

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

SUPERIOR GUNITE,

Plaintiff,

-against-

YONKERS CONTRACTING COMPANY,
INC. AND ZURICH AMERICAN
INSURANCE COMPANY,

Defendants.

Index No.: 54272/13

**AFFIDAVIT OF
ROBERT STEPIEN**

I, ROBERT STEPIEN, of full age, being duly sworn, hereby affirm as follows:

1. I am the Project Manager for Yonkers Contracting Company, Inc. ("Yonkers"). I have worked for Yonkers since 2008. I am a professional engineer, licensed by the State of New York and New Jersey, and I have been working in the heavy highway construction industry for over 20 years. I was directly involved with the work performed by Superior Gunitite ("Superior"), as the person in charge of all field operations for this Project. As such, the statements in this Affidavit are based on my personal knowledge, unless otherwise stated.

2. I make this affidavit in support of Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment filed by Plaintiff on March 7, 2014.

3. From 2010 to present day, I have worked as Yonkers' Project Manager on the subject construction project which involves the excavation for, and building of, a new subway station at 34th Street and 11th Avenue in New York City (the "Project"), part of an extension for the No. 7 MTA Line expansion program.

4. Pursuant to the prime contract between Yonkers and the Project owner, the Metropolitan Transit Authority ("MTA"), Yonkers undertook the role of general contractor on the

Project. A copy of the prime contract is too voluminous to attach hereto, but is readily available and can be produced upon request.

5. As Yonkers' Project Manager on the Project, I managed Yonkers' staff on the Project. I also interfaced with the Project's subcontractors throughout the performance of their respective scopes of work.

Nature of the Work

6. The Project is a \$116 million construction operation being performed both above and below ground. It constitutes the initial phases of the construction of a new terminal located at 11th Ave between 33rd and 34th Streets. This will be the Main Station and a central facility for the No. 7 Line Extension Project, a \$2.1 billion Project that began in 2007 and was scheduled for completion at the end of 2012, later extended to mid-2013.

7. Yonkers' contract included excavation for the station facility, installation of caissons for the foundation work, installation of underpinning, and construction of all of the outside and interior structures for the terminal. Fit-up for the interior space of the terminal is to be performed by separate contract by a follow-on contractor.

8. The underground portion of the contract, from which the current dispute primarily arose, involved extensive excavation and concrete work underneath active New York City streets. (See photograph attached as Exhibit 1.) This work consisted of building a concrete-lined shaft, 100' deep and the width of a residential house; two "inclined" concrete-lined shafts to support and encase the escalator systems; the floors and walls for the concrete-lined subway station; a four story ventilation building; and a cavernous public street entranceway.

9. The purpose of the Project has been to build the station and station entrance and to install facilities to connect to the existing tunnels through which the Number 7 subway line in New

York City runs. The Project was scheduled to take place over 26 months following the issuance of the Notice of Award on October 13, 2010. (See letter attached as Exhibit 2.)

10. Yonkers first began work on the Project by excavating soil and drilling and mining rock from the Project site to create the area within which to construct the station, inclined tunnels, and other ancillary structures — all within the confines of a New York City block. The Project site had limited access, plummeted deep underground into existing tunnels, and had variable and inclined surfaces upon which to work. (See photograph attached as Exhibit 3.)

11. As the general contractor for the Project, Yonkers was required to administer the operations of not only its own field forces, but also to oversee the management of its subcontractors performing the work. Yonkers self-performed all of the drilling, blasting, and rock and earth excavation. Yonkers hired subcontractors to perform some of the major trades, such as installation of caissons, cast-in-place concrete work, waterproofing, and concreting perimeter walls and liner work for the sand wall and final exterior finishes of the ventilation building.

12. Those operations included a significant amount of new concrete construction for the foundations and walls of the entire Project. Some of the concrete work was for the cast-in-place structures that had to be installed in, principally, above ground locations. But a large part of the concrete work was in the underground areas where concrete had to be pumped and, effectively, “sprayed” on forms and framework to construct the walls, floors, and overhead arches for the passageways and station facilities. Concrete that is “sprayed” in this method is referred to as “shotcrete.”

13. On or about March 3, 2011, Yonkers entered into contract with Superior (the “Subcontract”), under which Superior agreed to complete elements of the underground concrete work on the Project as a subcontractor to Yonkers for \$7.5 million dollars. (Bowers Aff. Ex. 4.)

