website often provides a significant amount of helpful information for making credit decisions.

For larger companies, and those with public securities, there will often be an "investors" section of the website that contains information about the customer's management, operations and financial performance. An increasing number of sites provide the option for a credit professional to register his or her email address to receive timely press releases and other notifications issued by the company. For example, companies will generally send email notifications when they file reports with the Securities and Exchange Commission (SEC) or other regulatory bodies. The benefit to being included on this email distribution list is that it is automated and the credit professional will receive the emails in a timely fashion, rather than the creditor having to conduct its own search for financial information that may have been released weeks or months earlier.

Companies with publicly registered securities generally must file periodic reports with the SEC containing significant information about the financial performance of the company, including audited financial statements, as well as the management's assessment of future opportunities and challenges for the business. These reports are publicly available, at no charge, on the SEC's website ([www.sec.gov](http://www.sec.gov)). For customers that are not publicly reporting, a creditor should consider requiring the customer, from the inception of their relationship, to provide the creditor with its financial statements and supporting information on a periodic basis. While waivers may be allowed, it is better to explain to the customer at the outset of the relationship that it is required to periodically submit financial information, rather than requesting such information on an ad hoc basis at a time when the customer is having financial difficulties and is most likely to resist.

Another important data point for a credit professional is to understand what assets the customer owns, and what interests other creditors have in the customer's assets. There are a number of local and national services that perform searches for mortgages and liens filed on real property; perfected security interests against personal property under the Uniform Commercial Code (UCC); federal and state tax and other liens; and litigations that have been commenced by or against the customer. A customer with multiple levels of secured debt and no unencumbered assets often suggests that unsecured trade creditors might receive a *de minimis* or no recovery upon a bankruptcy filing. Similarly, the recent commencement of a large number of collection lawsuits against the customer may be an indication that the customer has not paid other vendors and raises a heightened risk of nonpayment of the creditor's claim.

For larger customers, subscribing to proprietary subscription services that follow distressed companies may be warranted. There are numerous services available, including *Bloomberg News*, *Debtwire*, *Daily Bankruptcy Review*, *S&P Capital IQ* and *Markit*. These services, and others like them, are pay services that offer in-depth coverage about the financial condition of a company and real-time information about debt restructuring developments between the company and its major creditor groups. Generally, these services will report about publicly



available financial information and press releases, as well as industry gossip and “soft” information that may assist in assessing the customer’s credit risk. For instance, such services may report on rumors that the customer and/or its bondholders have retained bankruptcy professionals; the unavailability of credit insurance and/or puts covering the risk of the customer’s insolvency; and changes to the customer’s management personnel. These services may also report on takeover proposals, defaults concerning the customer’s loan and/or secured debt; and the views of various participants involved in a restructuring transaction. At critical times prior to a bankruptcy filing or an out-of-court restructuring, it is not uncommon for these services to issue reports several times a day.

### Using Warning Signs to Exercise State Law Rights

Identifying warning signs and locating sources to obtain information is a critical component to making credit decisions about a financially distressed customer on a prospective basis. Equally important is understanding how a credit professional can utilize this information in the legal context to reduce or eliminate future exposure to the financially distressed customer, particularly where there is a long-term contract in place between the creditor and the customer that, among other matters, requires the creditor to extend credit terms to its customer. Unlike a relationship where the customer orders goods or services on a “purchase order to purchase order” basis, creditors that have long-term contracts with their customers risk a breach of contract claim being filed against them if they unjustifiably refuse to continue to provide goods or services to the customer and offer credit terms in accordance with the terms of the contract.

State law excuses the creditor from performance in situations where, due to the customer’s financial condition, it is no longer reasonable for the creditor to rely merely upon the customer’s promise that payment will be made in accordance with the contract terms. These state law rights can be exercised long before the commencement of a customer’s bankruptcy proceeding, and in many instances a bankruptcy filing and the resulting automatic stay may increase the difficulty in exercising these remedies. A beneficial, but often overlooked, creditor remedy is the ability to demand that a financially distressed customer provide “adequate assurance” of the customer’s ability to fully perform all of its obligations under the contract where the creditor has reasonable grounds to be insecure about the customer’s ability to fully perform under their contract, including the customer’s obligation to timely pay the creditor’s invoices.

If the creditor makes a proper demand on the customer, and the customer is unable to timely provide reasonable assurance of its ability to perform under the contract, including timely paying invoices when due, then the creditor generally has the right to consider the contract repudiated and sue for breach of contract. The courts have found a customer’s agreement to provide a deposit to the creditor, arrange for the issuance of a letter of credit in favor of the creditor, or pay cash in advance terms to be adequate assurance of the customer’s ability to

fully comply with its payment obligation under the contract. A trade creditor could use its adequate assurance demand as a starting point to negotiate relief from its existing credit terms and obtain security for payment of its claim. However, the creditor should be careful in exercising this remedy, and should consult with counsel because the creditor could subject itself to a breach of contract claim if it acts improperly.

## Identifying warning signs and locating sources to obtain information is a critical component to making credit decisions about a financially distressed customer on a prospective basis.

The following example, based upon an actual case, illustrates how identifying the warning signs of a customer’s financial troubles long before the customer’s bankruptcy filing, through access to publicly available information, and then quickly exercising state law rights, resulted in a creditor reducing its exposure to a financially distressed customer:

Supply Co. had supply contracts with Customer, Inc., a manufacturer of widgets. Supply Co. was obligated under its agreements with Customer to provide credit terms of 30 days and 60 days from the Customer’s receipt of the goods. Customer suffered substantial losses over the prior few years, which accelerated alarmingly in 2011. By the end of 2011, Customer had a deficit net worth of approximately \$500 billion. As of July 1, 2011, Customer had a revolving credit facility on which Customer owed \$136 million that was secured by a first lien on Customer’s assets. Customer also owed approximately \$1.5 billion to lenders holding a first lien on Customer’s assets and approximately \$1 billion to lenders holding a second lien on Customer’s assets, as well as additional unpaid funded and other debt.

In June 2011, Customer’s chief executive officer and chairman of the board both resigned and were replaced by interim appointees. In August 2011, Customer announced its second quarter operating results, which showed a net loss of approximately \$300 million. Supply Co. was concerned about the continued risk of extending 30- to 60-day credit terms to Customer, particularly where there were questions about Customer’s ability to pay the interest owing on its first and second lien debt through the balance of 2011. Supply Co. was concerned that Customer would run out of liquidity in the second half of 2011 or in 2012, and, as a result, be forced into Chapter 11 bankruptcy.

In July 2011, Supply Co. sent Customer a letter in which Supply Co. raised grounds for insecurity about Customer’s ability to pay for goods that Supply Co. had previously and thereafter sold and delivered on credit terms to Customer. The grounds for insecurity noted in the letter referred to articles in

*Debtwire* and *Bloomberg* that suggested an upcoming restructuring; a real threat that Customer would run out of cash in 2011 or 2012; a significant drop in the Customer's EBITDA from 2010 to 2011; the fact that Customer was quickly burning through its available funds and cash; and the very thin liquidity cushions that Customer faced during the balance of 2011 and continuing through 2012.

In addition, Supply Co.'s letter provided excerpts from Customer's 10-Q report for the second quarter of 2011, filed with the SEC that showed significant losses in the first six months of 2011 compared to 2010; the risk of a short-term liquidity crunch with respect to cash and funds available under Customer's credit facility; and other adverse financial developments. Supply Co. also offered excerpts from Customer's 10-K report for 2010, filed with the SEC, in which Customer cautioned that it could not assure that its business would generate sufficient cash flow from operations or future borrowings under its revolving credit facility to enable it to pay its indebtedness and meet other liquidity needs.

As a result of these adverse developments, Supply Co. invoked its rights under UCC Section 2-609 by demanding adequate assurance of Customer's ability to timely and fully pay for goods that Supply Co. sold to Customer and to otherwise satisfy Customer's obligations to Supply Co. Supply Co. further stated that in the event Customer did not provide such adequate assurance to Supply Co. within 30 days of the date of the letter, Supply Co. reserved the right to revoke its credit terms, stop delivery of goods and/or switch to cash in advance terms. Customer responded to Supply Co.'s adequate assurance demand with its own letter. Customer disputed Supply Co.'s grounds for insecurity about Customer's ability to pay Supply Co.'s invoices and Supply Co.'s right to switch to cash in advance terms, despite its contractual obligation to provide credit terms to Customer.

The parties then commenced negotiations to address Supply Co.'s concerns. Customer ultimately agreed to allow Supply Co. to reduce Supply Co.'s credit terms to 15 days from invoice date and Customer also agreed to post a standby letter of credit in the amount of approximately \$2 million in favor of Supply Co. to secure payment of Supply Co.'s sales of specialty goods to one of Customer's plants. These modifications to the supply contracts substantially reduced Supply Co.'s exposure in Customer's Chapter 11 case, which was filed the following year.

## Conclusion

The dizzying array of financial information available to creditors is only as helpful as the processes that credit professionals put in place to capture, analyze and use the data in credit decisions. Understanding what information to look for and what it discloses about the customer are the key first steps. These additional sources of data should be incorporated into the credit function to supplement traditional sources of customer information that enable credit professionals to make better informed credit decisions and take swift and decisive action

to reduce the creditor's exposure as soon as a financially distressed customer is identified. ●

*Bruce Nathan, Esq. is a partner in the New York City office of the law firm of Lowenstein Sandler PC. He is a member of NACM and is on the Board of Directors of the American Bankruptcy Institute and is a former co-chair of ABI's Unsecured Trade Creditors Committee. He can be reached via email at [bnathan@lowenstein.com](mailto:bnathan@lowenstein.com).*

*Scott Cargill, Esq. is Of Counsel to Lowenstein Sandler's Roseland, New Jersey office. He is a member of NACM and ABI and can be reached at [scargill@lowenstein.com](mailto:scargill@lowenstein.com).*

This article was based on the NACM webinar "Warning Signs and Information Sources: Identifying and Responding to a Financially Distressed Customer Before Bankruptcy" presented by Bruce Nathan, Esq. (co-author of the above article) and Ken Rosen, Esq. of Lowenstein Sandler PC on February 6, 2012.

Check the NACM calendar at [www.nacm.org](http://www.nacm.org) for other teleconference and webinar opportunities.

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**ABC'S ADEQUATE ASSURANCE DEMAND**

**ABC LETTERHEAD**

August 20, 2010

**VIA FEDERAL EXPRESS**

**XYZ**

5320 Maiden Lane  
Dayton, Ohio

**Re: Adequate Assurance Demand**

Gentlemen:

This letter pertains to all current agreements between Debtor and Creditor (the "Agreements"), including without limitation the following:

- Procurement Agreement dated May 1, 2009 (Dayton Mill)
- Agreement dated January 1, 2007 (Decatur Mill)

ABC believes that grounds for insecurity exist under Official Code of Georgia (OCGA) §11-2-609; Ohio Revised Code Annotated (ORCA) §1302.67; and Wisconsin Statutes Annotated (WSA) §402.609; and other applicable laws with respect to XYZ's ability to pay for goods previously and hereafter sold and delivered based upon the credit terms currently provided to XYZ under the Agreements (the "Credit Terms"). Such grounds for insecurity are based upon:

1. March 15, 2010 article from *Debtwire* provided to the *Financial Times* and published at FT.com describing:
  - the prospect of a "near-term restructuring" as a result of the consolidation of the Debtor's USD 1B worth of second lien bonds by **[names of hedge funds]**
  - Debtor faces a real threat of running out of cash this year."
  - the expiration in December 2009 of the black liquor tax credit
  - Debtor's 2009 EBITDA being down 86% from its 2008 EBITDA
  - Debtor could burn through its available funds quite quickly."
- 2) The Risk Factors described in Item 1A of XYZ's Form 10-K for 2009 filed with the SEC on February 19, 2010.
- 3) The following statement appearing on page 65 of XYZ's Form 10-K for 2009:

“We cannot assure you that our business will generate sufficient cash flow from operations or that future borrowings will be available to us under the revolving credit facility in an amount sufficient to enable us to pay our indebtedness or to fund our other liquidity needs. If our cash flows and capital resources are insufficient to allow us to make scheduled payments on our indebtedness or to fund our other liquidity needs, we may need to reduce or delay capital expenditures, sell assets, seek additional capital or restructure or refinance all or a portion of our indebtedness on or before maturity.”

- 4) May 25, 2010 – XYZ’s withdrawal of its planned IPO for an \$805 million initial public offering.
- 5) The following statement appearing on page 28 of XYZ’s Form 10-Q for the Quarterly Period Ended June 30, 2010:

“However, given the uncertainty of the current economic environment, we cannot assure you that our business will generate sufficient cash flows from operations, that we will be able to complete the sale of nonstrategic assets or that future borrowings will be available to us under our revolving credit facility in an amount sufficient to enable us to fund our liquidity needs.”

- 6) According to XYZ’s 10Q for the Quarterly Period Ended June 30, 2010, (a) XYZ’s losses during the first 6 months of 2010 tripled to in excess of \$350 million compared to XYZ’s losses during the first 6 months of 2009; and (b) the cash and funds available under XYZ’s revolving credit facility dropped from \$247 million on March 31, 2010 to \$120 million on June 30, 2010. ABC is concerned that (a) XYZ’s liquidity is not sufficient to cover 4<sup>th</sup> quarter interest payments and expected 3<sup>rd</sup> quarter operating shortfall; (b) negative gross margins due to insufficient pricing to cover costs of goods sold will further exacerbate XYZ’s liquidity problems; (c) XYZ’s negative cash flow coverage ratio indicates the inability to generate sufficient funds from operations to cover debt obligations and other liabilities; and (d) XYZ’s negative equity (\$552M) due to cumulative losses over the last 5 years; and higher interest costs since FY09 because the debt refinancing in September 2009 and the new First Lien Notes in February 2010 bear a higher interest rate (11.375%) than the term loan (Libor = 3.75%) that was repaid will further endanger XYZ’s liquidity.
- 7) *Bloomberg* August 5, 2010 story reporting same day XYZ’s investors and analysts conference call and stating XYZ bonds fell by the most in almost six months after [Debtor] posted a \$174 million second-quarter net loss” which loss “widened 29-fold from a \$6 Million loss a year ago amid lower average sales prices, higher interest expense and the expiration of a tax break...”
- 8) *Bloomberg Businessweek* August 6, 2010 story describing a CreditSights, Inc. report stating that XYZ has a “very thin” liquidity cushion and “2011 may prove fatal.” The CreditSights’ analysts also stated that 2011 “could prove fatal if current positive operating momentum on the volume front faces economy-related hiccups.”
- 9) August 5, 2010 analyst report from ETG Capital, New York, stating “On XYZ’s conference call, accounts heard that one of the company’s planned asset dispositions was being delayed on account of regulatory issues. If the sale doesn’t close in the fourth

quarter, as planned, XYZ could be short of cash for end-of-year interest payments, sources said.” This is further borne out by the deterioration in XYZ’s liquidity position as of June 30, 2010 as discussed above.

- 10) The resignation of XYZ’s CEO and Chairman of the Board in June, 2010 and their replacement by interim appointees.
- 11) Adverse trends in XYZ’s industry, including the paper sector’s loss of market share to digital media and a downward pressure on prices, which are expected to continue.

In light of the foregoing, pursuant to OCGA §11-2-609, ORCA §1302.67 and WSA §402.609 and other applicable laws, ABC hereby demands adequate assurance of XYZ’s ability to timely and fully pay for goods that ABC shall sell and deliver to XYZ prior to the termination dates of the Agreements, and to otherwise fully satisfy XYZ’s obligations to ABC, including full payment of all invoices for goods previously sold and delivered to XYZ on Credit Terms. If ABC does not receive such adequate assurance from XYZ within thirty (30) days after XYZ’s receipt of this letter, ABC shall reconsider the Credit Terms and inform XYZ of any changes thereto that ABC believes to be necessary to alleviate its insecurity. ABC reserves all of its other rights and remedies, including without limitation, the right to refuse and/or stop delivery under the Uniform Commercial Code.

Very truly yours,

ABC

By: \_\_\_\_\_

Title: \_\_\_\_\_

**ABC'S REPLY**

**ABC LETTERHEAD**

September 7, 2010

XYZ Corporation  
5320 Maiden Lane  
Dayton, OH

Re: ABC Adequate Assurance Demand

Gentlemen:

I appreciate your meeting with us last Friday, August 27, in response to my August 20 letter to you seeking adequate assurance of XYZ's ability to pay for ABC products previously and hereafter sold and delivered to your mills based upon the current credit terms provided by ABC. We have carefully considered all of the information you have provided to us in response to my letter and my follow-up questions.

Unfortunately, the information provided by XYZ falls well short of providing adequate assurance of XYZ's ability to timely pay for ABC's products sold and delivered to XYZ based on ABC's current credit terms, and ABC remains unsure of XYZ's ability to pay its obligations to its suppliers and lenders, including ABC, in the coming months.

ABC is concerned that, during the balance of 2010, XYZ will be unable to achieve sustainable price increases, increased sales and the closing of asset sales on which its optimistic projected liquidity levels for the balance of 2010 are based. As a result, ABC continues to worry that XYZ might, in the near future, lack sufficient liquidity to timely pay ABC's invoices and be forced to file a Chapter 11 bankruptcy case.

ABC's concerns are essentially the same as XYZ's management stated in your Q2 4010 Form 10Q:

"However, given the uncertainty of the current economic environment, we cannot assure you that our business will generate sufficient cash flows from operations, that we will be able to complete the sale of nonstrategic assets or that future borrowings will be available to us under our revolving credit facility in an amount sufficient to enable us to fund our liquidity needs."

ABC has also concluded that XYZ is insolvent as defined under O.C.G.A. §11-1-201(23), O.R.C. Ann. §1301.01(W), Wis. Stat. §402.201(23) and other applicable state law. Accordingly, ABC has the right under O.C.G.A. §11-2-702, O.R.C. Ann. §1302.76, and Wis. Stat. §402.702 to, among other things, refuse to make any further deliveries to XYZ under the agreements between us, except on cash in advance terms.

Accordingly, please be advised that effective September 15, 2010, and until further notice from us, all of ABC's shipments to XYZ under our agreements will be on cash in advance terms, unless we can agree upon terms that address ABC's concerns.

