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

CASE NO.: 2021-015089-CA-01
SECTION: CA43
JUDGE: Michael Hanzman

IN RE: CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION

Plaintiff(s)

vs.

N/A

Defendant(s)

_______________________________________/

DESIMONE'S RESPONSE TO PLAINTIFFS' MOTION TO CERTIFY A LIABILITY CLASS

Defendant DeSimone Consulting Engineers LLC ("DeSimone"), by and through its undersigned attorneys and pursuant to the Florida Rules of Civil Procedure, files its Response in Opposition to the motion of the proposed class representatives to certify a liability class pursuant to Florida Rules of Civil Procedure ("FRCP") 1.220(b)(3), (d)(1) and (d)(4) (the Motion to Certify").

INTRODUCTION

This action arises from the tragic collapse of the Champlain Towers South condominium building (the "Collapse"), formerly located at 8777 Collins Avenue, Surfside, Florida ("CTS"). Plaintiffs ask this court to certify a liability class without satisfying any of the legal requirements to do so. In fact, contrary to well-settled case law requiring Plaintiffs seeking class certification to submit evidentiary support for each element of class certification, the Motion to Certify does not

present a shred of actual evidence that the proposed liability class meets the requirements of FRCP 1.220(a) or (b) or support for any theory of liability against DeSimone.

Instead, the Motion to Certify relies solely upon supposition and vague, intermingled allegations against various defendants. The Motion to Certify also fails to address real and apparent conflicts of interest between members of the proposed class. Therefore, the Motion to Certify must be denied.

BACKGROUND

On or about November 16, 2021, plaintiffs Raquel Azevedo de Oliveira, as personal representative of the Estates of Alfredo Leone and Lorenzo de Oliveira Leone; Kevin Spiegel, as personal representative of the Estate of Judith Spiegel; Kevin Fang, as personal representative of the Estate of Stacie Fang; Raysa Rodriguez; and Steve Rosenthal (collectively, "Plaintiffs" or the "Proposed Class Representatives") filed a Consolidated Second Amended Class Action Complaint (the "Complaint") on behalf of a putative liability class and subclasses (the "Liability Class") against defendants DeSimone; 8701 Collins Development ("8701 Collins"), LLC; Terra Group, LLC ("Terra Group"); Terra World Investments, LLC ("Terra World"); John Moriarty & Associates of Florida, Inc. ("JMA"); NV5, Inc. ("NV5"); Champlain Towers South Condominium Association, Inc. (the "Association"); Morabito Consultants, Inc. ("Morabito"); and Becker & Poliakoff, P.A. ("Becker") (collectively, "Defendants").

Defendants 8701 Collins, Terra Group, Terra World, NV5, JMA and DeSimone (collectively, the "87 Park Defendants") are accused of damaging CTS during construction operations – specifically, excavation, pile driving operations, soil compaction and dewatering; of failing to heed complaints and warnings of such damage, including vibration geotechnical and vibration monitoring reports; and failing to take steps to protect CTS. In conclusory fashion, the

allegations against DeSimone are commingled with other 87 Park Defendants, notwithstanding that the Complaint incorporates documentary evidence that DeSimone was not involved in planning, performing or supervising any of the alleged activities. As Plaintiffs are aware, DeSimone was hired to provide specific services, which did not include planning, performing or supervising excavation, pile driving, soil compaction or dewatering or surveying CTS or monitoring vibrations during construction. To the contrary, the Complaint specifically alleges that other parties – not DeSimone – were responsible for the actions that Plaintiffs allege caused damage to CTS.

The Liability Class, according to the Complaint, consists of "[a]ll persons and entities located at, residing at, and/or owning units at the Champlain Towers South condominium building, located at 8777 Collins Avenue, Surfside, Florida 33154, at the time of Champlain Towers South's collapse on June 24, 2021." (Complaint ¶307.) The Liability Class is claimed to include the following subclasses:

i. a Personal Injury and Wrongful Death Subclass, consisting of all persons who suffered personal injuries and the personal representatives, survivors and beneficiaries of the estates of all persons killed as a result of the Collapse (Complaint ¶308);

ii. a Non-Owner Personal Injury and Wrongful Death Subclass, consisting of all persons who suffered personal injuries and the personal representatives, survivors and beneficiaries of the estates of all persons killed as a result of the Collapse and who held no legal ownership interest in any condominium located in the CTS (Complaint ¶309); and

iii. an Economic Loss and Property Damage Subclass, consisting of all persons and entities located at, residing at, and/or owning units at CTS at the time of the Collapse, and that lost real property and/or personal property (Complaint ¶310).

