

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

YONKERS CONTRACTING COMPANY,
INC.,

Index No.: 61442/2014

Plaintiff,

-against-

KJC WATERPROOFING, INC., SUPERIOR
GUNITE, ZURICH AMERICAN
INSURANCE COMPANY, NICHOLSON
CONSTRUCTION CO., NATIONAL
WELDING AND FABRICATION,
KENSEAL CONSTRUCTION, BARKER
STEEL LLC, STRUCTURE TECH
NEWYORK INC., AND CITI STRUCTURE
LLC,

**PLAINTIFF YONKERS CONTRACTING
COMPANY, INC.'S VERIFIED REPLY AND
AFFIRMATIVE DEFENSES TO DEFENDANT
KJC WATERPROOFING, INC.'S
SUPPLEMENTAL COUNTERCLAIMS**

Defendants.

Plaintiff, Yonkers Contracting Company Inc. (“Yonkers”), and Counterclaim Defendant, Zurich American Insurance Company (“Zurich”), by and through Lewis & McKenna and Veneruso, Curto, Schwartz & Curto, LLP, co-counsel for Yonkers and Zurich, as and for their Verified Reply and Affirmative Defenses to the Supplemental Counterclaims of Defendant KJC Waterproofing, Inc. (“KJC”), respectfully state as follows:

1. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 and leave KJC to its proofs.
2. Yonkers and Zurich admit the allegations of Paragraph 2.
3. Yonkers and Zurich admit the allegations of Paragraph 3.
4. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 and leave KJC to its proofs.

5. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 and leave KJC to its proofs.

6. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 and leave KJC to its proofs.

7. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 and leave KJC to its proofs.

8. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 and leave KJC to its proofs.

9. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 and leave KJC to its proofs.

10. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 and leave KJC to its proofs.

11. KJC has omitted Paragraph 11 from its Counterclaims, and as such a reply cannot be provided on behalf of Yonkers and/or Zurich.

12. KJC has omitted Paragraph 12 from its Counterclaims, and as such a reply cannot be provided on behalf of Yonkers and Zurich.

13. KJC has omitted Paragraph 13 from its Counterclaims, and as such a reply cannot be provided on behalf of Yonkers and/or Zurich.

14. KJC has omitted Paragraph 14 from its Counterclaims, and as such a reply cannot be provided on behalf of Yonkers and Zurich.

15. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 and leave KJC to its proofs.

16. Yonkers and Zurich deny the allegations of Paragraph 16, except to admit that Yonkers works as a general contractor within the United States.

17. Yonkers and Zurich admit the allegations of Paragraph 17.

18. Yonkers and Zurich deny the allegations of Paragraph 18, except to admit that on or about February 15, 2011 Yonkers entered into a subcontract agreement with KJC (the “Subcontract”) designated as S/C# 10-0212-15. The Subcontract speaks for itself as to the terms, conditions, and responsibilities of the relevant contracting parties.

19. Yonkers and Zurich deny the allegations of Paragraph 19, except to admit that on or about September 3, 2010, Yonkers and Zurich executed Bond No. PRF09011946 related to the Project.

20. Yonkers and Zurich deny the allegations of Paragraph 20.

21. Yonkers and Zurich deny the allegations of Paragraph 21.

22. Yonkers and Zurich deny the allegations of Paragraph 22.

23. Yonkers and Zurich deny the allegations of Paragraph 23.

24. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 and leave KJC to its proofs.

25. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25 and leave KJC to its proofs.

26. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 and leave KJC to its proofs.

27. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 and leave KJC to its proofs.

28. Yonkers and Zurich deny the allegations of Paragraph 28, except to admit that on or about September 20, 2013, Yonkers, as principal, and Zurich, as surety, executed a lien discharge bond designated as Lien Discharge Bond No. LPM09129980 and in the amount of \$1,267,134.25.

29. Yonkers and Zurich deny the allegations of Paragraph 29, except to admit that Yonkers and Zurich are bound to the NYC MTA under Lien Discharge Bond No. LPM09129980.

30. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 and leave KJC to its proofs.

31. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 and leave KJC to its proofs.

32. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 and leave KJC to its proofs.

33. Yonkers and Zurich deny the allegations of Paragraph 33, except to admit that on or about April 25, 2014, Yonkers, as principal, and Zurich, as surety, executed a lien discharge bond designated as Lien Discharge Bond No. LPM09143345 and in the amount of \$2,609,360.48.

