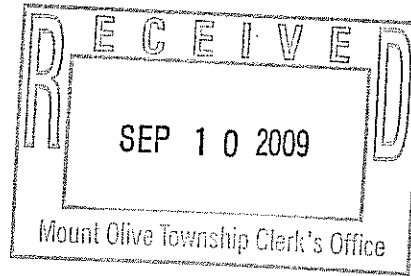


cc: Amin (Christ)  
Fax J. Dorsey

Attorney(s): Michael F. McKenna, Esq.  
Law Firm: Lewis & McKenna  
Address: 82 East Allendale Road  
Saddle River, NJ 07458  
  
Telephone No.: (201) 934-9800  
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E-mail: mmckenna@lewis-mckenna.com  
Attorney(s) for Plaintiff(s): Tilcon New York, Inc. & Kelly Excavating & Paving, Inc. D/B/A As Owl Contracting



**Tilcon New York, Inc. & Kelly Excavating & Paving, Inc.  
D/B/A As Owl Contracting**

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MORRIS COUNTY**

Plaintiff(s)

vs.

DOCKET NO. **MOR-L-569-09**

Morris County Cooperative Pricing Council; Township of Parsippany-Troy Hills; Lopatcong Township; Randolph Township; Readington Township; Mendham Township; Morris Township; Denville Township; Roxbury Township; Town of Morristown; Hackensack BOE; Mt. Olive Township; Warren County; Greenwich Township; Pohatcong Township Lebanon Township

**CIVIL ACTION  
Summons**

Defendant(s)

From the State of New Jersey

To the Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 85 days from the date you received this summons, not counting the date you received it. (The address of each deputy clerk of the Superior Court is provided.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey, and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of \$\_\_\_\_\_ and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live. A list of these offices is provided. If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A list of these numbers is also provided.

Dated: \_\_\_\_\_

*Donald F. Phelan* Clerk  
\_\_\_\_\_  
Donald Phelan  
Superior Court Clerk

Name of Defendant To Be Served: **Mt. Olive Township**

Address of Defendant To Be Served: **204 Flanders-Drakestown Road, Budd Lake, NJ 07828**

## Directory of Superior Court Deputy Clerk Offices

**ATLANTIC COUNTY:**

Deputy Clerk of the Superior Court  
Civil Division, Direct Filing  
1201 Bacharach Blvd., First Fl.  
Atlantic City, NJ 08401  
**LAWYER REFERRAL**  
(609) 345-3444  
**LEGAL SERVICES**  
(609) 348-4200

**BERGEN COUNTY:**

Deputy Clerk of the Superior Court  
Civil Division, Room 115  
Justice Center, 10 Main Street  
Hackensack, NJ 07601-0769  
**LAWYER REFERRAL**  
(201) 488-0044  
**LEGAL SERVICES**  
(201) 487-2166

**BURLINGTON COUNTY:**

Deputy Clerk of the Superior Court  
Central Processing Office  
Attn: Judicial Intake  
First Floor, Court Facility,  
49 Rancocas Road  
Mount Holly, NJ 08060  
**LAWYER REFERRAL**  
(609) 261-4862  
**LEGAL SERVICES**  
(609) 496-4570

**CAMDEN COUNTY:**

Deputy Clerk of the Superior Court  
Civil Processing Office  
First Floor, Hall of Justice  
101 South Fifth Street  
Camden, NJ 08108  
**LAWYER REFERRAL**  
(856) 964-4620  
**LEGAL SERVICES**  
(856) 964-2010

**CAPE MAY COUNTY:**

Deputy Clerk of the Superior Court  
9 North Main Street, Box DN-209  
Cape May Court House, NJ 08210  
**LAWYER REFERRAL**  
(609) 468-0318  
**LEGAL SERVICES**  
(609) 465-3001

**CUMBERLAND COUNTY:**

Deputy Clerk of the Superior Court  
Civil Case Management Office  
Broad & Fayette Streets, P.O. Box 10  
Bridgeton, NJ 08302  
**LAWYER REFERRAL**  
(856) 692-6207  
**LEGAL SERVICES**  
(856) 451-0008

**ESSEX COUNTY:**

Deputy Clerk of the Superior Court  
Civil Customer Service  
Hall of Records, Room 201  
465 Dr. Martin Luther King Jr. Blvd.  
Newark, NJ 07102  
**LAWYER REFERRAL**  
(973) 622-6204  
**LEGAL SERVICES**  
(973) 624-4500

**GLOUCESTER COUNTY:**

Deputy Clerk of the Superior Court  
Civil Case Management Office  
Attn: Intake  
First Floor, Court House  
1 North Broad Street, P.O. Box 750  
Woodbury, NJ 08096  
**LAWYER REFERRAL**  
(856) 848-4589  
**LEGAL SERVICES**  
(856) 848-5360