Plaintiffs moved, by motion dated January 28, 2022, to certify the proposed Liability Class and subclasses pursuant to FRCP 1.220(b)(3), 1.220(d)(1), and 1.220(d)(4). For the reason set forth herein, Plaintiffs' Motion to Certify should be denied.

STANDARD OF REVIEW

In determining whether to certify a class, the Court must consider and determine whether the class representative(s) and putative class members meet the requirements for class certification enumerated in FRCP 1.220. Plaintiffs, as the proponents of class certification, bear the burden of pleading and proving that the proposed Liability Class meets the threshold requirements of FRCP 1.220(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. Pinnacle Condo. Ass'n, Inc. v. Haney, 262 So. 3d 260, 262 (3rd DCA 2019). If the pleadings are facially sufficient, but the allegations are contested, the Court must determine whether the facts support certification and may, but is not required to, hold an evidentiary proceeding. Osborne v. Emmer, 184 So. 3d 637, 640 (4th DCA 2016).

In addition, the Plaintiffs must show that their claims satisfy one of the three (3) subdivisions of FRCP 1.220(b). See Execu-Tech Bus. Sys ., Inc. v. Appleton Papers, Inc., 743 So.2d 19, 21 (Fla. 4th DCA 1999), rev. den., 763 So.2d 1042 (Fla.2000) ("A party seeking class certification has the burden of pleading and proving each and every element required under rule 1.220.") Failure to meet any element of FRCP 1.220(a) or (b) precludes certification of the class. Id. To certify the Liability Class pursuant to 1.220(b)(3), which provides for members of the proposed Liability Class to opt-out and potentially prosecute their own action Plaintiffs must show that their claims are not maintainable under either subdivision (b)(1) or (b)(2), which provide for mandatory participation by all class members. FRCP 1.229(b)(3).

Before certifying a class action, the Court must conduct a rigorous analysis to determine whether Plaintiffs have met the requirements of FRCP 1.220(a) of numerosity, commonality, typicality, and adequacy of representation, and that Plaintiffs have also met one of the subdivisions of FRCP 1.220(b). Fla. Health Scis. Ctr., Inc. v. Elsenheimer, 952 So. 2d 575, 580–81 (Fla. 2nd DCA 2007), review denied, 966 So.2d 966 (Fla. 2007). Further, FRCP 1.220(d)(1) requires the Court, in its order, to "separately state the findings of fact and conclusions of law upon which the determination is based." Id., citing Rollins, Inc. v. Butland, 951 So. 2d 860, 867 (Fla. 2nd DCA 2006).

ARGUMENT

I. Plaintiffs Provide No Evidence in Support of the Motion to Certify, Particularly, Evidence of How DeSimone Could Possibly Be Liable; Rather, the Motion to Certify Contains Nothing more than Allegations and Speculation – a Clear Violation of Florida Class Action Law.

A. Evidentiary Support, Not Mere Allegations are Required

Plaintiffs cannot possibly satisfy the class certification requirements because they failed to provide any evidentiary support whatsoever to support a class action against DeSimone. "[T]he granting of class certification considerably expands the dimensions of the lawsuit, and commits the court and the parties to much additional labor over and above that entailed in an ordinary private lawsuit." Miami Automotive Retail Inc. v. Baldwin, 97 So.3d 846, 851 (Fla. 3rd DCA 2012), review denied, 107 So.3d 403 (Fla. 2012).