We hope that you understand ABC's position and that we are able to continue our business relationship. ABC reserves all of its other rights and remedies.

Very truly yours,

ABC

By: \_\_\_\_\_

Title: \_\_\_\_\_

**XYZ'S RESPONSE TO  
ABC'S ADEQUATE ASSURANCE DEMAND AND  
ABC'S CASH IN ADVANCE LETTER**

**XYZ LETTERHEAD**

September 15, 2010

ABC  
100 Park Avenue  
New York, N.Y. 10020

Re: ABC Adequate Assurance Demand

Dear \_\_\_\_\_:

I am writing in response to your letter dated August 20, 2010 and September 7, 2010 and your stated "worry" that XYZ "might, in the near future, lack sufficient liquidity to pay ABC's invoices and be forced to file a Chapter 11 bankruptcy case." ABC further concluded in the letter that XYZ is "insolvent" and has determined to place XYZ on cash in advance terms, despite the contractual obligations to provide credit terms to XYZ under signed agreements.

XYZ considers the ABC demand for cash in advance to be commercially unreasonable; to be an anticipatory breach of the two contracts between XYZ and ABC; and, conduct which is not supported by the facts and circumstances. The action appears to have been undertaken in bad faith. Finally, XYZ is offended by the assertion it is "insolvent" and considers any communication by ABC of that conclusion to a third party to be slanderous.

XYZ has met and discussed its status with ABC on several occasions over the last year. XYZ has provided ABC with non-public information to assist ABC in its assessment of the ability of XYZ to perform its obligations under current agreements. Nothing in the information provided supports the conclusion asserted by ABC in its letter. XYZ has sufficient capacity and liquidity to meet obligations as they come due and maintains assets greater than liabilities. XYZ filed an 8-K with the Securities and Exchange Commission forecasting its expectations for the balance of 2010 and through 2011 indicating strength in meeting its obligations. You previously mentioned third party comments about bonds but neglect now to observe the recent rally in those same bonds.

The timeframe mentioned above in the 8-K is critical to an evaluation of your demand since the two current contracts expire on December 31, 2010. The ABC demand for cash in advance is not supported by the standards of the Uniform Commercial Code sections you cite for authority as



the demand is not commercially reasonable given the facts and circumstances. This is a third party standard, not the standard of an ABC “worry”.

Accordingly, XYZ rejects your assertions regarding insolvency, rejects your demands for cash in advance as a deviation from your contractual commitment, and, demands ABC perform according to the terms of the current contracts between the parties.

We trust you understand the XYZ position if you expect to continue a business relationship past the end of 2010. XYZ further reserves all of its rights and remedies regarding the conduct of ABC.

Very truly yours,

XYZ

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Director, Raw Materials

FIRST BANK NA

FIRST BANK NA

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER 1234567

LETTER OF CREDIT AMOUNT	ISSUE DATE	EXPIRY DATE
USD 1,650,000.00	10/07/10	10/01/11

BENEFICIARY:  
 ABC  
 100 PARK AVENUE  
 NEW YORK, NY 10022  
 ATTN: CREDIT DEPARTMENT

APPLICANT:  
 XYZ  
 5320 MAIDEN LANE  
 DAYTON, OH

LADIES AND GENTLEMEN:

AT THE REQUEST OF AND FOR THE ACCOUNT OF XYZ (THE "ACCOUNT PARTY"), WE FIRST BANK, N.A. (THE "ISSUING BANK") HEREBY ISSUE THIS IRREVOCABLE STANDBY LETTER OF CREDIT NO. 1234567 (THE "LETTER OF CREDIT") IN YOUR FAVOR IN THE AGGREGATE AMOUNT OF ONE MILLION SIX HUNDRED FIFTY THOUSAND AND 00/100 U.S. DOLLARS (US\$1,650,000.00).

THIS LETTER OF CREDIT IS EFFECTIVE IMMEDIATELY AND SHALL AUTOMATICALLY EXPIRE AT 5:00 O'CLOCK P.M. EASTERN TIME, LOCAL TIME IN WINSTON-SALEM, NORTH CAROLINA ON OCTOBER 1, 2011 (THE "TERMINATION DATE").

SUBJECT TO THE PROVISIONS OF THIS LETTER OF CREDIT, DEMAND FOR PAYMENT UNDER THIS LETTER OF CREDIT MAY BE MADE BY YOU IN A SINGLE DRAWING OR PARTIAL DRAWINGS (EACH A "DRAWING").

FACSIMILE OF THE DRAW DOCUMENTS IS ACCEPTABLE TO 336-888-8888. IF PRESENTATION IS MADE BY FAX PROMPT PHONE NOTIFICATION MUST BE GIVEN TO 1-800-999-9999. THE FAX PRESENTATION SHALL BE DEEMED THE ORIGINAL PRESENTATION. IN THE EVENT OF A FULL OR FINAL DRAWING THE ORIGINAL STANDBY LETTER OF CREDIT MUST BE RETURNED TO US BY OVERNIGHT COURIER AT TIME OF FAX PRESENTATION.

CONTINUED ON NEXT PAGE WHICH FORMS AN INTEGRAL PART OF THIS  
IRREVOCABLE STANDBY LETTER OF CREDIT

A DRAWING MAY BE MADE BY YOU ON ANY BUSINESS DAY (AS DEFINED BELOW) PRIOR TO 5:00 O'CLOCK P.M. (EASTERN TIME) BY PRESENTATION TO ISSUING BANK AT ITS OFFICE AT 401 EAST STREET, 1ST FLOOR, WINSTON-SALEM, NORTH CAROLINA 27101 OF THE FOLLOWING DOCUMENTATION (COLLECTIVELY, THE "REQUIRED DOCUMENTS"):

- (I) YOUR DULY COMPLETED AND SIGNED DRAFT IN THE FORM OF ANNEX A, ATTACHED HERETO, (THE "DRAFT") DRAWN ON THE ISSUING BANK; AND
- (II) A DRAWING CERTIFICATE IN THE FORM OF ANNEX B, ATTACHED HERETO, DULY SIGNED BY YOUR. AUTHORIZED OFFICER.

PAYMENT AGAINST REQUIRED DOCUMENTS PROPERLY PRESENTED UNDER THIS LETTER OF CREDIT PRIOR TO 5:00 P.M. (EASTERN TIME) ON ANY BUSINESS DAY ON OR PRIOR TO THE TERMINATION DATE SHALL BE MADE BY THE ISSUING BANK IN UNITED STATES DOLLARS, BY WIRE TRANSFER IN IMMEDIATELY AVAILABLE FUNDS, TO THE ACCOUNT SPECIFIED BY YOU IN YOUR DRAFT NO LATER THAN THE THIRD FOLLOWING BUSINESS DAY. IF THE REQUIRED DOCUMENTS PRESENTED IN CONNECTION WITH THE DRAWING DO NOT, IN ANY INSTANCE, CONFORM TO THE TERMS AND CONDITIONS OF THIS LETTER OF CREDIT, THE ISSUING BANK PROMPTLY SHALL GIVE YOU NOTICE THAT THE PURPORTED PRESENTMENT WAS NOT EFFECTED IN CONFORMITY WITH THIS LETTER OF CREDIT, STATING IN REASONABLE DETAIL THE REASONS THEREFOR AND THAT THE ISSUING BANK IS HOLDING ANY DOCUMENTS SO PRESENTED AT YOUR DISPOSAL OR IS RETURNING SAME TO YOU, AS YOU MAY ELECT. UPON BEING NOTIFIED THAT THE PURPORTED PRESENTMENT WAS NOT EFFECTED IN CONFORMITY WITH THIS LETTER OF CREDIT, YOU MAY, PRIOR TO THE TERMINATION DATE, ATTEMPT TO CORRECT ANY SUCH NONCONFORMING DEMAND FOR PAYMENT OR DOCUMENT. FOR PURPOSES HEREOF, "BUSINESS DAY" MEANS ANY DAY OTHER THAN SATURDAY OR SUNDAY OR A DAY ON WHICH COMMERCIAL BANKS ARE REQUIRED OR AUTHORIZED TO BE CLOSED IN THE STATE OF NORTH CAROLINA.

ALL OTHER COMMUNICATIONS AND NOTICES TO THE ISSUING BANK WITH RESPECT TO THIS LETTER OF CREDIT SHALL BE IN WRITING AND DELIVERED TO THE ISSUING BANK AT THE ADDRESS SET FORTH IN THE ABOVE PARAGRAPH OF THIS LETTER OF CREDIT AND SHALL SPECIFICALLY REFER TO THE ISSUING BANK BY NAME AND TO THIS LETTER OF CREDIT BY THE IRREVOCABLE STANDBY LETTER OF CREDIT NO. 1234567.

THIS LETTER OF CREDIT SETS FORTH IN FULL THE ISSUING BANK'S UNDERTAKING AND SUCH UNDERTAKING SHALL NOT IN ANY WAY BE

MODIFIED, AMENDED, AMPLIFIED OR LIMITED BY ANY DOCUMENT, INSTRUMENT OR AGREEMENT REFERRED TO IN THIS LETTER OF CREDIT OR IN ANY CERTIFICATE PRESENTED BY YOU UNDER THIS LETTER OF CREDIT AND ANY SUCH REFERENCE SHALL NOT BE DEEMED TO INCORPORATE HEREIN BY REFERENCE ANY DOCUMENT, INSTRUMENT OR AGREEMENT.

ALL BANKING CHARGES ARE FOR THE ACCOUNT OF THE ACCOUNT PARTY.

THIS LETTER OF CREDIT IS SUBJECT TO THE INTERNATIONAL STANDBY PRACTICES 1998, INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO. 590 (THE "ISP98"). AS TO MATTERS NOT COVERED BY THE ISP98, THIS LETTER OF CREDIT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF NEW YORK.

VERY TRULY YOURS,

FIRST BANK, N.A.

\_\_\_\_\_, OPERATIONS OFFICER

THE ORIGINAL OF THIS LETTER OF CREDIT CONTAINS AN EMBOSSED SEAL OVER THE AUTHORIZED SIGNATURE.

PLEASE DIRECT ANY CORRESPONDENCE INCLUDING DRAWING OR INQUIRY QUOTING OUR REFERENCE NUMBER TO:

FIRST BANK, N.A.  
401 EAST STREET  
WINSTON-SALEM, NC 27101  
ATTN: STANDBY LETTER OF CREDIT DEPT.

OUR CUSTOMER CARE PHONE NUMBER FOR ANY QUERIES IS 800-777-7777.  
OUR FAX NUMBER FOR ANY QUERIES IS 336-222-2222 FOR DRAWINGS

THIS IS AN INTEGRAL PART OF LETTER OF CREDIT NUMBER: 1234567

ANNEX A

DRAFT

TO: FIRST BANK, N.A.

401 EAST STREET, 1ST FLOOR

WINSTON-SALEM, NORTH CAROLINA 27101 ATTN: STANDBY LETTERS OF CREDIT  
FAX: 336-888-8888

PAY AT SIGHT TO THE ORDER OF ABC THE SUM OF \_\_\_\_\_  
UNITED STATES DOLLARS (US\$ \_\_\_\_\_), DRAWN UNDER IRREVOCABLE  
STANDBY LETTER OF CREDIT NO. 1234567 DATED OCTOBER 07, 2010.

THE AFOREMENTIONED PAYMENT SHALL BE MADE TO ABC IN ACCORDANCE  
WITH THE FOLLOWING WIRE TRANSACTIONS:

ABC  
( ) ABA NUMBER: \_\_\_\_\_  
ACCOUNT NAME: ABC  
ACCOUNT NUMBER: \_\_\_\_\_  
ATTENTION: \_\_\_\_\_  
REFERENCE :

DATED:

ABC

\_\_\_\_\_  
AUTHORIZED SIGNATURE    PRINTED NAME    TITLE

THIS IS AN INTEGRAL PART OF LETTER OF CREDIT NUMBER: 1234567

ANNEX B

DRAWING CERTIFICATE

THE UNDERSIGNED, ABC, CERTIFIES AS FOLLOWS TO FIRST BANK, N.A. AS ISSUER OF THE ABOVE-REFERENCED STANDBY LETTER OF CREDIT:

THE AMOUNT OF THE ATTACHED DRAFT REPRESENTS THE AMOUNT OWING BY XYZ TO ABC, AS REFLECTED ON ABC'S BOOKS AND RECORDS, (A) FOR GOODS THAT ABC SOLD TO XYZ (I) WHICH GOODS XYZ HAS FAILED AND/OR REFUSED TO ACCEPT, AND/OR (II) WHICH GOODS ARE THE SUBJECT OF AN ORDER THAT HAS BEEN CANCELLED OR REPUDIATED BY, OR ON BEHALF OF, XYZ, AND/OR (III) WHICH GOODS HAVE BEEN DELIVERED TO XYZ, AND/OR (B) BASED ON OTHER INDEBTEDNESS OWING BY XYZ TO ABC.

DATED:

ABC

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AUTHORIZED SIGNATURE

# **WAR STORIES ON INCREASING SALES PROTECTING FUTURE RECEIVABLES AND SURVIVING BANKRUPTCY**

**Sometimes Belts and Suspenders  
Is a Very Good Thing**

**Prepared by: Wanda Borges  
Borges & Associates, LLC**

**WAR STORIES ON INCREASING SALES, PROTECTING FUTURE RECEIVABLES,  
AND SURVIVING BANKRUPTCY:**

**SOMETIMES BELTS AND SUSPENDERS IS A VERY GOOD THING**

**By: Wanda Borges, Esq.  
Borges & Associates, LLC**

Creditors' rights attorneys often feel like they are being ignored, because credit grantors don't use credit applications, or they ship on credit in amounts in excess of logical high credits, or ship on open account with no protection.

Then, along comes a credit grantor who does everything right. This case study shows how one credit grantor did exactly what should have been done, still had battles to overcome, and ultimately achieved a tremendous outcome.

This case study accompanies a verbal presentation for the NACM Eastern Region Credit Conference. Attached as appendices to this article are the following documents on which this true story is based. While most of the documentation has been redacted, court filed papers are not redacted since they are already a public record.

1. Credit Application
2. Personal Guaranty signed by the two principals of the corporate debtor
3. Cross-corporate guaranty by corporation owned by the same two principals of the original corporate debtor
4. Promissory Note by the original corporate debtor (a conversion of the open account balance)
5. Security Agreement with UCC Financing Statements filed against the original corporate debtor to secure the outstanding indebtedness
6. Mortgage taken on a personal residence of one of the individual guarantors signed by that individual guarantor and his wife on real property located in Vermont.
7. NYS Complaint (without exhibits)
8. Vermont Complaint to Foreclose on Real Property
9. Vermont Judgment of Foreclosure
10. Bankruptcy Court Order Confirming Inapplicability of the Automatic State

**FACT PATTERN:**

Creditor and Customer began business relations in August, 2004. The Customer filled out and executed a Credit Application. Part of the Credit Application authorized the Creditor to obtain and use a personal credit report on the owners of the Customer.



Creditor and Customer did business together for several years before Customer began to become slow in payments while the high credit outstanding increased. By the middle of 2010, Creditor was owed an excess of \$900,000. Creditor became unwilling to continue to sell goods on open account and decided to take various steps to protect itself.

On August 27, 2010, the Customer executed and granted a Security Interest to Creditor to cover its then outstanding indebtedness and all future indebtedness. That Security Interest included a blanket lien on the Customer's personal assets, particularly the accounts receivable, and a purchase money security interest on future goods purchased from the Customer.

To further protect itself, Creditor insisted on guaranties. On October 28, 2010, a cross-corporate guaranty was executed by a corporation owned by the same individuals who owned the original Customer. On November 30, 2010, individual personal guaranties were signed by the two individuals who owned the original Customer.

Still uncomfortable, Creditor converted the open account balance into a Promissory Note with interest, and the note was signed by the Customer on December 1, 2010.

In conjunction with the promissory note and personal guaranties, Creditor obtained a mortgage from one of the guarantors and his wife on two pieces of real estate: one was their residence in New York and the second was a vacation home in Vermont.

#### **CREDITOR'S ACTION AGAINST REAL PROPERTY IN VERMONT:**

Creditor commenced a lawsuit in September, 2011, in the State of Vermont to foreclose on the real property based on the mortgage given by one of the guarantors and his wife. It should be noted that the Creditor, for various reasons, did not pursue the other mortgage which had been granted to it on the personal residence of that guarantor located in New York. A judgment of foreclosure was granted on October 25, 2012. The real property was sold at public auction on May 24, 2013.

#### **CREDITOR'S ACTION AGAINST CUSTOMER, GUARANTORS AND OTHERS IN NEW YORK:**

Simultaneously, Creditor commenced a lawsuit in the Supreme Court of the State of New York in September, 2011 against the primary corporate debtor, the corporate guarantor, a related corporate entity who had issued checks which bounced and the two personal guarantors.

All defendants answered the lawsuit and discovery was ongoing when on January 17, 2012, the Customer and the related corporate defendant filed for chapter 11 protection on January 17, 2012.

Notwithstanding the fact that **only** two of the corporate defendants had filed chapter 11 proceedings, the state court judge would not let us proceed with the litigation against the guarantors because he believed the automatic stay of the Bankruptcy Code prohibited him from allowing us to proceed even against the guarantors. It became necessary to file a motion in the bankruptcy court in each of the separate chapter 11 proceedings showing that the automatic stay is not applicable to the non-debtor guarantors except in unusual circumstances in order to enable us to proceed in the state court against those defendants who had not filed for bankruptcy protection. Those Orders Confirming the Inapplicability of the Automatic Stay to Non-Debtor Guarantors were entered on May 3, 2013.

Once the Bankruptcy Court Orders Confirming the Inapplicability of the Automatic Stay to Non-Debtor Guarantors were entered, counsel for the guarantors entered into serious settlement discussions.

#### **ACTIVITY IN BANKRUPTCY PROCEEDINGS OF CORPORATE DEBTORS:**

The Creditor filed a claim as a secured creditor in each of the Debtors' Chapter 11 cases, to which claims the Debtors filed objections.

While settlement discussions were taking place in the state court action, the two chapter 11 corporate debtors were attempting to reorganize and file confirmable Plans of Reorganization. They were unsuccessful and ultimately both chapter 11 cases were dismissed.