**HUDSON COUNTY:**

Deputy Clerk of the Superior Court  
Superior Court, Civil Records Dept.  
Brennan Courthouse, First Floor  
588 Newark Avenue  
Jersey City, NJ 07306  
**LAWYER REFERRAL**  
(201) 798-2727  
**LEGAL SERVICES**  
(201) 792-6368

**HUNTERDON COUNTY:**

Deputy Clerk of the Superior Court  
Civil Division  
65 Park Avenue  
Flemington, NJ 08822  
**LAWYER REFERRAL**  
(908) 735-2611  
**LEGAL SERVICES**  
(908) 782-7979

**MERCER COUNTY:**

Deputy Clerk of the Superior Court  
Local Filing Office, Courthouse  
175 South Broad St., P.O. Box 8068  
Trenton, NJ 08650  
**LAWYER REFERRAL**  
(609) 585-8200  
**LEGAL SERVICES**  
(609) 695-8249

**MIDDLESEX COUNTY:**

Deputy Clerk of the Superior Court  
Middlesex Vicinage  
Second Floor - Tower  
56 Paterson Street, P.O. Box 2633  
New Brunswick, NJ 08903-2633  
**LAWYER REFERRAL**  
(732) 828-0053  
**LEGAL SERVICES**  
(732) 249-7600

**MONMOUTH COUNTY:**

Deputy Clerk of the Superior Court  
Monmouth County Courthouse  
71 Monument Park, P.O. Box 1269  
Freehold, NJ 07728-1269  
**LAWYER REFERRAL**  
(732) 431-5544  
**LEGAL SERVICES**  
(732) 866-0020

**MORRIS COUNTY:**

Deputy Clerk of the Superior Court  
Civil Division  
Washington and Courts Streets, P.O. Box 910  
Morristown, NJ 07960-0910  
**LAWYER REFERRAL**  
(973) 267-5882  
**LEGAL SERVICES**  
(973) 285-6911

**OCEAN COUNTY:**

Deputy Clerk of the Superior Court  
Court House, Room 119  
118 Washington Street  
Toms River, NJ 08754  
**LAWYER REFERRAL**  
(732) 240-3886  
**LEGAL SERVICES**  
(732) 341-2727

**PASSAIC COUNTY:**

Deputy Clerk of the Superior Court  
Civil Division  
Passaic County Court House  
77 Hamilton Street  
Paterson, NJ 07605  
**LAWYER REFERRAL**  
(973) 278-9223  
**LEGAL SERVICES**  
(973) 523-2900

**SALEM COUNTY:**

Deputy Clerk of the Superior Court  
92 Market Street, P.O. Box 29  
Salem, NJ 08079  
**LAWYER REFERRAL**  
(856) 678-8363  
**LEGAL SERVICES**  
(856) 451-0008

**SOMERSET COUNTY:**

Deputy Clerk of the Superior Court  
Civil Division Office  
40 North Bridge Street  
P.O. Box 3000  
Somerville, NJ 08876  
**LAWYER REFERRAL**  
(908) 685-2323  
**LEGAL SERVICES**  
(908) 231-0840

**SUSSEX COUNTY:**

Deputy Clerk of the Superior Court  
Sussex County Judicial Center  
43-47 High Street  
Newton, NJ 07860  
**LAWYER REFERRAL**  
(973) 267-5882  
**LEGAL SERVICES**  
(973) 383-7400

**UNION COUNTY:**

Deputy Clerk of the Superior Court  
First Floor, Court House  
2 Broad Street  
Elizabeth, NJ 07207-6078  
**LAWYER REFERRAL**  
(908) 258-4715  
**LEGAL SERVICES**  
(908) 354-4340

**WARREN COUNTY:**

Deputy Clerk of the Superior Court  
Civil Division Office  
Warren County Courthouse  
413 Second Street  
Belvidere, NJ 07823-1500  
**LAWYER REFERRAL**  
(973) 267-5882  
**LEGAL SERVICES**  
(908) 475-2010

Appendix XII-B1

CIVIL CASE INFORMATION STATEMENT (CIS)



Use for Initial Law Division Civil Part pleadings (not motions) under Rule 4:5-1. Pleading will be rejected for filing, under Rule 1:5-6(c), if information above the black bar is not completed or if attorney's signature is not affixed.

FOR USE BY CLERK'S OFFICE ONLY
PAYMENT TYPE: CK CG CA
CHG/CK NO.:
AMOUNT:
OVERPAYMENT:
BATCH NUMBER:

ATTORNEY/PRO SE NAME: Michael F. McKenna, Esq.
TELEPHONE NUMBER: (201) 934-980
COUNTY OF VENUE: Morris County
FIRM NAME: Lewis & McKenna
DOCKET NUMBER: MOR-L-569-09
OFFICE ADDRESS: 82 East Allendale Road, Saddle River, NJ 07458
DOCUMENT TYPE: Amended Complaint
JURY DEMAND: [X] YES [ ] NO
NAME OF PARTY: Tilcon New York, Inc. and Kelly Excavating & Paving, Inc. (D/B/A Owl Contracting)
CAPTION: Tilcon New York, Inc. and Kelly Excavating & Paving, Inc. (D/B/A As Owl Contracting v. Morris County Cooperative Pricing Council; Township of Parsippany-Troy Hills; Lopatcong Township; Randolph Township; Readington Township; Mendham Township; Morris Township; Denville Township; Roxbury Township; Town of Morristown; Hackensack Township BOE; Mt. Olive Township; Warren County; Greenwich Township; Pohatcong Township; Lebanon Township.
CASE TYPE NUMBER: 305, 599
IS THIS A PROFESSIONAL MALPRACTICE CASE? [ ] YES [X] NO
RELATED CASES PENDING? [ ] YES [X] NO
DO YOU ANTICIPATE ADDING ANY PARTIES? [ ] YES [X] NO
NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY: [ ] NONE [X] UNKNOWN

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION
DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP? [X] YES [ ] NO
IF YES, IS THAT RELATIONSHIP: [ ] EMPLOYER-EMPLOYEE [ ] FRIEND/NEIGHBOR [ ] OTHER (explain)
[ ] FAMILIAL [X] BUSINESS
DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? [ ] YES [X] NO
USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION:

RECEIVED AND FILED
SUPERIOR COURT
SEP - 2 PM 12:31
CIVIL DIVISION

DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS? [ ] YES [X] NO
IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION:
WILL AN INTERPRETER BE NEEDED? [ ] YES [X] NO
IF YES, FOR WHAT LANGUAGE:
ATTORNEY SIGNATURE: Michael F. McKenna

**SIDE 2**

## CIVIL CASE INFORMATION STATEMENT (CIS)

Use for initial pleadings (not motions) under Rule 4:5-1

**CASE TYPES** (Choose one and enter number of case type in appropriate space on the reverse side.)

**Track I — 150 days' discovery**

- 151 NAME CHANGE
- 175 FORFEITURE
- 302 TENANCY
- 399 REAL PROPERTY (other than Tenancy, Contract, Condemnation, Complex Commercial or Construction)
- 502 BOOK ACCOUNT (debt collection matters only)
- 505 OTHER INSURANCE CLAIM (INCLUDING DECLARATORY JUDGMENT ACTIONS)
- 506 PIP COVERAGE
- 510 UM or UIM CLAIM
- 511 ACTION ON NEGOTIABLE INSTRUMENT
- 512 LEMON LAW
- 801 SUMMARY ACTION
- 802 OPEN PUBLIC RECORDS ACT (SUMMARY ACTION)
- 999 OTHER (Briefly describe nature of action) \_\_\_\_\_

**Track II — 300 days' discovery**

- 305 CONSTRUCTION
- 509 EMPLOYMENT (other than CEPA or LAD)
- 599 CONTRACT/COMMERCIAL TRANSACTION
- 603 AUTO NEGLIGENCE - PERSONAL INJURY
- 605 PERSONAL INJURY
- 610 AUTO NEGLIGENCE - PROPERTY DAMAGE
- 699 TORT - OTHER

**Track III — 450 days' discovery**

- 005 CIVIL RIGHTS
- 301 CONDEMNATION
- 802 ASSAULT AND BATTERY
- 604 MEDICAL MALPRACTICE
- 606 PRODUCT LIABILITY
- 607 PROFESSIONAL MALPRACTICE
- 608 TOXIC TORT
- 809 DEFAMATION
- 616 WHISTLEBLOWER/CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA) CASES
- 617 INVERSE CONDEMNATION
- 618 LAW AGAINST DISCRIMINATION (LAD) CASES

**Track IV — Active Case Management by Individual Judge/450 days' discovery**

- 156 ENVIRONMENTAL/ENVIRONMENTAL COVERAGE LITIGATION
- 303 MT. LAUREL
- 508 COMPLEX COMMERCIAL
- 513 COMPLEX CONSTRUCTION
- 514 INSURANCE FRAUD
- 701 ACTIONS IN LIEU OF PREROGATIVE WRITS

**Mass Tort (Track IV)**

- |                                       |                       |
|---------------------------------------|-----------------------|
| 241 TOBACCO                           | 275 ORTHO EVRA        |
| 248 CIBA GEIGY                        | 278 DEPO-PROVERA      |
| 266 HORMONE REPLACEMENT THERAPY (HRT) | 277 MAHWAH TOXIC DUMP |
| 271 ACCUTANE                          | 278 ZOMETA/AREZIA     |
| 272 BEXTRA/CELEBREX                   | 601 ASBESTOS          |
| 274 RISPERDAL/SEROQUEL/ZYPREXA        | 619 VIOXX             |

If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics."

Please check off each applicable category:

Verbal Threshold

Putative Class Action

Title 59

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SUPERIOR COURT

2009 SEP -2 PM 12:37

CIVIL DIVISION

**LEWIS & MCKENNA**  
82 EAST ALLENDALE ROAD  
SADDLE RIVER, NEW JERSEY 07458  
(201) 934-9800

ATTORNEYS FOR PLAINTIFF  
TILCON NEW YORK, INC. AND  
KELLY EXCAVATING & PAVING, INC.