34. Yonkers and Zurich deny the allegations of Paragraph 34, except to admit that Yonkers and Zurich are bound to the NYC MTA under Lien Discharge Bond No. LPM09143345.

35. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 and leave KJC to its proofs.

IN RESPONSE TO THE FIRST COUNTERCLAIM
(BREACH OF CONTRACT AGAINST YONKERS)

36. Yonkers realleges its responses contained in Paragraphs 1 through 35 with the same force and effect as if fully set forth herein.

- 37. Yonkers denies the allegations of Paragraph 37.
- 38. Yonkers denies the allegations of Paragraph 38.

IN RESPONSE TO THE SECOND COUNTERCLAIM
(ACCOUNT STATED AGAINST YONKERS)

39. Yonkers realleges its responses contained in Paragraphs 1 through 38 with the same force and effect as if fully set forth herein.

- 40. Yonkers denies the allegations of Paragraph 40.
- 41. Yonkers denies the allegations of Paragraph 41.
- 42. Yonkers denies the allegations of Paragraph 42.
- 43. Yonkers denies the allegations of Paragraph 43.

IN RESPONSE TO THE THIRD COUNTERCLAIM
(QUANTUM MERUIT AGAINST YONKERS)

44. Yonkers realleges its responses contained in Paragraphs 1 through 43 with the same force and effect as if fully set forth herein.

- 45. Yonkers denies the allegations of Paragraph 45
- 46. Yonkers denies the allegations of Paragraph 46.
- 47. Yonkers denies the allegations of Paragraph 47.

IN RESPONSE TO THE FOURTH COUNTERCLAIM
(UNJUST ENRICHMENT AGAINST YONKERS)

48. Yonkers realleges its responses contained in Paragraphs 1 through 47 with the same force and effect as if fully set forth herein.

- 49. Yonkers denies the allegations of Paragraph 49.
- 50. Yonkers denies the allegations of Paragraph 50.
- 51. Yonkers denies the allegations of Paragraph 51.
- 52. Yonkers denies the allegations of Paragraph 52.

53. Yonkers denies the allegations of Paragraph 53.

54. Yonkers denies the allegations of Paragraph 54.

IN RESPONSE TO THE FIFTH COUNTERCLAIM
(FORECLOSURE OF MECHANIC'S LIEN AGAINST ALL COUNTER-DEFENDANTS)

55. Yonkers and Zurich reallege their responses contained in Paragraphs 1 through 54 with the same force and effect as if fully set forth herein.

56. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 56 and leave KJC to its proofs.

57. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 57 and leave KJC to its proofs.

58. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 58 and leave KJC to its proofs.

59. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 59 and leave KJC to its proofs.

60. Yonkers and Zurich deny the allegations of Paragraph 60 except to admit that on or about September 20, 2013, Yonkers, as principal, and Zurich, as surety, executed a lien discharge bond designated as Lien Discharge Bond No. LPM09129980 and in the amount of \$1,267,134.25. Yonkers and Zurich also admit that on or about April 25, 2014, Yonkers, as principal, and Zurich, as surety, executed a lien discharge bond designated as Lien Discharge Bond No. LPM09143345 and in the amount of \$2,609,360.48.

61. Yonkers and Zurich deny the allegations of Paragraph 61.

62. Yonkers and Zurich deny the allegations of Paragraph 62.

63. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 63 and leave KJC to its proofs.

64. Yonkers and Zurich deny the allegations of Paragraph 64.

IN RESPONSE TO THE SIXTH COUNTERCLAIM
(PAYMENT ON PERFORMANCE BOND AGAINST ALL DEFENDANTS)

65. Yonkers and Zurich reallege their responses contained in Paragraphs 1 through 64 with the same force and effect as if fully set forth herein.

66. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 66 and leave KJC to its proofs.

IN RESPONSE TO THE SEVENTH COUNTERCLAIM
(RESCISSION OF SETTLEMENT AGREEMENT BASED ON MUTUAL MISTAKE)

67. Yonkers realleges its responses contained in Paragraphs 1 through 66 with the same force and effect as if fully set forth herein.

68. Yonkers denies the allegations of Paragraph 68, except to admit that on or about January 8, 2014, Yonkers and KJC entered into an agreement (hereinafter, the “Agreement”) in order to address issues concerning KJC’s ability to complete the scope of work that it was obligated to perform under its original Subcontract with Yonkers.