#### **SETTLEMENT**

In addition to the proceeds which Creditor received from the sale of the Vermont real property, Creditor reached a global settlement with all parties which provided for the following:

The Guarantors agreed to pay a total sum of \$1,250,000.00, with an immediate payment of \$450,000.00 and the balance over a five year period of time.

Each of the individual Guarantors acknowledged and reaffirmed the Continuing Guaranty which had been executed on November 30, 2010 and reaffirmed his liability to pay all sums due the Creditor pursuant to the Settlement Agreement.

The cross-corporate guarantor acknowledged and reaffirmed the Guarantee which it had executed on October 28, 2010 and reaffirmed its liability to pay all sums due the Creditor pursuant to the Settlement Agreement.

The Settlement Agreement provided for various claims to be recognized, allowed and paid in the chapter 11 proceedings but this became moot upon the dismissal of the cases.

#### **FINAL CHAPTER**

To date, almost every payment has been made when due. Only once or twice have default notices been sent out but once sent those payments were made as well.



PO Box 1100  
Fax 410-388-8310

### CREDIT APPLICATION

Firm Name: G & J Beady Mix and Masonry Supply Inc. Phone No: (718) 454-0800  
 Trade Name: G & J Beady Mix and Masonry Supply Inc. Fax No: (718) 454-2902  
 Mailing Address: 183-30 Jamaica Avenue  
 City: Hollis County: Queens State: NY Zip Code: 11423  
 Shipping Address: 183-30 Jamaica Avenue  
 City: Hollis County: Queens State: NY Zip Code: 11423  
 Type & Nature of Business: Beady Mix Cement and Masonry Years in Business: N/A  
 State of Incorporation: New York Tax Exempt / Resale No: 20-0792834

**Please submit a copy of exemption or resale certificate & Certificate of Insurance if you or a contracted hauler will be picking up product at a Lehigh facility.**

Ours is a : Corporation  S Corporation  Co-Partnership  Limited Partnership  Individual Business   
 Annual Sales Revenue: NA Profit shown last US Income Tax Return: NA  
 We expect our monthly credit requirements from Lehigh Cement to be approximately \$ 25,000

#### Principal Owners & Officers

Name	Address	Position	SS#
[Redacted]	<u>Salem, NY, 10560</u>	<u>Pres.</u>	<u>108-62-606E</u>
[Redacted]	<u>Cliffside Pl, N.J. 07010</u>	<u>Sec.</u>	<u>139-72-1E</u>

#### Bank & Trade References

Bank: Northfork Bank  
 Address: 204-12 Hillside Ave  
 City: Hollis State: NY Zip: 11423  
 Account No: 2514003439  
 Phone No: (718) 465-1100

Aggregate Supplier or Other Major Supplier:  
Tilcom New York Inc.  
 Address: 162 old mill Road  
 City: West Nyac State: NY Zip: 10994  
 Phone No: (845) 3584500

Major Supplier:  
Southshore Beady Mix  
 Address: 116 E Hawthorne Ave  
 City: Valley Stream State: NY Zip: 11580  
 Phone No: (516) 872-3049

Major Supplier:  
Cambridge Powers Inc. <sup>DBA</sup>  
 Address: Jerome Ave PO. Box 157  
 City: Lynchhurst State: NY Zip: 07071  
 Phone No: (201) 933 5000

Are business premises owned? Yes  No  If yes Value \$ 4,000,000 Mortgage \$ 1,800,000

Mortgage or lease holder: Palisades Regional Financial Co.

Please attach a copy of your most recent financial statement. It will be held in strict confidence.

( SEE REVERSE SIDE FOR TERMS AND CONDITIONS )

This Application and accompanying financial statements (Application Documents) are submitted by the undersigned applicant (Applicant) to [redacted] Lehigh for the purpose of obtaining credit.

**Payment Terms:** Payments are due and payable on or before the last day of the month following the month of shipment (Payment Date). Cash discount (if any) shown on invoices is allowed for invoices paid in full on or before the 10<sup>th</sup> of the month following the month of shipment so long as all prior invoices are paid in full and any other obligations of Applicant (and any subsidiary or affiliate of Applicant) ~~to~~ are not in default.

**Service Charge Policy:** A service charge of 18% per annum (but in no event to exceed the maximum amount permitted under Pennsylvania law) on all unpaid invoice amounts shall be charged beginning the first day of the month following the Payment Date and daily thereafter until the past due amount is paid in full.

**Information Provided:** Applicant represents and warrants to Lehigh that the Applicants Documents are true, complete and accurate in all respects.

**Seller Obligations:** Nothing herein shall be construed as an agreement by or an obligation of [redacted] to sell cement or any other product to Applicant on credit terms or otherwise.

**Amendment of Terms:** [redacted] may at any time in its sole discretion with written notice to Applicant, amend, modify, supplement and/or supersede the terms and conditions of sale of cement and other products.

**Contract Documents:** Applicant's agreement to pay [redacted] is evidenced by the Applicants Documents, any prior notifications (and subsequent notices hereto) from [redacted] to Applicant, all invoices, and any permitted amendments, modifications, supplements or other charges to the foregoing (collectively, the Contract Documents). Upon approval of Applicant's credit, the Contract Documents shall constitute valid, binding and enforceable agreement between Applicant and [redacted].

**Attorney Costs:** Applicant agrees to pay [redacted] all of its costs including attorney's fees and court costs in connection with the collection of any unpaid account.

**Federal Equal Credit Opportunity Act:** The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington D. C. 20580.

**Choice of Law:** The laws of the state of Maryland shall govern validity, construction, enforcement and interpretation of the Application Documents and all other Contract Documents, and all transactions contemplated hereby and thereby. Any legal or equitable action for claims, debts, or obligations arising out of, or to enforce the terms of the Contract Documents, shall be brought in either a state or federal court of Maryland having jurisdiction over Carroll County, Maryland, and that either court shall have in-personam jurisdiction over the parties and venue of the action shall be appropriate in each court.

**Severability:** If a court of competent jurisdiction declares that any provision of the Contract Documents is illegal, invalid or unenforceable, then such provision shall be modified automatically to the extent necessary to make such provision fully enforceable. If such court does not modify any such provision as contemplated herein, but instead declares it to be wholly illegal, invalid or unenforceable, then such provision shall be severed from, and such declaration shall in no way affect the legality, validity and enforceability of the other provisions of the Contract Documents to which such declaration does not relate. In this event, the Contract Documents shall be construed as if they did not contain the particular provision held to be illegal, invalid or unenforceable, the rights and obligations of the parties shall be construed and enforced accordingly, and the Contract Documents otherwise shall remain in full force and effect.

**Authorization:** Applicant authorizes [redacted] to obtain credit information, verify and/or supplement the information stated hereon. The undersigned hereby consents to [redacted] use of a non-business consumer credit report on the undersigned in order to further evaluate the credit worthiness of the undersigned as principal, proprietor and/or guarantor in connection with the extension of business credit as contemplated by this credit application. The undersigned hereby authorizes [redacted] to utilize a customer credit report on the undersigned from time to time in connection with the extension or continuation of the business credit represented by this credit application. The undersigned as an individual hereby knowingly consents to the use of such credit report consistent with The Federal Fair Credit Reporting Act as contained in 15 U.S.C. @ 1681 et seq.

**Miscellaneous:** Upon approval of Applicant's credit, The Application Documents and the other Contract Documents set forth the entire agreement between Applicant and [redacted] regarding the matters described herein and therein, and supersede all prior oral or written agreements in respect thereof. Except as expressly provided herein, this Application may only be amended in writing by the parties hereto. The captions of sections hereof are inserted for convenience of reference only and shall not be used in construing the terms and provisions hereof.

You may submit your own application form provided [redacted] application has the legal firm name printed on the front and the back is signed by an individual authorized to do so.

Authorized Signature: [Signature]  
Title: pres Date: 8-10-04

### CONTINUING GUARANTY UNLIMITED

GUARANTOR(S): [Redacted]  
[Redacted]  
[Redacted]

DEBTOR: [Redacted]  
Inc.

BIN \_\_\_\_\_

ADDRESS: [Redacted]  
Hollis, NY 11423

For the purpose of inducing [Redacted], [Redacted], and any and all other subsidiaries, partnerships and dba's (hereinafter referred to as *Lehigh*) to lend money or advance credit to, or renew, extend or forbear from demanding immediate payment of the Obligations of [Redacted] Supply, Inc. (hereinafter referred to as "*Debtor*"), the undersigned (hereinafter referred to as "*Guarantors*" whether one or more), jointly and severally if more than one (which joint and several liability shall exist regardless of whether additional Guarantors have evidenced or may in the future evidence their undertaking by executing this Guaranty, by co-signing one or more promissory notes or other instruments of indebtedness, by executing one or more separate agreements of guaranty of any or all of the Obligations referred to herein or otherwise), hereby unconditionally guarantee the prompt and full payment to [Redacted] when due, whether by acceleration or otherwise, of all Obligations of any kind for which *Debtor* is now or may hereinafter become liable to [Redacted] in any manner.

The word "*Obligations*" is used in its most comprehensive sense and includes, without limitation, all indebtedness, debts and liabilities (including principal, interest, late charges, collection costs, attorney's fees and the like) of *Debtor* to [Redacted] either created by *Debtor* alone or together with another or others, primary or secondary, secured or unsecured, absolute or contingent, liquidated or unliquidated, direct or indirect, whether evidenced by note, draft, application for letter of credit, agreements of guaranty or otherwise, and any and all renewals of, extensions of or substitutes therefor.

Guarantors, and each of them, hereby promise that if one or more of the Obligations are not paid promptly when due, they, and each of them, will, upon request of [Redacted] pay the Obligations to [Redacted] irrespective of any action or lack of action on [Redacted] part in connection with the acquisition, perfection, possession, enforcement or disposition of any or all Obligations or any or all security therefor or otherwise, and further irrespective of any invalidity in any or all Obligations, the unenforceability thereof or the insufficiency, invalidity or unenforceability of any security therefor.

Guarantors waive notice of any and all acceptances of this Guaranty. This Guaranty is a continuing guaranty, and, in addition to covering all present Obligations of *Debtor* to [Redacted], and this whether such Obligations are reduced or entirely extinguished and thereafter increased or reincurred. This Guaranty is made and will remain in effect as to any and all Obligations of *Debtor* incurred or arising prior to receipt by the credit manager of [Redacted] who is handling *Debtor's* Obligations of written notice of termination of this Guaranty. No such written notice or other revocation will in any way affect the liabilities of Guarantors to [Redacted] with respect to revolving Obligations of *Debtor* on which loans or advances are made, whether such loans or advances are made prior or subsequent to such notice. Revocation by any one or more of the Guarantors will not affect the duties of the remaining Guarantor or Guarantors.

[Redacted] rights hereunder shall be reinstated and revived, and this Guaranty shall be fully enforceable, with respect to any amount at any time paid on account of the Obligations which thereafter shall be required to be restored or returned by [Redacted] as a result of the Bankruptcy, insolvency or reorganization of *Debtor*, Guarantors, or any other person, or as a result of any fact or circumstance, all as though such amount had not been paid.

Guarantors waive any claims or other rights which they might now have or hereafter acquire against *Debtor* or any other person, guarantor, maker or endorser primarily or contingently liable on the Obligations that arise from the existence or performance of Guarantors' obligations under this Guaranty or under any instrument or agreement with respect to any property constituting collateral or security herefor, including, without limitation, any right of subrogation, reimbursement, exoneration, contribution, indemnification, or any right to participate in any claim of remedy of ~~Debtor~~ against *Debtor* or any collateral security therefor which ~~Debtor~~ now has or hereafter acquires; whether such claim, remedy or right arises in equity, under contract or statute, at common law, or otherwise.

Guarantors waive presentment, demand, protest, notice of protest and notice of dishonor or other nonpayment of any and all Obligations and further waive notice of sale or other disposition of any collateral or security now held or hereafter acquired by ~~Debtor~~. Guarantors agree that no extension of time, whether one or more, nor any other indulgence granted by ~~Debtor~~ to *Debtor*, or to Guarantors, or any of them, and no omission or delay on ~~Debtor~~ part in exercising any right against, or in taking any action to collect from or pursue ~~Debtor~~'s remedies against *Debtor* or Guarantors, or any of them, will release, discharge or modify the duties of Guarantors. Guarantors agree that ~~Debtor~~ may, without notice to or further consent from Guarantors, release or modify any collateral, security or other guaranties now held or hereafter acquired, or substitute other collateral, security or other guaranties, and no such action will release, discharge, or modify the duties of Guarantors hereunder. Guarantors further agreed that ~~Debtor~~ will not be required to pursue or exhaust any of its rights or remedies against *Debtor* or Guarantors, or any of them, with respect to payment of any of the Obligations, or to pursue, exhaust or preserve any of its rights or remedies with respect to any collateral, security or other guaranties given to secure the Obligations, or to take any action of any sort, prior to demanding payment from or pursuing its remedies against Guarantors.

#### WAIVER OF RIGHT TO TRIAL BY JURY

GUARANTORS ACKNOWLEDGE THAT, AS TO ANY AND ALL DISPUTES THAT MAY ARISE BETWEEN GUARANTORS AND ~~Debtor~~. THE COMMERCIAL NATURE OF THE TRANSACTION OUT OF WHICH THIS GUARANTY ARISES WOULD MAKE ANY SUCH DISPUTE UNSUITABLE FOR TRIAL BY JURY. ACCORDINGLY, TO THE EXTENT NOT PROHIBITED BY LAW, GUARANTORS HEREBY WAIVE ANY RIGHT TO TRIAL BY JURY AS TO ANY AND ALL DISPUTES THAT MAY ARISE RELATING TO THIS GUARANTY OR TO ANY OF THE OTHER INSTRUMENTS OR DOCUMENTS EXECUTED IN CONNECTION HERewith.

#### CONSENT TO JURISDICTION AND VENUE

TO THE EXTENT NOT PROHIBITED BY LAW, ANY ACTION, SUIT OR DISPUTE UNDER RELATING TO, ARISING OUT OF OR PURSUANT TO THIS GUARANTY SHALL BE LITIGATED, IF ALL, IN AND BEFORE A COURT LOCATED IN THE STATE OF PENNSYLVANIA, COUNTY OF ~~Lehigh~~, WHICH COURT AND COUNTY SHALL HAVE THE SOLE AND EXCLUSIVE JURISDICTION AND VENUE OVER SAID ACTION, SUIT OR DISPUTE TO THE EXCLUSION OF THE COURTS OF ANY OTHER STATE OR COUNTY. IN THE EVENT GUARANTORS SHALL FILE AN ACTION, SUIT, OR DISPUTE WITH A COURT OTHER THAN AS PROVIDED FOR HEREIN AND ~~Debtor~~ SHALL INCUR ANY EXPENSES AND LEGAL FEES SEEKING TO DISMISS OR TRANSFER THE ACTION, GUARANTORS SHALL INDEMNIFY AND HOLD ~~Debtor~~ HARMLESS FOR SAID EXPENSES AND LEGAL FEES IN THE EVENT ~~Debtor~~ SHALL BE THE PREVAILING PARTY. GUARANTORS ACKNOWLEDGE THAT THIS FORUM SELECTION AND VENUE CLAUSE IS REASONABLE AND WAS NOT PROCURED BY FRAUD, UNDUE INFLUENCE, DURESS, COERCION OR OVERREACHING BARGAINING POWER, AND IRREVOCABLY SUBMIT TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUCH SUIT, ACTION OR PROCEEDING.

If any Obligation of Debtor is assigned by [redacted], this Guaranty will inure to the benefit of [redacted] assignee, and to the benefit of any subsequent assignee, to the extent of the assignment or assignments, provided that no assignment will operate to relieve Guarantors, or any of them, from the duty to [redacted] hereunder with respect to any unassigned Obligation. In the event that any one or more of the provisions contained in this Guaranty or any application thereof shall be determined to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein and any other applications thereof shall not in any way be affected or impaired thereby. This Guaranty shall be construed in accordance with the law of the State of Pennsylvania.

Executed on this 30 day of November, 2010.

GUARANTOR(S):

By: [redacted signature]

By: [redacted signature]

STATE OF NEW YORK, COUNTY OF QUEENS, SS:

Before me personally appeared [redacted], personally known to me, who signed the foregoing Continuing Guaranty Unlimited as his free act and deed for the uses and purposes set forth therein.

IN WITNESS WHEREOF, I have hereto set my hand and official seal this 30 day of November, 2010

[redacted signature]  
Notary Public

NOTARY PUBLIC-STATE OF NEW YORK  
No. 01KA6170995  
Qualified in Queens County  
My Commission Expires July 23, 2011

\_\_\_\_\_  
Witness as to signature only, without any recourse.

\_\_\_\_\_  
Witness as to signature only, without any recourse.

**GUARANTEE**

October 28, 2010

Made by [Redacted] ("Guarantor") in favor of [Redacted] ("Guaranteed Party").

Re: Extension of Credit to [Redacted] ("Debtors").

1. **Guaranty of Payment.** Guarantor hereby unconditionally guarantees the full and prompt payment to Guaranteed Party when due, whether by acceleration or otherwise, of any and all Indebtedness of Debtor to Guaranteed Party.

2. **Lender's Costs and Expenses.** Guarantor agrees to pay on demand all costs and expenses of every kind incurred by Guaranteed Party in enforcing this Guaranty. "Costs and expenses" as used in the preceding sentence shall include, without limitation, the actual attorneys' fees incurred by Guaranteed Party in retaining counsel in order to enforce this Guaranty, regardless of whether litigation is commenced. In the event that litigation is necessary to enforce this Guaranty, such attorneys' fees shall include any fees associated with an appeal.

3. **Nature of Guaranty: Continuing, Absolute and Unconditional.**

(a) This Guaranty is and is intended to be a continuing guaranty of payment of the Indebtedness independent of and in addition to any other guaranty, collateral or other agreement held by Guaranteed Party.

(b) This Guaranty is absolute and unconditional and shall not be changed or affected by any representation, oral agreement, act or think whatsoever, except as herein provided.

