

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

YONKERS CONTRACTING COMPANY,  
INC.,

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,

Defendants.

Index No.: 61442/2014

**YONKERS CONTRACTING COMPANY, INC.  
AND ZURICH AMERICAN INSURANCE  
COMPANY'S VERIFIED REPLY AND  
AFFIRMATIVE DEFENSES TO DEFENDANT  
SUPERIOR GUNITE'S CROSS-CLAIMS**

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 Cross-Claims of Defendant Superior Gunite ("Superior"), respectfully state as follows:

**IN RESPONSE TO SUPERIOR'S TWELFTH AFFIRMATIVE DEFENSE, COUNTERCLAIMS  
AGAINST YONKERS, AND CROSS-CLAIM AGAINST ALL DEFENDANTS**

1. Paragraph 27 does not require a response from Yonkers and Zurich. To the extent a response is required, Yonkers and Zurich deny the allegations of Paragraph 27.
2. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28 and leave Superior to its proofs.
3. Yonkers and Zurich admit the allegations of Paragraph 29.

4. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 and leave Superior to its proofs.
5. Yonkers and Zurich admit the allegations of Paragraph 31.
6. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32 and leave Superior 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 33 and leave Superior 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 34 and leave Superior 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 35 and leave Superior 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 36 and leave Superior to its proofs.
11. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 37 and leave Superior to its proofs.
12. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 38 and leave Superior to its proofs.
13. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 39 and leave Superior to its proofs.
14. Yonkers and Zurich deny the allegations of Paragraph 40.
15. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 41 and leave Superior to its proofs.

16. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42 and leave Superior to its proofs.

17. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43 and leave Superior to its proofs.

18. Yonkers and Zurich deny the allegations of Paragraph 44, except to admit that on or about September 12, 2014, Yonkers, as Principal, and Zurich, as Surety, executed Lien Discharge Bond No. LPM09157346 in the penal sum of \$3,496,642.60.

19. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 45 and leave Superior to its proofs.

20. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 46 and leave Superior to its proofs.

21. Yonkers and Zurich lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 47 and leave Superior to its proofs.

### **AFFIRMATIVE DEFENSES**

#### **FIRST AFFIRMATIVE DEFENSE**

Superior's Cross-Claims fail to state a claim upon which relief may be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

Superior's Cross-Claims are barred to the extent that they were not filed within the applicable statutes of limitation and/or administrative filing periods.

#### **THIRD AFFIRMATIVE DEFENSE**

Superior's Cross-Claims are barred, in whole or in part, by the principles of waiver and/or estoppel.

#### **FOURTH AFFIRMATIVE DEFENSE**

Superior's Cross-Claims are barred, in whole or in part, by the principle of setoff as well as the setoff provisions within Superior's Subcontracts with Yonkers.

#### **FIFTH AFFIRMATIVE DEFENSE**

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

#### **SIXTH AFFIRMATIVE DEFENSE**

Superior's Cross-Claims are barred by Superior's own breaches of contract.

#### **SEVENTH 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.

#### **EIGHTH AFFIRMATIVE DEFENSE**

To the extent the causes of action asserted in Superior's Cross-Claims are in equity, they are barred on the grounds of unclean hands.

#### **NINTH AFFIRMATIVE DEFENSE**

To the extent that Superior's Cross-Claims allege that Superior 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 Superior that have yet to be suitably discharged.

#### **TENTH 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 Superior.

**ELEVENTH AFFIRMATIVE DEFENSE**

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

**WHEREFORE**, Plaintiff Yonkers Contracting Company, Inc. and Defendant by Counterclaims Zurich American Insurance Company demand judgment dismissing the Cross-Claims of Defendant Superior Gunite, and such other and further relief as the Court deems just and proper.

Dated: October 5, 2015

**Lewis & McKenna**

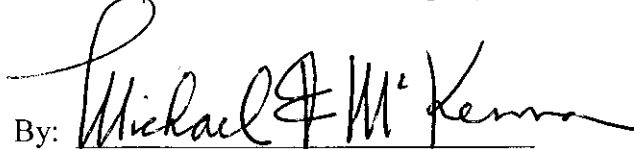
82 E. Allendale Road, Suite 6  
Saddle River, New Jersey 07458  
(201) 934-9800

*Co-Counsel for Plaintiff  
Yonkers Contracting Company, Inc. and  
Counterclaim Defendant  
Zurich American Insurance Company*

**Veneruso, Curto, Schwartz & Curto, LLP**

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(914) 202-3047

*Co-Counsel for Plaintiff  
Yonkers Contracting Company, Inc. and  
Counterclaim Defendant  
Zurich American Insurance Company*

