IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

IN RE: CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION,

CLASS REPRESENTATION

CBL DIVISION

CASE NO: 2021-015089-CA-01

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MOTION TO DISMISS CONSOLIDATED SECOND AMENDED CLASS ACTION COMPLAINT

Defendant 8701 Collins Development, LLC (variously, "8701," "8701 Collins" or "8701 Development"), pursuant to Rule 1.140(b) of the Florida Rules of Civil Procedure, moves to dismiss Plaintiffs' Consolidated Second Amended Class Action Complaint ("Complaint") for the reasons set forth below.

INTRODUCTION

Plaintiffs contend that the construction of Eighty-Seven Park,[1] which largely occurred in 2016, somehow contributed to the collapse of Champlain Towers South more than five years later. That astonishing proposition will be tested in this case and it will be, in time, disproven. Now is not the time to bring science to bear upon that fiction, and this motion does not challenge Plaintiffs' right to pursue their theory of their case, no matter how disprovable it is. This motion, however, does challenge the pleading of the Complaint as to its claims of direct and ostensibly derivative liability against 8701.

From the outset, this Court has rigorously managed this case, directing all counsel to observe the highest and most exacting standards of professionalism and practice: "Our community has been devastated by the loss here . . . . There are no words to describe how awful this case is,

[1] Unless otherwise indicated, this motion adopts the naming conventions of the Complaint such that capitalized terms have the meaning ascribed to them in the Complaint.

and it is not going to be treated as business as usual," and it should not be.[2] To the end of litigating a case worthy of the circumstances, the Court has warned against the pursuit of speculative and time-wasting theories of liability.[3] Notwithstanding the Court's frequent admonitions, the Complaint advances just the sort of speculative claims about which the Court warned.[4]

Through subpoenas, Plaintiffs have obtained hundreds of gigabytes of data from the Defendants that reveal each Defendant's role (or lack thereof) in the construction of Eighty-Seven Park. The Complaint's failure to properly differentiate among the Defendants, therefore, demonstrates a casual inattention to, or disregard of, basic principles of corporate independence, or an intentional conflation of the several, distinct Defendants for the inexplicable purpose of tarring them all with the same brush. Under the tragic circumstances of this case, and with the eyes of our community and the media watching, the Court should not permit reckless and unfounded allegations of misfeasance and malfeasance to be indiscriminately levied.

As explained below, the claims pled against 8701 "do not have substantial merit." The Complaint alleges that "8701 Collins Development, LLC, **by and through its agents, servants, workmen, employees, ostensible agents, joint venturers, and/or alter egos** owned, operated, constructed, managed, supervised, and/or developed [Eighty-Seven Park]," Compl. ¶ 13 (emphasis added), and that Defendant JMA "was hired, retained, or otherwise acting as the general contractor

[2] Hr'g Tr. 16:13-15, July 7, 2021 (emphasis added).

[3] "There are only going to be so many viable claims that can be pursued in this case. I made it very clear at the last hearing that I do not want this case bogged down with dubious claims and Hail Marys . . . . There are only going to be so many viable claims. I want the lawyers to be targeted and effective, and I don't want them – like I said, you know, throwing desperation passes. . . . Unless a defendant has engaged in conduct within the relevant statute of limitations that were posed, that can be said to have contributed to this disaster, then claims should not be brought, period." *Id*. at 39:1-13.

[4] See, *e.g.*, Hr'g Tr. 81:7-22, July 14, 2021.

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on the construction project known as 'Eighty-Seven Park,'" *id.* ¶ 17. That is, 8701 retained JMA to construct Eighty-Seven Park. It should go without saying, however, that 8701 is not JMA, or any other Defendant, and it is not liable for the acts of the other Defendants. It is an independent corporate entity, with an independent corporate existence, and if it is to be sued, the Plaintiffs must allege just what 8701 did to be subject to vicarious liability for the acts of JMA, or any other Defendant for that matter. Indeed, the Florida Supreme Court imposes a heightened pleading standard on claims of vicarious liability, such that the ultimate facts of the basis of any putative vicarious liability claim must be "specifically pled." *See Goldschmidt v. Holman*, 571 So. 2d 422, 423 (Fla. 1990). These are basic pleading requirements and fundamentals of due process, and the Complaint fails to satisfy these clear standards. The conflation of the three "Terra Defendants" and the Complaint's under-pled and conclusory theory of their derivative liability for the acts of others works a substantial injustice to 8701, and all the "Terra Defendants," and is unjustifiable under our Rules and the discovery conducted by the Plaintiffs to date. As we explain below, the Complaint must be re-pled.

PROCEDURAL BACKGROUND

1. On June 24, 2021, Champlain Towers suffered a partial collapse, and the remaining structure was demolished ten days later. Compl. ¶ 1.

