

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
(Eastern Division)**

In re:)	
)	
MODERN CONTINENTAL)	Chapter 11
CONSTRUCTION CO., INC.,)	
)	Case No. 08-14558 (WCH)
Debtor.)	

**MOTION BY DEBTOR AND DEBTOR-IN-POSSESSION TO
EXTEND TIME TO ASSUME OR REJECT INTEREST IN
NONRESIDENTIAL REAL PROPERTY LEASE**

Modern Continental Construction Co., Inc., the debtor and debtor-in-possession in the above-referenced Chapter 11 case (the “Debtor”), files this motion (the “Motion”) for entry of an Order, pursuant to Section 365(d)(4)(B) of Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”), Rule 6006 of the Federal Rules of Bankruptcy Procedure, and MLBR 6006-1, granting a ninety (90) day extension of time to assume, assume and assign, or reject its unexpired lease of nonresidential real property in which the Debtor is a lessee, to and including January 19, 2009. The deadline for assumption, assumption and assignment, or rejection, currently expires on October 21, 2008. In further support of this Motion, the Debtor respectfully states as follows:

JURISDICTION AND BACKGROUND

1. This Court has jurisdiction to consider and determine this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. On June 23, 2008 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Massachusetts (the “Court”). The Debtor continues to manage its business and remains in possession of its property as a debtor-in-possession under Sections 1107 and 1108 of the Bankruptcy Code.

3. No trustee or examiner has been appointed in this case. On July 2, 2008, the United States Trustee for the District of Massachusetts appointed the Official Committee of Unsecured Creditors (the “Committee”).

4. The Debtor is a closely-held Massachusetts corporation formed in 1967 to perform general contracting services. At one time, the Debtor was the largest heavy civil construction company in the northeastern United States and one of the largest in the country. The Debtor served as the largest contractor (in terms of the dollar amount of contracts awarded), on the historic “Big Dig” Central Artery/Tunnel project in Boston, Massachusetts (the “CA/T Project”).

5. The scope of the Debtor’s construction expertise included heavy civil, marine, transportation, power, design/build and microtunneling projects. Some of the Debtor’s more prominent projects included the construction of the San Francisco-Oakland Bay Bridge Seismic Retrofit, Back Bay Station and the Southwest corridor in Boston, MBTA Silver Line Immersed Tube Tunnels, Route 3 reconstruction from Route 128 to the New Hampshire border, Terminal E at Boston Logan Airport, the Deer Island Inter-Island Tunnel and a major portion of the CA/T Project.

6. The Debtor is party to a certain nonresidential real property lease (the “Lease”) dated June 1, 2008, by and between ROBLI Limited Partnership (the “Landlord”), for premises

located at 250 Milton Street, Dedham, Massachusetts (the “Premises”). The Lease term expires May 31, 2009.

RELIEF REQUESTED

7. The Debtor seeks the entry of an Order, pursuant to Section 365(d)(4)(B)(i) of the Bankruptcy Code, granting a 90-day extension of the 120-day period within which a debtor must to assume, assume and assign, or reject unexpired leases (the “120-Day Period”), to and including January 19, 2009. The 120-Day Period currently expires on October 21, 2008. Such an extension would be without prejudice to the rights of the Debtor to seek further extensions with the consent of the Landlord, as contemplated by Section 365(d)(4)(B)(ii) of the Bankruptcy Code.¹

8. Section 365(d)(4)(A)-(B) of the Bankruptcy Code provides that:

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property lease to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of – (i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

¹ MLBR 6006-1, provides in relevant part, that:

A motion seeking extension of the deadline for assumption or rejection of an unexpired lease of nonresidential real property shall be filed prior to the expiration of the one hundred twenty (120) day period found in 11 U.S.C. § 365(d)(4)(A). In the event that the Court can not hear or determine the motion prior to the expiration of the deadline, the extension requested in the motion shall be automatically approved on an interim basis, subject to final determination by the Court after notice and a hearing set as soon as the Court’s calendar may permit.

MLBR 6006-1(b).

- (ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

11 U.S.C. § 365(d)(4)(A)-(B). Thus, the Court may, for cause, order a 90-day extension of the period during which a debtor-in-possession must assume or reject nonresidential real property leases upon the filing of a motion for such relief within the 120-Day Period.

9. Courts have applied the following factors, among others, to determine whether “cause” existed to extend the Section 365(d)(4) deadline:

- Whether the debtor has not had the time necessary to intelligently “. . . appraise its financial situation and the potential value of its assets in terms of the formulation of a plan.” In re Wedtech Corp., 72 B.R. 464 (Bankr. S.D.N.Y. 1987) (quoting Theatre Holding Corp. v. Mauro, 681 F.2d 102, 106 (2d Cir. 1982)), 681 F.2d at 106); see also In re Midtown Skating Corp., 3 B.R. 194 (Bankr. S.D.N.Y. 1980);
- Whether the lessor continues to receive monthly rental payments. Id. at 472 (citing Bon Ton Restaurant and Pastry Shop, Inc., 52 B.R. 850, 853, 855 (Bankr. N.D. Ill. 1985)); and
- Whether there exist any other facts indicating the lack of a “reasonable time to decide whether to assume or reject.” Id. at 471 (quoting Theatre Holding, 681 F.2d at 105).

