

2. The Bankruptcy Court scheduled a hearing on the Motion for Relief for July 16, 2008.

3. The Motion for Relief set forth a multitude of inaccurate statements regarding the Debtor and the underlying state court litigation between the Debtor and Smyrna (the “State Court Litigation”).

4. The Debtor was prepared to file a limited objection to the Motion for Relief on the basis that the Motion for Relief set forth numerous inaccurate statements regarding the State Court Litigation and the position of the Debtor with respect thereto, but, notwithstanding such misrepresentations, the Debtor did not oppose lifting the stay for the limited purpose of permitting Smyrna to pursue its currently docketed appeal of the Judgment.¹

5. On July 15, 2008, the Bankruptcy Court granted the Motion for Relief and entered the order proposed by Smyrna’s counsel (the “Order”).

Relief Requested

6. The Order, as submitted by Smyrna’s counsel, is vague and ambiguous and, in light of the litigation history between Smyrna and the Debtor, the ambiguity of the Order requires amendment to protect the interests of the Debtor. The Order provides in part that the automatic stay is modified “allowing any and all actions to reach and implement settlements between the Plaintiff and non-debtor defendants in the State Action and to proceed until December 31, 2009.” The Debtor objects to an order that authorizes Smyrna to proceed with settlements and other undefined, unidentified actions against the Debtor through December 31, 2009.

7. The Debtor requests that the Court amend the Order, particularly romanette (ii) on page 1 of the Order. The Debtor asserts that Smyrna should not be permitted to proceed with

¹ Massachusetts Appeals Court Docket No. 2008-P-0059.

settlements and other undefined, uncertain actions against the Debtor until December 31, 2009. In the past eight (8) years, Smyrna has pursued four lawsuits against the Debtor, one of which was determined by the Appeals Court to be frivolous. The Debtor objects to the ambiguity of the Order because Smyrna may use such Order to pursue claims against the Debtor other than the appeal of the Judgment.

The State Court Litigation and Smyrna's Motion for Relief

8. The State Court Litigation has been pending for approximately eight (8) years.

9. The Superior Court dismissed certain of Smyrna's claims in the State Court Litigation on summary judgment in 2003, and the Superior Court dismissed the remainder of Smyrna's claims after a trial in 2006 and entered the Judgment in favor of the Debtor. At this time, Smyrna is appealing the Superior Court's decisions in the State Court Litigation.

10. The Motion for Relief sets forth numerous inaccurate statements regarding the contractual relationship between the Debtor and Smyrna, and the Debtor disputes the description of such contracts as set forth in the Motion for Relief. Indeed, the claims that Smyrna makes regarding the sequence of construction issues have been extensively litigated and were an element of a separate action that was the subject of an appeal by Smyrna before the Massachusetts Appeals Court docketed at 2006-P-0092 ("2006 Appeal"). As a result of the 2006 Appeal, Smyrna's claims were not only denied, but Smyrna's appeal was deemed frivolous and attorneys' fees were assessed. A true and accurate copy of the Massachusetts Appeals Court's November 17, 2006 Order is attached hereto at Exhibit A.

11. In the 2006 Appeal, the Massachusetts Appeals Court affirmed the findings of the Superior Court regarding Smyrna's actual knowledge of the construction sequence change, and both the Superior Court and Appeals Court held that Smyrna never made a claim pursuant to its

contract with the debtor for such sequence change. See Massachusetts Appeals Court Order pursuant to Rule 1:28, Exhibit A.

12. The Debtor disputes that it has admitted to any liability to Smyrna. A true and accurate copy of the Debtor's Answer and Counterclaim referenced in paragraph 7 of Smyrna's Motion for Relief from Automatic Stay is attached hereto at Exhibit B. A true and accurate copy of the April 4, 2003 letter from Robert Pine referenced in paragraph 7 of the Motion is attached hereto at Exhibit C.² The plain terms of these documents demonstrate that the Debtor has never made any admission of liability regarding Smyrna, and Smyrna's multiple statements to the contrary are simply false. The Debtor does not owe any money to Smyrna and, in fact, the appeal Smyrna seeks to prosecute involves overturning an award of \$5,833,898.73 in damages in favor of the Debtor.

13. The Debtor disputes that any insurance policies apply to Smyrna's claims. The documents to which Smyrna refers in the Motion for Relief as insurance policies are in fact payment bonds. See Space Bldg. Corp. v. Ins. Co. of North America, 7 Mass. App. Ct. 933 (1979) ("a surety bond is not an insurance contract as defined in s 2. G.L. c. 175, s 107").

14. Notwithstanding the multitude of inaccurate statements set forth in the Motion, the Debtor does not oppose lifting the stay to allow Smyrna to prosecute its appeal of the Judgment, so long as the order for relief limits Smyrna to appealing the Judgment and does not authorize Smyrna to take other, undefined actions against the Debtor through December 31, 2009.

² Notably, this document was held to be inadmissible at trial when presented by Smyrna in the case docketed at 2000-01192 in the Norfolk Superior Court and now being appealed in the Massachusetts Appeals Court in the appeal docketed as 2008-p-0059.

Argument

16. Rule 59(e) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 9023 of the Federal Rules of Bankruptcy Procedure, provides that “a motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.” The purpose of the motion is to correct manifest errors of law or fact, or to present evidence newly discovered from the time an issue was submitted to the Court. See Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). In this case, the Debtor’s evidence was not submitted to the Court because the Order was entered prior to the Debtor’s filing of its qualified opposition to the Motion for Relief.

