



“Bankruptcy Code”) in this Court. Since the bankruptcy filing, the Debtor has managed its financial affairs and remained in possession of its property as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

3. On July 11, 2008, the Court entered an Order granting the *Motion by Debtor and Debtor-in-Possession For Entry of Order Fixing Bar Dates and Approving Form of Notice*, and 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.

4. 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.

5. 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.<sup>1</sup>

6. 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

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<sup>1</sup> On July 21, 2009, the Court entered an order granting a joint motion by the Debtor and the Ohio DOT to continue the hearing on the Objection. The hearing is currently scheduled for September 23, 2009 at 9:30 a.m.

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.

7. 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.

8. On June 22, 2009, the Debtor filed the *Plan of Liquidation of Modern Continental Construction Co., Inc., Debtor and Debtor-in-Possession* (the “Plan”)<sup>2</sup> and a related disclosure statement. On July 15, 2009, the Court entered an order approving the adequacy of the disclosure statement and scheduled a hearing on confirmation of the Plan for August 19, 2009 at 9:30 a.m. (the “Confirmation Hearing”).

9. The Parties have engaged in negotiations regarding the Claim 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.

#### **THE PROPOSED STIPULATION**

10. Subject to the Court’s approval, the Parties have entered into the Stipulation to resolve their disputes. The major terms of the Stipulation are as follows:<sup>3</sup>

- (a) The Ohio DOT would have an allowed non-priority unsecured claim in the amount of \$42,708.14, consisting of \$33,722.75 of tax

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<sup>2</sup> Capitalized terms not otherwise defined in this motion have their meanings given to them in the Plan.

<sup>3</sup> The summary set forth in this Motion is not intended to be a substitute for the Stipulation, which contains additional terms and provisions.

and \$8,985.39 of interest (the “Allowed General Unsecured Claim”). The Allowed General Unsecured Claim would be treated in the same manner as other allowed non-priority unsecured claims against the Debtor’s estate.

- (b) The Ohio DOT would have an allowed subordinated tax penalty claim in the amount of \$5,058.42 (the “Subordinated Penalty Claim”). The Subordinated Penalty Claim would be treated in the same manner as other allowed subordinated tax penalty claims against the Debtor’s estate.
- (c) No portion of the Claim would be entitled to priority treatment under 11 U.S.C. § 507(a)(8) or otherwise.
- (d) The Ohio DOT would have no other allowed Claims against the Debtor’s estate.
- (e) 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, would 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.

**THE STIPULATION IS FAIR, EQUITABLE AND  
IN THE BEST INTERESTS OF THE DEBTORS’ ESTATE**

11. Rule 9019 of the Federal Rules of Bankruptcy Procedure provides, in pertinent part, that “[o]n motion by the trustee and after notice and a hearing, the Court may approve a compromise or settlement.” Local Rule 9019-1 also authorizes “settlement of any controversy that affects the estate.” While the decision to approve a particular settlement lies within the sound discretion of the Bankruptcy Court, the Court should give deference to the business

judgment of the debtor-in-possession. *See In re Neshaminy Office Bldg. Assoc.*, 62 B.R. 798, 803 (E.D. Pa. 1986); *In re Resorts Int'l, Inc.*, 145 B.R. 412, 451 (Bankr. D.N.J. 1990).

12. A settlement should be approved where it is fair, equitable and in the best interests of the estate. *See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S. Ct. 1157 (1968); *Jeremiah v. Richardson*, 148 F.3d 17 (1st Cir. 1998); *Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mtg. Corp.)*, 68 F.3d 914 (5th Cir. 1995). The First Circuit has held that a bankruptcy court should also consider the following factors in determining whether to approve a settlement:

- a. The probability of the success in the litigation being compromised;
- b. The difficulties, if any, to be encountered in the matter of collection;
- c. The complexity of the litigation involved and the expense, inconvenience, and delay in pursuing the litigation; and
- d. The paramount interest of the creditors and a proper deference to their reasonable views.

*See Jeremiah*, 148 F.3d at 23 (citing *Jeffrey v. Desmond*, 70 F.3d 183, 185 (1st Cir. 1995)); *see also Hicks, Muse & Co., Inc. v. Brandt (In re Healthco Int'l, Inc.)*, 136 F.3d 45, 50 (1st Cir. 1998); *In re Lawrence Paperboard Corp.*, 52 B.R. 907, 909 (Bankr. D. Mass. 1985). The Stipulation more than satisfies these requirements.

13. In the present case, the settlement contained in the Stipulation is the product of an arm's length negotiation between the Debtor and the Ohio DOT. Pursuant to the Stipulation, the Ohio DOT has agreed that no portion of the Claim is entitled to priority treatment pursuant to 11 U.S.C. § 507(a)(8) or otherwise, and has agreed to substantially reduce the allowed amount of the non-priority unsecured portion of the Claim and the subordinated tax penalty portion of the Claim consistent with applicable bankruptcy and non-bankruptcy law. Since the Stipulation

provides for this treatment of the Claim, it falls well within the range of reasonableness and benefits the Debtor's estate and its creditors.

14. The Debtor submits that no party in interest will be prejudiced by the relief requested in the Motion and entry of the Stipulation as an order of this Court.

**REQUEST TO LIMIT NOTICE**

15. The Debtor requests that this Court limit notice respecting this Motion and the related Stipulation (the "Settlement Pleadings"). The Court has authority to limit notice of this Motion pursuant to 11 U.S.C. § 105(a), Rule 2002(m) of the Federal Rule of Bankruptcy Procedure and MLBR 9019-1(c). Absent an order of this Court, MLBR 9019-1(c) requires the Debtor to serve all of the Settlement Pleadings on all creditors and parties in interest.

16. There are over eight hundred creditors in the above-captioned case, most of whom have had little or no participation in this case and are unlikely to have an interest in or respond to the Motion. The cost of mailing full copies of the Settlement Pleadings to the full creditor list is substantial and would unnecessarily deplete the Debtor's resources.

17. The Debtor requests that notice and service of the Settlement Pleadings be limited to the following parties: (a) the Office of the United States Trustee, (b) any secured creditors of the Debtor, (c) any taxing authorities that the Debtor believes may have claims against the Debtor, (d) counsel to the Committee, (e) creditors named on the Debtor's list of the twenty largest general unsecured claims against the Debtor; (f) all parties that have filed a notice of appearance in this case; and (g) counsel to the Ohio DOT.

18. The Debtor is in the process of serving the Settlement Pleadings on the foregoing parties, and will serve notice of any hearing and objection deadline established by the Court on the same parties.

19. The purpose of the request to limit notice is to avoid the burdensome costs associated with serving the Settlement Pleadings on all creditors and parties in interest in this case. Accordingly, no party in interest will be prejudiced by the relief requested in this motion.

**WHEREFORE**, the Debtor respectfully requests that the Court issue an order: (a) granting the relief requested in this Motion; (b) approving the Stipulation filed concurrently herewith as an Order of the Court; (c) approving the manner of notice as set forth above; and (d) granting to the Debtor such other and further relief as the Court deems just and proper in the circumstances.

Respectfully submitted,

MODERN CONTINENTAL  
CONSTRUCTION COMPANY, INC.,

By its attorneys,

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