TILCON NEW YORK, INC, KELLY  
EXCAVATING & PAVING, INC., (D/B/A AS  
OWL CONTRACTING

PLAINTIFF,

- AGAINST -

MORRIS COUNTY COOPERATIVE PRICING  
COUNCIL; TOWNSHIP OF PARSIPPANY-TROY  
HILLS; LOPATCONG TOWNSHIP; RANDOLPH  
TOWNSHIP; READINGTON TOWNSHIP;  
MENDHAM TOWNSHIP; MORRIS TOWNSHIP;  
DENVILLE TOWNSHIP; ROXBURY  
TOWNSHIP; TOWN OF MORRISTOWN;  
HACKETTSTOWN BOE; MT. OLIVE  
TOWNSHIP; WARREN COUNTY; GREENWICH  
TOWNSHIP; POHATCONG TOWNSHIP;  
LEBANON TOWNSHIP;

DEFENDANT.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MORRIS COUNTY  
CIVIL ACTION

DOCKET No. L-569-09

AMENDED COMPLAINT

Plaintiffs, Tilcon New York, Inc., and Kelly Excavating & Paving, Inc., (d/b/a as Owl Contracting), by and through its attorneys, Lewis & McKenna, as and against defendant Morris County Cooperative Pricing Council ("MCCPC" or the "Council"), and MCCPC members Township of Parsippany-Troy Hills; Lopatcong Township; Randolph Township; Readington Township; Mendham Township; Morris Township; Denville Township; Roxbury Township; Town of Morristown; Hackettstown BOE; Mt. Olive Township; Warren County; Greenwich Township; Pohatcong Township; Lebanon Township alleges as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff, Tilcon New York, Inc., (hereinafter "Tilcon") is a New Jersey corporation with a principal place of business at 625 Mt. Hope Road, Wharton, New Jersey 07885.
2. Defendant, MCCPC a group of municipalities and other government authorities that have joined together to collectively bid public contracts for public services. The MCCPC is currently managed by the Township of Randolph, as the lead agency. The Township of Randolph has its main office located at 502 Millbrook Avenue, Randolph, New Jersey, 07869.
3. Lopatcong Township is a New Jersey Municipality located at 232 South Third Street Phillipsburg, NJ 08865
4. Township of Parsippany-Troy Hills is a New Jersey Municipality located 1001 Parsippany Blvd, Parsippany, New Jersey 07054.
5. Randolph Township is a New Jersey Municipality located at 502 Milbrook Ave., Randolph, New Jersey, 07869.
6. Readington Township is a New Jersey Municipality located at 509 Route 523, Whitehouse Station, New Jersey 08889
7. Mendham Township is a New Jersey Municipality located at Township Hall, West Main and Cherry Lane, Brookside, New Jersey 07926.
8. Morris Township is a New Jersey Municipality located at 50 Woodland Ave, Convent Station, New Jersey 07961.
9. Denville Township is a New Jersey Municipality located at 1 St. Mary's Place, Denville, New Jersey 07834
10. Roxbury Township is a New Jersey Municipality located at 1715 Route 46, Ledgewood, New Jersey 07852.
11. Town of Morristown is a New Jersey Municipality located at 200 South Street, CN 914, Morristown, NJ 07963-0914

12. Hackettstown Board of Education is a New Jersey Municipal body located at 315 Washington Street, Hackettstown, New Jersey.
13. Mt. Olive Township is a New Jersey Municipality located at 204 Flanders-Drakestown Rd, Budd Lake, New Jersey 07828
14. Warren County is a political subdivision of the State of New Jersey and a Municipal Corporation of the State of New Jersey which is empowered to sue and be sued, as well as to enter into certain types of contracts located at 165 County Route 519 South Belvidere, New Jersey 07823.
15. Greenwich Township is a New Jersey Municipality located at 321 Greenwich St., Stewartsville New Jersey, 08886.
16. Pohatcong Township; is a New Jersey Municipality located at 50 Municipal Dr., Phillipsburg, New Jersey 08865.
17. Lebanon Township is a New Jersey Municipality located at 530 W. Hill Rd., Glen Gardner, New Jersey 08826
18. Plaintiff Kelly Excavating & Paving, Inc., (d/b/a as Owl Contracting ("Owl") is a New Jersey corporation with a principal place of business at 164 Franklin Ave, Rockaway, NJ 07866-3408.
19. Venue properly lies in the County of Morris, where the material and services were provided.