17. The history of the State Court Litigation supports the Debtor’s request for an amendment to the Order to delete romanette (ii) on page one. The ambiguity of the order presented to the Court requires such amendment so that Smyrna does not have free reign to pursue numerous claims and appeals against the Debtor through the end of 2009. The Debtor does not oppose lifting the stay to allow Smyrna to prosecute its appeal of the Judgment, provided that, in the event that the Appeals Court overturns the Judgment or otherwise remands the proceeding to the Superior Court, Smyrna shall be required to file a motion for additional relief in the Bankruptcy Court prior to further prosecuting any alleged claims. The Debtor’s position with respect to the Motion shall in no way be construed as an admission (a) of liability, (b) that Smyrna has a valid claim against the Debtor, by way of the Bonds or otherwise, or (c) that Smyrna has a valid claim against the Sureties, by way of the Bonds or otherwise. To the fullest extent provided by law, the Debtor hereby reserves its rights and the rights of the Sureties to assert any and all defenses that the Debtor or any of the Sureties may have with respect to Smyrna’s claims and to deny coverage of Smyrna’s claims.

WHEREFORE, in consideration of the foregoing, the Debtor respectfully requests that this Court (a) amend the Order and delete romanette (ii) on page one of the Order; and (b) granting to the Debtor 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,

Dated: July 15, 2008

/s/ Christian J. Urbano
Harold B. Murphy (BBO #326610)
D. Ethan Jeffery (BBO #631941)
Christian J. Urbano (BBO #644471)
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H

Briefs and Other Related Documents

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Appeals Court of Massachusetts.
 SMYRNA REBAR, INC.,

v.

MODERN CONTINENTAL CONSTRUCTION
 COMPANY, INC.
 No. 06-P-92.

Nov. 17, 2006.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

****1** On March 5, 1997, Modern Continental Construction Company, Inc. (Modern), a general contractor, entered into a contract with the Department of Public Works for work on a portion of the Central Artery/Third-Harbor Tunnel project. [FN1] On June 20, 1997, Modern entered into a subcontract with Smyrna Rebar, Inc. (Smyrna), a Georgia corporation that installs reinforcing steel (rebar). Under that subcontract, Smyrna agreed to provide rebar for the construction of six concrete immersed tube tunnel sections. Smyrna's work on the project began in September, 1997.

FN1. The Massachusetts Highway Department has succeeded the Department of Public Works as the relevant State agency in this matter.

Section 6.6 of the subcontract states that Modern has the right to "determine the order and sequence of all work and phases thereof as herein provided for." Five or six weeks after Smyrna began work, and pursuant to § 6.6 of the subcontract, Modern changed the work sequence so that the six tubes would be constructed in a 4-2 pattern instead of the originally contemplated 2-2-2 pattern.

In February, 1998, Modern agreed to advance funding to Smyrna to help Smyrna meet its payroll

expenses. Between March, 1998, and April, 1999, Modern advanced Smyrna over \$1.4 million. By the spring of 1999, Modern concluded that Smyrna was unable to carry out its contractual obligations. On April 9, 1999, Modern notified Smyrna of its intention to terminate the parties' relationship.

Procedural history. This appeal is the latest phase of protracted litigation between the parties. In August, 2000, Smyrna filed a lawsuit containing eighteen breach of contract counts, as well as counts asserting quantum meruit, wrongful termination, violation of G.L. c. 93A, and a G.L. c. 149 payment bond claim. Modern counterclaimed to recover over \$1.4 million it had advanced to Smyrna. In that case, *Smyrna Rebar, Inc. v. Modern Continental Const. Co.*, the Superior Court judge granted Modern's motion to dismiss several breach of contract claims and granted summary judgment in Modern's favor on its counterclaim. Among other admonitions, the judge stated in his memorandum that "Smyrna has done nothing more than offer conclusory opinions of its attorney and documents that have little value...." (App.163); Smyrna was ordered to pay Modern's costs. (App.180). Ultimately, the judge resolved that case in favor of Modern, awarding over \$5 million. [FN2]

FN2. At oral argument before this court, counsel for Modern alluded to two additional lawsuits, one between Smyrna and Modern Surety, and one between Smyrna and the Central Artery Tunnel Project, both dismissed as against Smyrna. The record before us does not include details about these suits.

Smyrna filed this lawsuit in 2003, alleging that Modern fraudulently induced Smyrna to enter into the subcontract by misrepresenting the sequence in which the work would be accomplished. In sum and substance, Smyrna alleges that Modern intended from the outset to alter the construction sequence of the project's work, but failed to disclose its intention to Smyrna at the time of bidding in order to induce Smyrna to offer Modern a lower bid than it would have otherwise offered. The allegedly fraudulent misrepresentation, therefore, took place at the latest in 1997, when the subcontract was signed. This case was filed six years after that alleged fraud, and three

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years after the expiration of the limitations period for fraud, G.L. c. 260, § 2A.

****2 Discussion.** For purposes of summary judgment, we view the evidence in the light most favorable to the nonmoving party. Nelson v. Salem State College, 446 Mass. 525, 530 (2006). "An order granting or denying summary judgment will be upheld if the trial judge ruled on undisputed material facts and his ruling was correct as a matter of law." *Ibid.*, quoting from Commonwealth v. One 1987 Mercury Cougar Auto., 413 Mass. 534, 536 (1992).

Generally, the limitations periods for a cause of action based on misrepresentation begins to run when the plaintiff knew or should have known of the misrepresentation. See Friedman v. Jablonski, 371 Mass. 482, 485-486 (1976). Smyrna invokes the "discovery rule," arguing that the misrepresentation was "inherently unknowable" at the time it was made, so as to toll the statute of limitations. See Patsos v. First Albany Corp., 433 Mass. 323, 328-329 (2001). Smyrna has failed to demonstrate that, within the statute of limitations, the harm it claims to have suffered was either unknown or unascertainable in the exercise of reasonable diligence. See Friedman v. Jablonski, *supra* at 487.

The Superior Court judge granted summary judgment for Modern on the ground that undisputed facts establish Smyrna's knowledge of the sequencing change as early as 1997, when the parties' work shifted to accommodate the change. Smyrna now argues that because its claim is based on fraud, the limitations period began to run not when the change in sequencing itself took place, but when Smyrna obtained actual knowledge that Modern originally proposed a 2-2-2 sequence with the intent to change it to a 4-2 sequence.