2. Eight days later, on July 2, 2021, Plaintiffs' counsel suggested that "there appears to be a potential significant defendant, a neighboring building, who if potentially liable would have some significant assets and insurance." Hr'g Tr. 26:22-27:15, July 7, 2021.

3. The Court cautioned against a rush to judgment to bring in insured third parties: "I have no doubt that every possible third-party claim will be fully investigated. Now, I don't want the Court's time and money being wasted on dubious claims. . . . I want you to be targeted and

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focused on claims that are viable and not a stretch. . . . I have the utmost confidence that once a leadership structure is imposed here that the lawyers . . . will properly staff and investigate all potential third-party claims." *Id.* 27:17-28:11.

4. On August 4, 2021, after the Plaintiffs' Class Lead Counsel and the Plaintiffs' Steering Committee were established, the Court was advised that the Plaintiffs would be filing a consolidated class action complaint naming the Champlain Towers South Condominium Association, Inc. as the only Defendant, but that a superseding amendment could be expected after third-party subpoenas were returned and the facts were investigated further. Hr'g Tr. 32:2-20, Aug. 4, 2021. Plaintiffs' counsel then commenced discovery in purported support of "a more robust complaint naming people we believe are responsible, not Hail Mary defendants, but defendants we believe are responsible." Hr'g Tr. 37:8-21, Aug. 18, 2021.

5. According to Plaintiffs, by September 10, 2021, "some 30-odd subpoenas had been issued, the documents for which are now coming in and are being analyzed," and at least one deposition had occurred. Hr'g Tr. 43:15-23, Sept. 10, 2021. Plaintiffs' counsel advised they were "moving Heaven and Earth" to complete their investigation to support their amended pleading. Hr'g Tr. 83:23-84:11, Sept. 30, 2021.

6. In fact, on August 11, 2021, Plaintiffs' counsel served a detailed subpoena on 8701 seeking all documents regarding the ownership and development of Eighty Seven Park.

7. 8701 Collins produced approximately 115 gigabytes – more than 200,000 pages of documents – in response to Plaintiffs' subpoena.

8. Based on the documents 8701 produced and the production of the other Defendants and various third parties, Plaintiffs became amply aware of the distinct and separate roles of 8701 and the independent contractors it hired to design and construct Eighty Seven Park. To wit:

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"[NV5] was hired by [8701 Collins] to conduct a geotechnical and foundational analysis."[5] *Id.* 86:11-13.

9. Similarly, by September 30, 2021, Plaintiffs' counsel were well aware that "8701 Collins" was "the single purpose entity that [developed] the building next door [to CTS]."[6] *Id.* 98:1-5.

10. Plaintiffs' counsel were also aware by September 30, 2021, that 87th Terrace was acquired by "8701 Collins [Development], LLC."[7] *Id.* 102:15-18.

11. The Consolidated Second Amended Class Action Complaint was filed on November 16, 2021.

12. Despite the voluminous discovery provided to Plaintiffs' counsel, and the Court's admonitions against overreaching claims unsupported by a thorough investigation, the Complaint indiscriminately lumps three separate corporate entities, *viz.,* 8701, Terra World Investments, LLC ("TWI"), and Terra Group, LLC ("TG"), together as "the Terra Defendants" and alleges, among other things, that all "collectively" "purchased the 8701 Property,"[8] "undertook excavation and construction" and "used large tractor cranes,"[9] "retained NV5,"[10] "engaged in onsite vibratory

[5] Despite this understanding on September 30, 2021, the Consolidated Second Amended Class Action Complaint alleges (wrongly) that "the Terra Defendants retained NV5." Compl. ¶ 72.
[6] Despite this understanding on September 30, 2021, the Complaint alleges (wrongly and indiscriminately) that "the Terra Defendants undertook excavation and construction" and "used large tractor cranes to drive 40-foot sheet piles into the ground." Compl. ¶ 68.
[7] Despite this understanding on September 30, 2021, the Complaint alleges (wrongly and impossibly) that "the Terra Defendants" acquired 87th Terrace. Compl. ¶¶ 60-65.
[8] Compl. ¶ 53.
[9] Compl. ¶ 68.
[10] Compl. ¶ 72.

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compaction procedures,"[11] "performed the site dewatering in a dangerous manner,"[12] and "excavated against the CTS south foundation wall."[13]

13. At the same time, Plaintiffs allege that John Moriarty & Associates of Florida, Inc. ("JMA") "was hired, retained, or otherwise acting as the general contractor on the construction project known as 'Eighty-Seven Park,'"[14] and allege that JMA also undertook "excavation and construction,"[15] "engaged in onsite vibratory compaction procedures,"[16] "performed the site dewatering in a dangerous manner,"[17] and "excavated against the CTS south foundation wall."[18] In other words, Plaintiffs allege that the purported Terra Defendants performed the same construction work that the general contractor, JMA, allegedly performed. These allegations are obviously inconsistent and factually impossible.

