

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL  
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2021-015089-CA-01

SECTION: CA43

JUDGE: Michael Hanzman

**In re:**

**Champlain Towers South Collapse Litigation**

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**RECEIVER'S MOTION FOR AUTHORIZATION TO TERMINATE  
CONTRACT WITH SWAYSLAND PROFESSIONAL ENGINEERING  
CONSULTANTS INC. AND DEEM RELATED OBLIGATIONS SATISFIED**

Receiver, Michael I. Goldberg (the “**Receiver**”), on behalf of the Champlain Towers South Condominium Association, Inc. (the “**Association**”), pursuant to Rule 4 of the Complex Business Litigation Rules, seeks authority to terminate a May 17, 2021 contract and companion Engineering Services Agreement (collectively, the “**Contract**”) entered into with Swaysland Professional Engineering Consultants, Inc. (“**Swaysland**,” with the Association, the “**Parties**”), and for the Court to deem the obligations, if any, under Contract satisfied, and in support thereof states:

1. At a hearing conducted on July 2, 2021 (the “**Commencement Date**”), in the captioned cases, the Court ordered the appointment of Michael I. Goldberg as Receiver for Association. Following the hearing, the Court entered an order so appointing Mr. Goldberg.

2. This receivership is the result of multiple lawsuits that were filed after the tragic collapse of a portion of the real property with a physical address of 8777 Collins Avenue, Surfside, Florida 33154 (the “**Property**”).

3. Prior to the Commencement Date, on or about May 17, 2021, the Association, as customer, and Swaysland, a professional engineering consulting provider, entered into the Contract pursuant to which Swaysland would conduct an examination of doors and

windows/sliding glass doors on the Property and submit a report thereafter (the “**Contemplated Services**”). A true and correct copy of the Contract is attached hereto as **Composite Exhibit A**.

4. In connection with execution of the Contract, the Association made an initial payment of \$6,000 to Swaysland (the “**Initial Payment**”).

5. Swaysland was to commence rendering the Contemplated Services under the Contract on June 28, 2021.

6. Given the collapse of a portion of the Property on June 24, 2021, the subsequent demolition of the remaining portion of the Property then-left standing, and commencement of the instant receivership, the fundamental purpose of entry into the Contract for provision of the Contemplated Services which were to commence on June 28, 2021 has been completely frustrated. *See Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617-18 (Fla. 2d DCA 1965) (“Impossibility of performance’ refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform. ‘Frustration of purpose’ refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party.”) (citations omitted); *Marathon Sunsets, Inc. v. Coldiron*, 189 So. 3d 235, 236 (Fla. 3d DCA 2016) (“Under the doctrine of impossibility of performance or frustration of purpose, a party is discharged from performing a contractual obligation which is impossible to perform and the party neither assumed the risk of impossibility nor could have acted to prevent the event rendering the performance impossible.”) (citations omitted).

7. At the request of and as an accommodation to the Receiver, the Association and the victims of this tragic collapse, Swaysland has agreed to termination of the Contract and refunding the Initial Payment to the Association.

8. Accordingly, the Receiver requests that he be authorized to terminate the Contract, and that any and all obligations of the Association and of Swaysland under the Contract be deemed satisfied.

9. The Receiver submits that good cause exists for the Court to authorize the Receiver to terminate the Contract and ordering that any and all obligations of the Association and of Swaysland under the Contract be deemed satisfied.

10. Swaysland consents to the relief requested in this Motion.

WHEREFORE, the Receiver respectfully requests that the Court enter an Order authorizing him to terminate the Contract, and ordering that any and all obligations of the Association and of Swaysland under the Contract, be deemed satisfied and that Swaysland refund the Initial Payment to the Association, and grant such other, further and related relief as may be appropriate under the circumstances.