69. Yonkers denies the allegations of Paragraph 69 and avers that the Agreement speaks for itself as to the terms, conditions, and responsibilities of the relevant contracting parties.

70. Yonkers denies the allegations of Paragraph 70. Throughout the course of the Project, MTA generated and emailed numerous reports regarding its water leak observations on the Project site. One such email was sent by Maher Mahmoud (MTA’s Resident Engineer) to Rob Stepien (Project Manager for Yonkers) and others on December 2, 2013. It was entitled “Updated water leaks condition at site J as of 11-29-13,” and included a list of water leak conditions that were observed on November 29, 2013. In a follow-up email on December 3, 2013, Ramesh Ramanathaiah (MTA’s Construction Manager) directed Yonkers to have KJC implement grouting operations in order to address these water leak conditions. In turn, Jim Strobel (of Yonkers)

forwarded the entire email chain to Vincent Capazzi of KJC and requested KJC to expedite its leak repair work, which was KJC's responsibility under its Subcontract with Yonkers. KJC was well aware that it was required under its Subcontract with Yonkers to furnish all labor, materials, and equipment in order to provide a "Complete Waterproofing System Installation" that was "whole and watertight."

71. Yonkers denies the allegations of Paragraph 71. On or about October 7, 2013, MTA directed Yonkers to perform hydro-demolition work in certain areas within the E2 Incline Tunnel as determined and selected by MTA's Engineers.

72. Yonkers denies the allegations of Paragraph 72. The MTA and its Engineers determined from the results of the hydro-demolition work that numerous voids existed in the shotcrete installed by Superior Gunite ("Superior").

73. Yonkers denies the allegations of Paragraph 73, except to admit that on October 14, 2013, a meeting was held with MTA, Superior, Yonkers, and MTA's Engineers present, in which the findings of the selective hydro-demolition performed at the E2 Incline were discussed.

74. Yonkers denies the allegations of Paragraph 74, except to admit that during the meeting held on October 14, 2013, MTA's Engineers noted that a large 6-in diameter by 2-ft long void was found in the "crown" and smaller voids were found in the "shoulders" of the arch.

75. Yonkers denies the allegations of Paragraph 74, except to admit that during the meeting held on October 14, 2013, MTA's Engineers expressed concern that the PVC waterproofing membrane would collapse and puncture at large void areas.

76. Yonkers denies the allegations of Paragraph 76. Yonkers discussed the results of the selective hydro-demolition with KJC on numerous occasions prior to the execution of the Agreement between Yonkers and KJC executed on or about January 8, 2014, and at length.

Furthermore, KJC was well aware of the existence of large voids within the shotcrete, having discovered them itself and documented its findings in emails to Yonkers dated as far back as June 11, 2013.

77. Yonkers admits the allegations of Paragraph 77.

78. Yonkers admits the allegations of Paragraph 78.

79. Yonkers denies the allegations of Paragraph 79. Had Yonkers and KJC contemplated on December 5, 2013, that the scope of work under the Agreement would only take a matter of days, then this would have obviated need to execute the Agreement more than a month later. Moreover, nowhere in the Agreement is any specific time or duration of work specified within which KJC was contemplated to have been able to complete its scope of work. Rather, the language of the Agreement that KJC agreed to expressly requires that KJC achieve the “dryness” requirements as determined by MTA. Yonkers avers that the terms of the Agreement speak for themselves as to what was contemplated by Yonkers and KJC thereunder.

80. Yonkers denies the allegations of Paragraph 80. Generally, the scope of work contemplated by Yonkers and KJC in the Agreement was intended to encompass whatever grouting operations were necessary to rectify water leaks on the Project to the point that MTA deemed the Project’s “dryness” requirements to have been achieved. Yonkers avers that the terms of the Agreement speak for themselves as to what was contemplated by Yonkers and KJC thereunder.

81. Yonkers denies the allegations of Paragraph 81. As expressly stated in the Agreement, “KJC shall not be responsible prospectively for the remediation of any defective condition that is the result of the actions or inactions of YCC, its subcontractors or third parties

during or subsequent to KJC's execution of the Work." Yonkers avers that the terms of the Agreement speak for themselves as to what was contemplated by Yonkers and KJC thereunder.

82. Yonkers denies the allegations of Paragraph 82. Generally, the scope of work contemplated by Yonkers and KJC in the Agreement was intended to encompass grouting operations that were necessary to rectify water leaks on the Project to the point that MTA deemed the Project's "dryness" requirements to have been achieved. Yonkers avers that the terms of the Agreement speak for themselves as to what was contemplated by Yonkers and KJC thereunder.