14. Superior's primary job was to install structural shotcrete for various walls, floors, partitions, and arched structures on the Project within the underground "bathtub" mined by Yonkers. The Subcontract contemplated the installation of approximately 11,200 cubic yards of concrete. (See Superior's final proposal attached as Exhibit 4.) Superior began performing its work under the Subcontract on or around June, 2011. Superior's contract contemplated that it would perform certain portions of that work, including the shotcrete operations.

Status of the Project

15. All of the operations contemplated by MTA's General Contract with Yonkers for this Project have been performed. MTA issued a certificate of substantial completion on February 19, 2013. (See letter attached as Exhibit 5.) A final punch list was prepared in September 2013 after a joint review of the Project site and structures. This review included testing and walkthroughs by MTA and Yonkers of all the field work.

16. With one exception, all of the work performed on the Project was found to be operating properly and in compliance with the Contract plans and specifications. However, currently, the MTA has yet to issue a certificate of Final Completion for the Project as a result of ongoing efforts to correct numerous leaks stemming from deficiencies in the work performed by Superior under the Subcontract.

17. The MTA continues to withhold five (5%) retainage from Yonkers, which the MTA has reported will be diminished as it assesses liquidated damages. Liquidated damages can be assessed by the MTA if Yonkers is unable to achieve completion of certain phases of the work by dates prescribed in the contract. These liquidated damages amount to \$72,500 per day, and continue to accumulate as remedial work is ongoing to correct Superior's defective work. They

are now estimated to be over \$1,800,000, all arising out of inability to meet Milestone 2 where the inclines are located and where Superior's work had caused the predominant delay.

18. A significant basis, if not the exclusive basis, for MTA's withholding of the retainage relates to Superior's work. MTA has notified Yonkers that it has been withholding payment of the retainage and final contract balance because of leaks through the shotcrete that is impeding MTA's follow-on contractor from initiating and performing the finishes of the station's interior. This follow-on work could not be initiated allegedly because of delays in completing the shotcrete work in the inclines.

Overview of Parties' Respective Claims

19. Yonkers recognizes that Superior has asserted certain demands and/or claims for payment. As the Project progressed, revisions in the work evolved in a number of ways. At first, there were issues involving additional quantities of concrete work that were required for which two Amendments in the total amount of \$1,150,813 were initiated by Yonkers—and paid. (Bowers Aff. Ex. 5.) In fact, Yonkers has authorized payments of sizeable amounts for extra work called for as the Project progressed.

20. There were issues involving "change order requests", documents prepared and generated by Superior for premium time and for work that Superior alleged was beyond the scope of their contract. There was also work that was deleted and transferred to another subcontractor in order to adhere to a very aggressive schedule.

21. But this was hardly a one-way street. Many of Superior's self-styled change order requests were for work that was never changed but was for work that was part of Superior's scope of work and responsibility.

22. Importantly, there were a number of instances where Yonkers had to step in to perform work that was crucial to the coordination and scheduling of the work program, that Superior could not do, did not do properly, or didn't do at all.

23. This included more than \$600,000 of cleanup of shotcrete rebound that Superior left on the site. (Id. Ex. 23.) It has included, and will continue to include, large amounts of money that Yonkers has been required to credit the Owner in the form of liquidated damages and for current and future repairs that are being, and will have to continue to be made for leaks from improperly or incomplete shotcreting operations.

24. Yonkers has been required to take over work that Superior was unable or refused to perform; it has had to divert much of its own work force and expend substantial amounts to complete work Superior did not complete, or repair or rehabilitate work that Superior could not do in compliance with the contract plans and specifications; it has had to perform work, or retain others to perform work that Superior could not get to, in order to meet this closely scheduled Project; it has had to clean up virtually all of the many areas of this tight underground site that were left with residual, mis-sprayed, or oversprayed shotcrete; and it has been compelled to dispute completely overpriced prices submitted by Superior and/or quantities and amounts totally inconsistent with the Subcontract's payment terms.

