

KL-1954/bl
February 27, 2008

HARRINGTON and LOMBARDI, LLP

508 Hamburg Turnpike, Suite 207

Wayne, NJ 07470

(973) 790-8900

Attorneys for Defendants, Maeco Construction,
Maeco Construction and Property Management
Co., Inc., and Anthony Pacelli / Plaintiff, Maeco
Construction and Property Management Co., Inc.

Ryan Fitzpatrick,

Plaintiff,

vs.

Maeco Construction; Maeco Construction
and Property Management Co., Inc.,
Anthony Pacelli; Rob Roth Architect, Inc.,
Brian K. Clayton, Ship Bottom Condo
Development Group; Ship Bottom, LLC,
Island Earth Company; Michael Mercadante,
Richard Rothstein; Woodworks, John Does
1-10; and John Doe Entities 1-10,

Defendants.

:SUPERIOR COURT OF NEW JERSEY

:LAW DIVISION: OCEAN COUNTY

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:DOCKET NO. OCN-L-411-05

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CIVIL ACTION

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Maeco Construction and Property
Management Co., Inc.,

Plaintiff,

vs.

Mt. Hawley Insurance Company
and Ryan Fitzpatrick,

Defendants.

:SUPERIOR COURT OF NEW JERSEY

:LAW DIVISION: OCEAN COUNTY

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:DOCKET NO. OCN-L-1669-06

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CIVIL ACTION

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**NOTICE OF MOTION
FOR SUMMARY JUDGMENT**

TO: Richard C. Sciria, Esq.
Keefe Bartels
830 Broad Street
Shrewsbury, NJ 07702
Attorneys for Plaintiff – Ryan Fitzpatrick

Eric Landman, Esq.
Sherman & Viscomi
399 Campus Drive
P.O. Box 6782
Somerset, NJ 08875
Attorney for Defendants - Island Earth and Michael Mercadante

Nancy L. Siegel, Esq.
White & Williams, LLP
457 Haddonfield Road, Suite 400
Cherry Hill, NJ 08002
Attorney for Defendant – Ship Bottom Condo

Michael R. Litke, Esq.
Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP
2070 Springdale Road, Suite 400
Cherry Hill, NJ 08003
Attorney for Defendant - Rob Roth Architect, Inc.

Kenneth M. Portner, Esq.
Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP
2000 Market Street, 13th Floor
Philadelphia, PA 19103
Attorneys for Defendant - Mt. Hawley Insurance Company

Matthew C. Waldt, Esq.
Sander & Carson, Esqs.
750 Route 73 South, Suite 205
Marlton, NJ 08050
Attorneys for Defendant – Ohio Casualty Insurance Company

S I RS/MADAM:

PLEASE TAKE NOTICE that the undersigned, attorney for defendants, Maeco Construction, Maeco Construction and Property Management Co., Inc., and Anthony Pacelli / Plaintiff Maeco Construction and Property Management Co., Inc., will apply to

the above-named Superior Court of New Jersey, Law Division, Ocean County Courthouse, Toms River, New Jersey on Friday, March 28, 2008, at 9:00 a.m. in the forenoon, or as soon thereafter as counsel may be heard, for an Order granting summary judgment as to the defendants, Maeco Construction, Maeco Construction and Property Management Co., Inc., and Anthony Pacelli / Plaintiff Maeco Construction and Property Management Co., Inc.;

PLEASE TAKE FURTHER NOTICE that defendants will rely upon the Certification of Matthew V. Markosian and Brief attached hereto.

A proposed form of Order is annexed hereto. The undersigned does not request oral argument, unless opposition is filed.

There is a:	Pre-trial conference:	None
	Calendar call:	None
	Trial date:	None
	Arbitration date:	March 29, 2007

HARRINGTON and LOMBARDI, LLP
Attorneys for Defendants, Maeco Construction,
Maeco Construction and Property
Management Co., Inc., and Anthony Pacelli /
Plaintiff Maeco Construction and Property
Management Co., Inc.