83. Yonkers denies the allegations of Paragraph 83. Again, nowhere in the Agreement is any specific time or duration of work specified within which KJC was contemplated to have been able to achieve the "dryness" requirements. As per the Project Specifications, the achievement of dryness was a determination to be made by MTA — not Yonkers or KJC. Thus, and especially given that MTA had yet to deem the Project as having achieved Substantial Completion, Yonkers and KJC did not know, and could not possibly predict, at the time the Agreement was executed when MTA would determine that dryness is achieved. Furthermore, numerous drafts of the Agreement were exchanged and reviewed extensively by counsel for both KJC and Yonkers in order to ensure that there was no mistake — unilateral, mutual, or otherwise — of any fact in executing the Agreement.

84. Yonkers denies the allegations of Paragraph 84. Since KJC's scope of work went hand-in-hand with achieving dryness, Yonkers and KJC could not possibly contemplate when the achievement of dryness would occur. Thus, Yonkers and KJC did not contemplate that the achievement of dryness would occur within a "short period of time."

85. Yonkers denies the allegations of Paragraph 85. KJC understood that its scope of work under its Subcontract included providing a "Complete Waterproofing System Installation"

that was “whole and watertight.” Both KJC and Yonkers also understood that the water leaks on the Project were extensive, and that KJC was obligated to remediate these water leaks pursuant to its Subcontract with Yonkers. Still, Yonkers executed the subsequent Agreement with KJC in good faith and in order to provide a means of releasing retainage and paying an additional \$100,000 to KJC for leak remediation work — because both Yonkers and KJC were aware that they could not contemplate when the MTA would deem the Project to have achieved “dryness.” KJC, however, did not fulfill its obligations under the Agreement for payment, and Yonkers in turn incurred additional expenses. There was and is no mutual mistake of fact or misunderstanding as to these facts.

86. Yonkers neither admits nor denies the allegations of Paragraph 86. To the extent that a response is required, Yonkers denies the allegations of Paragraph 86.

IN RESPONSE TO THE EIGHTH COUNTERCLAIM
(RESCISSION OF SETTLEMENT AGREEMENT BASED ON UNILATERAL MISTAKE)

87. Yonkers realleges its responses contained in Paragraphs 1 through 86 with the same force and effect as if fully set forth herein.

88. Yonkers denies the allegations of Paragraph 88. Yonkers kept KJC well-informed of the existence of voids within the shotcrete on the Project, the extensiveness of such voids, and the progress of efforts to remediate same. Yonkers also sent KJC a letter dated August 2, 2013, and with a copy of MTA’s Stop Work Order attached. The Stop Work Order specifically stated that there were concerns with the use of shotcrete on the Project. Furthermore, KJC was physically present on site and witnessed the shotcrete remediation efforts firsthand. Yonkers also had numerous discussions with KJC on the Project site in order to keep KJC informed of the issues concerning the shotcrete voids.

89. Yonkers denies the allegations of Paragraph 89. Again, nowhere in the Agreement is any specific time or duration of work specified within which KJC was contemplated to have been able to achieve the “dryness” requirements. As per the Project Specifications, the achievement of dryness was a determination to be made by MTA — not Yonkers or KJC. Thus, and especially given that MTA had yet to deem the Project as having achieved Substantial Completion, Yonkers and KJC did not know, and could not possibly predict, at the time the Agreement was executed when MTA would determine that dryness is achieved. Furthermore, numerous drafts of the Agreement were exchanged and reviewed extensively by counsel for both KJC and Yonkers in order to ensure that there was no mistake — unilateral, mutual, or otherwise — of any fact in executing the Agreement.

90. Yonkers denies the allegations of Paragraph 90. Since KJC’s scope of work went hand-in-hand with achieving dryness, Yonkers and KJC could not possibly contemplate when the achievement of dryness would occur. Thus, KJC did not contemplate that the achievement of dryness would occur within a “short period of time.” Yonkers avers that the terms of the Agreement speak for themselves as to what was contemplated by Yonkers and KJC thereunder.