An abundance of undisputed facts, any of which we may consider, support the Superior Court judge's decision. See Champagne v. Commissioner of Correction, 395 Mass. 382, 386 (1985).

As an example, Smyrna's superintendent conceded that Smyrna made no complaint or argument about the sequencing change when that change was instituted in 1997, or at any time thereafter until the filing of this lawsuit. Thus, the change--which Smyrna characterizes as "radical," a "massive alteration," and extremely damaging--failed to trigger any investigation into the timing of Modern's decision to utilize a 4-2 sequence. Yet such an

investigation, or other action constituting "reasonable diligence," was an essential prerequisite for Smyrna to invoke the discovery rule. See Albrecht v. Clifford, 436 Mass. 706, 715-716 (2002).

As another example, Modern's general bid was explicitly incorporated into the parties' subcontract, placing Smyrna on notice of Modern's intent to pursue a 4-2 sequence in 1997. [FN3] (App.383-384).

[FN3. Additionally, notes from a meeting of Modern and Smyrna representatives on February 20, 1997, show that Smyrna then knew of Modern's intention to shift to a 4-2 sequence. (App.247-48). Smyrna has provided no admissible evidence creating a genuine dispute on this point.

Frivolous appeal. An appeal is frivolous "when the law is well settled [and] when there can be no reasonable expectation of a reversal." See Love v. Pratt, 64 Mass.App.Ct. 454, 459 (2005), quoting from Avery v. Steele, 414 Mass. 450, 455 (1993). The determination whether an appeal is frivolous rests in this court's sound discretion. See Love, *supra* at 459.

****3** Smyrna argues that an affirmative defense asserting the statute of limitations as a bar to an action can only be treated as a motion to dismiss and resolved under Mass.R.Civ.P. 12, 365 Mass. 754 (1974), and that therefore the motion judge erred by resolving the statute of limitations issue with a summary judgment ruling. (Br. at 9-10). Although counsel at oral argument qualified this claim as perhaps "overstated," he nonetheless argued that an affirmative defense based on the statute of limitations may only be considered at the summary judgment stage in "very limited circumstances." This is patently untrue. In theory, fact, and practice, summary judgment motions provide an efficient and effective means by which a party may argue and a judge may decide disputes concerning threshold issues, including whether a claim is barred by the statute of limitations. See, e.g., Bowen v. Eli Lilly & Co., 408 Mass. 204, 210 (1990); Tavgeta Corp. v. Varian Assocs., 436 Mass. 217, 228 (2002); Clough v. Brown, 59 Mass.App.Ct. 405, 407-409 (2003); Vinci v. Byers, 65 Mass.App.Ct. 135, 138-139 (2005). No valid argument was, or could have been, presented to this court in support of Smyrna's contention that a statute of limitations defense may only be presented in a motion to dismiss.

We view similarly Smyrna's somewhat inconsistent

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argument that a Superior Court judge may not (or may only in "limited circumstances") grant summary judgment on a claim that previously survived a motion to dismiss. Smyrna's brief states that "a party is forbidden from filing a Motion for Summary Judgment ... when they previously filed a Motion to Dismiss on the exact same grounds and the motion was denied." (Br. at 14). Again, no cases can be cited for this proposition; to the contrary, such a sequence of motions and decisions is a common occurrence in our courts. Motions to dismiss and summary judgment motions serve different and essential purposes. See Mass.R.Civ.P. 12(b)(6); Mass.R.Civ.P. 56, 365 Mass. 824 (1974). In this case, as in many cases, the Superior Court judge properly denied Modern's motion to dismiss in order that discovery might take place; after it did, summary judgment was properly considered. No viable argument exists that such a sequence of events was improper or unreasonable.

Smyrna's brief presents several additional misstatements of law, including claims that (1) a grant of summary judgment by a judge of the Superior Court after the denial by another judge of a motion to dismiss constitutes an impermissible review of the decision of one Superior Court judge by a second; (2) dismissal of Smyrna's complaint on statute of limitations grounds constitutes a finding by the judge that alternative grounds for dismissal presented by Modern "had no merit" (Br. at 20) and (3) the appropriate standard of review on appeal from a denial of summary judgment is a de novo application of the motion to dismiss standard.

Viewed as a whole, the many misstatements of law and fact in Smyrna's presentations to this court warrant the award of attorneys' fees and costs to Modern. See G.L. c. 211A, § 15; Mass.R.A.P. 25, as amended, 378 Mass. 925 (1979).

****4 Conclusion.** We affirm the grant of summary judgment for Modern, and award appellate attorneys' fees and costs. [FN4]

FN4. Modern may submit a petition for appellate attorneys' fees to this court in the manner prescribed in Fabre v. Walton, 441 Mass. 9, 10- 11 (2004), within twenty days of the issuance of this memorandum and order. Smyrna may respond to the petition within twenty days of said filing.

So ordered.

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Briefs and Other Related Documents ([Back to top](#))

- [2006 WL 1386652](#) (Appellate Brief) Brief of Appellee Modern Continental Construction Company, Inc (Apr. 5, 2006)
- [2006 WL 857941](#) (Appellate Brief) Brief for the Appellant (Mar. 2, 2006)
- [2006-P-0092](#) (Docket) (Jan. 20, 2006)

END OF DOCUMENT

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
DEPARTMENT

SMYRNA REBAR, INC.,)
)
Plaintiff,)
)
v.)
)
MODERN CONTINENTAL)
CONSTRUCTION COMPANY, INC.,)
UNITED STATES FIDELITY &)
GUARANTY COMPANY, FIREMAN'S)
FUND INSURANCE COMPANY)
and NATIONAL SURETY)
CORPORATION,)
)
Defendants.)