**[Balance of page left blank intentionally]**

Dated: July 19, 2021

Respectfully submitted,

BERGER SINGERMANN, LLP  
*Counsel for the Receiver*  
1450 Brickell Ave., Ste. 1900  
Miami, Florida 33131  
Telephone: (305) 755-9500  
Fax: (305) 714-4340

By: s/ Jordi Gusó

Paul Steven Singerman  
Florida Bar No. 378860  
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[MDiaz@bergersingerman.com](mailto:MDiaz@bergersingerman.com)  
[Fsellars@bergersingerman.com](mailto:Fsellars@bergersingerman.com)

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on July 19, 2021, a copy of the foregoing was electronically filed with the Clerk of Court by using the Florida Courts E-Filing Portal, which, in turn, served same to all counsel of record through the Florida Court's E-Filing Portal. I further certify that a true and correct copy of the foregoing was served by electronic transmission and first class, U.S. Mail upon all parties on the attached Service List.

By: s/ Jordi Gusó  
Jordi Gusó

## **SERVICE LIST**

Patrick J. Toomey, Jr., Esq.  
Daniels, Rodriguez, Berkeley, Daniels & Cruz, P.A.  
*Counsel for Swaysland Professional Engineering Consultants, Inc.*  
4000 Ponce De Leon Blvd., Ste. 800  
Coral Gables, FL 33146  
[ptoomey@drbdc-law.com](mailto:ptoomey@drbdc-law.com)

# **COMPOSITE EXHIBIT “A”**

# SWAYSLAND

PROFESSIONAL ENGINEERING CONSULTANTS

May 17, 2021

Mr. Scott Stewart, Manager  
Champlain Towers South Condominium Association, Inc.  
877 Collins Avenue  
Surfside, FL 33154

Re: Window and Sliding Glass Door Investigation

Dear Board Members:

It is our pleasure to offer this proposal concerning your need for professional engineering services. This document is an agreement between Champlain Towers South Condominium Association, Inc. (herein called CLIENT) and Swaysland Professional Engineering Consultants, Inc. (herein called ENGINEER). The scope of work is as follows:

1. Perform a visual inspection of the existing exterior windows and doors at one-hundred and thirty-six (136) units. ENGINEER will attempt to operate each window or door. The purpose of the inspection is to determine general condition of windows/doors and if any impact protection is offered by windows/doors.
2. Submit a report setting forth our observations and opinions. Individual report for each unit  
(Note: CLIENT shall provide an as-built set of building plans for the ENGINEER'S use. If the ENGINEER needs to obtain plans from the building department an additional fee will be charged.)

*SP*  
*6-4-21*

The fee for the services set forth in Item (1) and (2) above is \$13,750.00

If you concur with this proposal, please sign the original of this Agreement and return it to our office together with your initial payment of \$6,000.00. A payment of \$7,750.00 is due upon completion of Item (2). Any services performed outside the scope of work will be charged at the ENGINEER'S standard rates as set forth below. Payment is due upon receipt of invoices. If at any time payments are not received within forty-five (45) days of receipt of the invoice, ENGINEER has the option of ceasing all further work and charging 1-1/2% per month on the uncollected amount.

## ENGINEER'S STANDARD HOURLY RATES


Principal	\$245.00 per hour
Senior Project Engineer	\$200.00 per hour
Project Engineer	\$180.00 per hour
Staff Engineer	\$160.00 per hour
Engineering Technician	\$100.00 per hour
Draftsman	\$ 95.00 per hour

2890 Marina Mile Boulevard, Suite 114 Fort Lauderdale FL 33312

phone: (954) 473-0043 | toll free (888) 264-7732 | fax: (954) 473-0063 | email: [info@specengineering.net](mailto:info@specengineering.net)



Support Personnel	\$ 75.00 per hour
Water Intrusion Kit (Infrared Camera/ Moisture Meter)	\$100.00 per day
Concrete Strength Kit	\$ 25.00 per day
Corrosion Rate Kit	\$150.00 per day

This agreement is for the preparation of engineering documents. The methodology used by the Engineer to produce these documents will be solely at the discretion of the ENGINEER. ENGINEER is the owner of the original documents pertaining to this project. Unrevokable license for use is granted to Champlain Towers South.  6-4-21

ENGINEER does not supervise the contractor's means, methods or techniques. ENGINEER takes no responsibility for the contractor's scheduling. ENGINEER takes no responsibility for the contractor's safety practices and precautions. All of these matters remain the sole responsibility of the contractor. ENGINEER takes no responsibility for variations between estimated repair quantities and quantities ultimately encountered.