91. Yonkers denies the allegations of Paragraph 91. KJC understood that its scope of work under its Subcontract included providing a “Complete Waterproofing System Installation” that was “whole and watertight.” KJC was well aware that the water leaks on the Project were extensive, and that it was obligated to remediate these water leaks pursuant to its Subcontract with Yonkers. KJC was also well aware that its remediation of water leaks would not be complete until MTA deemed the Project to have achieved “dryness.” Moreover, KJC’s counsel was involved extensively with negotiating the terms and conditions of the Agreement while all of this information was known. There was no unilateral mistake of fact or misunderstanding by KJC as

to this. Yonkers avers that the terms of the Agreement speak for themselves as to what was contemplated by Yonkers and KJC thereunder.

92. Yonkers neither admits nor denies the allegations of Paragraph 92. To the extent that a response is required, Yonkers denies the allegations of Paragraph 92.

IN RESPONSE TO THE NINTH COUNTERCLAIM
(RESCISSION OF SETTLEMENT AGREEMENT BASED ON FRAUD IN THE INDUCEMENT)

93. Yonkers realleges its responses contained in Paragraphs 1 through 92 with the same force and effect as if fully set forth herein.

94. Yonkers denies the allegations of Paragraph 94. Yonkers sent KJC a letter dated August 2, 2013, and with a copy of MTA's Stop Work Order attached. The Stop Work Order specifically stated that there were concerns with the use of shotcrete on the Project and the existence of water leaks. Thereafter, Yonkers kept KJC well-informed of the status and extensiveness of shotcrete voids and water leaks as Yonkers itself received this information. As KJC was physically present on site and performed water leak remediation work, KJC was aware of the extensiveness of the issues concerning the shotcrete voids and water leaks. Yonkers also had numerous discussions with KJC on the Project site in order to apprise KJC of these evolving issues on an ongoing basis.

95. Yonkers denies the allegations of Paragraph 95. At the time of executing the Agreement with KJC, Yonkers was aware — as KJC also was — that there were issues concerning the existence of voids within the shotcrete installed by Superior. Yonkers informed KJC of the extensiveness of the issues with the shotcrete as such information was obtained. Such information was generated not by Yonkers, but by MTA's Engineers.

96. Yonkers denies the allegations of Paragraph 96, except to admit that pursuant to the Agreement "KJC shall not be responsible prospectively for the remediation of any defective

condition that is the result of the actions or inactions of YCC, its subcontractors or third parties during or subsequent to KJC's execution of the Work.”

97. Yonkers denies the allegations of Paragraph 97. Yonkers did not fail to apprise of any information relating to the extent of shotcrete voids and/or water leaks on the Project. In fact, it was KJC who informed Yonkers on June 11, 2013 of the discovery of a large amount of voids within the shotcrete. There was no fraud or inducement in KJC entering into the Agreement. Furthermore, counsel for KJC, specifically Mr. Allan Bahn, Esq., was actively present and involved with the negotiation of the terms of the Agreement on behalf of KJC.

98. Yonkers denies the allegations of Paragraph 98. Neither Yonkers nor KJC knew when KJC's scope of work would be completed, as this was a determination that would ultimately be made by MTA. Both Yonkers and KJC were aware that the shotcrete contained numerous voids, which KJC had informed Yonkers of as far back as June 11, 2013.

99. Yonkers denies the allegations of Paragraph 99.

100. Yonkers neither admits nor denies the allegations of Paragraph 100. To the extent that a response is required, Yonkers denies the allegations of Paragraph 100.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

KJC's Supplemental Counterclaims fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

KJC's Supplemental Counterclaims are barred to the extent that they were not filed within the applicable statutes of limitation and/or administrative filing periods.

THIRD AFFIRMATIVE DEFENSE

KJC's Supplemental Counterclaims are barred, in whole or in part, by the principles of waiver and/or estoppel.

FOURTH AFFIRMATIVE DEFENSE

KJC's Supplemental Counterclaims are barred, in whole or in part, by the principle of setoff as well as the setoff provisions within KJC's Subcontract with Yonkers.

FIFTH AFFIRMATIVE DEFENSE

KJC's Supplemental Counterclaims are barred to the extent that KJC failed to timely and properly exhaust all necessary administrative, statutory, and/or jurisdictional prerequisites for the commencement of this action.

SIXTH AFFIRMATIVE DEFENSE

Yonkers and Zurich reserve the right to assert any and all other affirmative defenses as allowed by the CPLR or the orders of the Court.