4. **Certain Rights and Obligations.**

(a) Guarantor authorizes Guaranteed Party, without notice, demand or any reservation of rights against Guarantor and without affecting Guarantor's obligations hereunder, from time to time: (i) to renew, extend, increase, accelerate or otherwise change the time for payment of the Indebtedness or any part thereof; (ii) to accept from any person or entity and hold collateral for the payment of the Indebtedness or any part thereof, and to exchange, enforce or refrain from enforcing, or release such collateral or any part thereof; (iii) to accept and hold any endorsement or guaranty of payment of the Indebtedness or any part thereof, and to discharge, release or substitute any such obligation of any such endorser or guarantor, or any person or entity who has given any security interest in any collateral as security for the payment of the Indebtedness or any part thereof, or any other person or entity in any way obligated to pay the Indebtedness or any part thereof, and to enforce or refrain from enforcing, or compromise or modify, the terms of any obligation of any such endorser, guarantor, person or entity; (iv) to dispose of any and all collateral securing the Indebtedness in any manner as Guaranteed Party, in its sole discretion,



may deem appropriate, and to direct the order or manner of such disposition and the enforcement of any and all endorsements and guarantees relating to the Indebtedness or any part thereof as Guaranteed Party, in its sole discretion, may determine; and (v) to determine the manner, amount and time of application of payments and credits, if any, to be made on all or any part of any component or components of the indebtedness (whether principal, interest, costs and expenses, or otherwise), including, without limitation, if this Guaranty is limited in amount, to make any such application to Indebtedness, if any, in excess of the amount of this Guaranty.

(b) If any default shall be made in the payment of any Indebtedness, Guarantor hereby agrees to pay the same in full; (i) without requiring protest or notice of non-payment or notice of default to Guarantor, or to any other person; and (ii) without demand for payment or proof of such demand.

(c) Guarantor's obligation hereunder shall not be affected by any of the following, all of which Guarantor hereby waives; (i) any failure to perfect or continue the perfection of any security interest in or other lien on any collateral securing payment of any Indebtedness or Guarantor's obligation hereunder; (ii) the invalidity, unenforceability, propriety of manner of enforcement of, or loss or change in priority of any such security interest or other lien; (iii) any failure to protect, preserve, or insure any such collateral; (iv) failure of Guarantor to receive notice of any intended disposition of such collateral; (v) any defense arising by reason of the cessation from any cause whatsoever of liability of Debtor including, without limitation, any failure, negligence or omission by Guaranteed Party in enforcing his claims against Debtor; (vi) any release, settlement or compromise of any obligation of Debtor; including, but not limited to, any release by the Guaranteed Party of any collateral securing the repayment by Debtor of the Indebtedness, or (vii) the invalidity or unenforceability of any of the Indebtedness.

(d) In the event of the commencement of a case by or against the Debtor under Title 11 of the United States Code or similar statute, this Guaranty shall at all times remain effective in regard to any payments or other transfers of assets to Guaranteed Party received from or on behalf of the Debtor which are or may be held voidable on the grounds of preference or fraud, whether or not the indebtedness has been paid in full.

##### 5. Miscellaneous.

(a) Debtor as used in this Guaranty shall include (i) any successor individual, association, partnership or corporation to which all or a substantial part of the business or assets of Debtor; and (ii) any other corporation into or with which Debtor shall have been merged, consolidated, reorganized, or absorbed.

(b) Captions of the paragraphs of this Guaranty are solely for the convenience of the Guaranteed Party and Guarantor, and are not an aid in the interpretation of this Guaranty.


(c) Guarantor agrees that any action or proceeding to enforce or arising out of this guaranty may be commenced in the Supreme Court in any county or in the District Court of the United States in any district in which Guaranteed Party has an office, and Guarantor waives

personal service of process and agree that a summons and complaint commencing an action or proceeding in any such Court shall be properly served and shall confer personal jurisdiction if served by certified mail to Guarantor, or as otherwise provided by the laws of the State of New York or the United States.

(d) If any provision of this Guaranty is unenforceable in whole or in part for any reason, the remaining provisions shall continue to be effective.

(e) This Guaranty and the transactions evidenced hereby shall be construed under the laws of New York State.

Dated: October 10/28/2010

\_\_\_\_\_, Guarantor  
  
\_\_\_\_\_, Officer

## NOTE

**Date of Note:** December 1, 2010

**Maker:** G & J Ready Mix & Masonry Supply, Inc.  
**Address:** 183-30 Jamaica Avenue, Hollis, New York 11423

**Holder:** ~~High Capital Company LLC~~  
**Address:** 63 Flushing Avenue, Unit 295, Brooklyn, New York 11205

**Principal:** Nine Hundred Nineteen Thousand Three Hundred Seventy and 14/100  
(\$919,370.14)

**Interest Rate:** Four Percent (4%) per annum

**Date Interest Begins to Accrue:** December 15, 2010

**Payment Terms:** By the payment of the sum of \$20,689.54 on the fifteenth day of December, 2010, and on the fifteenth day of each month thereafter until November 15, 2014 when the entire principal, together with interest accrued thereon, shall be paid in full.

**FOR VALUE RECEIVED,** Maker promises to pay to the order of Holder at the above-stated Holder's address, or such other place as the Holder may, from time to time, designate in writing, the above-stated principal sum, together with interest thereon, at the above-stated rate from the date of this Note until the entire principal sum, together with accrued interest thereon, shall be paid in full. Maker agree to pay such principal sum together with interest thereon in accordance with the above-stated payment terms.

This Note may be prepaid without penalty at any time. Interest shall accrue from day to day on the outstanding balance.

It is not intended hereby to charge interest in excess of the maximum rate of interest permitted to be charged under applicable law, but if, notwithstanding, interest in excess of such maximum rate shall be paid hereunder, the excess shall, insofar as not prohibited by applicable law, be retained by the Holder as cash collateral for the loan.

The Holder shall have the option right to declare the amount of the total unpaid balance hereof to be due and forthwith payable in advance of the maturity date of any sum due or installment, as fixed herein, upon the failure of the undersigned to pay, when due, any of the installments of interest or principal. Forbearance to exercise this option with respect to any failure or breach of the undersigned shall not constitute a waiver of the right as to any continuing failure or breach or any subsequent failure or breach.

This Note has been executed and delivered in and its terms and provisions are to be governed and construed by the laws of the State of New York.

Time is of the essence of this contract and, in case this Note is collected by law through an attorney at law, or under advice therefrom, Maker agrees to pay all costs of collection, including reasonable attorney's fees.

Such attorney's fees and costs shall include, but not be limited to, fees and costs incurred in all matters of collection and enforcement construction and interpretation, before, during and after suit, trial, proceedings and appeals, as well as appearances in and connected with any bankruptcy proceedings or creditor's reorganization or arrangement proceedings.

No act of omission or commission of the Holder, including specifically any failure to exercise any right, remedy or recourse, shall be deemed to be a waiver or release of the same, such waiver or release to be effected only through a written document executed by the Holder and then only to the extent specifically recited therein. A waiver or release with reference to any one event shall not be construed as continuing, as a bar to, or as a waiver of release of, any subsequent right, remedy or recourse as to a subsequent event.

All persons or corporations now or at any time liable, whether primarily or secondarily, for the payment of the indebtedness hereby evidenced, for themselves, their heirs, legal representatives, successors and assigns respectively, hereby (a) expressly waive presentment, demand for payment, notice of dishonor, protest, notice of nonpayment or protest, and diligence in collection; (b) consent that the time of all payments or any part thereof may be extended, rearranged, renewed or postponed by the Holder hereof and further consent that any collateral security or any part thereof may be released, exchanged, added to or substituted for the Holder hereof, without in anyway modifying, altering, releasing, effecting or limiting their respective liability or the lien of any security instrument; (c) agree that the Holder, in order to enforce payment of this Note, shall not be required first to institute any suit or to exhaust any of its remedies against the undersigned or any other person or party to become liable hereunder.

Maker hereby expressly **WAIVES ANY RIGHT TO TRIAL BY JURY** of any claim, demand, action or cause of action (a) arising under this Note or any other instrument, document or agreement executed or delivered in connection herewith, (b) in any way connected with or incidental to the dealings of Maker or Holder or any of them with respect to this Note or any other instrument, document or agreement executed or delivered in connection herewith, or the transactions related hereto or thereto, in each case whether not existing or hereafter arising and whether sounding in contract or tort or otherwise, **AND MAKER HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY A COURT TRIAL WITHOUT A JURY AND THAT HOLDER MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF MAKER TO THE WAIVER OF MAKER'S RIGHT TO TRIAL BY JURY. MAKER AGREES THAT SERVICE OF PROCESS MAY BE MADE ON MAKER BY MAILING A COPY OF THE SUMMONS AND COMPLAINT, POSTAGE PAID, FIRST CLASS MAIL, TO THE MAKER'S ADDRESS SET FORTH ABOVE.**

If more than one party shall execute this Note, the term "Maker," as used herein, shall mean all parties signing this Note and each of them, who shall be jointly and severally obligated hereunder.

In this Note, whenever the context so requires, the neuter gender includes the feminine and/or masculine, as the case may be, and the singular number includes the plural.

This Note may not be changed or terminated orally.

IN WITNESS WHEREOF, Maker has executed this Note on the above-stated Date of Note.

**G & J READY MIX & MASONRY SUPPLY, INC.**

by: Joe [redacted]  
pres, Officer

WITNESS: [Signature]

State of New York )  
County of Kings )SS:

On the \_\_\_\_ day of December, 2010, before me, the undersigned, a Notary Public in and for said State, personally appeared \_\_\_\_\_, Officer, G & J Ready Mix & Masonry Supply, Inc., personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

# Loan Amortization Schedule

Vertex42

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HELP

Loan Information	
Loan Amount	\$ 919,370
Annual Interest Rate	4.00%
Compound Period	Monthly
Term of Loan in Years	4
First Payment Date	12/15/2010
Payment Frequency	Monthly
Payment Type	beginning of Period

## Summary

Rate (per period)	0.333%
Number of Payments	48
Total Payments	\$ 993,098.09
Total Interest	\$ 73,727.95
Est. Interest Savings	\$ (0.00)

**Monthly Payment \$20,689.54**

## Amortization Schedule

 Rounding On

No.	Due Date	Payment	Additional Payment	Interest	Principal	Balance
						\$919,370.14
1	12/15/10	20,689.54		0.00	20,689.54	898,680.60
2	1/15/11	20,689.54		2,995.60	17,693.94	880,986.66
3	2/15/11	20,689.54		2,936.62	17,752.92	863,233.74
4	3/15/11	20,689.54		2,877.45	17,812.09	845,421.65
5	4/15/11	20,689.54		2,818.07	17,871.47	827,550.18
6	5/15/11	20,689.54		2,758.50	17,931.04	809,619.14
7	6/15/11	20,689.54		2,698.73	17,990.81	791,628.33
8	7/15/11	20,689.54		2,638.76	18,050.78	773,577.55
9	8/15/11	20,689.54		2,578.59	18,110.95	755,466.60
10	9/15/11	20,689.54		2,518.22	18,171.32	737,295.28
11	10/15/11	20,689.54		2,457.65	18,231.89	719,063.39
12	11/15/11	20,689.54		2,396.88	18,292.66	700,770.73
13	12/15/11	20,689.54		2,335.90	18,353.64	682,417.09
14	1/15/12	20,689.54		2,274.72	18,414.82	664,002.27
15	2/15/12	20,689.54		2,213.34	18,476.20	645,526.07
16	3/15/12	20,689.54		2,151.75	18,537.79	626,988.28
17	4/15/12	20,689.54		2,089.96	18,599.58	608,388.70
18	5/15/12	20,689.54		2,027.96	18,661.58	589,727.12
19	6/15/12	20,689.54		1,965.76	18,723.78	571,003.34
20	7/15/12	20,689.54		1,903.34	18,786.20	552,217.14
21	8/15/12	20,689.54		1,840.72	18,848.82	533,368.32
22	9/15/12	20,689.54		1,777.89	18,911.65	514,456.57
23	10/15/12	20,689.54		1,714.86	18,974.68	495,481.99
24	11/15/12	20,689.54		1,651.61	19,037.93	476,444.06
25	12/15/12	20,689.54		1,588.15	19,101.39	457,342.67
26	1/15/13	20,689.54		1,524.48	19,165.06	438,177.61
27	2/15/13	20,689.54		1,460.59	19,228.95	418,948.66
28	3/15/13	20,689.54		1,396.50	19,293.04	399,655.62
29	4/15/13	20,689.54		1,332.19	19,357.35	380,298.27
30	5/15/13	20,689.54		1,267.66	19,421.88	360,876.39
31	6/15/13	20,689.54		1,202.92	19,486.62	341,389.77
32	7/15/13	20,689.54		1,137.97	19,551.57	321,838.20
33	8/15/13	20,689.54		1,072.79	19,616.75	302,221.45
34	9/15/13	20,689.54		1,007.40	19,682.14	282,539.31
35	10/15/13	20,689.54		941.80	19,747.74	262,791.57
36	11/15/13	20,689.54		875.97	19,813.57	242,978.00
37	12/15/13	20,689.54		809.93	19,879.61	223,098.39

No.	Due Date	Payment	Additional Payment	Interest	Principal	Balance
38	1/15/14	20,689.54		743.86	19,945.68	203,152.51
39	2/15/14	20,689.54		677.18	20,012.36	183,140.15
40	3/15/14	20,689.54		610.47	20,079.07	163,061.08
41	4/15/14	20,689.54		543.54	20,146.00	142,915.08
42	5/15/14	20,689.54		476.38	20,213.16	122,701.92
43	6/15/14	20,689.54		409.01	20,280.53	102,421.39
44	7/15/14	20,689.54		341.40	20,348.14	82,073.25
45	8/15/14	20,689.54		273.58	20,415.96	61,657.29
46	9/15/14	20,689.54		205.52	20,484.02	41,173.27
47	10/15/14	20,689.54		137.24	20,552.30	20,620.97
48	11/15/14	20,689.71		68.74	20,620.97	0.00

## APPENDIX " 4 "

[REDACTED]

[REDACTED]

7660 Imperial Way

[REDACTED]

610-366-4764

Fax: 866-443-9075

**SECURITY AGREEMENT**

This Security Agreement (the "Agreement") is made effective on this 27 day of August, 2008 between G & J Ready Mix & Masonry Supply, Inc. ("Debtor") whose address is 183-30 Jamaica Ave, Hollis, NY 11423 and [REDACTED] whose address is 7660 Imperial Way, [REDACTED]

As security for payment of the purchase price of goods sold heretofore or hereafter by [REDACTED] to Debtor, Debtor grants [REDACTED] a security interest in all goods sold heretofore or hereafter by [REDACTED] to Debtor and in the products and proceeds of those goods, including, but not limited to, finished goods, work in progress, and accounts receivable. Debtor agrees that the amount or amounts shown on [REDACTED] most recent account statement shall be rebuttably presumptive evidence of the amount owed by Debtor to [REDACTED]. As additional collateral, Debtor further grants [REDACTED] a security interest in all of Debtor's personal property wherever located, including without limitation Debtor's machinery, equipment, inventory and accounts, whether now owned by debtor or acquired hereafter by Debtor, including all products and proceeds thereof, as security for all indebtedness of Debtor to [REDACTED] whether now existing or arising in the future. This Security Agreement shall secure the payment of all other liabilities of Debtor to [REDACTED] of every kind and description, direct or indirect, absolute or contingent, due or to become due now or hereafter arising. Debtor agrees to sign on [REDACTED] request any financing statements or other documents required to perfect the security interests granted to [REDACTED] by this Agreement. Debtor authorizes [REDACTED] to file a financing statement. All terms in this agreement have the meanings specified in the New York Uniform Commercial Code.

Debtor shall be in default under this Agreement upon the happening of any of the following: (a) after 10 days written notice, failure by Debtor to pay its account with Lehigh in accordance with the payment terms; (b) any misrepresentation in connection with this Agreement on the part of Debtor; (c) any noncompliance with or nonperformance of the Debtor's obligations under this Agreement; (d) if Debtor is involved in any financial difficulty as evidenced by (i) an assignment for the benefit of creditors, or (ii) an attachment or receivership of assets not dissolved within thirty (30) days, or (iii) the institution of any bankruptcy proceedings, whether voluntary or involuntary, which is not dismissed within thirty (30) days from the date which it is filed. Upon default, and any time thereafter, [REDACTED] may declare all obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the New York Uniform Commercial Code. No waiver by [REDACTED] of any default shall operate as a waiver of any other default or of the same default on a future occasion.

Debtor shall pay, and this Security Agreement secures, all costs and expenses incurred by [REDACTED] (i) in the collection of any of the indebtedness owed to [REDACTED] or (ii) in connection with the enforcement of any of the duties and obligations of Debtor to [REDACTED] under this Security Agreement or (iii) in enforcing this Security Agreement and in preserving and liquidating collateral, including reasonable attorney's and paralegal's fees and expenses whether incurred with or without the commencement of a suit, trial, arbitration, or administrative proceeding, or in any appellate or bankruptcy proceeding.

This Agreement shall inure to the benefit and bind the heirs, executors, administrators, successors, and assigns of the parties. This Agreement shall be governed by the laws of the State of New York.

Creditor: [REDACTED]  
Inc  
By: [Signature]  
Title: [REDACTED]  
Date: 8/27/08

Debtor: G & J Ready Mix & Masonry Supply.  
By: [Signature]  
Title: Pres  
Date: 8-27-08



**UCC FINANCING STATEMENT**

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional) ucc@ncscredit.com NY SOS
B. SEND ACKNOWLEDGMENT TO: (Name and Address)  NCS UCC Services Group PO Box 24101 Cleveland, OH 44124 USA (800) 826-5256


New York Secretary of State  
File Number: 200808295967576  
File Date: 08/29/2008 04:53 PM  
(This document was electronically filed)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME G & J Ready Mix & Masonry Supply, Inc.	OR			1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
1c. MAILING ADDRESS 183-30 Jamaica Avenue	CITY Hollis			STATE NY	POSTAL CODE 11423	COUNTRY USA	
1d. SEE INSTRUCTIONS	ADD'L INFO ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION Corporation	1f. JURISDICTION OF ORGANIZATION New York	1g. ORGANIZATIONAL ID #, if any <input checked="" type="checkbox"/> NONE			

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME	OR			2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS	CITY			STATE	POSTAL CODE	COUNTRY	
2d. SEE INSTRUCTIONS	ADD'L INFO ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	2g. ORGANIZATIONAL ID #, if any <input type="checkbox"/> NONE			

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - Insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME	OR			3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
3c. MAILING ADDRESS	CITY			STATE MD	POSTAL CODE 21791	COUNTRY USA	

4. This FINANCING STATEMENT covers the following collateral:

As security for payment of the purchase price of goods sold heretofore or hereafter by [redacted] to Debtor, Debtor grants [redacted] a security interest in all goods sold heretofore or hereafter by [redacted] to Debtor and in the products and proceeds of those goods, including, but not limited to, finished goods, work in progress, and accounts receivable. Debtor further grants [redacted] a security interest in all of Debtor's personal property wherever located, including without limitation Debtor's machinery, equipment, inventory and accounts, whether now owned by Debtor or acquired hereafter by Debtor, including all products and proceeds thereof, as security for all indebtedness of Debtor to [redacted], whether now existing or arising in the future. This Security Agreement shall secure the payment of all other liabilities of Debtor to [redacted] of every kind and description, direct or Please see attached Addendum Form(s) for Additional Collateral.