Since the ENGINEER has no control over the cost of labor, materials, equipment or services furnished by others, or over the Contractor(s)' methods of determining process, or over competitive bidding or market conditions, the ENGINEER'S opinions of estimated Total Project Costs and Construction Costs provided for herein are made on the basis of the ENGINEER'S experience and qualifications and represent the ENGINEER'S best judgment as an experienced and qualified professional Engineer, familiar with the construction industry; but the ENGINEER cannot and does not guarantee that proposals, bids or actual Total Project or Construction Costs will not vary from opinions of estimated costs prepared by the ENGINEER.

For terminating ENGINEER'S services, CLIENT must give ENGINEER seven (7) days written notice of perceived deficiencies in ENGINEER'S services, and must give ENGINEER the opportunity to remedy those perceived deficiencies. If these perceived deficiencies are not remedied by the ENGINEER within seven (7) days of ENGINEER'S receipt of the written notice, ENGINEER'S services may be terminated. If payment is not received within forty-five (45) days of an invoice sent to CLIENT by ENGINEER, ENGINEER may terminate this agreement or suspend work under the agreement until payments have been made in full with interest.

In the event of any dispute concerning the accuracy or content of any invoice, CLIENT shall within ten (10) days of receipt of said invoice notify ENGINEER of the exact nature of the dispute. Any invoice not questioned within ten (10) days of receipt shall be deemed due and owing. In the event an invoice or portion of an invoice is disputed within ten (10) days of receipt, CLIENT shall be obligated to pay the undisputed portion of the invoice.

ENGINEER shall procure and maintain insurance policies with such coverage and in such amounts and for such periods of time as ENGINEER deems appropriate. CLIENT agrees that, to the fullest extent permitted by law, the total liability of the ENGINEER, ENGINEER'S principals or employees, or any representative of the ENGINEER to



This document is an Agreement, which if not executed and returned to the ENGINEER on or before July 31, 2020 shall be void.

We look forward to working with you on this project.

Sincerely,

SWAYSLAND PROFESSIONAL ENGINEERING CONSULTANTS, INC.

By: Stanley R. Swaysland  
Stanley R. Swaysland, P.E.  
President

CHAMPLAIN TOWERS SOUTH CONDOMINIUM ASSOCIATION, INC.

Signature \_\_\_\_\_

Print Name \_\_\_\_\_

Date: \_\_\_\_\_

Telephone No: \_\_\_\_\_

If accepted, please provide the following information:

Legal Name: Champlain Towers South Condominium Assoc

Location Address: 8777 Collins Ave  
Surf Side, FL 33154

Contact: Scott Stewart

Mailing/Billing Address: Above

Phone: 305 865 4740 Fax: 305 865 7800

Email: Manager @ Champlainsouth.org Cell 305 877 4868

Correspondence Preference: ☐ US Mail ☒ Email

Referred By: STEVE Lesser

**ENGINEERING SERVICES AGREEMENT**  
**Window and Sliding Glass Door Investigation**

**CHAMPLAIN TOWERS SOUTH CONDOMINIUM ASSOCIATION, INC.** ("Association") enters into this Agreement dated this 2<sup>nd</sup> day of June, 2021 (Effective Date) with **SWAYSLAND PROFESSIONAL ENGINEERING CONSULTANTS INC.** ("Engineer") relating to professional engineering services for the "Window and Sliding Glass Door Investigation" and other associated professional engineering services to be performed at the Champlain Tower South Condominium ("Project"). "Days" as referenced in this Agreement means "consecutive calendar days" unless otherwise specified. The Exhibits contemplated by this Agreement consist of the following:

Exhibit "1"	Proposal dated May 17, 2021
Exhibit "2"	Certificate of Insurance

**NOW THEREFORE**, in exchange for the mutual covenants and promises and agreements set forth in this Agreement, the parties hereto agree as follows:

1. **Compliance with Codes, Standards and Time for Completion:** All services rendered by Engineer pursuant to this Agreement including the Proposal dated May 17, 2021 labeled and attached to this Agreement as Exhibit "1" ("Services") will be performed in accordance with the standard of care for professional engineers performing the type of Services described in Exhibit "1" in Miami-Dade County, Florida. The Engineer will perform its Services in compliance with the requirements of the applicable edition of the Florida Building Code, and other local jurisdictional codes, laws, regulations and ordinances. The Engineer agrees to perform all Services expeditiously to meet the Association's objectives, time being of the essence. The reports referenced in this Agreement will be delivered to the Association in \_\_\_ days from the Effective Date, time being of the essence.

2. **Services:** Upon full execution of this Agreement by the Association and Engineer, the Engineer will perform only those Services outlined in this Agreement and Exhibit "1". All additional Services will only be authorized by written authorization to this Agreement signed by the Association and Engineer. Once the Engineer has been paid for the Services associated with the preparation of any or all of the Instruments of Services in accordance with this Agreement the Engineer and its consultants and sub-consultants grant to the Association a non-exclusive license to use and copy all Instruments of Service prepared by Engineer for any purpose associated with this Project only including the performance of repairs, alterations or improvements. The Instruments of Service include the reports referenced in Exhibit "1".

At the time of completion, or upon an earlier termination of this Agreement, Engineer shall promptly on demand turn over to Association the originals of all such documents. Engineer may retain one (1) set of reproducible copies thereof for information and reference purposes only. At all times, Engineer will allocate sufficient professional staff and other resources as required to perform the Services in accordance with the specified time periods as described in

the Agreement, time being of the essence. Engineer's failure to timely complete its Services in accordance with the dates specified in the Agreement, except for reasonable cause, shall be a material breach of this Agreement. All Services will be performed expeditiously to avoid and /or minimize delay to achieving the objectives of the Association.

3. **Engineers:** Engineer's consultants and its consultants shall be properly licensed to perform all Services relative to this Agreement. The Engineer shall be responsible to the Association for the acts and omissions of its employees, consultants, sub-consultants and their respective employees performing any of the Services under this Agreement. The Engineer and its consultant(s) shall perform without expense to the Association, such professional Services as may be required to correct or remedy any negligent act, error or omission of the Engineer or its Engineers. Once the Engineer has been paid for the Services associated with the preparation of Instruments of Services in accordance with this Agreement the Engineer and its consultants and sub-consultants grant to the Association a non-exclusive license to use and copy all Instruments of Service prepared by Engineer for the purpose of performing repairs, alterations or improvements to this Project only.

4. **Payments to Engineer:** The Engineer shall be paid for the Services as outlined in Exhibit "1". As to each payment, the Engineer shall provide Association with appropriate lien releases and other satisfactory documentation from Engineer and its Engineers to ensure against the filing of liens against the Project by the Engineer or its consultants. The Engineer agrees to defend, indemnify and hold the Association harmless, including reasonable attorney's fees for any claims made by any sub-consultant with respect to Services performed on behalf of Engineer pursuant to this Agreement. Engineer will submit billing invoices to the Association at thirty (30) day intervals setting forth the number of hours worked, and a description of the Services performed and will provide any additional documentation that the Association may reasonably request.