Requests for Adjustments in Compensation—Amendments to the Subcontract

25. One feature of the payment experience on this Project has included two Amendments issued by Yonkers for extra work. (Id. Ex 5.) Yonkers prepared and issued two Amendments to Superior's subcontract. (Id.) The work arose primarily out of the need to shotcrete additional quantities where there was overbreak in the rock excavation. "Overbreak" is a term used in the construction industry that refers to quantities of rock excavation beyond the contract's

original surface profile. Overbreak is primarily caused by drilling or blasting in rock where the rock encountered is unknown or otherwise differs from the expected condition.

26. Yonkers executed Amendment Nos. 1 and 2 to the Subcontract on June 1, 2012, which amounted to an aggregate increase of \$1.15 million to the Subcontract. (Id.) These Amendments also contained certain deductions due to deletions of certain other aspects of the work in Superior's scope of work, such as scaffolding and backforming that Superior had included in their Subcontract but which they were unable to perform.

Requests for Adjustments in Compensation—Disputed Amounts

Extra Work

27. Superior had also prepared and submitted change order requests of \$483,455 pertaining to extra work that it alleged to have performed. (Id. Ex. 23.) These are requests for work that Yonkers does not dispute occurred. (See Tavormina Affirmation Ex. 2-4.) Yonkers did, however, dispute this category of claims on the grounds that they had not been submitted with adequate backup information. (Id.) Additionally, Yonkers requested this backup information from Superior on numerous occasions. (See emails attached as Exhibit 6.)

28. Yonkers had compensated Superior through its change order requests for various aspects of extra work, as evidenced in the components of Amendment No. 2. Yonkers was willing to cooperate in an effort to compensate Superior for its outstanding claimed extra work, and did so until Superior completely changed the format of its submissions from the time and materials format (accompanied by substantiating backup) to submission of requests (without substantiating backup) based on prices cherry picked from a variety of sources not specified for such adjustments. (Id.)

29. In fact, Superior complicated, if not, undermined the process by submitting materials purporting to be backup in undistinguishable clumps at various and indiscriminate times.

Most of the materials were not earmarked or dated incorrectly, much of it was inaccurate and incomplete and, most importantly, did not relate to the work in question. In addition, much of the information necessary to account for their work was missing. (Id.)

Premium Time

30. Approximately fourteen (14) of Superior's Requests for Additional Compensation, totaling \$155,888 relate to compensation for work allegedly performed during weekend and non-standard hours for which Superior claims it is entitled to a higher and/or additional rate of pay. (See Bowers Aff. Ex. 23.) Yonkers had consistently informed Superior that these "premium time" costs were the result of Superior's own failure to keep up with the Project schedule, and therefore were not compensable. (See emails attached as Exhibit 7.) Superior acknowledges in its own correspondence to Yonkers that it was unable to provide the required manpower for the Project. (Id.)

31. The core problem was that Superior had spread itself thin with numerous jobs it was performing in New York City that ran concurrently with the Project. As a result, Superior's work force was stretched to the point that it neglected to properly supervise and manage the Project (see Tavormina Affirmation Ex. 5-6, 9-10, 12-13), contrary to its obligation to provide adequate labor forces and timely supervision under the Subcontract (see Bowers Aff. Ex. 4, § 5.10).

32. In effect, Superior could not possibly keep up with the Project schedule without working extra hours because it did not provide sufficient manpower on the Project during normal working hours. Superior's Project staffing was further hindered by the fact that the Project was scheduled from Superior's main office in California (Tavormina Affirmation Ex. 5, 12) and Superior's vice president in charge of the Project, Mr. Ron Federico, was seldom on site (Id. Ex. 14.)

33. Superior was made aware under the Subcontract that time was of the essence (see Bowers Aff. Ex. 4, § 5.1), that it was required to work in such a manner so as not to delay the Project (Id.), and that it was prohibited from claiming any compensation for overtime or weekend work that was necessitated by its failure to meet the Project schedule (Id. § 5.4). For the aforementioned reasons, Yonkers has rightfully refused to compensate Superior for the premium time work it so claims.

Deleted Work

34. There are two change order requests relating to deletion of certain concrete walls, the value of which is disputed.

35. Superior agrees that the work was deleted from the scope of their Subcontract but disagrees with the amount Yonkers has deducted. Yonkers contends that \$438,800 is the value of the work that should be deducted, using Superior's own unit prices for that work. (See Bowers Aff. Ex. 23.) Superior contends that \$161,547 should only be deducted, but never provided substantiation for its calculation. (Id.)