See also South Street Seaport, L.P. v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 761 (2d Cir. 1996) (providing non-exhaustive list of factors); In re Service Merchandise Co., Inc., 256 B.R. 744, 748 (Bankr. M.D. Tenn. 2000) (same); 3 Lawrence P. King, Collier on Bankruptcy ¶ 365.04[3][f] (15th ed. rev. 2006) (same).

10. Because it is often difficult for a debtor to determine what role its leases should play in the reorganization process until just prior to the confirmation of a plan, courts regularly refuse to set rigid deadlines by which leases must be assumed or rejected. See, e.g., In re Hub of Military Circle, Inc., 13 B.R. 288 (Bankr. E.D. Va. 1981) (“The Debtor has the absolute right, by statute, to assume the lease after bankruptcy and to cure any defaults. And a debtor has until

before confirmation of a plan to do this. That point has not arrived.”). Notwithstanding that the Hub of Military Circle case was decided prior to the BAPCPA amendments to Section 365 of the Bankruptcy Code, which modified subsection (d)(4) and the time period to assume or reject, the case should remain instructive on what may demonstrate “cause” for extensions of time to assume or reject. In this respect, the Debtor submits that sufficient cause exists for this Court to grant the requested extension.

11. The requested extension is reasonable in the circumstances of the present case, and the factors cited above support a finding of “cause” for the Debtor’s request. During the administration of this case, the Debtor and its professionals have focused their attention primarily on (a) obtaining the continued use of cash collateral and debtor-in-possession financing to ensure that its remaining construction projects are completed and postpetition obligations are satisfied; (b) addressing owner, subcontractor, and union issues relating to such projects; (c) addressing numerous motions for relief from stay relating to prepetition personal injury litigation; and (d) negotiating potential settlement(s) of prepetition litigation concerning the CA/T Project and the Route 3 reconstruction project.

12. If the Debtor is forced to assume the Lease on October 21, 2008, then the estate may accrue unnecessary administrative expenses if a decision is later made to terminate the Lease. See 11 U.S.C. § 503(b)(7). See also In re Frontier Properties, Inc., 979 F.2d 1358, 1367 (9th Cir. 1992). Similarly, premature rejection of the Lease would hamper the Debtor’s ability to operate effectively and its efforts to maximize recovery for the benefit of creditors. Immediate rejection of the Lease would cause the Debtor to incur unnecessary lease rejection claims as well as administrative liabilities stemming from closing the rejected location and moving their businesses and substantial amounts of equipment and merchandise inventory elsewhere.

13. On the other hand, the Debtor's requested extension to assume or reject will not prejudice the Landlord. The Debtor is current in all of its postpetition rent payments and other contractual obligations with respect to the Lease. The Debtor intends to continue to pay all rent obligations under the Lease in a timely manner until it is either rejected or assumed. As a result, the continued occupation of the Premises will not prejudice the Landlord or cause it to incur damages that cannot be recompensed under the Bankruptcy Code.

14. For these reasons, the Court should enter an Order, pursuant to Section 365(d)(4) of the Bankruptcy Code, extending the period in which the Debtor must assume, assume and assign, or reject the Lease to and including January 19, 2009, without prejudice to the Debtor to seek an additional extension as permitted by Section 365(d)(4)(B)(ii) of the Bankruptcy Code.

NOTICE

15. The Debtor has served a copy of this Motion on (a) the Office of the United States Trustee for the District of Massachusetts; (b) counsel to the Committee; (c) each person or entity claiming to hold a security interest or lien on property of the Debtor; (d) the Landlord; and (e) each party who has filed a notice of appearance and request for service of papers pursuant to Rule 2002(m) of the Federal Rules of Bankruptcy Procedure. In light of the nature of the relief requested, the Debtor submits that no other or further notice of this motion is necessary or required.

WHEREFORE, the Debtor respectfully requests that the Court enter an Order: (a) extending the time by which the Debtor must assume, assume and assign, or reject the Lease to and including Monday, January 19, 2009, without prejudice to the Debtor seeking further extensions consistent with Section 365(d)(4)(B)(ii) of the Bankruptcy Code; (b) and granting to

the Debtor such other and further relief as the Court may deem just and proper in the circumstances.

Respectfully submitted,

MODERN CONTINENTAL
CONSTRUCTION CO., INC.,

By its attorneys,

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