5. ALTERNATIVE DESIGNATION (if applicable)	LESSEE/LESSOR	CONSIGNEE/CONSIGNOR	BAILEE/BAILOB	SELLER/BUYER	AG. LIEN	NON-UCC FILING
6. This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum [if applicable]	7. Check to REQUEST SEARCH REPORT (s) on Debtor(s) [optional]	All Debtors	Debtor 1	Debtor 2		
8. OPTIONAL FILER REFERENCE DATA UCC# U057495						

# UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

**9. NAME OF FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT**

9a. ORGANIZATION'S NAME			
G & J Ready Mix & Masonry Supply, Inc.			
OR	9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME, SUFFIX

10. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

**11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only org name (11a or 11b) - do not abbreviate or combine names**

11a. ORGANIZATION'S NAME						
OR	11b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX	
11c. MAILING ADDRESS			CITY	STATE	POSTAL CODE	COUNTRY
11d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	11e. TYPE OF ORGANIZATION	11f. JURISDICTION OF ORGANIZATION	11g. ORGANIZATIONAL ID #, if any		
				<input type="checkbox"/> NONE		

**12. ADDITIONAL SECURED PARTY'S OR ASSIGNOR S/P'S NAME - Insert only org name (12a or 12b)**

12a. ORGANIZATION'S NAME						
OR	12b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX	
12c. MAILING ADDRESS			CITY	STATE	POSTAL CODE	COUNTRY

13. This FINANCING STATEMENT covers  timber to be cut or  ss-extracted collateral, or is filed as a  fixture filing.

14. Description of real estate:

16. Additional collateral description:  
indirect, absolute or contingent, due or to become due now or hereafter arising.

15. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest):

17. Check only if applicable and check only one box.  
Debtor is a  Trust or  Trustee acting with respect to property held in trust or  Decedent's Estate

18. Check only if applicable and check only one box.  
 Debtor is a TRANSMITTING UTILITY  
 Filed in connection with a Manufactured-Home Transaction — effective 30 years  
 Filed in connection with a Public-Finance Transaction — effective 30 years

MOUNT HOLLY TOWN CLERK'S OFFICE  
received for record Mar. 10 AD 2011  
At 8 O'Clock 30 Minutes A.M.  
and recorded in Vol. 79 Page 285-291  
of Land Record.  
Attest Juanita Cavella Town Clerk

### MORTGAGE

THIS MORTGAGE made and entered into this 14<sup>th</sup> day of December, 2010, by and between [redacted] and [redacted], 13 Apple Mill Road, North Salem, New York 10560 (hereinafter referred to as "Mortgagors") and [redacted], a Delaware limited liability company authorized to conduct business in the State of Vermont and having an office located at 63 Flushing Avenue, Unit 295, Brooklyn, New York 11205 (hereinafter referred to as "Mortgagee").

WHEREAS, the Mortgagee has extended credit and loaned certain monies to [redacted] or is the holder of notes or other documents evidencing the extension of credit and loan of certain monies to [redacted] and

WHEREAS, Mortgagors desire to secure, among other things, the Note, as hereinafter defined, from [redacted] to Mortgagee and all interest, costs and fees associated with said Note, all in accordance with the terms and conditions of the Note and this Mortgage;

### TRANSFER OF RIGHTS IN THE PROPERTY

WITNESSETH, that for the consideration of the aforesaid and hereinafter stated, receipt of which is hereby acknowledged, the Mortgagors do hereby mortgage, sell, grant, assign, and convey unto the Mortgagee, its successors and assigns, with power of sale, all of the following described property situated and being located in Mt. Holly, Rutland County, Vermont, and being more particularly described as follows:

Being all and the same land and premises conveyed to the grantors, [redacted] and [redacted] by Edward Whitlock and Elaine Whitlock, husband and wife, dated October 26, 1993, and recorded on October 28, 1993 in Vol. 47, at Pages 320-321 of the Mt. Holly Land Records and in said deed more particularly described as follows:

Being all and the same land and premises conveyed to the grantors, Edward Whitlock and Elaine Whitlock by Warranty Deed of Michael F. Colavito and Joan M. Colavito, husband and wife, dated October 15, 1986, and recorded in Vol. 39, at Page 358 of the Mt. Holly Land Records and in said deed more particularly described as follows:

Being all and the same land and premises conveyed to the grantors by Warranty Deed of Cosmo Tavella and Charles Doulens dated the 15th day of January, 1973, recorded in Book 31, Pages 319-320 of the Mount Holly Land Records, and in said deed described as follows:

All that certain piece or parcel of land situated in the Town of Mount Holly, County of Rutland and State of Vermont, being shown and designated as Lot 43 on a certain map entitled "Section One of Mount Holly Heights at Mount Holly, Vermont, Scale 1" = 100' September 12, 1969 Ryan and Faulds Land Surveyors, Norwalk, Connecticut", which map is certified "Substantially Correct" by Russell G. Faulds, Land Surveyor, Vermont Reg. No. 110, and is on file in the office of the Town Clerk of said Town of Mount Holly, Vermont, reference to which is hereby made for a more particular description of said premises.

Said premises are more particularly bounded and described on said map as follows:

Southeasterly: 190.00 feet by Okemo Way as shown on said map;  
Southwesterly: 230.00 feet by Lots 46 and 44, each in part, as shown on said map;  
Northwesterly: 190.00 feet by Lots 44 and 42, each in part, as shown on said map;  
and  
Northeasterly: 230.00 feet by Lot 41 as shown on said map.

Together with a right of way in common with others to pass and repass over the roads as shown on said map for the purpose of ingress and egress to said lot.

Said premises conveyed subject to limitations of use imposed by governmental authority; rules and regulations of the Board of Health of the State of Vermont; taxes hereafter becoming due and payable to the Town of Mount Holly; restrictions recorded in Volume 30 at page 270 of the Mount Holly Land Records; and an easement from Cosmo Tavella and Charles Doulens to the Vermont Public Service Corporation dated November 18, 1969.

Together with and including all buildings, fixtures and all improvements now or hereafter existing thereon (the "Property"). To have and to hold the same unto the Mortgagee and the successors in interest of the Mortgagee forever in fee simple or such other estate, if any, as is stated herein.

The Property is located at 120 Okemo Way, Mt. Holly, Vermont and has a Parcel/Tax ID No. of 07H6213.

The Mortgagors covenant that they are lawfully seized and possessed of and have the right to sell and convey said Property; that the same is free from all encumbrances except as set forth herein; and that they hereby bind themselves and their successors in interest to warrant and defend the title aforesaid thereto and every part thereof against the claims of all persons whomsoever.

This instrument is given to secure the payment of the Note dated December 1, 2010, in the principal sum of Eight Hundred Eighty Eight Thousand Thirty Seven and 07/100 Dollars (\$888,037.07) (the "Note"), between G&J and Mortgagee which is incorporated herein by reference and held by Mortgagee. The "Note" provides for monthly payments of \$20,051.04 and bears the final maturity date of October 15, 2014 at which time the entire principal, together with interest, costs and any fees shall be paid in full.

THIS MORTGAGE combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

a) The Mortgagors covenant and agree as follows:

i) Mortgagors will pay all taxes, assessments, water rates, and other governmental or municipal charges, fines, or impositions, for which provision has not been made hereinbefore, and will promptly deliver the official receipts therefor to the said Mortgagee.

ii) Mortgagors will pay such expenses and fees as may be incurred in the protection and maintenance of said Property, including the fees of any attorney employed by the Mortgagee for the collection of any or all of the indebtedness hereby secured, or foreclosure by Mortgagee's sale, or court proceedings, or in any other litigation or proceeding affecting said property. Attorneys' fees reasonably incurred in any other way shall be paid by Mortgagors.

iii) For better security of the indebtedness hereby secured, upon the request of the Mortgagee, its successors or assigns, Mortgagors shall execute and deliver a supplemental mortgage or mortgages covering any additions, improvements, or betterments made to the Property hereinabove described after the date hereof (all in form satisfactory to Mortgagee). Furthermore, should Mortgagors fail to cure any default in the payment of a prior or inferior encumbrance on the Property described by this instrument, Mortgagors hereby agrees to permit Mortgagee to cure such default, but Mortgagee is not obligated to do so; and such advances shall become part of the indebtedness secured by this instrument, subject to the same terms and conditions.

iv) The rights created by this conveyance shall remain in full force and effect during any postponement or extension of the time of the payment of the indebtedness evidenced by the Note.

v) Mortgagors will continuously maintain hazard insurance, of such type or types and in such amounts as the Mortgagee may from time to time require on the improvements now or hereafter on said property, and will pay promptly when due any premiums thereof. All insurance shall be carried in companies acceptable to Mortgagee and the policies and renewals thereof shall be held by Mortgagee and have attached thereto loss payable clauses in favor of and in form acceptable to the Mortgagee. In event of loss, Mortgagors will give immediate notice in writing to Mortgagee, and Mortgagee may make proof of loss if not made promptly by Mortgagors, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Mortgagee instead of to Mortgagors and Mortgagee jointly, and the insurance proceeds, or any part thereof, may be applied by Mortgagee at its option either to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged or destroyed. In event of foreclosure of this Mortgage, or other transfer of title to said property in extinguishment of the indebtedness secured hereby, all right, title, and interest of the Mortgagors in and to any insurance policies then in force shall pass to the purchaser or Mortgagee or, at the option of the Mortgagee, may be surrendered for a refund.

vi) Mortgagors will keep all buildings and other improvements on said property in good repair and condition; will permit, commit, or suffer no waste, impairment, deterioration of said property or any part thereof; in the event of failure of the Mortgagors to keep the buildings on said premises and those erected on said premises, or improvements thereon, in good repair, the Mortgagee may make such repairs as in its discretion it may deem necessary for the proper preservation thereof; and the full amount of each and every such payment shall be immediately due and payable; and shall be secured by the lien of this Mortgage.

vii) Mortgagors will not voluntarily create or permit to be created against the Property subject to this Mortgage any lien or liens inferior or superior to the lien of this Mortgage without the written consent of the Mortgagee; and further, that it will keep and maintain the same free from the claim of all persons supplying labor or materials for construction of any and all buildings or improvements now being erected or to be erected on said premises.

viii) Mortgagors will not rent or assign any part of the rent of said mortgaged Property or demolish, or remove, or substantially alter any building without the written consent of the Mortgagee.

ix) All awards of damages in connection with any condemnation for public use of or injury to any of the Property subject to this Mortgage are hereby assigned and shall be paid to Mortgagee, who may apply the same to payment of the installments last due under said Note, and Mortgagee is hereby authorized, in the name of the Mortgagors, to execute and deliver valid acquittances thereof and to appeal from any such award.

x) The Mortgagee shall have the right to inspect the mortgaged premises at any reasonable time.

b) Default in any of the covenants or conditions of this Mortgage or the Note or any of the loan documents secured hereby shall terminate the Mortgagors' right to possession, use, and enjoyment of the Property, at the option of the Mortgagee or its assigns (it being agreed that the Mortgagors shall have such right until default). Upon any such default, the Mortgagee shall become the owner of all of the rents and profits accruing after default as security for the indebtedness secured hereby, with the right to enter upon said property for the purpose of collecting such rents and profits. This instrument shall operate as an assignment of any rentals on said property to that extent.

c) The Mortgagors covenant and agree that in the event G&J fail to comply with any terms or conditions of the Note or any loan document secured by this Mortgage or if Mortgagors shall fail to perform any covenant or agreement of this instrument, the entire indebtedness hereby secured shall immediately become due, payable, and collectible without notice, at the option of the Mortgagee or assigns, regardless of maturity, and the Mortgagee or its assigns may before or after entry sell said Property without appraisal (the Mortgagors having waived and assigned to the Mortgagee all rights of appraisal). Mortgagee shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Mortgagee invokes the power of sale, and the Property is judicially ordered to be sold pursuant to such power, Mortgagee shall mail a copy of a notice of sale by registered mail to Mortgagors at the address designated for correspondence hereinafter or at any other address Mortgagors deliver to Mortgagee in writing for that purpose. Mortgagee shall publish the notice of sale for the time and in the manner required by applicable law and, without further demand on Mortgagors, the Property shall be sold at the time and under the terms designated by the court and in the notice of sale.

Mortgagee or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (1) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees; (2) to all sums secured by this Mortgage; and (3) any excess to the person or persons legally entitled to it.

In the event of a sale as hereinbefore provided, the Mortgagors or any persons in possession under the Mortgagors shall then become and be tenants holding over and shall forthwith deliver possession to the purchaser at such sale or be summarily dispossessed, in accordance with the provisions of law applicable to tenants holding over. The power and agency hereby granted are coupled with an interest and are irrevocable by death or otherwise, and are granted as cumulative to the remedies for collection of said indebtedness provided by law.

In the event the Mortgagors fail to pay any federal, state or local tax assessment, income tax or other tax lien, charge, fee, or other expense charged against the Property, the Mortgagee is hereby authorized at his option to pay the same. Any sums so paid by the Mortgagee shall be added to and become a part of the principal amount of the indebtedness evidenced by the Note, subject to the same terms and conditions.

Upon payment of all sums secured by this Mortgage, this Mortgage shall become null and void. Mortgagee shall discharge this Mortgage. Mortgagors shall pay any recordation costs if permitted by applicable law. Mortgagee may charge Mortgagors a fee for releasing this Mortgage, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under applicable law.

d) The covenants herein contained shall bind and the benefits and advantages shall inure to the respective successors and assigns of the parties hereto. Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender shall include all genders.

e) No waiver of any covenant herein or of the obligation secured hereby shall at any time thereafter be held to be a waiver of the terms hereof or of the Note secured hereby.

f) **Governing Law; Severability.** This Mortgage shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Mortgage are subject to any requirements and limitations of applicable law. Applicable law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Mortgage or the Note conflicts with applicable law, such conflict shall

not affect other provisions of this Mortgage or the Note which can be given effect without the conflicting provision.

g) **Hazardous Substances.** As used in this Section: (1) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (2) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (3) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (4) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Mortgagors shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Mortgagors shall not do, nor allow anyone else to do, anything affecting the Property (1) that is in violation of any Environmental Law, (2) which creates an Environmental Condition, or (3) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Mortgagors shall promptly give Mortgagee written notice of (1) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Mortgagors has actual knowledge, (2) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (3) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Mortgagors learn, or are notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Mortgagors shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Mortgagee for an Environmental Cleanup.

h) **Waiver of Homestead and Other Interest.** Mortgagors waive all rights of homestead exemption in the Property and relinquish all statutory and common law rights in the Property in the nature of dower and curtesy.

i) Mortgagors waive the right to a trial by jury in any action or proceeding between Mortgagors and the Mortgagee concerning or relating to this Mortgage.

j) Any written notice to be issued to the Mortgagee pursuant to the provisions of this instrument shall be addressed to the Mortgagee at Lehigh Cement Company, L.I.C., 63 Flushing Avenue, Unit 295, Brooklyn, New York 11205, and any written notice to be issued to the



Mortgagors shall be addressed to the Mortgagors at 13 Apple Mill Road, North Salem, New York 10560.

IN WITNESS WHEREOF, the Mortgagors have executed this instrument and the Mortgagee has accepted delivery of this instrument as of the day and year aforesaid.

~~John J. Cervoni~~  
~~John J. Cervoni~~, individually

STATE OF New York  
COUNTY OF Queens

I, a notary public in and for the state and county aforesaid, do hereby certify that the foregoing Mortgage was produced to me by John J. Cervoni who signed and acknowledged same to be his free and voluntary act and deed, on this 14 day of DEC, 2010.

My commission expires: 06/04/2011

~~Notary Public~~  
NOTARY PUBLIC

~~Notary Public~~  
Notary Public, State of New York  
No. 01VA6059786  
Qualified in Queens County  
Commission Expires June 4, 2011

~~Joann Cervoni~~  
~~Joann Cervoni~~

STATE OF New York  
COUNTY OF Westchester

I, a notary public in and for the state and county aforesaid, do hereby certify that the foregoing Mortgage was produced to me by Joann Cervoni who signed and acknowledged same to be her free and voluntary act and deed, on this 10 day of DECEMBER, 2010.

My commission expires: 08/24/2012

~~Notary Public~~  
NOTARY PUBLIC

~~Notary Public~~  
Notary Public, State of New York  
No. 01AL6112212  
Qualified in Dutchess County  
Commission Expires 08/24/2012

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

File No.

-----X  
LEHIGH CEMENT COMPANY LLC f/k/a  
LEHIGH CEMENT COMPANY,

Index No.

File Date:

Plaintiff,

Residing at:  
63 Flushing Avenue, Unit 295  
Brooklyn, NY 11205

-against-

**SUMMONS**

G & J READY MIX & MASONRY SUPPLY INC.,  
JOHN CERVONI, JR., Individually,  
JOHN CERVONI a/k/a JOHN CERVONI, SR.,  
Individually, A & B TESTA BUILDING CORP.,  
and NEW ATLANTIC READY MIX CORP,

Defendants.