#### MCCPC CONTRACT 6

20. Plaintiffs incorporate herein by reference all prior allegations set forth in paragraphs 1 through 19 of this Complaint with the same force and effect as if fully set forth herein at length.
21. In January 2008, Tilcon entered into a contract with the MCCPC to provide Asphalt and labor for the Council's Road Resurfacing needs. This was a one year requirements contract, where Tilcon would supply all of the Council's requirements for Road Resurfacing. This contract was awarded to the lowest responsible and responsive bidder. MCCPC Contract No. 6 -- Road Resurfacing ("MCCPC Contract 6") was let for several different Districts, with Tilcon being

awarded all work for District # 3, which called for the provision and placing of 62,050 tons of asphalt material.

22. Tilcon submitted its bid for the Project in December of 2007, listing six separate line items with unit prices from \$63.95 to \$67.20 per ton. The Hot Mix Asphalt ("HMA") material line item was \$67.20 per ton. Tilcon based its bid on current/historical conditions in the asphalt market. While Tilcon's bid was the lowest, it was competitive and minimally lower than the bids of the others.

23. Those conditions changed dramatically. To keep track of changes in asphalt costs, since August 1990, the NJDOT has published an index that is related to the cost of asphalt cement and fuel. Asphalt Cement is an oil-based product necessary for the binding and production of asphalt. At this time the New Jersey Department of Transportation Index for Asphalt cement was \$352.50, and Tilcon based its bid on current/normal expectations for fluctuations in that price.

24. Through the course of the Contract, Tilcon supplied 108,892 tons of material to MCCPC members.

#### MCCPC CONTRACT 5

25. In January 2008, Tilcon entered into a second contract with the MCCPC to provide the co-op with paving materials. This contract, like MCCPC Contract No. 6, was a requirements contract lasting for a duration of one year. The MCCPC Contract No. 5 - Paving Materials ("Project") was broken up into two different categories. Category 1 called for material to be picked up at Tilcon's plant. Category 2 called for material to be delivered by Tilcon to the members of MCCPC. This contract would also be awarded on the basis of the lowest responsible and responsive bidder.

26. Tilcon submitted its bid for the Project in October, 2007, listing unit prices which included \$39.90 per ton for Category 1 Bituminous Concrete Types FABC and MABC, \$47.50 per ton for Bituminous Concrete Type A, \$38.75 per ton for Binder and Stabilized Base, and \$74.50 per ton for Winterpatch. All material under Category 1 was to be picked up by members loaded by bidder material.

27. Under Category 2, Tilcon submitted unit prices which included \$45.90 per ton for Bituminous Concrete Types FABC and MABC, \$44.75 per ton for Stabilized Base, and \$67.00 per container for Liquid Asphalt Tack Coat. All Category 2 material was to be delivered to purchaser locations. At the time Tilcon submitted its bid, the NJDOT Asphalt Cement Index was \$340 and Tilcon based its bid on historical expectations for any fluctuations in that price.

28. Through the course of the contract, Tilcon supplied MCCPC members with 29,167 tons of material, for which it was provided no adjustments in price.

#### **OWL CONTRACT**

29. On or about January 17, 2008, Owl entered into a written contract with MCCPC, wherein Owl agreed to perform road resurfacing at certain locations in Morris County, New Jersey ("OWL Contract 6).

30. Bids were submitted for Owl Contract 6 in December 2007, listing six separate line items with unit prices from \$63.95 to \$65.00 per ton. The Hot Mix Asphalt ("HMA") material line item was \$65.00 per ton. At this time the NJDOT asphalt cement index was \$352.50, and Owl based its bid on current/normal expectations for fluctuations in that price.

31. During the course of Owl Contract 6, Owl supplied 71,902.25 tons of asphalt for which, it did not receive any adjustment in price, and is now seeking \$1,377,394.19 in Material Escalation cost.

#### **PUBLICLY BID CONTRACTS**

32. All three of the MCCPC contracts were publicly bid contracts.

33. The nature of publicly bid contracts is that a public entity, here the MCCPC advertises for bids to be submitted to it. At a date certain, those bids are "opened" and the party submitting the lowest responsive bid is awarded the contract.

34. These are not negotiated commercial contracts, but are in effect contracts of adhesion, where there is no arm's length negotiation.

35. By the very nature of the process, the letting agency is asking for a party's lowest responsive bid. Hence, there is no room for, nor are the parties expected to, include contingencies in their bid for unprecedented or unrealistic conditions and the inclusion of such contingencies is not expected in the competitive bid environment. Indeed, because the concept of public bidding and acceptance of the lowest responsive bidder is price drive, contingencies are inserted only for foreseeable risks or changes. In this manner, Tilcon did not act differently from any other bidder for these contracts.

36. While some material cost increase may be expected, these are generally in the nature of a 10% price increase, not the 100 plus% increases that ultimately occurred during the lifetime of the MCCPC contracts.

#### UNPRECEDENTED INCREASE IN ASPHALT CEMENT COSTS

37. As mentioned above, since August 1990, the NJDOT has published an index for asphalt cement and for fuel. A true and correct copy of the index is attached hereto as **Exhibit A**.

38. This index is used by NJDOT to regularly adjust the price of asphalt pavement. In August 1990 the asphalt cement index started at \$100. The index through the 1990s moved incrementally along with the price of crude oil. By February 2005, the index rose above the \$200 barrier. Thus, it took the passage of 15 years (1990 to 2005) for the price to go up \$100.