C.A. No. 00-1404-H

**ANSWER AND COUNTERCLAIM OF DEFENDANT
MODERN CONTINENTAL CONSTRUCTION CO., INC.**

Defendant Modern Continental Construction Co., Inc. ("Modern") hereby states the following as its Answer to each correspondingly numbered paragraph of the Plaintiff's Complaint:

NATURE OF THE ACTION

No response to this un-numbered paragraph is required.

PARTIES

- 1. Admit.
- 2. Admit.
- 3. Admit.
- 4. Admit.
- 5. Admit.

FACTS

6. Modern admits that it entered into a contract numbered 97356 (C09B1) (the "Contract") with Massachusetts Highway Department (the "MHD" or the "Owner"), but further answering states that the terms of the Contract speak for themselves.

7. Modern states that the terms of the Contract speak for themselves. Except as aforesaid, the allegations of this paragraph are denied.

8. Modern states that the terms of the Contract speak for themselves. Except as aforesaid, the allegations of this paragraph are denied.

9. Modern can neither confirm nor deny the allegations of this paragraph and calls upon the Plaintiff to prove the same.

10. Modern states that the terms of the Contract speak for themselves. Except as aforesaid, the allegations of this paragraph are denied.

11. Modern states that the terms of the Contract speak for themselves. Except as aforesaid, the allegations of this paragraph are denied.

12. Modern admits that it entered into a subcontract with the Plaintiff (the "Subcontract"), but further answering states that the terms of the Subcontract speak for themselves. Except as aforesaid, the allegations of this paragraph are denied.

13. Admit.

14. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

15. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

16. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

17. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

18. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

19. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

20. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

21. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

22. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

23. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

24. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

25. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

26. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

27. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

28. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the

Plaintiff might otherwise be entitled under CP #16 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

29. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

30. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under Issue #A010 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

31. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under Issue #A053 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

32. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under CP #16 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

33. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under Issue #A042 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

34. Admit.

35. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

36. Modern admits that a payment bond or bonds was issued for the Project. Modern denies the allegations of this paragraph to the extent that they are inconsistent with the terms of the bond(s) or applicable law.

37. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

COUNT I
BREACH OF CONTRACT

38. Modern re-alleges and incorporates by reference its answers to paragraphs 1-37 as set forth above.

39. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

40. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

41. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT II
BREACH OF CONTRACT

42. Modern re-alleges and incorporates by reference its answers to paragraphs 1-41 as set forth above.

43. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

44. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

45. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT III
BREACH OF CONTRACT

46. Modern re-alleges and incorporates by reference its answers to paragraphs 1-45 as set forth above.

47. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

48. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT IV
BREACH OF CONTRACT

49. Modern re-alleges and incorporate by reference its answers to paragraphs 1-48 as set forth above.

50. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT V
BREACH OF CONTRACT

51. Modern re-alleges and incorporates by reference its answers to paragraphs 1-50 as set forth above.

52. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT VI
BREACH OF CONTRACT

53. Modern re-alleges and incorporates by reference its answers to paragraphs 1-52 as set forth above.

54. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT VII
BREACH OF CONTRACT

55. Modern re-alleges and incorporates by reference its answers to paragraphs 1-54 as set forth above.

56. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT VIII
BREACH OF CONTRACT

57. Modern re-alleges and incorporates by reference its answers to paragraphs 1-56 as set forth above.

58. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT IX
BREACH OF CONTRACT

59. Modern re-alleges and incorporates by reference its answers to paragraphs 1-58 as set forth above.

60. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT X
BREACH OF CONTRACT

61. Modern re-alleges and incorporates by reference its answers to paragraphs 1-60 as set forth above.

62. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XI
BREACH OF CONTRACT

63. Modern re-alleges and incorporates by reference its answers to paragraphs 1-62 as set forth above.

64. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XII
BREACH OF CONTRACT

65. Modern re-alleges and incorporates by reference its answers to paragraphs 1-65 as set forth above.

66. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XIII
BREACH OF CONTRACT

67. Modern re-alleges and incorporates by reference its answers to paragraphs 1-66 as set forth above.

68. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XIV
BREACH OF CONTRACT

69. Modern re-alleges and incorporates by reference its answers to paragraphs 1-68 as set forth above.

70. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under CP #16 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XV
BREACH OF CONTRACT

71. Modern re-alleges and incorporates by reference its answers to paragraphs 1-70 as set forth above.

72. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under Issue #A010 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XVI
BREACH OF CONTRACT

73. Modern re-alleges and incorporates by reference its answers to paragraphs 1-72 as set forth above.

74. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under Issue ##A053 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XVII
BREACH OF CONTRACT

75. Modern re-alleges and incorporates by reference its answers to paragraphs 1-74 as set forth above.

76. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under CP #16 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XVIII
BREACH OF CONTRACT

77. Modern re-alleges and incorporates by reference its answers to paragraphs 1-76 as set forth above.

78. Modern denies that Plaintiff is entitled to any compensation beyond that which Plaintiff has already been paid. Further answering, Modern states that any amount to which the Plaintiff might otherwise be entitled under Issue #A042 would be greatly exceeded by Modern's counterclaims against the Plaintiff. Except as aforesaid, the allegations of this paragraph are denied.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XIX
QUANTUM MERUIT

79. Modern re-alleges and incorporates by reference its answers to paragraphs 1-78 as set forth above.

80. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

81. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

82. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XX
M.G.L. C.149 SURETY BOND CLAIM

83. Modern re-alleges and incorporates by reference its answers to paragraphs 1-82 as set forth above.

84. Modern states that the terms and conditions of the bond(s) speaks for themselves and Modern therefore denies any allegation of this paragraph which sets forth obligations beyond those existing under the bond(s).

85. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XXI
WRONGFUL TERMINATION

86. Modern re-alleges and incorporates by reference its answers to paragraphs 1-85 as set forth above.

87. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNT XXII
VIOLATION OF M.G.L. C.93A

88. Modern re-alleges and incorporates by reference its answers to paragraphs 1-87 as set forth above.

89. Modern can neither confirm nor deny the allegations of this paragraph and calls upon the Plaintiff to prove the same.