Residing at:  
G & J READY MIX & MASONRY SUPPLY INC.  
183-30 Jamaica Ave., Hollis, NY 11423

-----  
John Cervoni, Jr.  
13 Apple Mill Lane, N. Salem, NY 10560

-----  
John Cervoni a/k/a John Cervoni, Sr.  
137-11 56th Avenue, Flushing, NY 11355

-----  
A & B Testa Building Corp.  
56-02 138th Street, Flushing, NY 11355

-----  
New Atlantic Ready Mix Corp  
183-30 Jamaica Ave., Hollis, NY 11423  
-----X

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to serve upon plaintiff's attorney an answer to the complaint in this action within **TWENTY (20)** days after service of this summons, exclusive of the date of service, or within **THIRTY (30)** days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer,

judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue designated is the residence of defendant G & J Ready Mix & Masonry Supply, Inc., which is above set forth.

Dated: Syosset, New York  
September 1, 2011

  
BORGES & ASSOCIATES LLC  
Attorneys for Plaintiff  
575 Underhill Blvd., Suite 118  
Syosset, NY 11791  
(516) 677-8200

**WE ARE ATTEMPTING TO COLLECT A DEBT, AND ANY  
INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
LEHIGH CEMENT COMPANY LLC f/k/a  
LEHIGH CEMENT COMPANY,

**VERIFIED**  
**COMPLAINT**

Plaintiff,

-against-

G & J READY MIX & MASONRY SUPPLY INC.,  
JOHN CERVONI, JR., Individually,  
JOHN CERVONI a/k/a JOHN CERVONI, SR.,  
Individually, A & B TESTA BUILDING CORP.,  
and NEW ATLANTIC READY MIX CORP,

Defendants.  
-----X

Plaintiff, by its attorneys, Borges & Associates LLC, as and for its complaint against the defendants, sets forth and alleges as follows:

1. Plaintiff is a Delaware corporation authorized to do business in the State of New York.
2. Upon information and belief, the defendant G & J READY MIX & MASONRY SUPPLY INC. (hereinafter referred to as "G&J") is a domestic corporation and transacts business in the State of New York, County of Queens, and the instant causes of action are based upon said transactions of business.
3. Upon information and belief, the defendant JOHN CERVONI, JR. resides in the State of New York, County of Westchester and transacts business in the State of New York, County of Queens, and the instant causes of action are based upon said transactions of business.
4. Upon information and belief, the defendant JOHN CERVONI a/k/a JOHN CERVONI, SR. (hereinafter referred to as "JOHN CERVONI, SR.") resides in the State of New York, County of Queens, and transacts business in the State of New York, County of Queens, and the instant causes of action are based upon said transactions of business.

5. Upon information and belief, the defendant A & B TESTA BUILDING CORP. is a domestic corporation and transacts business in the State of New York, County of Queens, and the instant causes of action are based upon said transactions of business.

6. Upon information and belief, the defendant NEW ATLANTIC READY MIX CORP is a domestic corporation and transacts business in the State of New York, County of Queens, and the instant causes of action are based upon said transactions of business.

AS AND FOR A FIRST CAUSE OF ACTION  
AGAINST G&J

7. That on or about August 10, 2004, for valuable consideration, the defendant herein executed and delivered to plaintiff a Credit Application (hereinafter referred to as "Application") for the purpose of obtaining credit from plaintiff for the sale and delivery of various goods, wares and merchandise by plaintiff to the defendant. A true copy of the Application is annexed hereto and made a part hereof as Exhibit "A".

8. That plaintiff herein sold and delivered various goods, wares and merchandise to the defendant at the latter's special instance and request, on, about or prior to June 26, 2011, at the agreed upon price and with a reasonable value of \$1,112,207.25.

9. That plaintiff internally defined this account a "Bulk Account" and gave it an account number of 41769.

10. That no part of the amount of \$1,112,207.25 has been paid, although due and duly demanded, leaving a balance due and owing from defendant to plaintiff on the "Bulk Account" in the sum of \$1,112,207.25, together with interest running thereon from June 26, 2011, for goods, wares and merchandise sold to, and accepted by, defendant.

AS AND FOR A SECOND CAUSE OF ACTION  
AGAINST G&J

11. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "10" inclusive, as if more fully set forth herein at length.

12. Pursuant to the terms of the Application previously annexed hereto, the defendant agreed to pay interest in the amount of 18% per annum on any past due amounts.

13. Plaintiff herein sold and delivered various goods wares and merchandise to the defendant, prior to June 26, 2011, at the agreed upon price and with a reasonable value of \$1,112,207.25, of which \$1,112,207.25 on open account remains unpaid although due and duly demanded.

14. Pursuant to the terms of the Agreement, plaintiff is entitled to the amount of \$1,112,207.25, together with contractual interest of 18% per annum (or 1.5% per month) running thereon from June 26, 2011.

AS AND FOR A THIRD CAUSE OF ACTION  
AGAINST G&J

15. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "14" inclusive, as if more fully set forth herein at length.

16. On July 31, 2011 an account entitled "Bulk Account #41769" was delivered to, and retained by the defendant without objection thereto, in the amount of \$1,112,207.25, a true copy of which is annexed hereto and made a part hereof as Exhibit "B".

17. That no part of said account has been paid, although due and duly demanded, and there is now due and owing from defendant to plaintiff the sum of \$1,112,207.25 together with interest running thereon from June 26, 2011 on "Bulk Account #41769".

AS AND FOR A FOURTH CAUSE OF ACTION  
AGAINST G&J

18. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "17" inclusive, as if more fully set forth herein at length.

19. That plaintiff herein sold and delivered various goods, wares and merchandise to the defendant, exclusive of the goods, wares and merchandise previously set forth herein in the prior causes of action.

20. Said goods, wares and merchandise were sold and delivered at the defendant's special instance and request, on, about or prior to June 12, 2011, at the agreed upon price and with a reasonable value of \$7,690.00.

21. That plaintiff internally defined this account a "Package Account" and gave it an account number of 28837.

22. That no part thereof has been paid, although due and duly demanded, except for a credit in the amount of \$232.50, leaving a balance due and owing from defendant to plaintiff on the "Package Account" of \$7,457.50, together with interest of 1.5% per month running thereon from June 12, 2011, for goods, wares and merchandise sold to, and accepted by, defendant.

AS AND FOR A FIFTH CAUSE OF ACTION  
AGAINST G&J

23. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "22" inclusive, as if more fully set forth herein at length.

24. On May 8, 2011, May 22, 2011 and June 12, 2011 three accounts entitled "Package Account #28837" were delivered to, and retained by the defendant without objection thereto, in the respective amounts of \$2,985.50, \$2,720.00 and \$2,506.00, true copies of which are annexed hereto and made a part hereof as Exhibit "C".

25. That no part of said accounts have been paid, although due and duly demanded, except for credits and/or payments in the amount of \$754.00, and there is now due and owing from defendant to plaintiff the sum of \$7,457.50, together with interest of 1.5% per month running thereon from June 12, 2011 on "Package Account #28837".

AS AND FOR A SIXTH CAUSE OF ACTION  
AGAINST G&J

26. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "25" inclusive, as if more fully set forth herein at length.

27. Pursuant to the terms of the Application previously annexed hereto, the defendant agreed to pay plaintiff all of its costs including attorneys' fees and court costs in connection with the collection of any unpaid account.

28. By reason thereof, and the delinquent account heretofore alleged, plaintiff is entitled to reasonable attorneys' fees from the defendant herein.

AS AND FOR A SEVENTH CAUSE OF ACTION  
AGAINST G&J

29. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "28" inclusive, as if more fully set forth herein at length.

30. That on or about August 27, 2008, the defendant executed and delivered to plaintiff a Security Agreement to secure, among other things, the aforesaid indebtedness set forth in the prior causes of action herein. A true copy of said Security Agreement is annexed hereto and made a part hereof as Exhibit "D".

31. That pursuant to the terms and conditions of the aforesaid Security Agreement, plaintiff was granted a security interest in all goods sold heretofore or hereafter by plaintiff to defendant and in the products and proceed of those goods, including, but not limited to, finished goods, work in progress, and accounts receivable. Defendant further granted plaintiff a security interest in all of defendant's personal property wherever located, including without limitation defendant's machinery, equipment, inventory and accounts, whether now owned by defendant or acquired hereafter, including all products and proceeds thereof, as security for all indebtedness of defendant to plaintiff, whether now existing or arising in the future. The Security Agreement further secured the payment of all other liabilities of the defendant to



plaintiff of every kind and description, direct or indirect, absolute or contingent, due or to become due now or hereafter arising.

32. That plaintiff duly perfected its security interest by filing financing statements pursuant to Article 9 of the Uniform Commercial Code. A true copy of the financing statement is annexed hereto and made a part hereof as Exhibit "E".

33. That pursuant to the terms and conditions of the aforesaid Security Agreement, upon default in any payment by the debtor, the debtor shall be deemed in default under the terms of the said Security Agreement and the secured party is entitled to recovery of the chattels pledged as security thereunder.

34. Pursuant to the terms of the Security Agreement, plaintiff is entitled to immediate possession of the chattels aforescribed, such possession having been wrongfully refused by the corporate defendant.

AS AND FOR AN EIGHTH CAUSE OF ACTION  
AGAINST G&J

35. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "34" inclusive, as if more fully set forth herein at length.

36. By reason of the default heretofore alleged, plaintiff is entitled, pursuant to the terms of the Security Agreement, to reasonable attorneys' fees.

AS AND FOR A NINTH CAUSE OF ACTION  
AGAINST G&J

37. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "36" inclusive, as if more fully set forth herein at length.

38. On or about December 1, 2010, defendant G&J executed and delivered for valuable consideration, a Note in the principal sum of \$919,370.14.

39. Said Note was tendered by the defendant to the plaintiff to cover part of the merchandise sold and delivered by plaintiff to defendant under plaintiff's account defined "Bulk Account #41769" as referenced in the first cause of action herein.

40. That the Note granted the defendant time to pay the amount due and owing to plaintiff in the amount of \$919,370.14 in monthly installments of \$20,689.54 over a specified period of time.

41. The monthly payments due under the note were to begin on December 15, 2010, and continue on the 15th day of each and every month thereafter until November 14, 2014.

42. That the defendant has defaulted as of March 15, 2011 with respect to the monthly payments due on said Note. A true copy of the Note is annexed hereto and made a part hereof as Exhibit "F".

43. That the defendant has defaulted in payments of the Note and that plaintiff has made demand therefore, and has accelerated all payments thereon as a result of said default in accordance with the terms of the Note.

44. That there is now due and owing from the defendant to plaintiff the sum of \$870,986.66, together with interest at the rate of four percent (4%) percent per annum from March 15, 2011, due demand for which has been made and no part thereof has been paid.

AS AND FOR A TENTH CAUSE OF ACTION  
AGAINST G&J

45. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "44" inclusive, as if more fully set forth herein at length.

46. Pursuant to the terms of the Note previously annexed hereto, the defendant agreed to pay plaintiff all costs of collection, including reasonable attorneys' fees in the event of default.

47. By reason thereof, and the default heretofore alleged, plaintiff is entitled to reasonable attorneys' fees from the defendant herein.

AS AND FOR FIRST CAUSE OF ACTION  
AGAINST JOHN CERVONI, JR.

48. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "47" inclusive, as if more fully set forth herein at length.

49. On or about November 30, 2010, defendant JOHN CERVONI, JR., for valuable consideration, executed and delivered to plaintiff a Continuing Guaranty Unlimited (hereinafter referred to as "Guaranty"), which unconditionally guaranteed the payment of any sums now or hereafter due from G&J. A true copy of the Guaranty is annexed hereto and made a part hereof as Exhibit "G".

50. The defendant G&J is indebted to plaintiff for the total sum of \$1,119,664.75, with interest of 1.5% per month running thereon from June 26, 2011, and pursuant to the aforesaid Guaranty, JOHN CERVONI, JR. also is indebted to plaintiff for the same.

51. By reason thereof, plaintiff is entitled to the sum of \$1,119,664.75 from defendant JOHN CERVONI, JR., together with interest running thereon at the contractual rate of 1.5% per month from June 26, 2011, due demand for which has been made, and no part thereof has been paid.

AS AND FOR A SECOND CAUSE OF ACTION  
AGAINST JOHN CERVONI, JR.

52. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "51" inclusive, as if more fully set forth herein at length.

53. That in accordance with the terms of the Guaranty, the defendant is liable to plaintiff for reasonable attorneys' fees and court costs.

54. By reason thereof, plaintiff is entitled to reasonable attorneys' fees from defendant JOHN CERVONI, JR.

AS AND FOR FIRST CAUSE OF ACTION  
AGAINST JOHN CERVONI, SR.

55. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "54" inclusive, as if more fully set forth herein at length.

56. On or about November 30, 2010, defendant JOHN CERVONI, SR., for valuable consideration, executed and delivered to plaintiff his Continuing Guaranty Unlimited (hereinafter referred to as "Guaranty"), which unconditionally guaranteed the payment of any sums now or hereafter due from G&J. A true copy of the Guaranty is annexed hereto and made a part hereof as Exhibit "G".

57. The defendant G&J is indebted to plaintiff for the total sum of \$1,119,664.75, with interest of 1.5% per month running thereon from June 26, 2011, and pursuant to the aforesaid Guaranty, JOHN CERVONI, SR. also is indebted to plaintiff for the same.

58. By reason thereof, plaintiff is entitled to the sum of \$1,119,664.75 from defendant JOHN CERVONI, SR., together with interest running thereon at the contractual rate of 1.5% per month from June 26, 2011, due demand for which has been made, and no part thereof has been paid.

AS AND FOR A SECOND CAUSE OF ACTION  
AGAINST JOHN CERVONI, SR.

59. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "58" inclusive, as if more fully set forth herein at length.

60. That in accordance with the terms of the Guaranty, the defendant is liable to plaintiff for reasonable attorneys' fees and court costs.

61. By reason thereof, plaintiff is entitled to reasonable attorneys' fees from defendant JOHN CERVONI, SR.

AS AND FOR A FIRST CAUSE OF ACTION  
AGAINST A & B TESTA BUILDING CORP.

62. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "61" inclusive, as if more fully set forth herein at length.

63. On or about October 28, 2010, defendant A & B TESTA BUILDING CORP. executed and delivered for valuable consideration an absolute, unconditional continuing guaranty of payment of any indebtedness of G&J. A true copy of the "Guarantee" is annexed hereto and made a part hereof as Exhibit "H".

64. The defendant G&J is indebted to plaintiff for the sum of \$1,119,664.75, with interest of 1.5% per month running thereon from June 26, 2011, and pursuant to the aforesaid Guarantee, A & B TESTA BUILDING CORP. also is indebted to plaintiff for the same.

65. By reason thereof, plaintiff is entitled to the sum of \$1,119,664.75 from defendant A & B TESTA BUILDING CORP., together with interest running thereon at the contractual rate of 1.5% per month from June 26, 2011, due demand for which has been made, and no part thereof has been paid.

AS AND FOR A SECOND CAUSE OF ACTION  
AGAINST A & B TESTA BUILDING CORP.

66. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "65" inclusive, as if more fully set forth herein at length.

67. That in accordance with the terms of the Guarantee, the defendant is liable to plaintiff for attorneys' fees incurred by plaintiff in retaining counsel in order to enforce the guaranty.

68. By reason thereof, plaintiff is entitled to reasonable attorneys' fees from defendant A & B TESTA BUILDING CORP.

AS AND FOR A CAUSE OF ACTION  
AGAINST NEW ATLANTIC READY MIX CORP

69. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "68" inclusive, as if more fully set forth herein at length.

70. On or about June 12, 2011, June 14, 2011 and June 21, 2011 , defendant NEW ATLANTIC READY MIX CORP issued three negotiable instruments in the respective amounts of \$7,000.00 \$11,000.00 and \$9,000.00, true copies of which are annexed hereto and made a part hereof as Exhibit "I".

Said negotiable instruments were issued to be applied to the outstanding debt due from G&J to plaintiff herein.

71. That said negotiable instruments were returned and dishonored by the presenting bank.

72. By reason of the dishonor of the negotiable instruments, defendant is obligated to plaintiff in the combined sum of \$27,000.00, the amount of such instruments.

73. That by reason of the improper issuance of said negotiable instruments by the defendant, defendant is obligated to the plaintiff in the sum of \$27,000.00, with interest thereon from June 21, 2011, exclusive of the balance as set forth in the prior causes of action herein, no part of which has been paid although due and duly demanded.

WHEREFORE, plaintiff demands judgment as follows:

(a) Against the defendant G & J READY MIX & MASONRY SUPPLY INC., on the first, second and third causes of action, in the amount of \$1,112,207.25, together with interest of 1.5% per month running thereon from June 26, 2011.

(b) Against the defendant, G & J READY MIX & MASONRY SUPPLY INC., on the fourth and fifth cause of action in the amount of \$7,457.50, with interest of 1.5% per month running thereon from June 12, 2011.

(c) Against the defendant, G & J READY MIX & MASONRY SUPPLY INC., on the sixth cause of action for reasonable attorneys' fees.

(d) Against the defendant G & J READY MIX & MASONRY SUPPLY INC., on the seventh cause of action, ordering the defendant to turn over all collateral pledged to plaintiff.

(e) Against the defendant, G & J READY MIX & MASONRY SUPPLY INC., on the eight cause of action, for reasonable attorneys' fees.

(f) Against the defendant, G & J READY MIX & MASONRY SUPPLY INC., on the ninth cause of action in the amount of \$870,986.66 together with interest of 4% per annum running thereon from March 15, 2011 .

(g) Against the defendant, G & J READY MIX & MASONRY SUPPLY INC., on the tenth cause of action, for reasonable attorneys' fees.

(h) Against the defendant JOHN CERVONI, JR. on the first cause of action, in the amount of \$1,119,664.75, together with interest of 1.5% per month from June 26, 2011.

(I) Against the defendant JOHN CERVONI, JR. on the second cause of action, for reasonable attorneys' fees.

(j) Against the defendant JOHN CERVONI a/k/a JOHN CERVONI, SR. on the first cause of action, in the amount of \$1,119,664.75, together with interest of 1.5% per month from June 26, 2011.

(k) Against the defendant JOHN CERVONI a/k/a JOHN CERVONI, SR. on the second cause of action, for reasonable attorneys' fees.