APPLICABLE STANDARDS

"The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal." *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001). Florida Rule of Civil Procedure 1.110(b) requires the pleading of the ultimate facts on which a plaintiff's claims rest: "A pleading which sets forth a claim . . . shall contain . . . a short and plain statement of the *ultimate facts* showing that the pleader is entitled to relief . . . ." (emphasis added).

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[11] Compl. ¶ 157.
[12] Compl. ¶ 172.
[13] Compl. ¶ 187.
[14] Compl. ¶ 17.
[15] Compl. ¶ 199
[16] Compl. ¶ 157.
[17] Compl. ¶ 172.
[18] Compl. ¶ 187.

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Ultimate-fact pleading requires that a plaintiff allege not only the elements of the claim, but also the facts supporting each element:

> ***The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged.*** The complaint . . . must set forth factual assertions that can be supported by evidence which gives rise to legal liability.

Barrett v. City of Margate, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) (emphasis added) (citation omitted); *see also Clark v. Boeing Co.*, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) ("Pleadings must contain ultimate facts supporting each element of the cause of action"). "It is insufficient to plead opinions, theories, legal conclusions or argument." *Id.*; *see also Davis v. Bay Cnty. Jail*, 155 So. 3d 1173, 1177 (Fla. 1st DCA 2014) ("Under Florida procedural law, a complaint that simply strings together a series of sentences and paragraphs containing legal conclusions and theories does not establish a claim for relief."). These pleading requirements exist "so that the trial judge in reviewing the ultimate facts alleged may rule as a matter of law whether or not the facts alleged are sufficient as the factual basis for the inferences the pleader seeks to draw and are sufficient to state a cause of action." *Beckler v. Hoffman*, 550 So. 2d 68, 71 (Fla. 5th DCA 1989).

Rule 1.110 separately requires that a plaintiff plead "each distinct claim in a separate count, rather than plead the various claims against all of the defendants together." *KR Exchange Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 893 (Fla. 3d DCA 2010) (citing Fla. R. Civ. P. 1.110(f)); *Pratus v. City of Naples*, 807 So. 2d 795, 797 (Fla. 2d DCA 2002); *Aspsoft, Inc. v. WebClay*, 983 So. 2d 761, 768 (Fla. 5th DCA 2008) (holding that the plaintiff's complaint set forth defective claims by "impermissibly comingling separate and distinct claims" in a single count); *Dubus v. McArthur*, 682 So. 2d 1246, 1247 (Fla. 1st DCA 1996) (stating that the "task of the trial court was made more difficult because the appellants' amended complaint improperly

attempts to state in a single count separate causes of action"). Failing to differentiate "among the various defendants' actions and statements" and utilizing collective definitions—like, "defendants" or, in this case, "Terra Defendants"—to attribute conduct to multiple parties without differentiation is "improper." *KR Exchange*, 48 So. 3d at 893.

A court should "not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions." *Gallego v. Wells Fargo Bank, N.A.*, 276 So. 3d 989, 990 (Fla. 3d DCA 2019) (citing *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999)); *Response Oncology, Inc. v. Metrahealth Ins. Co.,* 978 F. Supp. 1052, 1058 (S.D. Fla. 1997). Additionally, the Court may take judicial notice of and consider public records when evaluating the sufficiency of a pleading on a motion to dismiss.[19] *See, e.g.*, *Setai Hotel Acquisition, LLC v. Miami Beach Luxury Rentals, Inc.*, No. 16-21296-Civ-Scola, 2017 WL 3503371 *7 (S.D. Fla. 2017) (taking judicial notice of condominium declaration); *Mills v. Ball*, 372 So. 2d 497, 498 (Fla. 1st DCA 1979) (affirming dismissal order based on judicial notice of public records); *Byrne Realty Co. v. S. Fla. Farms Co.*, 81 Fla. 805, 837 (Fla. 1921) ("A demurrer does not admit allegations that are contradicted by records of which the court may take judicial notice."). Application of these standards to Plaintiffs' Complaint requires the dismissal of the repleading of the Complaint vis-à-vis 8701.

[19] "[A] motion to dismiss does not admit allegations that are contradicted by records of which the trial court may take judicial notice." *Mills*, 372 So. 2d at 498; *see also Byrne*, 81 Fla. at 837 ("A demurrer does not admit allegations that are contradicted by records of which the court may take judicial notice.").