Consequently, under Florida law, it is well established that **only in rare cases** can the trial court certify a class action without the presentation of evidentiary support – regarding each element of class certification – from the party moving for class certification and without holding an evidentiary hearing to examine the movant's evidence. See e.g. Florida Health Sciences Center Inc., 952 So.2d at 580-582 (reversing trial court's certification of a class because the court "based

the bulk of its findings on the allegations in the [] complaint" and not on evidence);[1] Miami Automotive Retail Inc. v. Baldwin, 97 So.3d 846, 851 (Fla. 3rd DCA 2012) ("The [class certification] burden is only met if there is a sound basis in fact, not supposition . . . . To meet her burden, [plaintiff] was required to present evidence . . . "), review denied, 107 So.3d 403 (Fla. 2012); Seminole County v. Tivoli Orlando Assoc. Ltd., 920 So.2d 818, 822-824 (Fla. 5th DCA 2006) (reversing trial court's class certification order because "[t]he trial court's order contained neither rigorous analysis nor evidentiary support for its conclusion. Thus, the order was defective."); Waste Pro USA v. Vision Construction Ent. Inc., 282 So.3d 911, 920-921 (Fla. 1st DCA 2019) ("A court generally violates the 'rigorous analysis' requirement when its order contains limited analysis or conclusory statements with no factual support."); Fidelity National Title Ins. Co. v. Grosso, 110 So.3d 521, 522-523 (Fla. 4th DCA 2013) ("If evidence is not presented to the trial court, which could demonstrate a proper factual basis for class certification, it is an abuse of discretion to certify the class."); Brown-Peterkin v. Williamson, 307 So.3d 45, 50 (Fla. 4th DCA 2020) ("The circuit court's [class certification] factual findings must be supported by competent, substantial evidence.").

Indeed, "[t]he factual record, as opposed to "**sheer speculation**" (G.H. v. Tamayo, 339 F.R.D. 584, 588 (N.D. Fla. Oct. 22, 2021)),[2] "**simpl[e] supposition**" (Miami Automotive, 97 So.3d

[1] In Florida Health, the Second District remanded the case to provide the parties with "an opportunity to **conduct discovery** regarding the issue of class certification." Id. at 582.

The Florida Supreme Court favorably cited Florida Health in Sosa v. Safeway Premium Fin. Co., 73 So.3d 91 (Fla. 2011), regarding its discussion identifying the significant **evidence** the trial court reviewed before certifying a class:

> the trial court conducted a rigorous analysis, and determined facts which made class certification proper. Before rendering the certification order, the trial court evaluated written arguments for and against certification. It also considered **affidavits, deposition testimony, as well as discovery, documentation, and court filings** . . . ." Additionally, the trial court **held a hearing** where it entertained argument from both parties.

Id. at 118.

[2] "Florida's class action rule is patterned upon Federal Rule of Civil Procedure 23. We look to federal law for interpretive guidance." Leibell v. Miami-Dade County, 84 So.3d 1078, 1083 fn.5 (Fla. 3rd DCA 2012).

at 851), or "**the allegations in the [] complaint**" (Florida Health at 581), must support each element of class certification:

> The [class certification] burden is only met if there is a **sound basis in fact, not supposition** . . . .

Miami Automotive, 97 So.3d at 851;

> Contrary to the Plaintiffs' assertions, **it is insufficient for the trial court to accept the allegations in the Plaintiffs' complaint as true** for purposes of the class certification.

Florida Health, 952 So.2d at 581;

> Accordingly, when plaintiffs contend that their complaints' allegations are sufficient to meet the [class certification] rule's requirements, courts explicitly disagree and conclude **that [they] were required to present evidence** to support class action certification. [citations omitted].
>
> [Plaintiff] did **not call any witnesses or present any evidence** other than three depositions to support the conclusory allegations in its complaint, **failed to present facts to support its class allegations**, and did not meet the burden set by rule 1.220. [citations omitted].

Seminole County, 920 So.2d at 823.

Here, Plaintiffs provided five affidavits which simply attest to the residency of five individuals of CTS – nothing more. In fact, Plaintiffs' Motion to Certify is **supported entirely by citations to allegations of the Complaint** – **not evidence** – and allegations that are not even found in the Complaint – and thus, apparently are sheer speculation or supposition which fails as a matter of law.

Although Plaintiffs filed the Complaint in November 2021, Plaintiffs were permitted to begin extensive documentary discovery in August 2021 and are in possession of hundreds of thousands of documents from Defendants, in addition to public records published by the Town of

Surfside in July and September of 2021, that, if Plaintiffs' claims were supportable on documentary evidence, should have been utilized in support of the Motion to Certify.[3]

Indeed, Plaintiffs have, among other things:

(1) failed to provide affidavits or documentary evidence regarding the elements of class certification or of DeSimone's alleged liability;

(2) failed to provide an expert report regarding the Collapse and how DeSimone could possibly be liable; and,

(3) failed to provide any evidence regarding DeSimone's scope of work and how such scope of work could have caused or contributed to the Collapse.

