



established August 22, 2008 as the deadline for any individual or entity to file a proof of claim against the Debtor's estate, and December 22, 2008 as the deadline for governmental units to file a proof of claim against the Debtor's estate. These bar dates were extended only for certain creditors on account of the Debtor's amendment of its bankruptcy schedules. All bar dates for the filing of proofs of claim have expired.

C. On November 10, 2008, the Ohio DOT filed the Claim, which asserts a priority unsecured claim under 11 U.S.C. § 507(a)(8) against the Debtor's estate in the amount of \$525,720.63. The Claim is based upon a sales and use tax arising from a micro-tunneling project (the "Project") commenced by the Debtor in May 2003 and concluding in early 2005. The Ohio DOT asserted that sales and use taxes were due for materials utilized for the Project but purchased outside of the State of Ohio.

D. On June 17, 2009, the Debtor filed an objection to the Claim on the grounds that, among other things, (i) the Claim was improperly classified as a priority claim; and (ii) the Claim asserted amounts not due to the Ohio DOT.

E. In particular, the Debtor objected to any priority treatment of the Claim because the only applicable sub-section of 11 U.S.C. § 507(a)(8) for the tax allegedly due for a sales and use tax that is not withheld was § 507(a)(8)(e). Section 507(a)(8)(e) provides priority treatment for excise taxes only to the extent that "a return, if required, is last due, including extensions, after three years before the date of the filing of the petition." 11 U.S.C. § 507(a)(8)(e). The Debtor asserted that any return due for sales and use tax associated with the Project was last due in the year 2004.

F. The Debtor also objected to the Claim because the alleged tax, interest and penalties due exceeded the maximum amounts due based upon the applicable tax rate, the

aggregate cost of all materials for the Project, and subtraction of in-state materials for which tax had previously been paid.

G. The Parties have engaged in negotiations regarding the foregoing disputes and have agreed to the compromises set forth in the Stipulation in order to avoid the risks and expenses associated with formal and protracted litigation.

**NOW THEREFORE**, the Parties hereby stipulate and agree, subject to the approval of the Bankruptcy Court, as follows:

1. The Ohio DOT shall have an allowed non-priority unsecured claim in the amount of \$42,708.14, consisting of \$33,722.75 of tax and \$8,985.39 of interest (the "Allowed General Unsecured Claim"). The Allowed General Unsecured Claim shall be treated in the same manner as other allowed non-priority unsecured claims against the Debtor's estate.

2. The Ohio DOT shall have an allowed subordinated tax penalty claim in the amount of \$5,058.42 (the "Subordinated Penalty Claim"). The Subordinated Penalty Claim shall be treated in the same manner as other allowed subordinated tax penalty claims against the Debtor's estate.

3. No portion of the Claim shall be entitled to priority treatment under 11 U.S.C. § 507(a)(8) or otherwise.

4. The Ohio DOT shall have no other allowed Claims against the Debtor's estate.

5. This Stipulation constitutes the complete and exclusive agreement of the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, oral or written, between the Parties with respect to such subject matter.

6. Subject to an order of the Court approving this Stipulation, this Stipulation shall

be binding upon and inure to the benefit of the Parties, and their respective successors and assigns.

7. This Stipulation shall be governed by and construed in accordance with the substantive law of the Commonwealth of Massachusetts, and shall have the force and effect of an instrument executed and delivered under seal under the law of the Commonwealth of Massachusetts.

8. Upon payment of the Claim pursuant to a confirmed plan of liquidation or pursuant to Section 726 of the Bankruptcy Code and entry by the Bankruptcy Court of a final order approving this Stipulation and Order, the Debtor and its successors and assigns, and the Ohio DOT and its successors and assigns, release and discharge each other from any and all claims, charges, complaints, demands, actions, causes of action, suits, rights, liabilities and expenses (including attorney's fees and costs), whether known or unknown, relating to any amounts owed to the Ohio DOT for the tax, interest and penalties contained in Claim, including: (a) any right the Debtor and its successors and assigns may have to request a refund for overpayments made by the Debtor and its successors and assigns to the Ohio DOT in connection with the taxes, interest and penalties in the Claim; and (b) any right the Ohio DOT and its successors and assigns may have to any additional payment of taxes, interest and penalties in connection with the Claim.

9. This Stipulation may be executed in counterparts, each of which shall be deemed to be an original, and all such counterparts together shall constitute one and the same instrument. This Stipulation may be executed by facsimile or portable document format ("pdf").

10. The Court shall retain jurisdiction to resolve any dispute arising under or in connection with this Stipulation.

11. This Stipulation shall have no force or effect unless it is approved by the Court.

**Ohio Department of Taxation,**

By its counsel,

/s/ Amy K. Kaufman\*

Amy K. Kaufman, Esq.

Assistant Attorney General

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Dated: August 17, 2009

[signatures cont'd on next page]

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\* Pursuant to ECF Rule 8(b)(2), I, Christian J. Urbano, represent that Attorney Kaufman has authorized me to attach her electronic signature to this Stipulation.

Modern Continental Construction Co., Inc.,  
Debtor-in-Possession

By its counsel,

/s/ Christian J. Urbano

Harold B. Murphy (BBO #326610)

D. Ethan Jeffery (BBO #631941)

Christian J. Urbano (BBO #644471)

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Dated: August 17, 2009

IT IS SO ORDERED.

Signed in said District this \_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Honorable William C. Hillman  
U.S. Bankruptcy Judge

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