By: 

Michael F. McKenna

ATTORNEY VERIFICATION

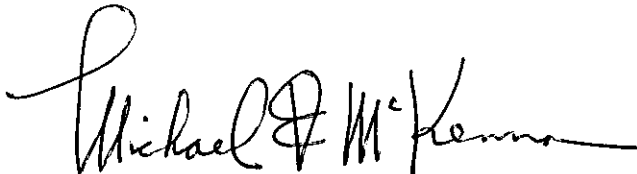
STATE OF NEW JERSEY            )  
  )    ss.:  
COUNTY OF BERGEN            )

**MICHAEL F. McKENNA**, an attorney duly admitted to practice law before the Courts of the State of New York, being duly sworn, deposes and says:

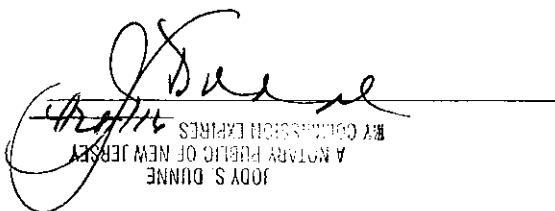
I am an attorney and partner of the firm of Lewis & McKenna, co-counsel for Yonkers Contracting Company, Inc., the Plaintiff in the within action, and Zurich American Insurance Company, a Defendant by Counterclaims in the within action; I have read the foregoing Verified Reply and Affirmative Defenses to the Cross-Claims of Defendant Superior Gunitite 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.

  
Michael F. McKenna

Sworn to before me this  
5<sup>TH</sup> day of October, 2015

  
JODY S. DUNNE  
A NOTARY PUBLIC OF NEW JERSEY  
MY COMMISSION EXPIRES 12/31/2016

**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 October 5, 2015, deponent served the within Verified Reply and Affirmative Defenses to Defendant Superior Gunite's Cross-Claims upon:

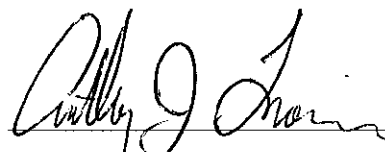
**ALL PARTIES AS APPEARED ON THE SUPREME COURT  
STATE OF NEW YORK ELECTRONIC FILING WEBSITE.**

Martin I. Gold, Esq.  
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*Counsel for Defendant  
KJC Waterproofing, Inc.*

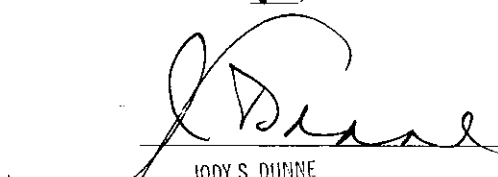
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Superior Gunite*

Henry C. Chan, Esq.  
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1375 Broadway, 3rd Floor  
New York, New York 10018  
*Counsel for Defendant  
Citi Structure LLC*

  
Anthony J. Tavormina

Sworn to before me  
October 5, 2015

  
JODY S. DUNNE  
A NOTARY PUBLIC OF NEW JERSEY  
MY COMMISSION EXPIRES 12/16

**SUPREME COURT OF THE STATE OF NEW YORK  
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YONKERS CONTRACTING COMPANY,  
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KJC WATERPROOFING, INC., SUPERIOR  
GUNITE, ZURICH AMERICAN  
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NEWYORK INC., AND CITI STRUCTURE  
LLC,

Defendants.

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**STIPULATION TO EXTEND TIME TO REPLY  
OR OTHERWISE PLEAD FOR PLAINTIFF  
YONKERS CONTRACTING COMPANY, INC.**

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys that the time for Plaintiff Yonkers Contracting Company, Inc. to Reply or otherwise respond to the Counterclaims of Defendant Superior Gunite, filed on September 1, 2015, is extended to October 9, 2015;

IT IS HEREBY FURTHER STIPULATED AND AGREED that this Stipulation may be executed in counterparts, and by electronic or facsimile signature, each of which shall be deemed an original and shall constitute the same Stipulation.



Dated: October 5, 2015

**DUANE MORRIS, LLP**

By: 

Brian A. Shue  
1540 Broadway  
New York, New York 10036  
Phone: (212) 692-1000  
Facsimile: (212) 537-0236  
*Counsel for Defendant*  
*Superior Gunite*

Dated: October 5, 2015

**LEWIS & MCKENNA**

By: 

Anthony J. Tavormina  
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Phone: (201) 934-9800  
Facsimile: (201) 934-8681  
*Co-Counsel for Plaintiff*  
*Yonkers Contracting Company, Inc.*