



**BACKGROUND**

1. 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”).

2. No trustee or examiner has been appointed. On July 2, 2008, the Office of the United States Trustee appointed an official committee of unsecured creditors (the “Committee”). The Committee has retained counsel.

3. The Debtor continues to operate its business and manage its property as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

4. The Debtor is a closely-held Massachusetts corporation formed in 1967 by Lelio Marino (“Mr. Marino”) and Kenneth Anderson (“Mr. Anderson”) to perform general contracting services. Over time, the Debtor’s operations substantially increased and it became the largest heavy civil construction company in the northeastern United States and one of the largest in the country.

5. At the height of its operations, the Debtor employed four thousand two hundred (4,200) persons in twenty (20) states and had annual revenues of approximately \$1,100,000,000. The Debtor and/or its affiliates performed work across the United States, including projects in New England, New York, South Carolina, California, Nevada and Hawaii.

6. The Debtor began experiencing financial difficulties at the end of 2001. The Debtor began working with its primary creditors to resolve its financial difficulties. On November 12, 2004, Mr. Marino passed away unexpectedly and the Debtor began in earnest a plan to wind down its operations in an orderly fashion.

7. At the time of Mr. Marino's death, the Debtor had twenty-four (24) open construction contracts with more than \$485,000,000 remaining to complete on such contracts. In cooperation with Travelers<sup>2</sup> and certain of the Debtor's banks and noteholders, the Debtor determined that fulfilling its obligations to owners by completing its open contracts was in the best interest of the owners, and various other stakeholders in the projects and in the Debtor, including employees, trade creditors, Travelers, the banks and the noteholders.

8. After November 2004, with funding from Travelers, the Debtor worked diligently to complete its open construction contracts. As of the Petition Date, most of the projects had been completed or were in the final stages of completion.

9. Since the Petition Date, the Debtor has worked with Travelers to complete projects in the most cost-efficient manner possible. The Debtor has been able to settle its disputes regarding the Central Artery/Tunnel project (the so-called "Big Dig") and its Route 3 project. Both settlements were approved by the Court and permitted the Debtor to reduce its operations, overhead and associated costs. Both settlements were milestones in this bankruptcy case and in the wind down of the Debtor's operations.

10. In order to fund its post-petition operations, on August 7, 2008 and August 28, 2008 the Court entered interim and final orders (collectively the "Initial DIP Orders"), respectively authorizing the Debtor to obtain post-petition financing from Travelers. Commencing on October 8, 2008, the Court entered a series of orders (collectively the "DIP Extension Orders") that, among other things, extended the post-petition financing from Travelers (the Initial DIP Orders and the DIP Extension Orders shall hereinafter be collectively referred to

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<sup>2</sup> The term "Travelers" shall mean any or all of the following: Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc. and Fidelity and Guaranty Insurance Company.

as the “DIP Orders”). Pursuant to the DIP Orders, the Debtor and the Lender executed a *Final DIP Credit and Security Agreement* and various amendments (as amended the “DIP Loan Agreement”).

**THE FOUNTAIN AVE. PROJECT**

11. The Fountain Ave. Project, commenced in August, 2001, is a landfill capping project in Brooklyn, New York. The New York City Department of Environmental Protection (the “Owner”) is the owner of the Fountain Ave. Project. The total contract value was approximately \$158,000,000. As of the Petition Date, work with a value of approximately \$2,000,000 remained to be completed.

12. Since the Petition Date, the Debtor has completed substantially all of the work on the Fountain Ave. Project except for: (a) the requirement to maintain a methane flare until July 24, 2009, (b) a warranty obligation that expires on March 31, 2010, and (c) the submission of close-out paperwork (collectively the “Contract Obligations”). The Debtor estimates that the costs to complete the Contract Obligations, assuming no claims are made under the warranty, will not exceed \$40,000.

13. USF&G is prepared to discharge the Debtor’s Contract Obligations, to the extent such obligations are within the scope of the Bonds and to the extent it receives one or more demands under the Bonds.

14. As of the Petition Date, the Debtor had claims against the Owner (exclusive of any post-petition work) totaling approximately \$31,000,000 as follows: (a) amounts billed but not yet paid – \$2,875,000, (b) retainage – \$7,720,000, (c) claims for design flaws, requests for change orders and requests for equitable adjustment – \$20,327,000. The recovery from these

claims has been pledged to Travelers in accordance with the DIP Orders, the DIP Loan Agreement and Travelers' rights of subrogation under the Bonds.