By: _____
MATTHEW V. MARKOSIAN

DATED: February 27, 2008

I HEREBY CERTIFY that the within Notice of Motion has been filed with the Clerk of the Superior Court, Ocean County Courthouse, 118 Washington Street, P.O. Box 2191, Toms River, New Jersey, 08754, together with an original and two copies of a proposed Order and that copies have been forwarded to all counsel of record within the time prescribed by law, at the following address:

Richard C. Sciria, Esq.

Keefe Bartels
830 Broad Street
Shrewsbury, NJ 07702
Attorneys for Plaintiff – Ryan Fitzpatrick

Eric Landman, Esq.

Sherman & Viscomi
399 Campus Drive
P.O. Box 6782
Somerset, NJ 08875
Attorney for Defendants - Island Earth and Michael Mercadante

Nancy L. Siegel, Esq.

White & Williams, LLP
457 Haddonfield Road, Suite 400
Cherry Hill, NJ 08002
Attorney for Defendant - ShipBottom Condo

Michael R. Litke, Esq.

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Attorney for Defendant - Rob Roth Architect, Inc.

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Philadelphia, PA 19103
Attorneys for Defendant, Mt. Hawley Insurance Company

Matthew C. Waldt, Esq.

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750 Route 73 South, Suite 205
Marlton, NJ 08050
Attorneys for Defendant – Ohio Casualty Insurance Company

HARRINGTON and LOMBARDI, LLP

Attorneys for Defendants, Maeco Construction,
Maeco Construction and Property
Management Co., Inc., and Anthony Pacelli /
Plaintiff Maeco Construction and Property
Management Co., Inc.

By: _____
MATTHEW V. MARKOSIAN

DATED: February 27, 2008

PROOF OF MAILING

I HEREBY CERTIFY that a copy of the within Motion was served within the time prescribed by **R. 4:6**.

I, the undersigned, mailed the Notice of Motion for Summary Judgment to all counsel of record the their respective addresses as follows:

Richard C. Sciria, Esq.
Keefe Bartels
830 Broad Street
Shrewsbury, NJ 07702
Attorneys for Plaintiff – Ryan Fitzpatrick

Eric Landman, Esq.
Sherman & Viscomi
399 Campus Drive
P.O. Box 6782
Somerset, NJ 08875
Attorney for Defendants - Island Earth and Michael Mercadante

Nancy L. Siegel, Esq.
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Cherry Hill, NJ 08002
Attorney for Defendant - ShipBottom Condo

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Attorney for Defendant - Rob Roth Architect, Inc.

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Attorneys for Defendant, Mt. Hawley Insurance Company

Matthew C. Waldt, Esq.

Sander & Carson, Esqs.
750 Route 73 South, Suite 205
Marlton, NJ 08050
Attorneys for Defendant – Ohio Casualty Insurance Company

HARRINGTON and LOMBARDI, LLP

Attorneys for Defendants, Maeco Construction,
Maeco Construction and Property
Management Co., Inc., and Anthony Pacelli /
Plaintiff Maeco Construction and Property
Management Co., Inc.

By: _____
MATTHEW V. MARKOSIAN

DATED: February 27, 2008

KL-1954/bl
February 27, 2008

HARRINGTON and LOMBARDI, LLP
508 Hamburg Turnpike, Suite 207
Wayne, NJ 07470
(973) 790-8900
Attorneys for Defendants, Maeco Construction,
Maeco Construction and Property Management
Co., Inc., and Anthony Pacelli / Plaintiff, Maeco
Construction and Property Management Co., Inc.