5. **Indemnification:** To the fullest extent permitted by law, Engineer shall indemnify, defend and hold harmless the Association, its directors, officers, members, and their respective employees (hereafter collectively referred to as "Related Parties"), from and against all liability, claims, damages, losses and expenses, including, but not limited to, attorneys' fees, expert witness fees and other engineering fees, but only if such claims, damages, loss or expense result from the failure of the Engineer and /or its Engineers to exercise due care in the performance of its Services relating to this Project. The parties hereto specifically acknowledge and agree the foregoing indemnity shall be construed in accordance with Section 725.06, Florida Statutes in force as of the date of this Agreement. This Agreement does not require the Engineer to provide indemnification for the negligence of the Association. However, should Section 725.06, Florida Statutes, be held applicable to this provision then and only then will the indemnification obligation of the Engineer will have a monetary limitation of One Million Dollars (\$1,000,000.00). The foregoing amount bears a reasonable commercial relationship to the risks undertaken by each party in accordance with this Agreement and is incorporated by reference into the Agreement. This Indemnification obligation of Engineer to the Association shall survive termination or expiration of this Agreement.

6. **Insurance:** The Engineer shall carry Professional Liability Insurance for acts or omissions in a minimum amount of \$1,000,000.00 declining limits as well as Commercial General Liability and Worker's Compensation Insurance (these insurance requirements shall, unless otherwise stated, hereinafter be collectively referred to as "Insurance"). These policies shall remain in effect to provide coverage to the Association during performance of the Engineer's Services for the Project. The Engineer will not begin any Services at the Project until it has obtained all insurance required. The Certificate of Insurance for the Engineer is labeled and attached to this Agreement as Exhibit "2". The Association shall be named as an additional insured by a separate written endorsement to the policy with respect to its Commercial General Liability Insurance to be delivered to the Association prior to commencement of the Services (not applicable to Professional Liability Insurance). A company licensed in the State of Florida must write the insurance required by this Agreement. Copies of the pertinent insurance policies maintained by Engineer shall be made available for inspection and copying by the Association. This insurance shall be primary and other insurance of Association shall not be contributory. Engineer shall not cause any insurance policies to be cancelled or permit them to lapse during the period of performance of this Contract. All policies must provide that Association shall receive not less than thirty (30) days' notice of any cancellation. Certificates of Insurance shall be authenticated by the proper office of the insurer. Engineer shall be responsible for verifying that all sub-consultants maintain Worker's Compensation Insurance. PURSUANT TO FLORIDA STATUTE, SECTION 558.0035, AN INDIVIDUAL EMPLOYEE OR PRINCIPAL OF SWAYSLAND PROFESSIONAL ENGINEERING ENGINEERS, INC. MAY NOT BE HELD INDIVIDUALLY LIABLE FOR NEGLIGENCE.

7. **Records:** The Engineer shall keep such full and detailed accounts as may be necessary for proper financial management under this Agreement and to document the Services rendered to the Association. The Association shall be afforded access to all Engineer's records related to this Project, including, but not limited to billing invoice records, documents supporting reimbursable expenses claimed by the Engineer, and other supporting documentation regarding Services rendered to Association, as well as all books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to this Agreement, as kept by Engineer in the normal course of business, and the Engineer shall preserve all such records for a period of five (5) years after the final payment.

8. **Termination/Termination for Convenience:** This Agreement may be terminated by either party, for materially failing to perform its respective obligations as outlined in this Agreement upon not less than seven (7) days written notice. The Engineer shall be paid for Services rendered and accepted by Association up to the date of termination and shall be paid for all reasonable expenses resulting from such termination and for any unpaid reimbursable expenses. The Association retains the exclusive right to terminate this Agreement for convenience at the conclusion of Services rendered as outlined in the Proposal. The Association and Engineer acknowledge and agree that a termination for convenience under this paragraph will only require the Association to pay Engineer for Services performed and approved by the Association and no other compensation. The Association will provide Engineer with ten (10) days

written notice before the termination for convenience becomes effective. Once notice of a termination for convenience is delivered to Engineer, the Engineer will initiate all steps not to incur any further fees, costs and expenses absent the express written consent of the Association. In the event of termination for cause or convenience Engineer and its Engineers and sub-Engineers grant to the Association a non-exclusive license to use and copy all Instruments of Service prepared by Engineer for the purpose of performing repairs, alterations or improvements to this Project only.