39. From that point until the time of bid for the three MCCPC contracts, the NJDOT Asphalt Price Index rose to \$350. The index was relatively stable until late spring 2008 when crude oil price went wild. The Asphalt Price index reached a high in August 2008, when it hit \$822.90.

40. From August 1990 to early 2008, the index had risen during those 18 years by \$260. In a span of about six months it rose more than \$400. These drastic increases did not just stop in July, because the index, and the corresponding costs of Asphalt have continued to increase throughout the year and operation of the MCCPC contracts.

41. The rise in asphalt cements costs in such a short period of time was contrary to any reasonable predictions or expectations, and was not in keeping with the historic data available regarding asphalt cement prices.

42. The rise in asphalt cement costs was so unprecedented, that for the first time in the history of the index, NJDOT issued a midmonth asphalt cement adjustment, to try and keep up with the unprecedented rise in costs.

43. The extent of the rise in asphalt cement costs was of such an extreme nature that it was outside the foreseeability of Tilcon and MCCPC, and was not a risk that either party assumed at the time of contract execution. In 18 years asphalt cement costs rose by \$260. In a span of about six months it rose \$400.

44. As a result of the dramatic and unpredictable rise in asphalt cement costs, Tilcon has suffered damages not less than \$2,012,673.20 on MCCPC Contract 6, and \$489,040.01 on MCCPC Contract 5. Owl has suffered not less than \$1,681,452.25, on Owl Contract 6.

**COUNT ONE**  
Unjust Enrichment

45. Plaintiff incorporates herein by reference all prior allegations set forth in paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein at length.

46. From the time that Tilcon entered into the contract with MCCPC, there was an unpredictable and unprecedented rise in the costs of asphalt cement, which resulted in a rise in the fair market value of asphalt, asphalt related materials and fuel.

47. This rise in costs was not contemplated by Tilcon or MCCPC at the time the parties entered into the contracts, and was not a risk assumed or contemplated by the parties when they entered into the MCCPC contracts.

48. The rise in asphalt cements costs in such a short period of time was contrary to any reasonable predictions or expectations, and was not in keeping with the historic data available regarding asphalt cement prices.

49. The extent of the rise in asphalt cement costs was of such an extreme nature that it was outside the foreseeability of Tilcon and MCCPC, and was not a risk that either party assumed at the time of contract execution. In 18 years asphalt cement costs rose by \$260. In a span of about six months it rose \$340.

50. This unprecedented and unpredictable rise in asphalt costs frustrated the essential purpose of the contracts between Tilcon and MCCPC.

51. Tilcon provided MCCPC members materials, and services in an amount equaling \$2,012,673.20, on MCCPC Contract 6, and \$489,040.01 on MCCPC Contract 5. Owl supplied MCCPC members with \$1,681,452.25 worth of materials and services on Owl Contract 6, for which MCCPC members accepted and received the benefit but for which MCCPC did not pay a fair or equitable price given the changed market conditions.

52. MCCPC and its members received the benefit of receiving many tons of asphalt for dramatically below fair market price.

53. MCCPC and its members have failed to pay Plaintiffs for the materials and services provided under the Contracts despite due demand.

54. Because the MCCPC and its members have wrongfully refused to pay Plaintiff while retaining the benefit of Plaintiffs' services, MCCPC has been unjustly enriched.

**COUNT TWO**  
Quantum Meruit

55. Plaintiffs incorporates herein by reference all prior allegations set forth in paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein at length.

56. Plaintiff have fully performed their obligations pursuant to the Contracts with MCCPC.

57. MCCPC and its members have accepted and enjoyed the benefits of the Contracts and the costs incurred by Plaintiffs.

58. By retaining the benefits conferred by Plaintiff without paying for those benefits, MCCPC and its should pay Plaintiff the reasonable value of its work, less any payments received to date.

59. It would be inequitable for MCCPC and its to retain the benefits of the work performed and costs incurred by Plaintiffs without payment of the reasonable value of services, entitling Plaintiffs to a Quantum Meruit recovery.

### COUNT THREE

#### Breach of Covenant of Good Faith and Fair Dealing

60. Plaintiffs incorporates herein by reference all prior allegations set forth in paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein at length.

61. Every contract in the State of New Jersey imposes an implied covenant of good faith and fair dealing on the contracting parties.

62. As such, an agreement to be performed in New Jersey is subject to the implied covenant of good faith and fair dealing.

63. By refusing to re-negotiate adjustments to the price of these contracts or to award equitable adjustments, MCCPC and its members has acted, and continues to act in bad faith towards Plaintiffs, and thereby breached, and continues to breach, the covenant of good faith and fair dealing.

64. As a direct and proximate result thereof, Plaintiffs have suffered, and continues to suffer, financial injury.

**COUNT FOUR**  
Reformation

65. Plaintiffs incorporates herein by reference all prior allegations set forth in paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein at length.