Backcharges

36. Yonkers' backcharges amount to approximately \$1.8 million (Id.), which does not include the additional \$1,885,000 of liquidated damages being assessed by the MTA. Nor does it include the cost of remediating the leaks caused by the voids in Superior's shotcreting. Yonkers notified Superior of its claims and backcharges throughout the course of the Project.

37. Yonkers is rightfully entitled to such withholding in order to satisfy its claims against Superior resulting from its defective work and breach of the Subcontract. To date, Yonkers believes that the total accumulated costs of remediating Superior's defective work and liquidated

damages will ultimately exceed the entire amount of payment that Superior claims it is allegedly owed.

Cleanup

38. Of significance among the backcharges claimed against Superior are those for Superior's failure to cleanup leftover concrete from its concrete operations, amounting to approximately \$606,162. (Id.)

39. The amount may seem large for such a term as "cleanup", but that is because cleaning up shotcrete is not your ordinary cleanup task. With this kind of concrete—which weighs more than 150 lbs per cubic foot—cleanup requires extensive amounts of equipment and labor, especially when that specialty work is someone else's work.

40. The Subcontract required Superior to clean up shotcrete created by its work and neatly situate it on the Project site for removal by Yonkers. (Id. Ex. 4, §§ 2.1, 5.11.) Essentially, Superior would fill certain "debris bags" with shotcrete to be removed by Yonkers. (See photograph attached as Exhibit 8.) Superior's failure to both fill and situate these bags in an appropriate manner caused Yonkers to expend tremendous time, effort, and costs in accessing and transporting them. Because of the weight of the shotcrete, the debris bags became impossible to lift or move by hand—especially when they were overfilled them. (See photographs attached as Exhibit 9.)

41. Despite Yonkers' warnings that it would backcharge Superior for its failure to neatly place its shotcrete on site (see emails attached as Exhibit 10; Tavormina Affidavit Ex. 8), Superior continued to overfill debris bags with concrete, making them both difficult and unsafe for Yonkers to handle. In turn, Yonkers had to use heavy machinery and equipment in order to transport them off site.

42. To make matters even more difficult, Yonkers had to navigate its equipment atop variable ground profiles and through a maze of scaffolding systems to access the debris bags — some of which were left suspended high above the ground surface and within the scaffolding system. (See photograph attached as Exhibit 11.)

43. In addition Superior left behind shotcrete to cure on adjacent scaffold decking, floor surfaces, and equipment, thereby requiring Yonkers to tediously “chip” the concrete away in order to remove it.

Waterstop

44. Another backcharge resulted from Superior’s failure to install adequate finished surfaces along concrete interface locations (“construction joints” or “keyways”) that required the installation of “waterstop” material.

45. Yonkers notified Superior on numerous occasions that its placement of waterstop along said interface locations was unacceptable. (See emails attached as Exhibit 12.) Furthermore, the MTA cited Superior’s “sloppy” workmanship. (See email attached as Exhibit 13.)

46. Because the MTA refused to accept Superior’s work, Yonkers was required to step in and perform this work for Superior to maintain the Project schedule. As a result, Yonkers has incurred costs of approximately \$445,000 for which it backcharged Superior. (See Bowers Aff. Ex. 23.)

Bulkheads

47. Yonkers was required to assert another backcharge against Superior because of its failure to install adequate finished surfaces along certain concrete interface locations as required

by the Subcontract. Under the Subcontract, Superior was required to provide a certain finish to portions of concrete that were intended to connect with subsequently installed concrete sections.

48. Superior opted to install these finished surfaces by “hand tooling” them, rather than using conventional formwork (or “bulkheads”). Superior’s finished surfaces were ultimately installed so poorly, that the MTA refused to approve this work — as it had done for Superior’s waterstop work. (Id.)

49. In turn, Superior’s hand tooling approach was substituted with the conventional formwork method for installing the interface surfaces, creating keyways to allow walls to key into previously poured walls. Superior could not perform this work because it had not consummated a collective bargaining agreement with the union that was required to install this formwork.

50. Thus, Yonkers was again forced to step in on account of its affiliation with the union and perform Superior’s work. Yonkers informed Superior that it would be backcharged for Yonkers incurred costs in doing so. (See emails attached as Exhibit 14.) Basically, Superior could not perform the work that it agreed to do under the Subcontract on account of a problem that was not disclosed to Yonkers. The costs incurred by Yonkers in performing this work for Superior amounted to approximately \$200,000. (See Bowers Aff. Ex. 23.)