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ARGUMENT

I. Plaintiffs Fail to Satisfy Rule 1.110 and Wrongly Comingle Claims Among Multiple Defendants.

The Complaint fails to differentiate three separate corporate defendants—8701 Collins Development, LLC, TG, and TWI—improperly comingling all three under the moniker, the "Terra Defendants." Compl. ¶ 15. In doing so, the Complaint violates Rule 1.110(f). *See KR Exchange Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889 (Fla. 3d DCA 2010); *see also Collado v. Baroukh*, 226 So. 3d 924, 927-28 (Fla. 4th DCA 2017) ("By comingling separate and distinct claims against multiple defendants, [the plaintiffs] violated Rule 1.110(f) for failing to state in a separate count 'each claim founded upon a separate transaction or occurrence.'"); *Pratus*, 807 So. 2d at 797 ("[E]ach claim should be pleaded in a separate count instead of lumping all defendants together."); *Aspsoft*, 983 So. 2d at 768 (holding that the plaintiff's complaint set forth defective claims by "impermissibly comingling separate and distinct claims" in a single count); *Dubus*, 682 So. 2d at 1247 (stating that the "task of the trial court was made more difficult because the appellants' amended complaint improperly attempts to state in a single count separate causes of action").

Rule 1.110 requires that a plaintiff plead "each distinct claim in a separate count, rather than plead the various claims against all of the defendants together." *KR Exchange*, 48 So. 3d at 889. Failing to differentiate "among the various defendants' actions and statements" and utilizing collective definitions—like the "Terra Defendants"— to conflate the conduct of multiple, distinct parties violates Rule 1.110, and is "improper" under binding Third District Court of Appeal precedent. *Id.* The Complaint must be re-pled for this failure alone.

Moreover, by "lumping" 8701 Collins Development, LLC, TWI and TG together as the "Terra Defendants," the Complaint fails to allege just what each Defendant supposedly did wrong.

When a complaint refers to defendants collectively, it "fail[s] . . . to give the defendants adequate notice of the claims against them and the ground upon which each claim rests." *Magnum Constr. Management, LLC v. WSP USA Solutions, Inc.*, 522 F. Supp. 3d 1202, 1206 (S.D. Fla. 2021). Comingled defendants "do not have notice of the purported conduct they are alleged to have committed," *Bentley v. Bank of Am., N.A.*, 773 F. Supp. 2d 1367, 1373 (S.D. Fla. 2011), and such pleadings "waste judicial resources, inexorably broaden the scope of discovery, wreak havoc on appellate court dockets, and undermine the public's respect for the courts," *Taylor v. Royal Caribbean Cruises Ltd*., No. 20-22161-CIV, 2020 WL 3257988, at *1 (S.D. Fla. June 16, 2020).[20]

[20] *See also Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (finding pleading insufficient, while allowing leave to amend, and citing failure to distinguish the defendants in the allegations even "though geographic and temporal realities make it plain that all of the defendants could not have participated in every act"); *Real Est. Mortg. Network, Inc. v. Cadrecha*, No. 8:11-cv-474-T-30AEP, 2011 WL 2881928, at *2 (M.D. Fla. July 19, 2011) (Moody, J.) ("[C]laims should not refer generally to 'Defendants' . . . [as] [l]umping the Defendants together in this manner makes it impossible for the Defendants to be placed on notice as to what allegations specifically apply to their actions or misconduct."); *Centrifugal Air Pumps Australia v. TCS Obsolete, LLC*, No. 6:10-cv-820-Orl-31DAB, 2010 WL 3584948, at *2 (M.D. Fla. Sept. 9, 2010) (Presnell, J.) (dismissing complaint and explaining that "[t]here is no justification for referring to them [multiple defendant and non-party entities] as one, single entity in laying out the factual predicate in the Complaint"); *Gibbs v. United States*, No. 3:11-cv-75-J-34TEM, 2011 WL 485899, at *2 (M.D. Fla. Feb. 7, 2011) (striking complaint where, among other things, allegations fail to specify "to which defendant the allegation[s] appl[y]"); *Marsar v. Smith and Nephew, Inc*., No. 8:13-CV-1244-T-27TGW, 2013 WL 4106345, at *1-3 (M.D. Fla. Aug. 14, 2013) (Whittemore, J.) (holding that dismissal was necessary where "instead of clarifying the allegations as to 'each separate Defendant,' Plaintiff persists in 'lumping' them together," and where breach of warranty claim "lumps Sterling in with the TRIAD Defendants" and lacks "facts unique to Sterling"); *Rivero v. Taylor*, No. 09-20852-CIV, 2010 WL 3384913, at *3 (S.D. Fla. Aug. 3, 2010) (McAliley, J.) (recommending dismissal, and citing that "Plaintiff makes allegations against undifferentiated groups of defendants" as a factor for concluding complaint was a shotgun pleading in violation of Rule 8); *Hanley v. Sports Auth.*, No. 98-6531-CIV-DAVIS, 1998 WL 934792, at *3 (S.D. Fla. Nov. 16, 1998) (Davis, J.) ("Taylor has failed to allege any facts with respect to Defendant Messina that would warrant her being an individual defendant in his hostile work environment claim and therefore she will be dismissed as an individual defendant for this count.").