SEVENTH AFFIRMATIVE DEFENSE

To the extent the causes of action asserted in KJC's Supplemental Counterclaims are in equity, they are barred on the grounds of unclean hands. Also, there can be no claims in quantum meruit or unjust enrichment, as there is a specific written contract between the Parties.

EIGHTH AFFIRMATIVE DEFENSE

To the extent that KJC's Supplemental Counterclaims allege that KJC is due payment of monies from Yonkers under the Subcontract, such monies have been withheld as necessary to satisfy any claims, liens, and/or judgments against KJC that have yet to be suitably discharged.

NINTH AFFIRMATIVE DEFENSE

Due to the complex nature and necessary closeout procedures of the Project at issue, which has yet to achieve Final Completion, Yonkers is currently unable to determine how much, if any, monies are due and owing to KJC.

TENTH AFFIRMATIVE DEFENSE

Yonkers' obligations to pay KJC commence no earlier than payment by the Owner to Yonkers for work performed by KJC.

WHEREFORE, Plaintiff Yonkers Contracting Company, Inc. and Defendant by Counterclaims Zurich American Insurance Company demand judgment dismissing the Supplemental Counterclaims of Defendant/Third-Party Plaintiff KJC Waterproofing, Inc., and such other and further relief as the Court deems just and proper.

Dated: August 19, 2015

Lewis & McKenna

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Co-Counsel for Plaintiff
Yonkers Contracting Company, Inc. and
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By: 

Anthony J. Tavormina

ATTORNEY VERIFICATION

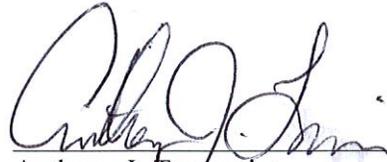
STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

ANTHONY J. TAVORMINA, an attorney duly admitted to practice law before the Courts of the State of New York, being duly sworn, deposes and says:

I am an attorney of the firm of Lewis & McKenna, co-counsel for Yonkers Contracting Company, Inc., the Plaintiff in the within action, and Zurich American Insurance Company, a Defendant by Counterclaims in the within action; I have read the foregoing Verified Reply to Counterclaims and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

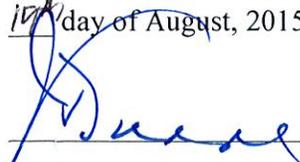
This Verification is submitted by me and not by Plaintiff Yonkers Contracting Company, Inc. or Defendant by Counterclaims Zurich American Insurance Company, and on behalf of co-counsel Veneruso, Curto, Schwartz & Curto, LLP, for the reason that the Plaintiff and Defendant by Counterclaims are not within the county where I have my office and I am familiar with the facts upon which the suit is based.

The grounds of my belief as to all matters not stated upon my knowledge are investigations and reports made to me.



Anthony J. Tavormina

Sworn to before me this
17th day of August, 2015



JODY S. DUNNE
A NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES 4/28/16

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

AFFIDAVIT OF SERVICE BY ELECTRONIC FILING

Anthony J. Tavormina, being duly sworn, deposes and says: that deponent is not a party to this action, that he is 18 years and upwards; that he is employed by Lewis & McKenna, co-counsel for Plaintiff Yonkers Contracting Company, Inc. and Defendant by Counterclaims Zurich American Insurance Company in the above captioned action; that the address of said attorneys is 82 East Allendale Road, Suite 6, Saddle River, New Jersey 07458.

On August 19, 2015, deponent served the within Verified Reply and Affirmative Defenses to Defendant KJC Waterproofing, Inc.'s Supplemental Counterclaims upon:

**ALL PARTIES AS APPEARED ON THE SUPREME COURT
STATE OF NEW YORK ELECTRONIC FILING WEBSITE.**

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KJC Waterproofing, Inc.*

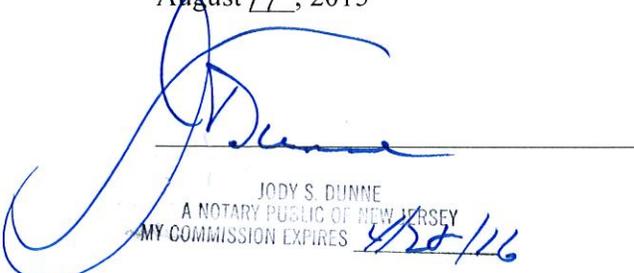
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Citi Structure LLC*


Anthony J. Tavormina

Sworn to before me
August 19, 2015



JODY S. DUNNE
A NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES 8/28/16