Ryan Fitzpatrick,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: OCEAN COUNTY
	:	
Plaintiff,	:	DOCKET NO. OCN-L-411-05
	:	
vs.	:	<u>CIVIL ACTION</u>
	:	
Maeco Construction; Maeco Construction	:	
and Property Management Co., Inc.,	:	
Anthony Pacelli; Rob Roth Architect, Inc.,	:	
Brian K. Clayton, Ship Bottom Condo	:	
Development Group; Ship Bottom, LLC,	:	
Island Earth Company; Michael Mercadante,	:	
Richard Rothstein; Woodworks, John Does	:	
1-10; and John Doe Entities 1-10,	:	
	:	
Defendants.	:	

Maeco Construction and Property	:	SUPERIOR COURT OF NEW JERSEY
Management Co., Inc.,	:	LAW DIVISION: OCEAN COUNTY
	:	
Plaintiff,	:	DOCKET NO. OCN-L-1669-06
	:	
vs.	:	<u>CIVIL ACTION</u>
	:	
Mt. Hawley Insurance Company	:	
and Ryan Fitzpatrick,	:	
	:	
Defendants.	:	

**BRIEF IN SUPPORT OF DEFENDANTS, MAECO CONSTRUCTION, MAECO CONSTRUCTION AND
PROPERTY MANAGEMENT CO., INC., and ANTHONY PACELLI / PLAINTIFF, MAECO
CONSTRUCTION AND PROPERTY MANAGEMENT CO., INC.'S, NOTICE OF MOTION FOR
SUMMARY JUDGMENT**

On the Brief:

Matthew V. Markosian, Esq.

KL-1954/bl
February 27, 2008

HARRINGTON and LOMBARDI, LLP

508 Hamburg Turnpike, Suite 207

Wayne, NJ 07470

(973) 790-8900

Attorneys for Defendants, Maeco Construction,
Maeco Construction and Property Management
Co., Inc., and Anthony Pacelli / Plaintiff, Maeco
Construction and Property Management Co., Inc.

Ryan Fitzpatrick,

Plaintiff,

vs.

Maeco Construction; Maeco Construction
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Anthony Pacelli; Rob Roth Architect, Inc.,
Brian K. Clayton, Ship Bottom Condo
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Island Earth Company; Michael Mercadante,
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:SUPERIOR COURT OF NEW JERSEY

:LAW DIVISION: OCEAN COUNTY

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Maeco Construction and Property
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Mt. Hawley Insurance Company
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Defendants.

:SUPERIOR COURT OF NEW JERSEY

:LAW DIVISION: OCEAN COUNTY

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:DOCKET NO. OCN-L-1669-06

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CIVIL ACTION

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**ORDER GRANTING
SUMMARY JUDGMENT**

THIS MATTER having been opened to the Court by **HARRINGTON and LOMBARDI, LLP**, attorneys for defendants, Maeco Construction, Maeco Construction and Property Management Co., Inc., and Anthony Pacelli / Plaintiff Maeco Construction and Property Management Co., Inc., and the Court having reviewed the moving papers and heard oral argument and for other good and sufficient reason appearing;

IT IS on this _____ day of March 2008;

ORDERED that summary judgment is hereby granted on behalf defendants, Maeco Construction, Maeco Construction and Property Management Co., Inc., and Anthony Pacelli / Plaintiff Maeco Construction and Property Management Co., Inc.; and, it is further

ORDERED that a conformed copy of the within Order be served on all counsel within _____ days of its entry hereof.

J.S.C.

MOTION OPPOSED _____

MOTION UNOPPOSED _____

STATEMENT OF UNDISPUTED FACTS

1. This matter arises out of an underlying lawsuit for personal injuries allegedly sustained by Ryan Fitzpatrick while working on a construction site on Central Avenue in Ship Bottom, otherwise known as Castle Harbor Condominiums on August 12, 2004. (See plaintiff's original Complaint attached hereto as **Exhibit A**).
2. Ship Bottom Condo Group was the owner of the project at Castle Harbor Condominiums, and hired Maeco Construction as that general contractor at this location. (Deposition testimony of Anthony Pacelli at Page 20, Line 9-17, attached hereto as **Exhibit B**).
3. Maeco subcontracted with Island Earth to perform various on site function subject premises. (See contract attached hereto as **Exhibit C**).
4. On August 14, 2004, plaintiff sustained injuries to his left hand while operating a table saw at the Castle Harbor Condominiums construction site. (See **Exhibit A**).
5. As a result of the above-mentioned incident, plaintiff, Fitzpatrick, filed a Complaint on January 31, 2005, in the Superior Court of New Jersey, Law Division, Ocean County, under Docket No. OCN-L-411-05, against Maeco Construction and Property Management Co. and a number of other defendants. (See **Exhibit A**).
6. On or about March 15, 2004, defendant, Mt. Hawley Insurance Company issued and delivered a policy of insurance for the policy period of March 15, 2004,

