

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

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

**ASSENTED-TO MOTION BY DEBTOR AND DEBTOR-IN-POSSESSION TO EXTEND
TIME TO ASSUME OR REJECT 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 for entry of an Order, pursuant to Section 365(d)(4)(B)(ii) 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(b), granting a sixty (60) 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 March 20, 2009. The deadline for assumption, assumption and assignment, or rejection, currently expires on January 19, 2009. The Landlord (as defined below) has provided prior written consent to the relief requested in this motion as required by Section 365(d)(4)(B)(ii) of the Bankruptcy Code. 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. The predicates for the relief

requested herein are Section 365(d)(4) of the Bankruptcy Code, Bankruptcy Rule 6006 and MLBR 6006-1(b).

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 (the “Route 3 Project”), 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.

7. On or about October 10, 2008, the Debtor sought an extension of the initial 120-day deadline to assume or reject the Lease. By Order dated October 21, 2008, this Court granted the relief requested and extended the deadline to assume or reject the Lease to January 19, 2009.

RELIEF REQUESTED

8. The Debtor seeks the entry of an order, pursuant to Section 365(d)(4)(B)(ii) of the Bankruptcy Code, granting an additional 60-day extension of the period within which it must assume, assume and assign, or reject the Lease, to and including March 20, 2009. Such an extension would be without prejudice to the right 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.

9. 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.

- (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). The Debtor has obtained the prior written consent of the Landlord, a true and correct copy of which is attached to this Motion as Exhibit A. Accordingly, the condition that “prior written consent of the lessor” be obtained has been satisfied.

10. 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 (2nd 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).

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. The Landlord has provided prior written consent to the requested extension. The Debtor has therefore satisfied the provisions of Section 365(d)(4)(B)(ii) of the Bankruptcy Code.

12. During the administration of this case, the Debtor has completed certain of its construction projects, has made considerable progress towards completing its open contracts, and has actively engaged in discussions to settle disputes with project owners and subcontractors in an effort to wind down its business affairs. The Debtor reached two significant settlements with the private and governmental parties to litigation concerning the CA/T Project and the Route 3 Project. This Court approved the settlements by orders dated December 18, 2008. The Debtor is in the final stages of completing other major construction projects and is attempting to settle other significant project disputes, which should be brought to a conclusion within the near future.

13. If the Debtor is forced to assume the Lease on January 19, 2009, 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 hinder its efforts to maximize recovery for the benefit of creditors. Immediate rejection of the Lease would cause the Debtor to incur an unnecessary lease rejection claim as well as administrative liabilities stemming from closing the Premises.

14. 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. The Landlord has provided prior written consent to the extension sought in this motion, and will therefore suffer no prejudice.

15. For these reasons, grounds exist for the entry of an order extending the period on or before which the Debtor must assume, assume and assign, or reject the Lease to and including

March 20, 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

16. 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.

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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 Friday, March 20, 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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Dated: January 8, 2009

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
(Eastern Division)

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

CERTIFICATE OF SERVICE

I, Christian J. Urbano, hereby certify that on January 8, 2009, I caused a copy of the *Assented-to Motion by Debtor and Debtor-in-Possession to Extend Time to Assume or Reject Nonresidential Real Property Lease* to be served by this Court's CM/ECF System and/or by first-class mail, postage prepaid on the persons and entities listed on the attached Service List.

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In re Modern Continental Construction Co., Inc.
Case Number: 08-14558 (WCH)
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