Leaks

51. The Project was plagued with leaks as a result of improper shotcreting, which left voids in the various structures where Superior was working. The leaks appeared to be progressively intensifying in size and quantity as the Project progressed.

52. More specifically, the voids within Superior’s shotcrete raised great concern with the MTA as to their adverse effect on the shotcrete’s capacity for strength. The MTA was seriously

concerned over whether the concrete was sufficient to support adjacent and overhead structures. (See meeting minutes attached as Exhibits 15 and 16.)

53. In light of the gravity of this issue concerning the safety of the public and New York City mass transit, the MTA issued a Stop Work Order on the Project in order to investigate the deficiencies within Superior's installed concrete. (See letter attached as Exhibit 17.) Subsequently, numerous engineering reports were generated that evidenced Superior's failure to install concrete in accordance with the Subcontract due to the existence of voids throughout same. (See report attached as Exhibit 18.) In fact, Superior's own independent engineering consultant also reported his findings on this issue concerning structural integrity. (See report attached as Exhibit 19.) As a result, Superior was compelled to step in and perform remedial grouting work in order to "fill in" the voids that plagued its concrete.

54. The problems continued, as more water leaks through Superior's concrete were located throughout the Project. The MTA's engineer, Parsons Brinckerhoff, explained in meetings that the substantial size of voids in Superior's concrete caused the flexible waterproofing system to span over extensive areas (i.e., over the void areas) which it was not designed to span. In effect, the waterproofing system collapsed into the void areas and ruptured — thereby causing water to leak into and through the concrete. (Exhibit 15.)

Requisition Issues

55. Superior makes a generalized, indiscriminate, and unsubstantiated charge that it was paid in an untimely manner. Superior was required under the Subcontract to submit its requisitions for payment on a monthly basis, specifically within three (3) days after the end of the relevant pay period—or the last day of each month. (Bowers Aff. Ex. 4, § 4.4.) Yonkers had to constantly communicate with Mr. Ron Federico and members of Superior's staff based in

California in an effort to properly and timely coordinate the submission of payment requisitions from Superior as well as the issuance of payment to Superior from Yonkers. (See emails attached as Exhibit 20.) Superior's submissions were typically provided in an untimely manner. (See emails attached as Exhibit 21.)

56. Aside from failing to submit its requisitions for payment in a timely manner, it was not uncommon for Superior's requisitions to contain numerous errors regarding quantities claimed to have been installed and the amount of payment entitled to. (See emails attached as Exhibit 22.) As such, payment was not processed until these issues were resolved and both Yonkers and Superior agreed upon the accuracy of each payment requisition. I would discuss and resolve issues concerning Superior's payment requisitions with Mr. Ron Federico.

57. Upon receipt of Superior's payment requisitions pertaining to the base Subcontract work, Yonkers would submit applications for payment to the MTA. When payment was received from the MTA, Yonkers would then release payment to Superior for work performed under the base Subcontract as long as no issues involving disputes or claims with respect to Superior's work were involved. Yonkers did not include amounts for Superior's alleged claims for extra work and premium time work in its applications for payment to the MTA because these issues did not relate to any directive issued by the MTA or concern work pursuant to Yonkers' contract with the MTA. Moreover, these aspects of work had not been resolved and were, and still are, in dispute.

Mr. Bowers' Affidavit

58. Mr. David Bowers, CFO for Superior, has prepared an affidavit in support of Superior's motion. He attests that he has personal knowledge of the books and records of his corporation. (Bowers Aff. ¶ 1.) But he cannot attest to personal knowledge of the Project, its

operations, the work that was performed by the respective parties, or the interaction between these parties.

59. The affidavit asserts that Yonkers was paid all but \$49,502 plus a holdback of 5%. In fact, the “holdback” is more than \$6,000,000 and Yonkers has received no payments from MTA for any of its requisitions since June, 2013. (Id. ¶¶ 19-20.) The principal, if not singular, reason for this “holdback” is deficiencies in Superior’s shotcrete work.