through March 15, 2005, to the plaintiff, Maeco Construction, under policy number MCF0001368. (Declaration page attached hereto as **Exhibit D**).

7. Mt. Hawley retained Steven L. Hopkins, an attorney with Braff, Harris, and Sukoneck, to defend Maeco Construction in the underlying lawsuit brought by Mr. Fitzpatrick. (See correspondence dated June 8, 2005, attached hereto as **Exhibit E**).
8. On June 8, 2005, defendant, Mt. Hawley, sent plaintiff, Maeco, a reservation of rights letter outlining Mt. Hawley's coverage position, however, this letter was deficient in that it failed to solicit a non-waiver agreement from plaintiff, Maeco, informing plaintiff that the defense and indemnity offered by Mt. Hawley under a reservation of rights could be rejected or accepted. (See **Exhibit E**).
9. On June 20, 2005, Brian Harris of Braff, Harris, and Sukoneck filed an Answer on defendant, Maeco's, behalf in relation to the underlying lawsuit filed by Mr. Fitzpatrick. (See Answer attached hereto as **Exhibit F**).
10. On September 28, 2005, defendant, Mt. Hawley, sent plaintiff, Maeco, a letter disclaiming coverage for the injuries sustained by Mr. Fitzpatrick, which is the subject the underlying lawsuit, for a failure to comply with the conditions set forth in the applicable insurance contract. (See letter attached hereto as **Exhibit G**).
11. The above-mentioned letter disclaiming coverage specifically cites five conditions of coverage allegedly not met by plaintiff, Maeco: "Insured will obtain certificates of insurance with limits of liability equal to or greater than those provided by this policy from all subcontractors prior to the commencement of any work performed

for the insured; Insured will confirm that the subcontractor's insurance policies are valid and have not been cancelled prior to the commencement of any work by the subcontractors performed by the insured; Insured will obtain hold harmless agreements from subcontractors indemnifying against all losses from the work performed for the insured by any and all contractors; Insured will be named as an additional insured on all subcontractors general liability policies.”

(See **Exhibit G**).

12. On October 5, 2005, attorney, Stephen L. Hopkins, sent plaintiff, Maeco, a letter indicating that Mt. Hawley was no longer retained to defend Maeco in the underlying suit, and on December 9, 2005, the Honorable Judge Buczynski signed an Order relieving the law firm of Braff, Harris, and Sukoneck of counsel for Maeco Construction. (See letter attached hereto as **Exhibit H**).
13. On or about May 18, 2006, Maeco Construction and Property Management Company filed an Amended Complaint against Mt. Hawley Insurance Company and Ryan Fitzpatrick petitioning the Court seeking a declaratory relief and ordering defendant, Mt. Hawley, to provide coverage and to defend and indemnify Maeco Construction with regard to claims advanced by Ryan Fitzpatrick arising out of the underlying lawsuit. (See Complaint attached hereto as **Exhibit I**).
14. Plaintiff, Maeco Construction, now seeks summary judgment in this matter as the purported reservation of rights letter issued to Maeco by Mt. Hawley failed to solicit a non-waiver agreement from plaintiff such that the reservation of rights letter is void and summary judgment is warranted as a matter of law, whereby Mt.