15. Upon the termination of the Debtor's involvement in the Fountain Ave. Project, the Debtor will be able to cease its construction operations. The Debtor has drafted and expects that it will shortly file a plan of reorganization (the "Plan"), an accompanying disclosure statement (the "Disclosure Statement") and the additional pleadings necessary to seek approval of the Disclosure Statement. The Plan will provide for the appointment of a liquidating supervisor to administer the next phase of the Debtor's wind down – the prosecution and/or liquidation of the Debtor's remaining intangible assets, primarily consisting of causes of action.

**BASIS FOR RELIEF**

16. The Debtor requests that the Court authorize the Debtor to issue a letter, substantially in the form attached as Exhibit A, terminating the Debtor's involvement in the Fountain Ave. Project.

17. If the Debtor is not permitted to terminate its involvement in the Fountain Ave. Project, the Debtor will continue to incur the costs of maintaining its current construction operations, including retaining employees in New York and Massachusetts, maintaining offices in New York and Massachusetts, maintaining extensive insurance coverage and incurring various other overhead costs.

18. The small amount of work that is required to complete the Contract Obligations does not justify the costs of maintaining the Debtor's current construction operations.

19. The Debtor has analyzed the situation and determined that the most cost-effective way to complete the Contract Obligations is for the Debtor to terminate its involvement in the

Fountain Ave. Project and to allow USF&G to discharge the Debtor's Contract Obligations under the Bonds.

20. The surrender of the Fountain Ave. Project will resolve the Debtor's last major unfinished project in the most cost effective way, will advance the Debtor's wind down and will advance the completion of its Chapter 11 proceeding. The surrender of the Fountain Ave. Project is therefore in the best interest of the Debtor, its creditors and its bankruptcy estate.

**NOTICE**

21. The Debtor has served this motion on: (a) Travelers, (b) the Office of the United States Trustee for the District of Massachusetts, (c) the attorneys for the Debtor's prepetition secured lenders, (d) the Committee, (e) the Owner, (f) the 20 largest unsecured creditors, and (g) all parties having filed a notice of appearance and request for service of documents in this Chapter 11 case or required by MLBR. The Debtor submits that such notice is sufficient given the relief requested.

**WHEREFORE**, the Debtor respectfully requests that this Court enter an order: (a) authorizing the Debtor to terminate its involvement in the Fountain Ave. Project by sending a letter to the Owner substantially in the form attached as Exhibit A, (b) finding that notice of this

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motion was sufficient given the relief requested, and (c) granting such other and further relief as the Court deems just and proper in the circumstances.

Respectfully submitted,

MODERN CONTINENTAL  
CONSTRUCTION CO., INC.,  
By its proposed counsel,

/s/ D. Ethan Jeffery  
Harold B. Murphy (BBO #326610)  
D. Ethan Jeffery (BBO #631941)  
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Dated: June 17, 2009

::ODMA\PCDOCS\DOCS\531913\1

**IN RE: MODERN CONTINENTAL CONSTRUCTION CO., INC.  
BANKRUPTCY NO. 08-14558-WCH**

**EXHIBIT A TO**

**MOTION FOR ENTRY OF AN ORDER AUTHORIZING  
DEBTOR-IN-POSSESSION TO TERMINATE CONSTRUCTION PROJECT**

\_\_\_\_\_, 2009

[ADDRESSEE]  
[ADDRESS]  
[ADDRESS]  
[ADDRESS]

RE: **Principal:**  
**Project:**  
**Contract No.:**  
**Surety:**  
**Obligee:**  
**Bond:**

To Whom It May Concern:

This will confirm that Modern Continental Construction Co., Inc. (MCC), the Contractor on the aforescribed Project hereby acknowledges that, due to MCC's current financial difficulties, we are unable to pay for the completion of and/or to perform under the terms of our contract with the New York Department of Environmental Protection (Contract).

In furtherance of the foregoing, MCC hereby notifies you of their voluntary default on the Contract. Pursuant to the terms of the Bond issued by United States Fidelity and Guaranty Company (USF&G) bonding certain of MCC's obligations under the Contract, you may, if you deem necessary, contact USF&G, in its capacity as surety, to arrange for completion of the performance due under the terms of the Contract.

Thank you for your time and assistance in this matter.

Sincerely,

**MODERN CONTINENTAL CONSTRUCTION CO., INC.**

John H. Pastore  
President

::ODMA\PCDOCS\DOCS\531477\1

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
(Eastern Division)

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

**CERTIFICATE OF SERVICE**

I, D. Ethan Jeffery, hereby certify that on June 17, 2009, I caused a copy of the *Motion for Entry of an Order Authorizing Debtor-in-Possession to Terminate Construction Project* to be served by this Court's CM/ECF System and/or by first class mail as indicated on the persons and entities listed on the attached Service List.

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Dated: June 17, 2009  
532443

**Modern Continental Construction Co., Inc.**

**Case Number: 08-14558 (WCH)**

**Service List**

**Doc. #: 499625-v1**

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