60. The affiant further states that counsel has advised him that, under New York law, Yonkers may not hold retainage in a greater percentage than the owner withheld from Yonkers. (Id. ¶ 18.) But Yonkers is authorized to withhold retainage withheld by the owner in that amount as well as the amount necessary to satisfy claims by the general contractor.

61. The affidavit infers that a “payment plan” was “required” to be established by Yonkers in June, 2012 to remedy delinquencies to Superior. (Id. ¶ 22.) The affidavit is incorrect. The payment plan was not established to cover delinquencies; on the contrary, the plan was set up for Superior’s benefit in order to pay them for over \$1 million in additional compensation under the Amendments referenced above.

62. The affidavit states that the only reason that Superior worked outside regular work day hours was because of “earlier construction delays for which [Superior] was not responsible.” (Id. ¶ 28.) Mr. Bowers did not work on the Project and has no support for that statement. Superior’s sizeable amount of non-regular, premium hours of work had nothing to do with any construction delays. The delays to which he refers never affected Superior’s operations on the Project. They never accelerated their operations.

63. In fact, the proposal that Mr. Bowers refers to was just that—a proposal. Not all of the proposed activities were accepted and/or authorized by MTA and only a fraction of the

proposal was paid, only 3.5 million on the original 6.4. The amount proposed on behalf of Superior was for work that neither MTA, nor Yonkers, authorized. Superior was never required, or asked, to undertake an accelerated schedule involving extra work shifts.

64. The “change order requests” and responses cited by Mr. Bowers are taken completely out of context. As per my discussion above, Superior’s need to work outside of regular hours was a result of its own doing. It had spread itself thin and, flatly, could not place crews on the job many weekdays because of conflicting commitments. Yonkers had to authorize its subcontractors to work on non-regular hour days and had to report that with MTA inspectors and project management.

65. I did authorize Superior to work on Saturdays, but that was because Superior was regularly failing to show up on the prescribed weekday shifts. But Yonkers never conceded or agreed that Yonkers would pay Superior for the premium time. I know of only one occasion that I can remember that I indicated that Yonkers would pay for the premium charges.

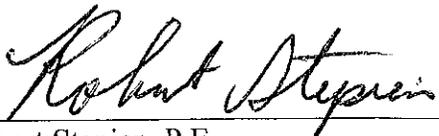
66. Superior had placed Yonkers in a difficult position. Shotcrete work was an essential part of this construction project. It was absolutely necessary for the work to be performed in consonance with the other operations and trades on the Project. When Superior’s crews chronically failed to show up midweek while all of the trades were active, it was imperative that we not disrupt these operations and lose momentum for the next week by having Superior perform catch-up work and perform its operations totally out of sync with the work schedules of others or for the Project as a whole.

67. I spoke to Ron Federico concerning this persistent problem. I would not authorize premium payments and we never paid these amounts. The change order requests that Superior submitted on Fridays for work done on Saturday made no reference to changes in the method of

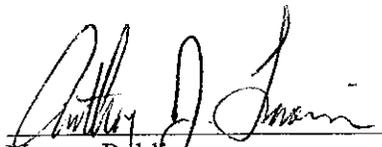
performing the work or for performing any extra work. Superior proceeded to do the work knowing that we would not acknowledge an obligation to pay under the circumstances in which they had placed Yonkers and that they would not be entitled to recover any claim made by them unless it was authorized by an executed change order. (Id. ¶ 32.)

68. The affidavit also distorts the facts when it states that the calculus of the spreadsheets demonstrates that there is only a minor “gap” between Yonkers’ backcharges and claims and Superior’s claims (“Even after compiling all of these spurious charges”, he announces, Yonkers “analysis” shows a “balance due” of over a million). (Id. ¶ 37.) The affiant may be a controller and chief financial officer but his “math” is patently misleading. In listing Superior’s “claims” he includes each and every claim made by Superior at 100%. Moreover, the affidavit omits any reference to the liquidated damages and other offsets MTA is taking, and may continue to take prior to final acceptance.

69. Based on the foregoing, I submit this Affidavit in support of Defendant’s Opposition to Plaintiff’s Motion for Partial Summary Judgment.


Robert Stepien, P.E.

Sworn to before me
this 26 day of March 2014


Notary Public

ANTHONY J. TAVORMINA
NOTARY PUBLIC-STATE OF NEW YORK
No. 08TA6252356
Qualified in Richmond County
My Commission Expires December 05, 2015