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These considerations are particularly apropos here where the tragedy from which this case arises cries out for the utmost rigor, the Court has repeatedly advised counsel against pursuing speculative claims,[21] and Plaintiffs have been provided significant pre-suit discovery demonstrating the fallacy that the "Terra Defendants" acted in unison all times and in all matters. Plaintiffs' failure to grapple at all with the distinct corporate entities lumped into the "Terra Defendants," or to differentiate between their respective actions, does not satisfy Rule. 1.110 and patently results in the assertion of claims against the "Terra Defendants" that do not apprise those entities of the acts or omissions allegedly supporting the claims *against each of them*.

For example, the Complaint alleges that "the Terra Defendants undertook excavation and construction," Compl. ¶ 68, as if all three distinct entities somehow occupied the cab of the excavator simultaneously to work the gears and excavate the site.[22] And this impossible allegation is even more difficult to comprehend in light of the allegation that JMA "was hired to, retained, or otherwise act[ed] as the general contractor [for the construction of Eighty Seven Park]," Compl. ¶ 18, and that it too (along with NV5 and Desimone) "excavated and built the 87th Terrace footpath in a manner that damaged CTS's south foundation," Compl. ¶ 184. The allegation that six distinct entities "excavated and built" the footpath defies logic, and it is reckless in its disregard of the corporate separateness of the six corporate defendants.

[21] Hr'g Tr. 27:20-21, July 2, 2021.

[22] This is not the only example of the Complaint's impossible conflations. The "Terra Defendants" are all alleged to have collectively "perform[ed] pile driving," "use[d] a vibratory hammer," "perform[ed] numerous vibration-emitting construction activities," "excavat[ed]" and "perform[ed] dewatering," among other things. Compl. ¶ 336. JMA is alleged to have done the same, as if all four entities simultaneously operated the heavy equipment necessary for the performance of such work. Compl. ¶ 365.

Finally, a multitude of Florida courts – including the Third DCA – confirm that this sort of "lumping" together of defendants violates Rule 1.110. *See K.R. Exch. Servs.*, 48 So. 3d at 893 (finding that claim-lumping "fails to comply with the basic rules of pleading"); *Simon v. Celebration Co.*, 883 So. 2d 826, 833 (Fla. 5th DCA 2004) ("The lack of specificity is particularly troublesome here where nine separate defendants are lumped together in each count in a complaint that often fails to particularize which of the nine defendants made which statements"); *Eagletech Commc'ns, Inc. v. Bryn Mawr Inv. Grp, Inc.*, 79 So. 3d 855, 862 (Fla. 4th DCA 2012) ("Eagletech lumped twenty-nine defendants together and failed to identify which defendant made which statement [and in what context]. Thus, the trial court correctly concluded that these other allegations of fraud lacked the required specificity."). For instance, in *KR Exch. Services*, the Third DCA applied Rule 1.110 to affirm the dismissal of a complaint that attempted to allege, without differentiation, claims of malpractice against four independent entities and individuals. 48 So. 3d at 893. The Third DCA explained, "numerous paragraphs contain allegations and legal conclusions that improperly refer to FHI and Ittleman (as well as CRA and Guido) collectively as 'defendants' and do not differentiate among the various defendants' actions and statements." *Id*. (emphasis added). The Complaint here suffers the same pleading defects, and it must be re-pled in accordance with the foregoing standards so as to allege – in good faith – 8701's role in the development and construction of Eight-Seven Park. Plaintiffs, we submit, will be unable to allege that 8701 was anything other than the landowner and developer that contracted at-arm's length with third-parties for the construction work about which the Plaintiffs complain.

II. The Complaint Fails to Satisfy Rule 1.110(b).

The Complaint is also devoid of any allegation of "ultimate facts" sufficient to establish what, if anything, 8701 (or the other Defendants) purportedly did to subject 8701 to liability under Plaintiffs' derivative or vicarious theories of liability. *See, e.g.*, Fla. R. Civ. P. 1.110(b) ("A

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pleading which sets forth a claim . . . shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . . ."); *Taplett*, 2009 WL 8030450, at *1 (Florida law requires a defendant have "some personal involvement" in order to be held liable; "vague allegations against 'Developer' fail to demonstrate this personal involvement."); *see also Trilogy Props., LLC v. SB Hotel Assocs., LLC*, No. 09-21406-CIV, 2010 WL 7411912, at *2 (S.D. Fla. Dec. 23, 2010) (dismissing plaintiffs' claims against defendants Roy Stillman and Bayrock Group where the complaint "define[d] the term 'developer defendants' as a term including both Mr. Stillman and the Bayrock Group, but every allegation using the term 'developer defendants' [was] a legal conclusion"); *Davis v. Bay Cnty. Jail*, 155 So. 3d 1173, 1177 (Fla. 1st DCA 2014) ("Under Florida procedural law, a complaint that simply strings together a series of sentences and paragraphs containing legal conclusions and theories does not establish a claim for relief."); *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 501 (Fla. 3d DCA 1994) ("A party does not properly allege a cause of action by alleging in conclusive form, which tracks the language of the statute, acts which lack factual allegations and merely state bare legal conclusions.").

