

**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,

Defendants.

**VERIFIED REPLY AND  
AFFIRMATIVE DEFENSES TO  
COUNTERCLAIMS**

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 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. Defendant/Third-Party Plaintiff KJC Waterproofing, Inc. has omitted Paragraph 11 from its Counterclaims, and as such a reply cannot be provided on behalf of Yonkers and Zurich.

12. Defendant/Third-Party Plaintiff KJC Waterproofing, Inc. has omitted Paragraph 12 from its Counterclaims, and as such a reply cannot be provided on behalf of Yonkers and Zurich.

13. Defendant/Third-Party Plaintiff KJC Waterproofing, Inc. has omitted Paragraph 13 from its Counterclaims, and as such a reply cannot be provided on behalf of Yonkers and Zurich.

14. Defendant/Third-Party Plaintiff KJC Waterproofing, Inc. 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. Yonkers also notes that this Paragraph is improperly numbered in KJC's Counterclaims as Paragraph 27.

37. Yonkers denies the allegations of Paragraph 37, which is improperly numbered in KJC's Counterclaims as Paragraph 28.

38. Yonkers denies the allegations of Paragraph 38, which is improperly numbered in KJC's Counterclaims as Paragraph 29.

**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. Yonkers also notes that this Paragraph is improperly numbered in KJC's Counterclaims as Paragraph 30.

40. Yonkers denies the allegations of Paragraph 40, which is improperly numbered in KJC's Counterclaims as Paragraph 31.

41. Yonkers denies the allegations of Paragraph 41, which is improperly numbered in KJC's Counterclaims as Paragraph 32.

42. Yonkers denies the allegations of Paragraph 42, which is improperly numbered in KJC's Counterclaims as Paragraph 33.

43. Yonkers denies the allegations of Paragraph 43, which is improperly numbered in KJC's Counterclaims as Paragraph 34.

**IN RESPONSE TO 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. Yonkers also notes that this Paragraph is improperly numbered in KJC's Counterclaims as Paragraph 35.

45. Yonkers denies the allegations of Paragraph 45, which is improperly numbered in KJC's Counterclaims as Paragraph 36.

46. Yonkers denies the allegations of Paragraph 46, which is improperly numbered in KJC's Counterclaims as Paragraph 37.

47. Yonkers denies the allegations of Paragraph 47, which is improperly numbered in KJC's Counterclaims as Paragraph 38.

**IN RESPONSE TO 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. Yonkers also notes that this Paragraph is improperly numbered in KJC's Counterclaims as Paragraph 39.

49. Yonkers denies the allegations of Paragraph 49, which is improperly numbered in KJC's Counterclaims as Paragraph 40.

50. Yonkers denies the allegations of Paragraph 50, which is improperly numbered in KJC's Counterclaims as Paragraph 41.

51. Yonkers denies the allegations of Paragraph 51, which is improperly numbered in KJC's Counterclaims as Paragraph 42.

52. Yonkers denies the allegations of Paragraph 52, which is improperly numbered in KJC's Counterclaims as Paragraph 43.

53. Yonkers denies the allegations of Paragraph 53, which is improperly numbered in KJC's Counterclaims as Paragraph 44.

54. Yonkers denies the allegations of Paragraph 54, which is improperly numbered in KJC's Counterclaims as Paragraph 45.

**IN RESPONSE TO FIFTH COUNTERCLAIM**  
**(Foreclosure of Mechanic's Lien against All Counter-Defendants)**

55. Yonker and Zurich reallege their responses contained in Paragraphs 1 through 54 with the same force and effect as if fully set forth herein. Yonkers and Zurich also note that this Paragraph is improperly numbered in KJC's Counterclaims as Paragraph 46.

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, which is improperly numbered in KJC's Counterclaims as Paragraph 47, 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, which is improperly numbered in KJC's Counterclaims as Paragraph 48, 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, which is improperly numbered in KJC's Counterclaims as Paragraph 49, 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, which is improperly numbered in KJC's Counterclaims as Paragraph 50, and leave KJC to its proofs.

60. Yonkers and Zurich deny the allegations of Paragraph 60, which is improperly numbered in KJC's Counterclaims as Paragraph 51, 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, which is improperly numbered in KJC's Counterclaims as Paragraph 52.

