

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

\_\_\_\_\_  
MASSACHUSETTS BAY  
TRANSPORTATION AUTHORITY,

*Plaintiff,*

v.

ROCLA CONCRETE TIE, INC.,

*Defendant.*  
\_\_\_\_\_

10-1783 E

CIVIL ACTION

No. \_\_\_\_\_

MICHAEL JOSEPH GONZA  
CLERK/MAGISTRATE

2011 NOV -4 PM 12:02

COMPLAINT

1. This action is brought by the Massachusetts Bay Transportation Authority (the “MBTA”) against Rocla Concrete Tie, Inc. to recover monetary damages resulting from defective concrete railroad ties supplied by Rocla in the 1995-1997 construction of the Old Colony commuter railroad line (the “Old Colony Line”).

2. As set forth more fully below, Rocla falsely represented to the MBTA that Rocla’s concrete ties would provide fifty years of service with minimal maintenance. Within approximately ten years of commencing commuter rail service on the Old Colony Line, however, the concrete ties supplied by Rocla began to fail. When confronted with the discovery of the defective ties, Rocla admitted that the MBTA would need to replace the entirety of the

concrete ties installed on the Old Colony Line and that its concrete ties should never have been marketed as having a fifty-year life span.

3. Despite its admissions, Rocla has nevertheless failed to honor the fifteen-year contractual warranty it provided the MBTA. Rocla's provision of defective concrete ties and failure to honor its contractual warranty has required the MBTA to commence the process to rebuild the Old Colony Line with an estimated cost of \$91,500,000.

4. Additionally, the MBTA and its operator, the Massachusetts Bay Commuter Railroad Company ("MBCR") have, at significant expense, implemented regular track inspection and repair procedures to ensure the safe operation of the Old Colony Line pending large-scale replacement.

5. Accordingly, the MBTA brings this action to recover monetary damages for Rocla's negligent misrepresentations, breach of warranty, and violations of the Massachusetts Consumer Protection Act.

### **PARTIES**

6. Plaintiff MBTA is a body politic and corporate, and a political subdivision of the Commonwealth of Massachusetts, organized under and existing by virtue of Mass. Gen. Laws ch. 161A, with its principal place of business at 10 Park Plaza, Boston, Massachusetts 02116.

7. Defendant Rocla is, upon information and belief, a foreign corporation organized and existing under the laws of the State of Texas, with its principal place of business in Denver, Colorado.

### **JURISDICTION AND VENUE**

8. Jurisdiction in the Suffolk County Superior Court is proper pursuant to Mass. Gen. Laws ch. 212, § 4 and Mass. Gen. Laws ch. 223A, § 3.

9. Venue in the Suffolk County Superior Court is proper pursuant to Mass. Gen.

Laws ch. 223, §§ 5, 8.

### **GENERAL ALLEGATIONS**

10. The Old Colony Line is owned by the MBTA and spans from Boston's South Station to the towns of Plymouth and Middleboro. The Old Colony Line was constructed in 1995-1997 following a public bidding process for the procurement of materials and the selection of contractors.

11. As part of the public bidding process, the MBTA advertised invitations to bid on contracts for the supply of railroad ties. Following previous failures of concrete ties on lines owned by the MBTA and other railroads in the United States, the MBTA initially specified that wood railroad ties would be used for the entirety of the Old Colony Line.

12. Following the initial specifications for wood ties, the MBTA met with representatives from Rocla on November 6, 1992. Following that meeting, Rocla represented in a letter dated November 9, 1992, that Rocla's ties "far exceed" the MBTA's requirements for "durable, long-lasting and low-maintenance track structures." In the same letter, Rocla also represented that:

The lot specific problem recently experienced here in the United States has greatly enhanced the production techniques and material selection process used in the manufacture of these durable track structure components. We would like to provide you with the high level of confidence you need in deciding that concrete ties are the most effective and economically beneficial for use in the Old Colony Line.

13. On February 15, 1993, Rocla sent the MBTA another letter requesting that the MBTA reconsider its decision to use wood ties for the Old Colony Line and to permit Rocla to submit an unsolicited proposal for concrete ties. Rocla proposed to provide the MBTA (i) a significant price reduction, (ii) technical information to show the long term cost savings

associated with the use of concrete ties as compared to wood ties, and (iii) a revision of Rocla's

existing warranty provision. Rocla also stated in the letter:

We believe the decision to use timber ties resulted from MBTA's unfortunate experience with defective concrete ties. As you may know, the Court determined the cause to be defective cement, not production or design. However, during the period of investigation preceding the trial, quality control procedures were substantially improved by the industry. Further, the testing of cements now used in the production of concrete ties assures there will be no repetition of the previous problem.

14. At all relevant times, Rocla generally marketed its concrete ties to have a fifty-year life span.

15. In reliance on Rocla's representations, the MBTA altered the specifications to provide for concrete ties instead of wood ties so as to reduce the long-term costs associated with maintenance of the railroad. Although concrete ties cost significantly more than wood ties to install, the purported fifty-year life span and reduced maintenance costs would have offset the shorter life-span and increased maintenance costs associated with wood ties had the concrete ties performed as represented.

16. Following the public bidding process, on or about January, 1995, Rocla entered into a contract to provide the MBTA with 147,500 concrete ties at a cost of \$9,001,823.

17. Pursuant to the contract, Rocla provided the MBTA with a warranty that the concrete ties "will be free from defects in material and workmanship for a period of fifteen years." Pursuant to the warranty, Rocla agreed, at the MBTA's option, to "provide a replacement to the original delivery point, or allow appropriate credit, not to exceed the purchase price."

18. Within approximately ten years of commencing commuter rail service on the Old Colony Line, however, the MBTA started to observe abnormal failures of the concrete ties supplied by Rocla.