Hawley is estopped from denying coverage, and further declaring that Mt. Hawley owes insurance coverage to plaintiff, Maeco Construction, for claims made in the underlying lawsuit brought by Mr. Fitzpatrick.

LEGAL ARGUMENT

POINT I

THE RESERVATION OF RIGHTS LETTER ISSUED BY MT. HAWLEY INSURANCE COMPANY TO MAECO CONSTRUCTION FAILED TO SOLICIT A NON-WAIVER AGREEMENT FROM PLAINTIFF AND THEREFORE THE RESERVATION OF RIGHTS LETTER IS VOID SUCH THAT MT. HAWLEY OWES PLAINTIFF INSURANCE COVERAGE FOR THE UNDERLYING FITZPATRICK LAWSUIT

Our Supreme Court held in Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114, 1263 (1962) that the “defense of an action against an insured is incompatible with the denial of liability unless the carrier reserved the issue of it’s liability by taking appropriate measures.” An insurance carrier may reserve the issue of it’s liability by notifying the insured that it will undertake the defense of the insured under a “non-waiver agreement”, otherwise known as a reservation of rights letter. Id. at 357. This agreement may be “inferred from the insured’s failure to reject the carrier’s offer to defend with a reservation of rights,” but the letter “must fairly inform the insured that the offer may be accepted or rejected.” Id. at 126-127.

The Eggleston Court’s holding recognizes that “carriers contract for control” and an inherent unfairness results where the control of an insured’s defense is in the hands of the insurance carrier without his or her consent, only to leave the judgment for the insured’s payment. Id. at 127. It is under the above principles that we turn to the facts in the instant matter.

In the case at bar, defendant, Mt. Hawley, undertook the defense of plaintiff, Maeco, for the personal injuries allegedly sustained by Ryan Fitzpatrick while working on a construction site on Central Avenue in Ship Bottom, otherwise known as Castle

Harbor Condominiums on August 14, 2004. The underlying law suit was filed on January 31, 2005, and defendant, Mt. Hawley, assigned defense counsel and controlled the defense of Maeco Construction until September 28, 2005, when Mt. Hawley sent plaintiff a letter disclaiming coverage for the underlying suit under the terms of the applicable policy.

While defendant, Mt. Hawley, did send plaintiff a reservation of rights letter on June 8, 2005, same was deficient in that it failed to solicit a non-waiver agreement from plaintiff Maeco, informing Maeco that the defense and indemnity offered by Mt. Hawley under a reservation of rights could be rejected or accepted, as required under Eggleston and its progeny. (See **Exhibit A**). Therefore, Mt. Hawley is estopped from denying coverage to plaintiff, because Mt. Hawley assumed the defense of Maeco without a valid reservation of rights. **U.S. Casualty Co. v. Home Ins. Co., 79 N.J. Super. 493, 192 A.2d 169 (1963); Sneed v. Concord Ins. Co.**, 237 A.2d 289 (1967).

In the instant matter plaintiff need not show that it suffered prejudice by the insurer's actions in order to bar the insurer for denying liability by waiver or estoppel, because such prejudice is presumed. The Court, in **Sneed v. Concord Insurance Co.**, 98 N.J. Super. 306 (App. Div. 1967), addressed whether or not the insured must show prejudice in fact to bar the insurer from denying liability by waiver or estoppel. The Court unequivocally stated that "the bar would arise on the basis of presumptive prejudice if the company participated in a defense of an action on the claim is clear." **Id. at 316, citing Eggleston, at 129, and O'Dowd v. United States Fidelity & Guaranty Co.**, 117 N.J.L. 444, 541-452 (E&A 1937). It is undisputed that Mt. Hawley participated in the defense of plaintiff in the underlying lawsuit for nine months following the filing of

plaintiff's complaint. Accordingly, prejudice incurred by the plaintiff due to defendant, Mt. Hawley's, inadequate reservation of rights and the subsequent withdraw of the defense of Maeco is presumed, leaving no issue of material fact in the motion at bar. Therefore, summary judgment is appropriate.