90. Admit.

91. Modern denies the allegations of this paragraph and calls upon the Plaintiff to prove the same.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that this Complaint be dismissed and that it be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint, and each and every count thereof, fails to state a claim upon which relief may be granted.

2. Plaintiff's claims are barred because the Plaintiff failed and refused to substantially perform under the Subcontract and therefore is not entitled to recover against the Defendant.

3. Plaintiff's claims are barred by the express terms of the Subcontract.

4. Plaintiff's claims are barred by its conduct from maintaining the present action.

5. Plaintiff's claims are barred because the Plaintiff breached its subcontract obligations to Modern.

6. Plaintiff is barred from bringing the present action because full payment has been made.
7. Plaintiff's claims are barred or limited by its failure to mitigate its damages, if any.
8. Plaintiff's claims are barred by the doctrine of accord and satisfaction.
9. Plaintiff has failed to comply with the terms and conditions of the bond(s).
10. Plaintiff's claims are barred by the statute of frauds.
11. Plaintiff's claims are barred as a consequence of Plaintiff's failure to provide proper and timely notice of its claims.
12. Plaintiff's claims are barred as a consequence of Plaintiff's failure and refusal to participate in/assist Modern with the assertion of claims against the Owner.
13. Plaintiff's claims are barred by the applicable statute of limitations and/or contractual limitation of actions provision(s).
14. Plaintiff claim is improper, as it was commenced in a venue other than the venue specified in the Subcontract.
15. Plaintiff's claims are barred, in whole or in part, by its failure to comply with the provisions of applicable statutes, including, but not limited to, the provisions of M.G.L. c. 149, § 29.
16. Plaintiff's claims are barred, in whole or in part, because Plaintiff has previously released such claims.
17. Plaintiff is barred from maintaining all, or part, of the present action because it has waived its rights to do so.
18. Plaintiff's claims are barred by and subject to backcharge, setoff and recoupment by Modern.
19. Plaintiff's claims are barred by the doctrine of laches.
20. Plaintiff's claim of jury trial is expressly barred by the terms of the Subcontract.

WHEREFORE, Defendant Modern Continental Construction Company, Inc. respectfully requests that Plaintiff's Complaint be dismissed and that Modern be awarded its costs incurred defending the same, and that this Court allow it any other and further relief as justice may require.

COUNTERCLAIMS

1. Defendant/Plaintiff-in-Counterclaim Modern Continental Construction Company, Inc. ("Modern") is a Massachusetts corporation with a principal place of business at 600 Memorial Drive, Cambridge, Massachusetts.
2. Plaintiff/Defendant-in-Counterclaim Smyrna Rebar, Inc. ("Smyrna") is a Massachusetts corporation with a principal business address at 186 Lincoln Street, Boston, Massachusetts.
3. On or about April 2, 1997, Smyrna and Modern entered into a written agreement (the "Subcontract") whereby Smyrna was to provide labor, among other things, to install reinforcing steel, couplers, dowel bar substitutes and wire mesh for the I-90 Fort Point Channel Crossing section of the Central Artery/Tunnel project (the "Project").
4. On or about March 6, 1998, Smyrna and Modern executed a Memorandum of Understanding ("MOU") subject to which Modern agreed to supplement Smyrna's weekly billings during a period of low production by Smyrna. The MOU provided that Smyrna would refund all excess funds advanced by Modern, including all retainage released previously by Modern to Smyrna, when weekly production dollars exceeded Smyrna's weekly payroll requirements, and that Smyrna would, in any event, be liable for the amounts its received under the MOU.
5. Smyrna is responsible, pursuant to the MOU, to Modern for all payments made by Modern in excess of funds attributed to production and to retainage released prior to the execution of the MOU.

COUNT I
BREACH OF CONTRACT; MEMORANDUM OF UNDERSTANDING

6. Modern has paid Smyrna more than \$1,400,000 more than Smyrna was entitled to pursuant to the terms of the Subcontract.

7. Modern is, therefore, entitled to recover said excess payments from Smyrna pursuant to the provisions of the MOU.

WHEREFORE, Defendant/Plaintiff-in-Counterclaim respectfully requests that the damages caused to it by the breach of contract by Plaintiff/Defendant-in-Counterclaim be determined and that it be awarded those damages, plus attorney's fees and costs, and interest thereon, and that the Court award to Modern all such other relief as may be appropriate and just under the circumstances.

COUNT II
BREACH OF CONTRACT; SUBCONTRACT

8. Modern incorporates by reference each of the allegations contained in the foregoing paragraphs.

9. The Subcontract was a valid and binding contract.

10. Modern fully and completely performed its obligations under the Subcontract and has satisfied all conditions necessary for Modern to recover under the Subcontract.

11. Smyrna breached the Subcontract by, inter alia: failing and refusing to properly and in timely fashion perform the Work; and failing to maintain and provide to Modern required safety records.

12. Smyrna has willfully failed and refused to remedy its breaches of the Subcontract, despite demands by Modern that it do so.

13. Modern has been foreseeably and proximately damaged by Smyrna's breaches of the Subcontract.

WHEREFORE, Defendant/Plaintiff-in-Counterclaim respectfully requests that the damages caused to it by the breaches of contract by Plaintiff/Defendant-in-Counterclaim be determined and that it be awarded those damages, plus attorney's fees and costs, and interest thereon, and that the Court award to Modern all such other relief as may be appropriate and just under the circumstances.

COUNT III
BREACH OF IMPLIED COVENANT OF
GOOD FAITH AND FAIR DEALING

14. Modern incorporates by reference each of the allegations contained in the foregoing paragraphs.

15. The Subcontract requires Smyrna to perform certain obligations, which carry with them an implied covenant of good faith and fair dealing.