66. From the time that Tilcon entered into the contract with MCCPC, there was an unpredictable, and unprecedented rise in the costs of asphalt cement.

67. This rise in costs was not contemplated by Tilcon or MCCPC at the time the parties entered into the contracts.

68. The rise in asphalt cements costs in such a short period of time was contrary to any reasonable predictions, and was not in keeping with the historic data available regarding asphalt cement prices.

69. The extent of the rise in asphalt cement costs was of such an extreme nature that it was outside the foreseeability of Tilcon and MCCPC, and was not a risk that either party assumed at the time of contract execution. In 18 years asphalt cement costs rose by \$260. In a span of about six months it rose \$340.

70. Tilcon is entitled to additional costs and reformation of the contracts given the extreme increase in asphalt costs, caused by a supervening event that was not in fact contemplated by the parties and the risk of same which was not allocated by them.

71. If the contracts remain unmodified, the Plaintiffs alone would suffer a devastating amount of out of pocket loss under the MCCPC contracts, even though none of the parties anticipated or assumed the risk of the supervening event of the increase in asphalt cement,

and MCCPC and its members alone would retain the total benefit of receiving significantly undervalued asphalt.

72. As such, the MCCPC contracts should be reformed to provide the plaintiffs fair market costs associated with the dramatic and unprecedented rise in asphalt costs, an increase the Plaintiffs did not assume the risk of at the time the parties entered into the contracts.

**COUNT FIVE**  
Restitution

73. Plaintiffs incorporate herein by reference all prior allegations set forth in paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein at length.

74. From the time that the Plaintiffs entered into the contracts with MCCPC, there was an unpredictable, and unprecedented rise in the costs of asphalt cement.

75. This rise in costs was not contemplated by the Plaintiffs or MCCPC at the time the parties entered into the contracts.

76. The rise in asphalt cements costs in such a short period of time was contrary to any reasonable predictions, and was not in keeping with the historic data available regarding asphalt cement prices.

77. The extent of the rise in asphalt cement costs was of such an extreme nature that it was outside the forscability of the Plaintiffs and MCCPC, and was not a risk that either party assumed at the time of contract execution. In 18 years asphalt cement costs rose by \$260. In a span of about six months it rose \$340.

78. This unprecedented and unpredictable rise in asphalt costs frustrated the essential purpose of the contracts between the Plaintiffs and MCCPC.

79. The Plaintiffs are entitled to additional costs and reformation of the contracts given the extreme increase in asphalt costs, caused by a supervening event that was not in fact contemplated by the parties and the risk of same which was not allocated by them.

80. If the contracts remain unmodified, the Plaintiffs alone would suffer a devastating amount of out of pocket loss under the MCCPC contracts, even though neither party anticipated or assumed the risk of the supervening event of the increase in asphalt cement, and MCCPC and its members alone would retain the total benefit of receiving significantly undervalued asphalt.

81. As such, Tilcon is entitled to restitution of the reasonable value of their services as Tilcon's provision of materials and services has benefited MCCPC.

**COUNT SIX**  
Mutual Mistake

82. Plaintiffs incorporate herein by reference all prior allegations set forth in paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein at length.

83. From the time that Plaintiffs entered into the contract with MCCPC, there was an unpredictable, and unprecedented rise in the costs of asphalt cement, that neither party had foreseen, had ever experienced, or could ever have foreseen.

84. The rise in asphalt cements costs in such a short period of time was contrary to any reasonable predictions, and was completely at odds with the historical data then available regarding asphalt cement prices.

85. The extent of the rise in asphalt cement costs was of such an extreme nature that it was outside the foreseeability of the Plaintiffs and MCCPC, and was not a risk that either party

assumed at the time of contract execution. In 18 years asphalt cement costs rose by \$260. In a span of about six months it rose \$340.

86. There was no way that either party could have entered into this contract had these conditions been known.

87. The Plaintiffs are entitled to additional costs given the extreme increase in asphalt costs, caused by a supervening event that was not in fact contemplated by the parties and the risk of same which was not allocated by them.

88. If the contracts remain unmodified, the Plaintiffs alone would suffer a devastating amount of out of pocket loss under the MCCPC contracts, even though neither party anticipated or assumed the risk of the supervening event of the increase in asphalt cement, and MCCPC alone would retain the total benefit of receiving significantly undervalued asphalt.

89. As such, the MCCPC contracts should be reformed to provide the Plaintiffs fair market costs associated with the dramatic and unprecedented rise in asphalt costs, an increase the Plaintiffs did not assume the risk of at the time the parties entered into the contracts.

**COUNT SEVEN**  
Frustration

90. Plaintiffs incorporates herein by reference all prior allegations set forth in paragraphs 1 through 29 of this Complaint with the same force and effect as if fully set forth herein at length.

91. From the time that the Plaintiffs entered into the contracts with MCCPC, there was an unpredictable, and unprecedented rise in the costs of asphalt cement.