The rule in Florida that a pleading must allege ultimate facts requires that Plaintiffs allege not only the elements of the claim, but also the facts supporting the elements.

> ***The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged. The complaint . . . must set forth factual assertions that can be supported by evidence which gives rise to legal liability.***

Barrett v. City of Margate, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) (emphasis added) (citation omitted). "It is insufficient to plead opinions, theories, legal conclusions or argument." *Id.* The Complaint fails to plead the *ultimate facts* supporting Plaintiffs' derivative or vicarious causes of action vis-à-vis 8701.

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For example, the Complaint attempts to link 8701 to the CTS collapse with the conclusory allegation that "Defendant 8701 [], **by and through its agents, servants, workmen, employees, ostensible agents, joint venturers, and/or alter egos** owned, operated, constructed, managed, supervised and/or developed a construction project known as 'Eighty-Seven Park,' located at 8701 Collins Avenue, Miami Beach, Florida," without specifying the identity of any of these purported "agents, servants, workmen, employees, ostensible agents, joint venturers and/or alter egos," or what any one of them did to expose 8701 to vicarious liability for their alleged misconduct. Compl. ¶ 13 (emphasis added). Rule 1.110(b) requires more. *See Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990).

In *Goldschmidt v. Holman*, the Florida Supreme Court, held that the ultimate facts of the basis of any putative vicarious liability claim must be "specifically pled." *Id.* at 423. The court explained:

> In this case, the Holmans would have been entitled to relief against Goldschmidt for the negligence of Soud only through vicarious liability. Thus, rule 1.110(b)(2) required the Holmans to allege Goldschmidt's vicarious liability in the complaint. **Because the complaint failed to set forth any ultimate facts that establish either actual or apparent agency or any other basis for vicarious liability, the Holmans did not allege any grounds entitling them to relief**.

Id. (emphasis added). Thus, Plaintiffs must allege the ultimate facts of the relationships (i.e., the purported "agents, servants, workmen, employees, ostensible agents, joint venturers and/or alter egos") on which they rest their claims of 8701's vicarious liability and "which underlying torts, committed by whom, serve as the basis for each vicarious liability claim against each corporate defendant." *See Honig v. Kornfeld*, 339 F. Supp. 3d 1323, 1347-48 (S.D. Fla. 2018) (applying Florida law) ("To state a claim based on vicarious liability, a plaintiff must 'set forth any ultimate

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facts that establish either actual or apparent agency.'"). The Complaint fails to do so and should be dismissed as a result.

This is not a trivial insistence upon the Rules. They require rigor when pleading vicarious liability claims because, without the detail, courts and litigants cannot test the legal viability of the vicarious-liability claim or the plaintiff's theory of its case. If an agency relationship is the basis of the vicarious liability, it must be pled specifically to evaluate the purported agency. If some other relationship is the basis of the vicarious liability, the details of that relationship must be specified. To adequately plead that 8701 is somehow responsible for the CTS collapse due to the acts of purported "agents, servants, workmen, employees, ostensible agents, joint venturers and/or alter egos," Compl. ¶ 13, the Florida Supreme Court's *Goldschmidt* decision requires ultimate-fact pleading establishing those third-party relationships and demonstrating what those third parties did to expose 8701 to vicarious liability. *See* 571 So. 2d at 423. Plaintiffs pled no such facts, and so the Complaint must be dismissed.

III. Plaintiffs Fail to State a Negligence Cause of Action Against 8701

The Complaint also fails substantively insofar as it seeks to hold 8701 liable in negligence for the acts of others: A landowner simply is **not** liable for injuries caused by an independent contractor's negligence.[23] *Baxley v. Dixie Land & Timber Co.*, 521 So. 2d 170, 172 (Fla. 1st DCA

[23] An exception to this rule is the inherently dangerous work doctrine, which applies when the work to be performed by the independent contractor "is inherently or intrinsically dangerous." *Fla. Power & Light Co. v. Price*, 170 So. 2d 293, 295 (Fla. 1964). An activity is inherently dangerous if the "danger inheres in the performance of the work," and "it is sufficient if there is a recognizable and substantial danger inherent in the work, even though a major hazard is not involved." *Id*. The activity, moreover, must be such that "in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken." *Id*. If the activity is found to be inherently dangerous, then the "one engaged in or responsible for the performance of [the] work . . . is said to be under a nondelegable duty to perform, or have others perform, the work in a reasonably safe and careful manner." *Baxley*, 521 So. 2d at 172.