(l) Against the defendant A & B TESTA BUILDING CORP. on the first cause of action, in the amount of \$1,119,664.75, together with interest of 1.5% per month from June 26, 2011.

(m) Against the defendant A & B TESTA BUILDING CORP. on the second cause of action, for reasonable attorneys' fees.

(n) Against the defendant NEW ATLANTIC READY MIX CORP on plaintiff's cause of action, in the amount of \$27,000.00, together with interest running thereon from June 21, 2011.

(o) For the costs and disbursements of this action.

Dated: Syosset, New York  
September 1, 2011

BORGES & ASSOCIATES LLC  
Attorneys for Plaintiff  
575 Underhill Blvd., Suite 118  
Syosset, NY 11791  
(516) 677-8200

  
By: WANDA BORGES

Pursuant to 22NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

  
WANDA BORGES



STATE OF VERMONT

SUPERIOR COURT	)	CIVIL DIVISION
Rutland Unit	)	Docket No.
	)	
LEHIGH CEMENT COMPANY, LLC	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
JOHN J. CERVONI and JOANN CERVONI,	)	
and Occupants of 120 Okemo Way, Mount Holly)	)	
Defendants	)	

COMPLAINT FOR FORECLOSURE

Now Comes Plaintiff Lehigh Cement Company, LLC, by and through its attorneys, Potter Stewart, Jr. Law Offices, P.C., and hereby alleges as follows:

BACKGROUND

1. Plaintiff is a Delaware limited liability company authorized to conduct business in the State of Vermont and having an office located at 63 Flushing Avenue, Unit 295, Brooklyn, New York, 11205.

2. Upon information and belief, Defendants John J. Cervoni and Joann Cervoni are residents of North Salem, New York with an address of 14 Apple Mill Road, North Salem, New York, 10560.

3. Defendants are the owners of land and premises located at 120 Okemo Way, Mount Holly, Vermont, which property is the subject of this Complaint. A description is of the property is attached hereto as Exhibit A and incorporated herein.

4. On December 1, 2010 G&J Ready Mix and Masonry Supply, Inc., a New York corporation with a place of business at Hollis, New York, executed and delivered to Lehigh Cement Company, LLC a promissory note ("Note") in the amount of \$919,370.14, with interest thereon. A copy of the Note is attached hereto as Exhibit B and incorporated herein.

5. On or about December 14, 2010, Defendants John J. Cervoni and Joann Cervoni duly executed and delivered to Lehigh Cement Company, LLC a mortgage deed ("Mortgage") on certain land and premises in the Town of Mount Holly, County of Rutland, State of Vermont (the "Premises"), which mortgage was given as security for the Promissory Note referenced above. The Mortgage was recorded on March 10, 2011 in Book 79, Page 275 of the Mount Holly Land Records. A copy of the mortgage deed is attached hereto as Exhibit C, and by this reference incorporated herein.

6. The original Note and Mortgage are in the possession and control of Plaintiff and Plaintiff is entitled to enforcement pursuant to the Uniform Commercial Code.

7. Occupants, if any, are named in this action pursuant to 12 V.S.A. § 4523(c)(1). Plaintiff believes the property is occupied by Defendants as a second home only. Plaintiff has no knowledge whether the property is tenant occupied.

### COUNT I

8. Plaintiff re-alleges and incorporates paragraphs 1-7 as stated above.

9. G&J Ready Mix and Masonry Supply, Inc., has breached the conditions of the above referenced Note by failing to make payments when due. The Note has not been paid according to the tenor and effect thereof and is in default. Plaintiff is entitled to accelerate the

Note. The failure by G&J Ready Mix and Masonry Supply, Inc. to make payments on the Note when due constitutes a breach of the Mortgage.

10. The Note and Mortgage provide for recovery by Plaintiff of all sums paid by it for attorney's fees and costs.

11. The following amounts are currently due under the Note as of September 15, 2011:

Note Principal Balance	\$870,986.66
Note Interest	\$24,820.54
<b>TOTAL OWED</b>	<b>\$895,807.20</b>

Interest continues to accrue on the Note. In addition, attorneys' fees and costs continue to accrue in connection with attempts to collect amounts due under the Note.

Wherefore, plaintiff respectfully requests that this Court:

- a) Take jurisdiction of this matter;
- b) Determine the amount of indebtedness due to Plaintiff by Defendants.
- c) Award Plaintiff its costs of collection and all expenses incident to this foreclosure including its attorneys' fees and advancements that this Plaintiff has made or may hereafter make for the payment of taxes, insurance, or other assessments.
- d) Terminate the interest of tenants, if any, residing at or occupying the premises.
- e) Order all Defendants to pay to the Clerk of the Court for the benefit of Plaintiffs the amounts due and to become due with interest thereon together with sums expended, reasonable attorneys' fees and costs, and in default thereof, order that Defendants and all

persons claiming by and from and under them be forever foreclosed of all equity of redemption in the premises.

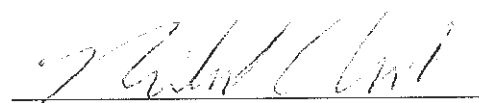
- f) Order a judicial sale of the Property in accordance with Vermont law.
- g) Order any rents due to Defendants be paid over to Lehigh Cement Company, LLC during the pendency of this matter.
- h) Order a shortened redemption period to thirty days from date of judgment.
- i) Grant such other relief that is equitable and just.

NOTICE TO DEFENDANTS: YOU MUST ENTER YOUR APPEARANCE IN ORDER TO RECEIVE NOTICE OF THE FORECLOSURE JUDGMENT WHICH WILL SET FORTH THE MONEY WHICH YOU MUST DEPOSIT TO REDEEM THE PREMISES IN THE PERIOD OF TIME ALLOWED TO DEPOSIT THIS AMOUNT.

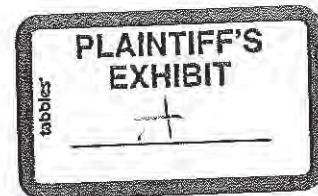
NOTICE TO OCCUPANTS: THE PROPERTY IN WHICH YOU LIVE IS BEING FORECLOSED UPON. YOU ARE NAMED AS A DEFENDANT IN THE FORECLOSURE BECAUSE YOUR RIGHT TO REMAIN ON THE PREMISES MAY END WHEN THE FORECLOSURE IS COMPLETED. YOU MUST NOTIFY THE COURT OF YOUR NAME AND ADDRESS IN ORDER TO BE KEPT INFORMED OF THE STATUS OF THE FORECLOSURE.

Dated at Brattleboro, Vermont this 21<sup>st</sup> day of September, 2011.

LEHIGH CEMENT COMPANY, LLC



By: Richard C. Carroll, Esq.  
Potter Stewart, Jr. Law Offices, P.C.  
205 Main Street, Suite 8  
Brattleboro, VT 05301



SCHEDULE A

Being all and the same land and premises conveyed to the grantors, John J. Cervoni and Joann Cervoni by Edward Whitlock and Elaine Whitlock, husband and wife, dated October 26, 1993, and recorded on October 28, 1993 in Vol. 47, at Pages 320-321 of the Mt. Holly Land Records and in said deed more particularly described as follows:

Being all and the same land and premises conveyed to the grantors, Edward Whitlock and Elaine Whitlock by Warranty Deed of Michael F. Colavito and Joan M. Colavito, husband and wife, dated October 15, 1986, and recorded in Vol. 39, at Page 358 of the Mt. Holly Land Records and in said deed more particularly described as follows:

Being all and the same land and premises conveyed to the grantors by Warranty Deed of Cosmo Tavella and Charles Doulens dated the 15th day of January, 1973, recorded in Book 31, Pages 319-320 of the Mount Holly Land Records, and in said deed described as follows:

All that certain piece or parcel of land situated in the Town of Mount Holly, County of Rutland and State of Vermont, being shown and designated as Lot 43 on a certain map entitled "Section One of Mount Holly Heights at Mount Holly, Vermont, Scale 1" = 100' September 12, 1969 Rynn and Faulds Land Surveyors, Norwalk, Connecticut", which map is certified "Substantially Correct" by Russell G. Faulds, Land Surveyor, Vermont Reg. No. 110, and is on file in the office of the Town Clerk of said Town of Mount Holly, Vermont, reference to which is hereby made for a more particular description of said premises.

Said premises are more particularly bounded and described on said map as follows:

Southeasterly: 190.00 feet by Okeno Way as shown on said map;  
Southwesterly: 230.00 feet by Lots 46 and 44, each in part, as shown on said map;  
Northwesterly: 190.00 feet by Lots 44 and 42, each in part, as shown on said map;  
and  
Northeasterly: 230.00 feet by Lot 41 as shown on said map.

Together with a right of way in common with others to pass and repass over the roads as shown on said map for the purpose of ingress and egress to said lot.

Said premises conveyed subject to limitations of use imposed by governmental authority; rules and regulations of the Board of Health of the State of Vermont; taxes hereafter becoming due and payable to the Town of Mount Holly; restrictions recorded in Volume 30 at page 270 of the Mount Holly Land Records; and an easement from Cosmo Tavella and Charles Doulens to the Vermont Public Service Corporation dated November 18, 1969.

STATE OF VERMONT

SUPERIOR COURT )  
Rutland Unit )  
LEHIGH CEMENT COMPANY, LLC )  
Plaintiff )  
v. )  
JOHN J. CERVONI and JOANN CERVONI, )  
and Occupants of 120 Okemo Way, Mount Holly )  
Defendants )

CIVIL DIVISION  
Docket No. 652-9-11  
Rdev

FILED

OCT 25 2012

VERMONT SUPERIOR COURT  
RUTLAND

**JUDGMENT ORDER AND DECREE OF FORECLOSURE**  
**BY JUDICIAL SALE**

This foreclosure action was brought before the Rutland Superior Court by Complaint of Lehigh Cement Company, LLC, dated September 21, 2011 and served upon the Defendants on or before October 31, 2011. Dismissal of the Complaint as to Joann Cervoni was stipulated to and granted by the Court on March 28, 2012. Judgment was granted to Plaintiff on July 26, 2012 as to Defendant John J. Cervoni on the basis of default. The Accounting was entered without hearing, pursuant to V.C.R.P. 80.1 (g) and V.R.C.P. 58:

IT IS HEREBY ORDERED, ADJUDGED and DECREED, as follows:

1. **Judgment.** There is presently due and owing the principal amount of \$870,986.66; accrued interest as of December 14, 2011 in the amount of \$33,411.13; court costs of \$262.50, reasonable attorneys fees in the amount of \$4,381.83; recording fees in the amount of \$40.00; making the total amount due the Plaintiff as of October 1, 2012,

the sum of \$909,082.12, plus interest accruing at the rate of \$95.45 per diem from 12/15/11 TO 8/13/12, PLUS INTEREST AT THE RATE OF \$286.46 PER DIEM FROM 8/14/12 until the date of redemption.

2. **Taxes and Other Advances.** Plaintiff is entitled to have any amounts paid for taxes after the date of the Affidavit of Amounts Owing added to the amount due at the time of redemption, pursuant to 12 V.S.A. §4525, upon proof of payment made. Plaintiff shall also be entitled to have any amounts paid for other advances made after the date of the Affidavit added to the amount due at the time of redemption with the approval of the Court.

3. **Mortgaged Property.** The property which is the subject of this foreclosure, the "Mortgaged Property," is described as follows:

See Schedule A attached herein and incorporated herewith.

4. **Redemption.** It is FURTHER ORDERED that unless John J. Cervoni pays to the Clerk of the Court on or before NOV. 26, 2012, the date of redemption payable to the Court, before 4:30 p.m., the sum of \$909,082.12, together with any amounts established under paragraph 2 above and PER DIEM INTEREST OF \$95.45 FROM 12/15/11 TO 8/13/12 AND per diem interest of \$286.46 from August 14, 2012 to the date of redemption, then the Plaintiff may file a motion for a Writ of Possession.

5. **Defendant/Mortgagor's Additional Right to Redeem.** Defendant/mortgagor John J. Cervoni may also redeem up to the date of the judicial sale, described in paragraph 7 below, by payment of the redemption amount pursuant to 12 V.S.A. § 4532 (i).

6. **Non-Redemption; Notice of Sale.** If the Defendants shall fail to redeem the Mortgage Property as set forth in paragraph 4 above, then the Court shall issue a Certificate of Non-Redemption, and the Mortgaged Property shall be sold as a whole to the highest bidder at public sale by a sheriff, deputy sheriff, constable, licensed auctioneer or other disinterested person specifically appointed by the Court, pursuant to 12 V.S.A. § 4531 *et seq* and V.R.C.P 80.1. The sale shall take place within six (6) months of the last redemption date under paragraph 4 above, unless extended by the Court or the case is stayed by a bankruptcy filing. Plaintiff shall send a Notice of Sale as required by 12 V.S.A. § 4532 (e) and (f) at least 60 days before the sale. If the designation of a specific date and time of sale is not included, Plaintiff shall send a supplemental Notice of Sale as required by 12 V.S.A. § 4532 (e) and (f) at least 21 days before the sale, specifying the exact date and time of sale. Plaintiff shall also publish a Notice of Sale in a newspaper distributed in Mount Holly, Vermont, for three (3) consecutive weeks prior to the date of sale and shall specify that the property shall be sold to the highest bidder at a public sale to be held at the Mortgaged Property on a specified date and time. The first publication shall be not less than 21 days prior to the date of the sale. Prior to any request for confirmation, Plaintiff shall file a copy of all Notices of Sale with the Court with a Certificate of Service. Plaintiff shall also file a copy of the published Notice of Sale with the Court, with a copy of the publications or a certificate of publication dates.

7. **Public Sale.** At the sale, the person holding the public sale shall sell to the highest bidder all of the Mortgaged Property, subject to property taxes and municipal assessments, if any. If the Plaintiff makes the highest bid, Plaintiff shall be required to pay cash or certified funds only to the extent that the bid is in excess of the sum due it by



the Defendant/mortgagor up to the date of the sale under this Judgment and Decree. The purchaser at the sale shall pay cash or certified funds to the person holding the sale. The Notice of Sale shall specify that this form of payment is authorized. In any case, a deposit shall be paid at the time of sale of at least Ten Thousand Dollars (\$10,000) in the form of cash, a bank treasurer's check, or certified funds. This provision shall not be required of Plaintiff or its designee.

Plaintiff is authorized to require the purchaser to sign a purchase and sale agreement. If specified in the Notice of Sale that includes the date and time of sale, the person holding the public sale may, for good cause, postpone the sale for a period of up to thirty (30) days, from time to time, until it is completed, giving notice of such adjournment and specifying the new date by public proclamation at the time and place appointed for the sale.

8. **Report of Sale.** The person holding the public sale shall file a Report of Sale, under oath, with the Court within ten (10) days of the date of sale pursuant to 12 V.S.A. §4533 (a). The person holding the public sale, or the attorney for the Plaintiff, shall retain all sale proceeds as custodian, to be disbursed in accordance with the final Confirmation Order of this Court promptly following confirmation pursuant to 12 V.S.A. § 4533 (a).


9. **Confirmation.** Plaintiff shall file a motion for confirmation, which shall set forth the satisfaction of all statutory requirements for confirmation, supported by an affidavit if necessary, and a proposed distribution of sale proceeds in specified amounts together with a factual basis for such a distribution supported by the record and affidavits

if necessary. The Court may require Plaintiff to serve any interested persons, as well as all parties who appeared in the case, with any motion for confirmation and notice of confirmation hearing scheduled pursuant to 12 V.S.A. § 4533 (a). At confirmation, Plaintiff may be allowed reasonable attorneys' fees and the reasonable expenses of making the sale pursuant to 12 V.S.A. § 4533 (a) as well as taxes paid since the accounting, if any, pursuant to 12 V.S.A. §4525. If the Court confirms the sale, the Court shall issue a Final Confirmation Order which shall set forth the information required by V.R.C.P. 80.1 (k) and shall order distribution of sale proceeds to named persons in specified amounts in accordance with V.C.R.P. 80.1 (j) (1). If the Court confirms the sale, the Confirmation Order shall constitute conclusive evidence against all persons that the power was duly executed. When the purchase price has been paid in full and the Confirmation Order recorded in the land records, transfer of title is effectuated pursuant to 12 V.S.A. §4533 (b).

10. **Deficiency Claim.** Plaintiff's Complaint was for foreclosure of the subject mortgage only. The maker of the underlying promissory note was not named as a defendant in this action. Accordingly, there will be no judgment for deficiency in this action.

**If you wish to appeal this judgment, you must request permission to appeal by motion filed with the Court within ten (10) days of the date of entry of the judgment, not including that date or Saturdays, Sundays, or legal holidays.**

DATED at Rutland, Vermont, this 23 day of Oct, 2012.

  
\_\_\_\_\_  
Honorable William D. Cohen  
Presiding Judge

SCHEDULE A

Being all and the same land and premises conveyed to the grantors, John J. Cervoni and Joann Cervoni by Edward Whitlock and Elaine Whitlock, husband and wife, dated October 26, 1993, and recorded on October 28, 1993 in Vol. 47, at Pages 320-321 of the Mt. Holly Land Records and in said deed more particularly described as follows:

Being all and the same land and premises conveyed to the grantors, Edward Whitlock and Elaine Whitlock by Warranty Deed of Michael F. Colavito and Joan M. Colavito, husband and wife, dated October 15, 1986, and recorded in Vol. 39, at Page 358 of the Mt. Holly Land Records and in said deed more particularly described as follows:

Being all and the same land and premises conveyed to the grantors by Warranty Deed of Cosmo Tavella and Charles Doulens dated the 15th day of January, 1973, recorded in Book 31, Pages 319-320 of the Mount Holly Land Records, and in said deed described as follows:

All that certain piece or parcel of land situated in the Town of Mount Holly, County of Rutland and State of Vermont, being shown and designated as Lot 43 on a certain map entitled "Section One of Mount Holly Heights at Mount Holly, Vermont, Scale 1" = 100' September 12, 1969 Ryan and Faulds Land Surveyors, Norwalk, Connecticut", which map is certified "Substantially Correct" by Russell G. Faulds, Land Surveyor, Vermont Reg. No. 110, and is on file in the office of the Town Clerk of said Town of Mount Holly, Vermont, reference to which is hereby made for a more particular description of said premises.