9. **No Waiver of Rights:** Neither the Association's review, approval or payment for any of the Services required under this Agreement shall be construed to operate as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement, and the Engineer shall be and remain liable to the Association in accordance with the applicable law for all damages to the Association caused by the Engineer's negligent performance of any of the Services furnished under the Agreement. The rights and remedies of the Association provided for under this Agreement are in addition to other rights and remedies provided by law

10. **Jurisdiction and Venue:** The venue for any litigation from the Agreement shall be in a Court of competent jurisdiction in Miami-Dade County, Florida.

11. **Alternative Dispute Resolution:** If any dispute arises in connection with the performance of any obligation under this Agreement, the parties agree to consult with each other and consider the use of mediation or other form of alternative dispute resolution prior to resolving to litigation. Pending resolution of any dispute, the Engineer shall continue to perform its obligations under the Agreement and be compensated for any amounts not in dispute to minimize interruptions in construction of the Project. Mediation will be conducted in Miami-Dade County using the services of a mediator certified by the Florida Supreme Court.

12. **No Assignment:** This Agreement is personal to Association and cannot be assigned by the Engineer without written approval of Association which consent shall not be unreasonably withheld.

13. **Deletion/Modifications of Certain Provisions in the Proposal:** The following provisions are deleted: The entire paragraph of the Proposals beginning with the words "ENGINEER shall procure and maintain insurance policies..." is deleted and is not part of this Agreement between the parties. The bold language relating to Section 558.0035, Florida Statutes at the end of the paragraph will remain intact. All payments withheld without justification will bear interest at the prevailing statutory rate in Florida as opposed to 1.5% per month as set forth in the Proposals.

14. **Gender:** Wherever the context shall so require, all words herein in the masculine gender shall be deemed to include the feminine or neuter gender, all singular words shall include the plural, and all plural words shall include the singular.

15. **Time is of the Essence:** Time is of the essence of this Agreement. Where necessary to effectuate the intent of the parties, the terms of this Agreement shall survive completion of the Project. This Agreement shall be construed under the laws of the State of Florida regardless of where executed by either party.

16. **Written Agreement:** This Agreement is binding upon the parties hereto, their successors and assigns and replaces any and all prior agreements or understanding between the parties hereto (whether written or oral) and cannot be modified except in a written document signed by Association and Engineer. This Agreement is the joint product of the parties and shall not be more strictly construed against any party to this Agreement.

17. **Waiver of Chapter 558, Florida Statutes:** The Association and Engineer waive any requirement of Chapter 558, Florida Statutes relative to any matter arising from this Agreement except for the provision dealing with Section 558.0035, Florida Statutes which shall be preserved by this Agreement.




18. **Severability:** If any provision of this Contract is held to be or becomes invalid, illegal or unenforceable or has been breached by any party to this Contract, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

19. **Notices:** Notices to the parties as provided herein shall be by certified mail, return receipt requested, to the following addresses:

As to Association:	Champlain Tower South Condominium Association, Inc. Attn: Board of Directors 877 Collins Avenue Surfside, Florida 33154
Additional Notice to:	Steven B. Lesser, Esq. Becker & Poliakoff PA 1 East Broward Boulevard, Suite 1800 Fort Lauderdale, FL 33301

As to Engineer:	Swaysland Professional Engineering Engineers Inc. 2890 Marina Mile Boulevard, Suite 114 Fort Lauderdale, FL 33312
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IN WITNESS WHEREOF, the parties have executed this Agreement on the Effective Date.

CHAMPLAIN TOWER SOUTH CONDOMINIUM ASSOCIATION, INC. ("ASSOCIATION")	SWAYSLAND PROFESSIONAL ENGINEERING ENGINEERS ("ENGINEER")
By:  — Jean Wodnicki, President	By: <u>Stanley R. Swaysland</u> — STANLEY R. SWAYSLAND, P.E., President
 — Witness Signature <u>Scott Stewart</u> — Printed Name Witness	 — Witness Signature <u>Renaldo Jaimini Samardo</u> — Printed Name Witness