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1988); *see also Carrasquillo v. Holiday Carpet Service, Inc.*, 615 So. 2d 862, 863 (Fla. 3d DCA 1993) ("Florida follows the general rule that an 'employer' of an independent contractor is not liable for the negligence of the independent contractor.").

Again, the Complaint alleges that "8701 [], **by and through its agents, servants, workmen, employees, ostensible agents, joint venturers, and/or alter egos** owned, operated, constructed, managed, supervised, and/or developed [Eight-Seven Park]," Compl. ¶ 13 (emphasis added), and that Defendant JMA "was hired, retained, or otherwise acting as the general contractor on the construction project known as 'Eighty-Seven Park,'" *id.* ¶ 17. This allegation of JMA's independent contractor status, however, defeats Plaintiffs' negligence claim against 8701 because a landowner who contracts with an independent contractor is not liable for the negligence of its independent contractor absent other facts. *See, e.g.*, *Carrasquillo*, 615 So. 2d at 863; *Kane Furniture Corporation v. Miranda*, 506 So. 2d 1061 (Fla. 2d DCA 1987); *Armenteros v. Baptist Hospital of Miami, Inc.* 714 So. 2d 518 (Fla. 3rd DCA 1998); *T & T Communications, Inc. v. State Department of Lab.*, 460 So. 2d 996 (Fla. 2d DCA 1984). *See also. Keith v. News & Sun Sentinel Co.*, 667 So. 2d 167 (Fla. 1995); *Miami Herald Publishing Company v. Kendall*, 88 So. 2d 276 (Fla. 1956); *Marcoux v. Circle K Stores, Inc.*, 773 So. 2d 1270 (Fla. 4th DCA 2000); *King v. Hall*, 740 So. 2d 1241 (Fla. 3d DCA 1999); *see also See Mann v. Island Resorts Dev. Inc.*, No. 3:08-cv-297–RS–EMT, 2008 WL 5381390, at *1 (N.D. Fla. Dec. 19, 2008) (building code does not impose a duty on a landowner to supervise construction); *Sierra v. Allied Stores Corp.*, 538 So. 2d 943, 944 (Fla. 3d DCA 1989) (same); *cf. Van Ness v. Indep. Constr. Co*., 392 So. 2d 1017, 1019-20 (Fla. 5th DCA), *rev. denied*, 402 So. 2d 614 (Fla. 1981) (finding no duty under Florida common law requiring owner to supervise independent contractor). Absent well-pled allegations of ultimate

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facts of 8701's own affirmative negligence or of facts sufficient to satisfy an exception to the independent contractor rule, Count I must be dismissed.

Moreover, the Complaint's conclusory allegation that the "Terra Defendants . . . had final supervisory authority over all decision-making related to the project," Compl. ¶ 328, is insufficient to overcome the general rule of non-liability. *See City of Miami v. Perez*, 509 So. 2d 343 (Fla. 3d DCA 1987). An owner's right to supervise its contractor may be exercised, without defeating the independent contractor rule. Rather, "[t]o impose liability for retention of control over an independent contractor, there must be such a right of supervision or direction **that the contractor is not entirely free to do the work in its own way**." *Id.* at 346 (emphasis added). Indeed, "an owner has the right to inspect the work of an independent contractor to determine that the work conforms to the contract and to reject unsatisfactory work and demand that it be made satisfactory . . . [and] reservation of this right, through an owner, is not a usurpation of control and does not change an owner from a passive non-participant to an active participant." *Id.* (citing *Van Ness*, 392 So. 2d at 1019).[24] There is no allegation in the Complaint that 8701 retained, much less exercised, "a right of supervision or direction that the contractor is not entirely free to do the work his own way." *Id.*

The Complaint's allegations concerning violations of building codes, Compl. ¶¶ 80-84, are similarly of no moment vis-à-vis the owner's derivative liability for the acts of its contractors and consultants. *See Sierra v. Allied Stores Corp*., 538 So. 2d 943, 944 (Fla. 3d DCA 1989); *Mann*., 2008 WL 5381390, at *1. In *Sierra*, the Third DCA held that "the code does not impose a duty on

[24] The Third DCA further explained in *Perez* that "the presence of an on-site inspector representing the owner's interest does not mean that the owner is actively participating in the construction to the extent that he directly influences the manner in which the work is being performed." *Id.* at 347.

a landowner to supervise construction undertaken by an independent contractor." *Sierra,* at 944. Following *Sierra*, the *Mann* court similarly held that:

> **Florida law clearly holds that the building code does not impose a duty on a landowner to supervise construction to ensure compliance with the building code**. *Sierra v. Allied Stores Corp*., 538 So. 2d 943, 944 (Fla. 3d DCA 1989); *Brown v. S. Broward Hosp. Dist.*, 402 So. 2d 58 (Fla. 4th DCA 1981). *See also City of Miami v. Perez*, 509 So. 2d 343 (Fla. 3d DCA 1987); *Skow v. Dep 't. of Transp*., 468 So. 2d 422 (Fla. 1st DCA 1985) (no explicit duty on a property owner to monitor, inspect or correct safety violations by an independent contractor); *Van Ness v. Indep. Constr. Co*., 392 So.2d 1017 (Fla. 5th DCA 1981) (owner has no common-law duty to supervise independent contractor's work). **Liability under the code, and in accordance with common law principles, is only imposed on "the person or party who committed the violation."** § 553.84, Fla. Stat. (2008).

Mann, 2008 WL 5381390, at *1 (emphasis added).

Next, the Complaint's conclusory allegations of vicarious negligence liability separately fail due to the Complaint's failure to adequately plead the basis of that derivative liability. "To state a claim based on vicarious liability, a plaintiff must 'set forth any ultimate facts that establish either actual or apparent agency.'" *Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990); *see also Ilgen v. Henderson Props., Inc.*, 683 So. 2d 513, 515 (Fla. 2d DCA 1996) (dismissing claim that failed to adequately allege elements of agency relationship). To state a claim based on an actual agency relationship, a plaintiff must allege (1) acknowledgement by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent. *Id*. To assert a claim based on apparent agency, a plaintiff must allege (1) a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party in reliance upon such representation. *Id.* at 514. The Complaint does not contain any such allegations, and it should be dismissed as a result.

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To the extent Plaintiffs are alleging that 8701 is an "alter ego" of any of the other "Terra Defendants" or of any other Defendant, *see* Compl. ¶ 16, this effort fails as well. As Plaintiffs recognize, TG, TWI and 8701 are all limited liability companies. *Id.* ¶¶ 13-15. Under the Florida Revised Limited Liability Company Act, "[a] debt, obligation, or other *liability of a limited liability company is solely the debt, obligation, or other liability of the company*." § 605.0304(1), Fla. Stat. (emphasis added). And, as the Florida Supreme Court has recognized, "[e]very corporation is organized as a business organization to create a legal entity that can do business in its own right and on its own credit as distinguished from the credit and assets of its individual stockholders," *Advertects, Inc. v. Sawyer Indus., Inc.*, 84 So.2d 21 (Fla. 1955), and "[t]he corporate entity is an accepted, well used and highly regarding form of organization in the economic life of our nation. . . [the purpose of which] is generally to limit liability and serve a business convenience." *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1120-21 (Fla. 1984). Indeed, "limited liability is one of the paramount reasons for forming an LLC." *Dinuro Invests., LLC v. Camacho*, 141 So. 3d 731, 742 (Fla. 3d DCA 2014). And while in some circumstances a plaintiff may "pierce the corporate veil" of a company to assert claims against a company's shareholders under an "alter ego" theory of liability, *see, e.g.*, *Dania*, 450 So. 2d at 1117-21, to state such a claim the complaint "must allege facts sufficient to pierce the corporate veil of the corporation. . . . The plaintiff must allege not only that the corporation is a 'mere instrumentality' of the individual defendant but that the individual defendant engaged in 'improper conduct' in the formation or use of the corporation." *Aldea Commc'ns, Inc. v. Gardner*, 725 So. 2d 456, 457 (Fla. 2d DCA 1999). "[U]nless there is a showing that a corporation was formed, or at least employed, for an unlawful or improper purpose—as a subterfuge to mislead or defraud creditors, to hide assets, to evade the requirements of a statute or some analogous betrayal of trust, the corporate veil cannot be pierced."

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Lipsig v. Ramlawi, 760 So. 2d 170, 187 (Fla. 3d DCA 2000). In addition, the plaintiff must show that "the improper use of the corporate form caused injury to the claimant." *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008). The Complaint does not contain any of these allegations. If Plaintiffs are claiming that 8701 is the "alter ego" of any other Defendant, they have failed to plead any facts to support an alter ego theory of liability.

WHEREFORE, based on the foregoing, 8701 respectfully requests that the Court dismiss Plaintiffs' Complaint, and grant all such additional relief as the Court deems just and proper.

Dated: December 28, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, either via transmission of Notices of Service of Court Document generated by the E-Portal or in some other authorized manner for those counsel or parties who are excused from e-mail service on this 30th day of December, 2021.

/s/ Christopher L. Barnett
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