16. Smyrna has breached the implied covenant of good faith and fair dealing by, among other things:

- (a) failing, without justification or excuse, to perform its obligations under the Subcontract;
- (b) failing to remedy and/or address its breaches of the Subcontract, without justification or excuse, after demand by Modern that it do so;
- (c) filing this action to recover sums to which Smyrna is clearly not entitled under the Subcontract; and
- (d) filing this action in bad faith, and in an effort to coerce Modern to pay Smyrna sums which are not owed by Modern to Smyrna.

17. As a foreseeable and proximate result of Smyrna's breach of the implied covenant of good faith and fair dealing, Modern has sustained damages.

WHEREFORE, Defendant/Plaintiff-in-Counterclaim respectfully requests that the damages caused to it by the breaches of the implied covenant of good faith and fair dealing by Plaintiff/Defendant-in-Counterclaim be determined and that it be awarded those damages, plus

attorney's fees and costs, and interest thereon, and that the Court award to Modern all such other relief as may be appropriate and just under the circumstances.

COUNT IV
UNJUST ENRICHMENT

18. Modern incorporates by reference each of the allegations contained in the foregoing paragraphs.

19. Smyrna has breached the Memorandum of Understanding and Subcontract, as described above.

20. Smyrna has received from Modern payments which far exceed the value of the services Smyrna provided pursuant to the Subcontract.

21. In the absence of a judgment in favor of Modern in an amount which will be made to appear, Smyrna will be unjustly enriched.

WHEREFORE, Defendant/Plaintiff-in-Counterclaim respectfully requests that the amounts owed to it by Plaintiff/Defendant-in-Counterclaim be determined and that it be awarded such amounts, plus attorney's fees and costs, and interest thereon, and that the Court award to Modern all such other relief as may be appropriate and just under the circumstances.

COUNT V
ABUSE OF PROCESS

22. Modern incorporates by reference each of the allegations contained in the foregoing paragraphs.

23. By filing baseless claims against Modern, Smyrna unlawfully and maliciously has sought to unfairly coerce Modern to pay to Smyrna money which is not owed to Smyrna under the Subcontract, and to coerce Modern to accept less than the sums which are owed to Modern by Smyrna pursuant to the Subcontract and the Memorandum of Understanding.

24. As a foreseeable and proximate result of Smyrna's actions, Modern has been damaged.

WHEREFORE, Defendant/Plaintiff-in-Counterclaim respectfully requests that the damages caused to it by Plaintiff/Defendant-in-Counterclaim's abuse of process be determined, and that it be awarded those damages, plus attorney's fees and costs, and interest thereon, and that the Court award to Modern all such other relief as may be appropriate and just under the circumstances.

COUNT VI
VIOLATION OF MASS. GEN. LAWS CH. 93A

25. Modern incorporates by reference each of the allegations contained in the foregoing paragraphs.

26. At all relevant times, Modern has been engaged in the conduct of trade or commerce in the Commonwealth of Massachusetts within the meaning of Mass. Gen. Laws ch. 93A.

27. On information and belief, at all relevant times, Smyrna has been engaged in the conduct of trade or commerce in the Commonwealth of Massachusetts within the meaning of Mass. Gen. Laws ch. 93A.

28. Through the above-described actions, Smyrna, has engaged willfully and knowingly in unfair and deceptive acts and practices in violation of Mass. Gen. Laws ch. 93A, § 11.

29. The unfair and deceptive acts of Smyrna took place wholly and substantially within the Commonwealth of Massachusetts.

30. Modern has suffered a foreseeable loss of money or property and other damages as a result of the unfair and deceptive acts and practices of Smyrna.

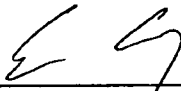
WHEREFORE, Defendant/Plaintiff-in-Counterclaim respectfully requests that the damages caused to it by Plaintiff/Defendant-in-Counterclaim's unfair and deceptive acts and practices be determined, and that it be awarded multiple damages, plus attorney's fees and costs, and interest

thereon, and that the Court award to Modern all such other relief as may be appropriate and just under the circumstances.

Respectfully submitted,

**MODERN CONTINENTAL CONSTRUCTION
COMPANY, INC.**

By and through its attorneys,

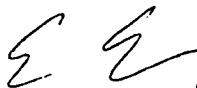


Eric F. Eisenberg, Esq. (BBO No. 544682)
Anatoly M. Darov, Esq. (BBO No. 648116)
Hinckley, Allen & Snyder LLP
28 State Street
Boston, MA 02109
(617) 345-9000

CERTIFICATE OF SERVICE

I, Eric F. Eisenberg, hereby certify that on this 25th day of June, 2001, I served a copy of the foregoing document by mailing said copy postage prepaid to all counsel of record as follows:

Thomas A. Dougherty, Esq.
Law Offices of Thomas A. Dougherty, Esq.
142 Main Street
Suite 402
Brockton, MA 02301





600 Memorial Drive, Cambridge, Massachusetts 02139

Telephone: (617) 864-6300 Fax: (617) 864-8766

April 4, 2003

**VIA FACSIMILE AND
CERTIFIED MAIL 70020460000103188457**

Ms. Lina Swan
Massachusetts Highway Department
Ten Park Plaza
Boston, Massachusetts 02116

Re: **Sworn Reply to Demand for Direct Payment**
Subcontractor: Smyrna Rebar, Inc.
Project: Central Artery/Tunnel Project, I-90 Fort Point Channel Crossing, C09B1

Dear Ms. Swan:

Please consider this letter as Modern Continental Construction Co.'s ("Modern") formal response to the March 27, 2003 demand for direct payment from Smyrna Rebar, Inc. ("Smyrna") received by us on March 28, 2003. I am the Project Manager for Modern on the I-90 Fort Point Channel Crossing (C09B1) portion of the Central Artery/Tunnel project in Boston, Massachusetts (the "Project") and I am familiar with the status of Smyrna's subcontract.