92. This rise in costs was not contemplated by the Plaintiffs or MCCPC at the time the parties entered into the contracts.

93. The rise in asphalt cements costs in such a short period of time was contrary to any reasonable predictions, and was not in keeping with the historical data available regarding asphalt cement prices.

94. The extent of the rise in asphalt cement costs was of such an extreme nature that it was outside the foreseeability of the Plaintiffs and MCCPC, and was not a risk that either party assumed at the time of contract execution. In 18 years asphalt cement costs rose by \$260. In a span of about six months it rose \$340.

95. This unprecedented and unpredictable rise in asphalt costs frustrated the essential purpose of the contracts between the Plaintiffs and MCCPC.

96. The Plaintiffs are entitled to additional costs and reformation of the contracts given the extreme increase in asphalt costs, caused by a supervening event that was not in fact contemplated by the parties and the risk of same which was not allocated by them.

97. If the contracts remain unmodified, the Plaintiffs, alone would suffer a devastating amount of out of pocket loss under the MCCPC contracts, even though neither party anticipated or assumed the risk of the supervening event of the increase in asphalt cement, and MCCPC members alone would retain the total benefit of receiving significantly undervalued asphalt.

98. As such, the MCCPC contracts should be reformed to provide the Plaintiffs reasonable costs associated with the dramatic and unprecedented rise in asphalt costs, an increase the plaintiffs did not assume the risk of at the time the parties entered into the contracts.

**COUNT EIGHT**  
Equitable Adjustment

99. Plaintiffs incorporates herein by reference all prior allegations set forth in paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein at length.

100. From the time that the Plaintiffs entered into the contracts with MCCPC, there was an unpredictable, and unprecedented rise in the costs of asphalt cement. This rise in costs was not contemplated by the Plaintiffs or MCCPC at the time the parties entered into the contracts. The rise in asphalt cements costs in such a short period of time was contrary to any reasonable predictions, and was not in keeping with the historical data available regarding asphalt cement prices.

101. Throughout the course of the contracts, the MCCPC continued to order asphalt at well below fair market values, which increased the total cost of the contracts well above the initial bid upon estimated contract values.

102. The Plaintiffs continued through the course of the contracts to supply MCCPC with material, while making MCCPC aware of the drastic and unprecedented costs increases, and that a claim for addition compensation would be necessary if a mutually agreeable change order could not be issued.

103. As a result of the drastic and unprecedented modifications to the pricing of asphalt, the plaintiffs have suffered extreme financial harm.

104. An equitable adjustment is necessary to keep the plaintiffs whole in the face of the drastic estimated contract value increases.

COUNT NINE  
UCC- Bad Faith

105. Plaintiffs incorporates herein by reference all prior allegations set forth in paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein at length.

106. The MCCPC contracts were requirement contracts, which called for the plaintiffs to supply asphalt materials to the members.

107. Under New Jersey law governing requirements contracts, quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

108. When analyzing whether a party receiving material under a requirements contract one of the factors in an expansion situation would be whether the market price had risen greatly in a case in which the requirements contract contained a fixed price.

109. Despite being on notice of the drastic and unprecedented rise in asphalt costs, MCCPC continued to order asphalt far exceeding the contractual amounts. For example, MCCPC Contract 6 called for the supplying of 62,050 tons of asphalt material. Throughout the course of the contract, MCCPC issued orders for 108,892 tons of material.

110. MCCPC acted in bad faith by requiring plaintiffs to provide asphalt at well below fair market value, in quantities that far exceeded the listed contract quantities.

111. As such, the MCCPC contracts should be reformed to provide the Plaintiffs reasonable costs associated with the dramatic and unprecedented rise in asphalt costs, and increases well above the contract quantities.

WHEREFORE, Plaintiffs, demands that judgment be entered in their favor against the MCCPC and its members, awarding the following relief:

- (a) Damages, compensatory and consequential in an amount not less than \$2,501,713.21 to Tilcon, and \$1,681,452.25 to Owl;
- (b) Pre-judgment and post-judgment interest;
- (c) Any and all other relief as this Court may deem just and appropriate.

Lewis & McKenna  
82 E. Allendale Road  
Saddle River, NJ 07458  
(201) 934-9800  
Attorneys for Plaintiffs

DATED: September 1, 2009

BY: Michael F. McKenna  
Michael F. McKenna

**CERTIFICATION PURSUANT TO R. 4:5-1**

I certify that the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding. Further, no other action or arbitration proceeding is contemplated and there are no other parties at this time that should be joined in this action. I 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 for contempt.

DATED: September 1, 2009

By: Michael F. McKenna  
Michael F. McKenna**Designation of Trial Counsel**

Pursuant to the requirements of the New Jersey Rules Governing Civil Practice, Michael F. McKenna is designated as trial counsel for this matter.

DATED: September 1, 2009

By: Michael F. McKenna  
Michael F. McKenna