Said premises are more particularly bounded and described on said map as follows:

Southeasterly: 190.00 feet by Okemo Way as shown on said map;  
Southwesterly: 230.00 feet by Lots 46 and 44, each in part, as shown on said map;  
Northwesterly: 190.00 feet by Lots 44 and 42, each in part, as shown on said map;  
and  
Northeasterly: 230.00 feet by Lot 41 as shown on said map.

Together with a right of way in common with others to pass and repass over the roads as shown on said map for the purpose of ingress and egress to said lot.

Said premises conveyed subject to limitations of use imposed by governmental authority; rules and regulations of the Board of Health of the State of Vermont; taxes hereafter becoming due and payable to the Town of Mount Holly; restrictions recorded in Volume 30 at page 270 of the Mount Holly Land Records; and an easement from Cosmo Tavella and Charles Doulens to the Vermont Public Service Corporation dated November 18, 1969.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

In re:

G&J READY MIX & MASONRY SUPPLY INC.,

Debtor.

Chapter 11

Case No. 12-40253 (CEC)

**ORDER CONFIRMING THE INAPPLICABILITY OF THE AUTOMATIC STAY**

Upon the Motion of Lehigh Cement Company LLC (“Lehigh”), by and through its counsel Borges & Associates, LLC, for a determination that the Automatic Stay does not apply to the Non-Debtor Guarantors,

Due notice being served on the parties in interest and the court having jurisdiction and being duly advised in the premises

A hearing having been held on April 10, 2013 and no opposition to said Motion having been filed, and upon due deliberation having been had

**NOW, THEREFORE, IT IS HEREBY ORDERED** that:

1. the Automatic Stay does not apply to the Non-Debtor Guarantors, John Cervoni, Jr., John Cervoni, Sr., and A&B Testa Building Corp., and that Lehigh may proceed against the Non-debtor Guarantors in the State Court Action; and
2. the automatic stay shall remain effective as to G&J Ready Mix & Masonry Supply Inc. (the “Debtor”) ~~only~~ (CEC).

**Dated: Brooklyn, New York  
May 3, 2013**



*Carla E. Craig*  
\_\_\_\_\_  
**Carla E. Craig  
United States Bankruptcy Judge**



## **Bruce S. Nathan**

Partner

Tel 212.204.8686 Fax 973.422.6851

E-mail: [bnathan@lowenstein.com](mailto:bnathan@lowenstein.com)

### **Practice**

Bruce S. Nathan, Partner in the firm's Bankruptcy, Financial Reorganization & Creditors' Rights Department, has more than 30 years' experience in the bankruptcy and insolvency field, and is a recognized national expert on trade creditor rights and the representation of trade creditors in bankruptcy and other legal matters. Bruce has represented trade and other unsecured creditors, unsecured creditors' committees, secured creditors, and other interested parties in many of the larger Chapter 11 cases that have been filed, and is currently representing the liquidating trust and previously represented the creditors' committee in the Borders Group Inc. Chapter 11 case. Bruce also negotiates and prepares letters of credit, guarantees, security, consignment, bailment, tolling, and other agreements for the credit departments of institutional clients.

Bruce was co-chair of the Avoiding Powers Committee that worked with the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and also participated in ABI's Great Debates at their 2010 Annual Spring Meeting, arguing against repeal of the special BAPCPA protections for goods providers and commercial lessors, and was a panelist for a session sponsored by the American Bankruptcy Institute ("ABI") and co-sponsored by Georgetown University Law Center. Bruce also regularly speaks at conferences held by the National Association of Credit Management, its international affiliate, An Association of Executives in Finance, Credit and International Business ("FCIB"), Credit Research Foundation ("CRF"), and many credit groups on bankruptcy, insolvency, and creditor's rights issues; is a member of NACM's Government Affairs Committee, a regular contributor to NACM's *Business Credit*, a contributing editor of NACM's *Manual of Credit and Commercial Laws*, and co-author of *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Overhaul of U.S. Bankruptcy Law*, published by NACM; and has contributed to CRF's Journal, *The Credit and Financial Management Review*.

Bruce is recognized in the Bankruptcy & Creditor/Debtor Rights section of *Super Lawyers* (2012-2014) and in the 2014 *Super Lawyers Business Edition*. In March 2011, Bruce received the Top Hat Award, a prestigious annual award honoring extraordinary executives and professionals in the credit industry.

Bruce is also a co-author of "Trade Creditor Remedies Manual: Trade Creditors' Rights under the UCC and the U.S Bankruptcy Code" published by the American Bankruptcy Institute ("ABI") at the end of 2011, has contributed to the *ABI Journal*, and is a former member of ABI's Board of Directors and former Co-Chair of ABI's Unsecured Trade Creditors Committee.

### **Education**

- **University of Pennsylvania Law School** (J.D., 1980)
- **Wharton School of Finance and Business** (M.B.A., 1980)
- **University of Rochester** (B.A., 1976), *Phi Beta Kappa*

## Affiliations

- New York State Bar Association
- American Bar Association
  - Commercial Financial Services Committee
  - Business Bankruptcy Committee
- American Bankruptcy Institute
  - Former Member, Board of Directors
  - Former Chair, Unsecured Trade Creditor Committee
  - Regular Contributor to *American Bankruptcy Institute Journal's* "Last in Line" Column
  - Speaker at 2007 Annual Spring Meeting: "Fifty Ways to Leave Your Debtor: Lesser Known Remedies For Jilted Creditors"
  - Panelist at "Chapter 11 At The Crossroads: Does Reorganization Need Reform?" A Symposium on the Past, Present and Future of U.S. Corporate Restructuring," on November 16-17, 2009, sponsored by ABI and co-sponsored by Georgetown University Law Center
  - Participated in the Great Debates at ABI's Annual Spring Meeting held on April 30, 2010 on whether Congress should eliminate the special BAPCPA protections for providers of goods and lessors (arguing against repeal)
  - Task Force on Preferences
  - Chair, Task Force on Reclamations
  - Uniform Commercial Code Committee and Task Force - Revised Article 9 Primer
- American Bankruptcy Institute's Commission to Study the Reform of Chapter 11
  - Co-chair, Avoiding Powers Advisory Committee
- Commercial Law League of America
- Association of Commercial Finance Attorneys
- National Association of Credit Management
  - Contributor to *Business Credit* - National Association of Credit Management Magazine
  - National Bankruptcy and Insolvency Group
  - Lecturer, National Association of Credit Management and Affiliates and Credit Groups on Bankruptcy, UCC Article 9, Consignments, Letter of Credit law and other credit-related issues
- Member of FCIB, an Association of Executives in Finance, Credit and International Business. Presented at **The 4th China International Credit and Risk Management Conference**, Shenzhen, China, September 21, 2007, and **FCIB Teleconference**, December 13, 2007, on key provisions of People's Republic of China's 2006 Law on Enterprise Bankruptcy, similarities to and differences with the U.S. Bankruptcy Code, and upcoming implementation challenges
- Media Financial Management Association
  - Member
  - Frequent Lecturer
  - Contributor to "The Financial Manager" on Creditors' Rights Issues
- Lecturer, Executive Enterprises Inc. the Bank Lending Institute and the Banking Law Institute on Commercial Loan Workouts & UCC Issues
- Past Contributor
  - *Credit Today*
  - *National Credit News*

## Articles/Interviews Featuring Bruce S. Nathan

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- **Bruce S. Nathan is quoted in NACM eNews, predicting that the recent rate hike and future hikes by the Federal Reserve should increase the number of bankruptcy filings. *NACM eNews*, December 17, 2015**
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- **Bruce S. Nathan comments in NACM eNews regarding the Supreme Court's ruling that bankruptcy courts may not award attorneys' fees for work performed in defending their fee application in court. *NACM eNews*, June 18, 2015**
- **Lowenstein Sandler LLP Selected to Represent Official Committee of Unsecured Creditors of Gourmet Express March 31, 2015**
- **Bruce S. Nathan comments in the May 2014 *Financier Worldwide Magazine* on identifying early warning signs concerning a financially distressed customer and suggested steps vendors should take to mitigate their losses. *Financier Worldwide Magazine*, May 2014**
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- **Bruce S. Nathan was quoted in the National Association of Credit Management's eNews regarding claims against General Motors. *NACM's eNews*, April 24, 2014**
- **In NACM's eNews for December 12, 2013, Bruce Nathan comments on how the recent Supreme Court ruling regarding forum-selection clauses continues to allow opportunities for subcontractors in contract negotiations. *NACM's eNews*, December 12, 2013**
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- In *The Deal Pipeline*, Sharon L. Levin, Jeffrey Prol and Bruce Nathan are highlighted for representing the official committee of unsecured creditors in the Handy Hardware Wholesale, Inc. bankruptcy. *The Deal Pipeline*, June 21, 2013
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- **"Another Ordinary Course of Business Preference Defense Double Feature,"** Bruce S. Nathan, *Business Credit*, July/August 2011
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- **"Section 503(b)(9) Priority Claim Developments: The Beat Goes On!,"** Bruce S. Nathan, *Business Credit*, June 1, 2010
- **"Vendors Beware: The Risk of a Debtor's Unauthorized Post-petition Payments For Post-petition Goods or Services,"** Bruce S. Nathan, *Business Credit*, May 2010
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- **"Section 503(b)(9) Goods Supplier Priority - Beware of the Debtor's Setoff Rights,"** Bruce S. Nathan, *Business Credit*, February 2010
- **"Hooray for Delaware - A Tale of Two Decisions,"** Bruce S. Nathan, *Business Credit*, January 2010
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- **"The 20-Day Goods Priority Claim Under Bankruptcy Code Section 503(b) (9),"** Bruce S. Nathan, Scott Cargill, *The Credit and Financial Management Review*, Fourth Quarter 2009
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- **"The Limits of Consignment Rights When Consigned Goods Are Manufactured Into Finished Product,"** Bruce S. Nathan, *Business Credit*, July/August 2009
- **"Enforceability of Triangular Setoff Rights In Safe Harbor Contracts - Still An Open Question? Part 2,"** Bruce S. Nathan, S. Jason Teele, Matthew A. Magidson, *Derivatives Week*, June 29, 2009
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- **"Credit Card Payments as Preferences: The Sixth Circuit Joins the Bandwagon,"** Bruce S. Nathan, *Business Credit*, June 2009
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### Bar Admissions

- 1981, New York



## **WANDA BORGES**

*WANDA BORGES, the principal member of Borges & Associates, LLC., has been specializing in commercial insolvency practice and commercial litigation representing corporate clients throughout the United States for an excess of thirty years.*

*She is admitted to practice before the courts of the State of New York and the United States District Court for the Southern, Eastern, Northern and Western Districts of New York, the United States District Court for the District of Connecticut, the Second Circuit Court of Appeals and the Supreme Court of the United States. She is a member of the American Bar Association, American Bankruptcy Institute, The Hispanic National Bar Association, The International Association of Commercial Collectors, International Women's Insolvency and Restructuring Confederation, New York Institute of Credit and the Turnaround Management Association. As a member of the Commercial Law League of America, she is a Past President of the League, is a Past Chair of its Bankruptcy Section, served for six years on the Executive Council of the Eastern Region of the CLLA and currently is Chair of the CLLA Creditors' Rights Section.*

*She is a regular lecturer for the National Association of Credit Management (NACM) and its various affiliates. She has prepared and continues to update courses on "Advanced Issues in Bankruptcy", "Basics in Bankruptcy", "Current Cases in Bankruptcy", "Creditor's Committees", "Credit and Collection Issues", Sarbanes-Oxley Act of 2002, "Litigation Issues" and "Antitrust Issues" which have been presented at past NACM Annual Credit Congresses and at trade credit association meetings. Even prior to the passage of the "Red Flags Rule", Ms. Borges worked with the NACM and the FTC to determine the applicability of the Rule to business creditors. Ms. Borges has prepared and presents seminars on Red Flags compliance issues for the NACM, its various affiliates, corporations, collection agencies and various other organizations. Ms. Borges is a faculty member for the NACM's Graduate School of Credit and Financial Management at Dartmouth College. Ms. Borges has been a faculty member for the National Institute on Credit Management, a program jointly sponsored by the Commercial Law League of America and the National Association of Credit Management.*

*She has routinely presented seminars for Riemer Reporting Service on legal topics in credit and bankruptcy. She has been a regular lecturer for the American Management Association on the Uniform Commercial Code and Fundamentals of Business Law for the Non-Lawyer, and for both the American Management Association, the Media Financial Management Association (formerly the Broadcast Cable Financial Management Association) and the Broadcast Cable Credit Association on Creditor's Rights in Commercial Litigation and Bankruptcy Matters. Additionally, she has presented seminars and webinars for the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, The Commercial Law League of America, The International Association of Commercial Collectors, various local and national Bar Associations, Thomson West Publishing Company and the New York State Food Service Distributors Association.*

## WANDA BORGES

*Ms. Borges frequently presents live seminars, tele-seminars and webinars for various trade credit groups, many of whom are managed by NACM Affiliate Associations. Additionally, she has prepared and presented these educational programs for the American Automotive Leasing Association, the National Chemical Credit Association, the National Cement Trade Credit Group, which is managed by Riemer Reporting Service, the Health Industry Manufacturers Association, the Beauty and Barber Manufacturers Credit Association, the New Hampshire Association of Broadcasters and the Credit Association for Satellite History.*

*She has served as the Managing Editor and still is one of the contributing authors of the Manual of Credit and Collection Laws published by the National Association of Credit Management and is a contributing author to its Principles of Business Credit. She is a member of NACM's Editorial Advisory Committee. She has served as a Contributing Editor for the Commercial Law League of America's Bulletin and Journal, has contributed to the Bankruptcy Section Newsletter and contributes to the Commercial Law World magazine of the CLLA. Her treatise Hidden Liens: Who is Entitled to What? was published in the Fall, 1998 Edition of the Commercial Law Journal. She has authored Antitrust, Restraint of Trade and Unfair Competition: Myth Versus Reality, published by the NACM. Ms. Borges is the lead author and Editor-in-Chief of Enforcing Judgments and Collecting Debts in New York published by Thomson West Publishing Company and updated annually. She routinely publishes articles for the National Association of Credit Management "Business Credit" magazine and has published articles for its "Fraud Prevention News". Upon the passage of the BAPCPA in 2005, Ms. Borges prepared and presents educational programs on this new legislation and co-authored The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 – An Overhaul of U.S. Bankruptcy Law, published by the NACM. In November, 2015, Ms. Borges' article "Uniform Voidable Transactions Act (US)" was published by Thomson Reuters in the United Kingdom law journal Insolvency Intelligence.*

*She has published articles for the Broadcast Cable Credit Association "Creditopic\$" and the "The Financial Manager" on Commercial Creditors' Rights in Bankruptcy, Bankruptcy issues generally, the FTC's Red Flags Rule, the ECOA and Regulation B, Electronic Invoicing, "Dot Com" Businesses, and on Advertiser/Agency Liability; and has prepared the "white paper" on the discontinuance of notarization of broadcast invoices. She is a co-author of the National Association of Broadcasters' book Out of the Red and into the Black, as well as the Broadcast Cable Credit Association's Credit & Collection Handbook. Ms. Borges has appeared as a guest on the Fox News Channel program, "Fox on Consumers", speaking on consumer bankruptcy exemptions. In February, 2010, Ms. Borges prepared and presented a program entitled "Avoiding Bankruptcy Pitfalls: Creditors' Rights and Professional Obligations in Bankruptcy Proceedings" for the Georgia Bar Association and the Institute of Continuing Legal Education in Georgia" which was televised live and telecasted to satellite locations throughout the State of Georgia.*

## WANDA BORGES

*She has conducted "in-house" seminars on antitrust issues, credit, collection, secured transactions and insolvency for corporate clients such as Agrium, Inc., Amerisource Bergen, Bristol-Myers Squibb, Burlington Industries, Inc., Cosmair, Inc., Doric Enterprises, Ferguson Enterprises, Inc., Mars Incorporated, McKesson Corporation, Mobil Chemical Company, Multi-Arc Corp., Pfizer Inc., R.J. Reynolds Tobacco Company, Sandvik, Inc., Sharp Electronics Corporation, Simon & Schuster Corp., SONY Corporation, Southeastern Freight Lines, Inc., Stanley Works, SunTrust Bank and The Clyde Companies.*

*She was Chair of the Board of Trustees of Mercy College from 1991 through 1995 and served as a member of that board for nine years. She has served on the board of Regents College, and has taught Business Law at Seton College in Westchester County, New York. She is a past Chair of the Broadcast Cable Financial Management Association.*

*Ms. Borges actively participates in community events. She is a Leader of Song and has directed the Youth Music Ministry at her parish, Our Lady Star of the Sea. She remains a member of the Fairfield County Chorale for which she served as its president for the years 1995 through 1997 and most recently served as a director and Executive Vice-President of the Fairfield County Chorale during the years 2012 through 2013. She is a member of the Diocesan Choir for the Diocese of Bridgeport.*

*She received the "Human Valor" Award by Noticias del Mundo, a New York based spanish-language newspaper in 1985, the Mercy College Alumni Association's "Professional Achievement" Award in 1991, honorary membership in Delta Mu Delta - The National Honor Society in Business Administration - in May, 1995 and in October, 1996, was awarded the Mercy College Trustee's Medal for outstanding dedication to her profession and alma mater. She is listed in Who's Who of American Women. In September, 2000 she was named one of the "50 Outstanding Alumni" of Mercy College. In February, 2001 she received the "Career Achievement Award" from the Broadcast Cable Credit Association. In May, 2004, she received the "Strength in Numbers Recognition Certificate" from the National Association of Credit Management. In December 2006, she was named one of "2006 Top25 Most Influential Collection Professionals" by Collection Advisor Magazine. Ms. Borges was recently inducted into Mercy College's Alumni Hall of Fame celebrating its 60<sup>th</sup> year in existence. In November, 2010, Ms. Borges received the "Robert E. Caine Award for Leadership" from the Commercial Law League of America. In April, 2015, Ms. Borges received a "Woman of Distinction" award from St. Catharine Academy, her high school alma mater, celebrating its 125<sup>th</sup> year in existence. Ms. Borges has been included on the New York Super Lawyers – Metro Edition list (Bankruptcy & Creditor/Debtor Rights) each year since 2009.*