Simply stated, Smyrna is not entitled to direct payment under M.G.L. c. 30 § 39F (the "Statute"). Smyrna's demand for direct payment is—on its face—without merit and does not even meet the minimum requirements of M.G.L. c. 30 § 39F. Accordingly, Smyrna's demand for direct payment must be denied in its entirety.

By way of background, Smyrna was a rebar subcontractor to Modern on the Project. Almost from the beginning of Smyrna's performance, Smyrna could not meet its financial obligations to its workers and suppliers and performed the subcontract work in a defective and untimely manner. As a result, Modern terminated Smyrna's subcontract for default in April of 1999. At the time Smyrna was terminated, Smyrna had been advanced over \$1.4 million by Modern to cover its financial obligations and Smyrna refused and failed to provide Modern with any assurances that it would be able to meet its future financial obligations on the Project. At the time Smyrna was terminated, it had only completed less than one-third of the work required under its subcontract.¹ Now, almost four years after it last performed work on the Project,

¹ In 2000, Smyrna filed a lawsuit (Civil Action No. NOCV2000-01192) against Modern and its sureties seeking \$5,484,459.00 in damages for, inter alia, breach of contract and wrongful termination. Modern has vigorously

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Smyrna seeks direct payment for unapproved extra work claims—for which it has never submitted an approved requisition or invoice—for which it is not entitled to any payments.

The following is Modern's detailed breakdown of Smyrna's subcontract account² that demonstrates that Smyrna is not owed any money by Modern:

(a) Original Subcontract Value:	\$18,019,258.50
Approved Value of Subcontract Work Performed:	
--Installation of rebar: 13,360.01 tons @ \$360.00 per ton	\$4,906,803.60
--Installation of couplers: 970 @ \$12.50 each	\$12,125.00
--Installation of female dowel bar substitutes: 3,030 @ \$3.00 each	\$9,090.00
--Installation of male dowel bar substitutes: 133 @ \$5.00 each	\$665.00
--Installation of wire mesh: 54,880 sf @ \$0.13 per sf	\$7,134.40
--Insurance cost: \$3,437.76 lump sum	\$3,437.76
Total Value of Subcontract Work Performed:	\$4,939,255.76
(b) Retainage Withheld: ³	\$0.00
(c) Amount Modern Advanced to Smyrna to Help Cover Financial Obligations Prior to Monies Being Owed to Smyrna:	\$1,443,231.91
(d) Total Amount Paid to Date (Including monies advanced to Smyrna in Line C, above):	\$6,382,487.67
(e) Approved Claims for Extra Work (Unpaid):	
--Construction of Mock-up	\$361.00
--Epoxy Touchup of Rebar	\$15,329.60
--Electrical Conduit Interference	\$4,122.00
--Shrink Wrapping	\$8,223.00
--Boston Fire Department Openings	\$22,145.00
--Electrical Pull Boxes	\$40,120.00
Total Approved Extra Work (Unpaid):	\$90,300.60
(f) TOTAL AMOUNT CURRENTLY DUE:	(\$1,352,931.31)

Smyrna's demand for direct payment is also improper on its face for several reasons. First, Smyrna has failed to abide by the requirements of the Statute, which expressly requires that "[t]he demand shall be by a sworn statement..." See M.G.L. c. 30 § 39F(1)(d). Smyrna's direct payment demand, however, is not certified under the pains and penalties of perjury, and, accordingly, does not constitute a sworn statement. Rather, Smyrna's direct payment demand is simply signed by Smyrna's president, Mr. Johnny Brown, and notarized by a notary public.

defended itself against Smyrna's claims and has asserted counterclaims against Smyrna seeking to recover the monies advanced to Smyrna for which Smyrna continues to be liable.

² See also, Smyrna Requisition No. 82, attached hereto as Exhibit A (Smyrna's last requisition on the Project).

³ In February of 1998, Modern released—at Smyrna's request—\$137,714.74 of retainage held in connection with Smyrna's work.

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Smyrna's demand makes no representation that the signor—Mr. Johnny Brown—attests to the veracity of the statements contained therein. Smyrna's direct payment demand must, therefore, be denied because it is not sworn as required by the Statute.

Second, Smyrna's demand for direct payment must also be denied because it does not contain a detailed breakdown of the balance claimed due under the subcontract as required by M.G.L. c. 30 § 39F(1)(d). Smyrna's demand states that the "fair value of the whole agreed to be done or furnished by claimant prior to being terminated" is \$6,382,487.67 and the "value of labor and materials furnished to date due to directive changes and change orders, contract modifications and change orders and agreements to pay" is \$8,107,633.60. Smyrna then improperly concludes that "there is due, owing and unpaid the sum of One Million Seven Hundred Twenty Five Thousand One Hundred Forty Six Dollars and zero cents." Smyrna's lump sum figures and vague, general statements do not constitute a detailed breakdown as required by the Statute, and Modern categorically disputes same. Specifically, Modern disputes Smyrna's claims of the "fair value of the whole" and the "value of labor, and materials furnished to date."

Smyrna has attached to its demand for direct payment thirty (30) pages of documents that it asserts to be a detailed breakdown of the "balance due and owing pursuant to M.G.L. c. 30 § 39F." However, the referenced documents are nothing more than Smyrna's claims for extra work that have (1) been rejected by Modern or the Owner, or (2) have not been paid because the amounts owed to Modern by Smyrna far exceed any amounts due Smyrna for claimed extra work. In light of Smyrna's failure to include a detailed breakdown of its subcontract balance, Smyrna's demand for direct payment must be denied.

Third, Smyrna's demand for direct payment must be denied because it does not contain a statement with regard to the status of completion of the subcontract work as required by M.G.L. c. 30, § 39F(1)(d), and—in fact—Smyrna is not entitled to direct payment because it did not substantially complete its subcontract work before it was terminated. Smyrna asserts in its demand for direct payment that Smyrna has "performed labor and furnished materials for a work of improvement described as follows: Construction of four of six Tunnel Sections 'ITT's', Boston, MA." Smyrna's subcontract requirements were not limited to construction of only four of six tunnel sections, but, rather, Smyrna's subcontract required Smyrna to install rebar for all six tunnel sections as well as numerous other steel-reinforced concrete structures to be built on the Project. Smyrna does not assert that it substantially completed its subcontract work, which is a condition precedent to an entitlement to direct payment under the Statute. Therefore, Smyrna is not entitled to demand direct payment and, therefore, its direct payment demand must be denied.