62. Yonkers and Zurich deny the allegations of Paragraph 62, which is improperly numbered in KJC's Counterclaims as Paragraph 53.

63. Yonkers and Zurich deny the allegations of Paragraph 63, which is improperly numbered in KJC's Counterclaims as Paragraph 54.

64. Yonkers and Zurich deny the allegations of Paragraph 64, which is improperly numbered in KJC's Counterclaims as Paragraph 55.

**IN RESPONSE TO 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. Yonkers and Zurich also note that this Paragraph is improperly numbered in KJC's Counterclaims as Paragraph 56.

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, which is improperly numbered in KJC's Counterclaims as Paragraph 57, and leave KJC to its proofs.



## **AFFIRMATIVE DEFENSES**

### **FIRST AFFIRMATIVE DEFENSE**

The Counterclaims fail to state a claim upon which relief may be granted.

### **SECOND AFFIRMATIVE DEFENSE**

The 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**

The Counterclaims are barred, in whole or in part, by the principles of waiver and/or estoppel.

### **FOURTH AFFIRMATIVE DEFENSE**

The Counterclaims are barred, in whole or in part, by the principle of setoff.

### **FIFTH AFFIRMATIVE DEFENSE**

The 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 the Counterclaims are in equity, they are barred on the grounds of unclean hands.

#### **EIGHTH AFFIRMATIVE DEFENSE**

To the extent that the 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, 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 Counterclaims of Defendant/Third-Party Plaintiff KJC Waterproofing, Inc., and such other and further relief as the Court deems just and proper.

Dated: September, 26, 2014

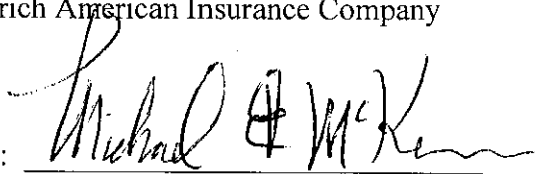
**Lewis & McKenna**

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**

35 East Grassy Sprain Road, Suite 400  
Yonkers, New York 10710  
(914) 202-3047  
Co-Counsel for Plaintiff  
Yonkers Contracting Company, Inc. and  
Counterclaim Defendant  
Zurich American Insurance Company

By:

A handwritten signature in black ink, appearing to read "Michael F. McKenna", written over a horizontal line.

Michael F. McKenna

**ATTORNEY VERIFICATION**

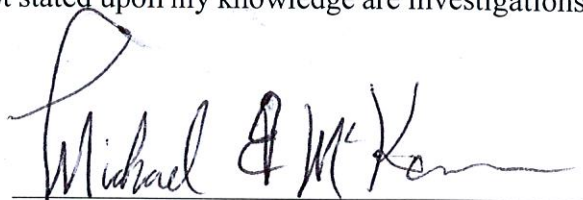
STATE OF NEW YORK                    )  
  )    SS.:  
COUNTY OF WESTCHESTER        )

**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 a member 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 y 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.

  
\_\_\_\_\_  
Michael F. McKenna

Sworn to before me this  
26 day of September, 2014

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

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

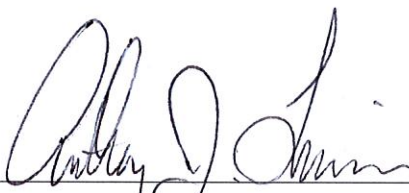
**AFFIDAVIT OF SERVICE BY ELECTRONIC FILING**

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 Counterclaim Defendant 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 September 26, 2014, deponent served the within Verified Reply and Affirmative Defenses to Defendant KJC Waterproofing, Inc.'s Counterclaims upon:

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

Martin I. Gold, Esq.  
Bahn Multer LLP  
555 Fifth Avenue, 14th Floor  
New York, New York 10017  
*Counsel for Defendant  
KJC Waterproofing, Inc.*

  
\_\_\_\_\_  
Anthony J. Tavormina

Sworn to before me  
September 26, 2014

  
\_\_\_\_\_

JODY S. DUNNE  
A NOTARY PUBLIC OF NEW JERSEY  
MY COMMISSION EXPIRES 9/26/16