19. Beginning in the spring of 2008, the MBTA and MBCR have, at significant expense, implemented regular track inspections and repair procedures to ensure the safe operation of the Old Colony Line. Such procedures and repairs, however, are merely temporary measures to allow the continued safe operation of the Old Colony Line pending large-scale replacement.

20. The MBTA has commenced the preparation of bid documents and specifications for the replacement of all Rocla concrete ties installed on the Old Colony Line, with an initial estimated cost of \$91,500,000.

21. The MBTA has made repeated demands on Rocla to fulfill its contractual warranty obligations, which Rocla has refused or ignored.

**COUNT I**  
**(Negligent Misrepresentation)**

22. The MBTA repeats and realleges the allegations contained in paragraphs 1 through 21 above as if set forth in full herein.

23. Rocla provided the MBTA with false information regarding the concrete ties, including representations that the concrete ties would have a fifty-year life span, representations regarding the sufficiency of the design of the concrete ties, representations regarding the manufacturing processes purportedly implemented by Rocla to ensure the production of durable concrete ties, and representations regarding the durability of the concrete ties sold to the MBTA.

24. Rocla reasonably should have known that its foregoing representations were false and misleading and failed to exercise reasonable care in making such representations.

25. The MBTA justifiably relied on Rocla's representations.

26. WHEREFORE, the MBTA seeks an award of monetary damages in an amount to

be determined at trial, including (i) the difference between the value of the concrete ties received and the purchase price, (ii) the costs to replace the defective concrete ties manufactured by Rocla, and (iii) any further incidental damages incurred by the MBTA in connection therewith.

**COUNT II**  
**(Unfair or Deceptive Trade Practices)**

27. The MBTA repeats and realleges the allegations contained in paragraphs 1

through 26 above as if set forth in full herein.

28. Rocla provided the MBTA with false information regarding the concrete ties,

including representations that the concrete ties would have a fifty-year life span, representations regarding the sufficiency of the design of the concrete ties, representations regarding the manufacturing processes purportedly implemented by Rocla to ensure the production of durable concrete ties, and representations regarding the durability of the concrete ties sold to the MBTA, all in violation of Mass. Gen. Laws ch. 93A.

29. The MBTA furnished a written demand for relief upon Rocla on May 21, 2009

describing the foregoing unfair or deceptive acts and practices, a copy of which is attached as Exhibit A hereto (the "93A Demand Letter").

30. Rocla has not, to date, made any written tender of settlement.

31. Rocla's refusal to grant relief upon demand was made in bad faith and with

knowledge or reason to know that the act or practice complained of violated Mass. Gen. Laws ch. 93A, § 2.

32. WHEREFORE, the MBTA seeks an award of monetary damages in an amount to

be determined at trial, including treble damages plus an award of attorneys' fees and costs.

**COUNT III**  
**(Breach of Express Warranty)**

33. The MBTA repeats and realleges the allegations contained in paragraphs 1 through 32 above as if set forth in full herein.

34. Rocla provided the MBTA with an express warranty that its concrete ties would be free from defects in materials and workmanship for a period of fifteen years.

35. In breach of its express warranty, Rocla supplied the MBTA with defective concrete ties.

36. Pursuant to the express warranty, Rocla agreed to “provide a replacement to the original delivery point, or allow appropriate credit, not to exceed the purchase price.”

37. In breach of the express warranty, Rocla has, to date, provided only 500 replacement ties and has refused to provide a replacement or credit for the remaining 147,000 defective concrete ties.

38. The MBTA provided Rocla with timely and reasonable notice of Rocla’s breach of express warranty, including without limitation by means of the 93A Demand Letter, and Rocla has failed to cure such breach.

39. Rocla’s failure to provide replacements or a credit has caused the warranty to fail of its essential purpose, and any limitations in the warranty therefore do not apply.

40. WHEREFORE, the MBTA seeks an award of monetary damages in an amount to be determined at trial, including direct and consequential damages.

**COUNT IV**  
**(Unfair or Deceptive Trade Practices)**

41. The MBTA repeats and realleges the allegations contained in paragraphs 1 through 40 above as if set forth in full herein.

42. Rocla's breach of express warranty, as described in paragraphs 33 through 40 above, constitutes an unfair or deceptive trade practice in violation of Mass. Gen. Laws ch. 93A.

43. The unfair and deceptive trade practice of Rocla in breaching its express warranty was a willful and knowing violation of Mass. Gen. Laws ch. 93A, § 2.

44. The MBTA furnished a written demand for relief upon Rocla on May 21, 2009, describing the foregoing unfair or deceptive acts and practices, a copy of which is attached as Exhibit A hereto.

45. Rocla has not, to date, made any written tender of settlement.

46. Rocla's refusal to grant relief upon demand was made in bad faith and with knowledge or reason to know that the act or practice complained of violated Mass. Gen. Laws ch. 93A, § 2.

47. Wherefore, the MBTA seeks an award of monetary damages in an amount to be determined at trial, including treble damages plus an award of attorneys' fees and costs.

**JURY DEMAND**

THE MBTA DEMANDS A TRIAL BY JURY ON ALL TRIABLE ISSUES.

CONCLUSION

WHEREFORE, the MBTA respectfully requests that this Court enter judgment and award damages in favor of the MBTA as requested in this Complaint.

Dated: Boston, Massachusetts  
May 4, 2010

ROPES & GRAY LLP

By: 

Steven T. Hoort (BBO# 239380)

Andrew G. Devore (BBO# 669937)

One International Place

Boston, MA, 02110-2624

Tel: 617-951-7000

Fax: 617-951-7050

steven.hoort@ropesgray.com

andrew.devore@ropesgray.com

*Attorneys for the Massachusetts Bay  
Transportation Authority*