POINT II

**SUMMARY JUDGMENT IS APPROPRIATE IN THE INSTANT MATTER,
AS THERE IS NO ISSUE OF MATERIAL FACT SURROUNDING THE
INSUFFICIENCY OF DEFENDANT MT. HAWLEY'S RESERVATION OF
RIGHTS LETTER AND ITS ACCOMPANYING DUTY TO DEFEND AND
INDEMNIFY PLAINTIFF**

New Jersey Court Rule 4:46-2 provides that a Court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions

on file, along with affidavits, if any, show that there is not genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law.” **R. 4:46-2**. In **Brill v. Guardian Life Ins. Co of America, 142 N.J. 520 (1995)**, the Supreme Court of New Jersey held that on a motion for summary judgment, the Court must decide whether the facts are so one-sided that the movant is entitled to summary judgment as a matter of law. When determining whether a disputed fact is “genuine,” the Brill Court held:

When deciding a motion for summary judgment under **Rule 4:46-2** the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. **Id. at 522**.

The first step is for the movant to identify “portions of the pleadings, answers to interrogatories and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact.” **Celotex v. Catrett, 477 U.S. 317, 323 (1986)**. **Rule 4:46-2** states that such a motion should be denied “only if the party opposing the motion comes forward with evidence that creates a “genuine issue as to any material fact alleged” **Brill, 142 N.J. 520, 529 (1995)**.

Further, a party opposing the motion may not rest upon the mere allegations or denials of its pleadings. As stated in **Heljon Management Corp. v. DiLeo, 55 N.J. Super. 306, 312 (1959)** . . .

It is settled that where there is a prima facie right to summary judgment, the party opposing the Motion is required to demonstrate by competent evidential material that a genuine issue of material fact exists. This is for

litigants' protection against groundless claims and frivolous defenses. **Robbins v. Jersey City, 23 N.J. 229 (1957)**. It is not for the party opposing the Motion merely to deny the fact in issue where means are at hand to make possible an affirmative demonstration as to the existence or nonexistence of the fact.

In light of the facts and circumstances enumerated above, it is clear that the reservation of rights letter sent by Mt. Hawley was insufficient and ineffective, as the letter did not solicit a non-waiver agreement from plaintiff, Maeco. Further, no material fact surrounds the issue of whether plaintiff was prejudiced by this ineffective reservation of rights letter and Mt. Hawley's subsequent withdraw of plaintiff's defense and insurance coverage, because such prejudice is assumed where, as here, the insurer participates in the defense of the insured. **Sneed v. Concord Insurance Com., 98 N.J. Super. 306, 316 (App. Div. 1967)**.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court enter an Order granting summary judgment as to the defendants, Maeco Construction, Maeco Construction and Property Management Co., Inc., and Anthony Pacelli / Plaintiff Maeco Construction and Property Management Co., Inc.

Respectfully submitted,

HARRINGTON and LOMBARDI, LLP

Attorneys for Defendants, Maeco Construction, Maeco Construction and Property Management Co., Inc., and Anthony Pacelli / Plaintiff Maeco Construction and Property Management Co., Inc.

By: _____
MATTHEW V. MARKOSIAN

DATED: February 27, 2008

KL-1954/bl
February 27, 2008

HARRINGTON and LOMBARDI, LLP

508 Hamburg Turnpike, Suite 207
Wayne, NJ 07470
(973) 790-8900

Attorneys for Defendants, Maeco Construction,
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CIVIL ACTION

Exhibit C – Contract between Maeco Construction and Island Earth;

Exhibit D – Declaration page;

Exhibit E – Correspondence dated June 8, 2005;

Exhibit F – Defendant, Maeco's, Answer;

Exhibit G – Letter dated September 28, 2005;

Exhibit H – Letter dated October 5, 2005;

Exhibit I – Amended Complaint.

I HEREBY CERTIFY that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

MATTHEW V. MARKOSIAN

DATED: February 27, 2008