Fourth, Smyrna's demand for direct payment must also be denied because the demand requests amounts for unapproved extras and claims that do not fall under the scope of the Statute and Smyrna, even if its demand was otherwise appropriate, which it is not, is not permitted to

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seek direct payment for such claims. When reviewing a demand for direct payment—like Smyrna's instant demand—that attempts to incorporate unapproved subcontractor change orders, the Suffolk Superior Court of Massachusetts said the following:

[S]ubstantially all of the work which forms the basis of [the subcontractor's] direct payment demands is work for which the Department has neither paid [the general contractor] nor approved for payment to [the general contractor]. This work is related to extra costs and change orders allegedly incurred by [the subcontractor] during the performance of its subcontract. Since the amounts due for this "extra work" have not yet been approved by the Department, they do not qualify or fall within the scope of the direct payment provision of G.L. c. 30, § 39F.

See Cardi Corp. v. Sutton Corp. et al., Page 6, Suffolk Superior Court, Civil Action No. 95-6027-D (10/3/96), Lauriat, J. (Copy attached hereto has Exhibit B). In accordance with the Cardi Corp. decision, unapproved change orders and alleged claims are not yet "due" and thus do not fall within the scope of M.G.L. c. 30 § 39F until they are approved by the awarding authority or general contractor. Section 39F is not a general funds lien statute. It is a statute designed to ensure that funds paid by an awarding authority to a general contractor on a subcontractor's behalf are passed down to the subcontractor. Therefore, where, as here, a subcontractor seeks direct payment for unapproved or rejected change order requests or claims, its request must be denied.

Fifth, Smyrna's direct payment demand must be denied because, as summarized in Modern's detailed accounting, Modern advanced Smyrna \$1,443,231.91 (between February 1998 and April 1999) to assist Smyrna to cover its payroll and other financial obligations on the Project. Smyrna is liable to Modern for the advanced sums pursuant to an agreement executed by Modern and Smyrna, a copy of which is attached hereto as Exhibit C. Smyrna has failed to repay these monies to Modern, and, accordingly, any monies due Smyrna are offset by this sum. To the extent any of Smyrna's claims for extra work are determined to be valid, such monies would not be paid to Smyrna because the monies owed by Smyrna to Modern far exceed the total of all sums due Smyrna for extra work, and Smyrna would, at most, be entitled to a credit for the amount determined to be due.

Sixth, Smyrna's direct payment demand must be denied because Smyrna has never previously submitted a requisition or invoice, as required under its subcontract with Modern, seeking payment for the monies it now, almost four years later, alleges are due by Modern to Smyrna. Smyrna's last requisition on the Project, attached hereto as Exhibit A, was in the sum of \$4,830.40. Smyrna now seeks \$1,725,146.00 for claimed extra work for which it never previously sought payment through the procedure set forth in the subcontract. Accordingly, Smyrna's direct payment demand must be denied because the monies sought therein have never been requisitioned by Smyrna, and, therefore, are not due under the subcontract.

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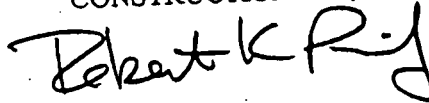
Ms. Lina Swan
April 4, 2003
Page 5 of 6

For the reasons stated above, Smyrna's demand for direct payment must be denied without encumbering any contract funds due and payable to Modern. Please feel free to contact me should you require any additional information regarding this matter.

I certify, under the pains and penalties of perjury, that the above information is true and correct to the best of my knowledge and belief.

Very truly yours,

MODERN CONTINENTAL
CONSTRUCTION CO., INC.



Robert K. Pine, Jr., P.E.
Project Manager

AMD/kmp
Enclosure

cc: Smyrna Rebar, Inc.
VIA FACSIMILE AND
CERTIFIED MAIL 70020460000103188464
c/o Thomas A. Dougherty, Esq.
142 Main Street, Suite 402, Brockton, MA 02401

Mr. John Stavola, P.E.,
B/PB Authorized Representative
VIA FIRST CLASS MAIL

Ms. Karen Santaniello
VIA FIRST CLASS MAIL

Eric F. Eisenberg, Esq.

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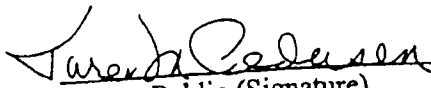
Ms. Lina Swan
April 4, 2003
Page 6 of 6

COMMONWEALTH OF MASSACHUSETTS

April 4, 2003

Middlesex, ss.

Then personally appeared the above-named, Robert K. Pine, Jr., to me known and acknowledged the foregoing Sworn Reply to Smyrna's Demand for Direct Payment to be his true free act and deed.


Notary Public (Signature)

My Commission expires: 9-18-03

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**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 July 15, 2008, I caused a copy of the *Motion of Debtor and Debtor-in-Possession Pursuant to Fed. R. Civ. P. 59(e) and Fed. R. Bankr. P. 9023 to Clarify and Amend Order on the Motion for Relief From the Automatic Stay* 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.

/s/ Christian J. Urbano
Christian J. Urbano (BBO #644471)
HANIFY & KING, Professional Corporation
One Beacon Street, 21st Floor
Boston, MA 02108
Tel: (617) 423-0400
Fax: (617) 556-8985
Email: cju@hanify.com

Dated: July 15, 2008
502320-v1

(Proposed counsel to the Debtor)

Modern Continental Construction Co., Inc.
Case Number: 08-14558 (WCH)
Service List
Doc. #: 499625-v1

VIA ECF

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