Accordingly, how could a class action be certified against DeSimone when Plaintiffs failed completely to provide any evidentiary support as to DeSimone's scope of work and how such scope of work could have contributed to the Collapse?

Because Plaintiffs failed to provide the evidentiary support in support of the Motion to Certify or as against DeSimone, Plaintiffs cannot possibly provide evidentiary support regarding every element of a class action against DeSimone. Consequently, Plaintiffs' Motion to Certify must be denied since it is in direct conflict and contrary to Florida law.

B. The Motion to Certify Relies Solely on Supposition Contradicted by Plaintiffs' Own Complaint

Tellingly, rather than submit any actual evidence to support certification, Plaintiffs' Motion to Certify fabricates facts that are directly contrary to the allegations in the Complaint. At the outset, importantly, DeSimone vehemently denies the false allegations in the Motion to Certify that DeSimone, a premier structural engineering firm, ignored, directed, supervised or carried out allegedly dangerous or damaging conduct or alleged damage to CTS (Motion to Certify at 3).

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[3] Plaintiffs served more than two dozen subpoenas in August 2021. See Plaintiffs Notice of Compliance with Florida Rule of Civil Procedure 1.351, dated August 6, 2021, Filing # 132229828.

Nonetheless, as is abundantly clear from the Complaint, DeSimone was not responsible for planning, performance or supervision of excavation, pile driving, soil compaction, geotechnical or dewatering activities, nor was DeSimone involved in pre-construction investigations of conditions at CTS or vibration monitoring for pile driving activities. (Complaint ¶¶ 72, 102-104, 106, 112-119, 121, 124-126, 130, 134-136, 173, 177, 383.) Plaintiffs concede that *other entities* – not DeSimone – were responsible for these activities and Plaintiffs incorporate numerous reports and communications into the Complaint that, on their face, are directed to and by or between others without including or involving DeSimone. (Complaint ¶¶ 72, 103-104, 106, 121, 124, 126, 130, 134-136, 158-159, 173, 177.)

In addition to being patently false, many allegations made in support of the Motion to Certify are made for the first time on this motion and/or contradict the Plaintiffs' pleading, including, but not limited to the following:

> More specifically, the Terra Defendants, Moriarty, NV5, and DeSimone knowingly ignored warnings about the risk of construction to CTS, and directed, supervised, and carried out negligent construction practices, including their (1) excavation ([Complaint] ¶¶ 184-192, 334-36), (2) pile driving ([Complaint] ¶¶ 87-152, 333), (3) soil compaction ([Complaint] ¶¶ 153-165), and (4) dewatering activities. ([Complaint] ¶¶ 166-183, 334-36).

(Certification Motion at 3.)

These allegations are contradicted by documentary evidence in the Plaintiffs' possession, including DeSimone's contract, which is for *structural engineering design services*, as Plaintiffs concede in the Complaint (Complaint ¶19). It is elementary that excavation, pile driving, soil compaction and dewatering are not structural engineering services, particularly when the Complaint alleges and provides ample evidence that other engineering and construction professionals, including *geotechnical* and *dewatering engineers* were hired by the project owner

to investigate, plan, direct, supervise and perform excavation, pile driving, soil compaction and dewatering. (Complaint ¶¶ 72, 102-104, 112-119, 124-126, 135, 173, 383.) DeSimone is not, nor is it alleged to be, a geotechnical engineer or dewatering engineer and was not hired to perform such services.

The Complaint incorporates documentary evidence establishing that DeSimone was not involved in directing, supervising or performing these activities – reports from other engineering entities and directed to Terra Defendants, emails and meeting minutes discussing these activities that do not include any DeSimone personnel (Complaint ¶¶ 72, 103-104, 106, 121, 124, 126, 130, 134-136, 158-159, 173, 177). The Complaint alleges, contrary to any allegations made against DeSimone, that Terra Group, Terra World and/or 8701 Collins (collectively, "Terra Defendants") hired others – all construction and engineering professionals – to direct, supervise and perform excavation, pile driving, soil compaction and dewatering activities, in addition to neighboring property surveys and vibration monitoring. Specifically, and opposite to the Motion to Certify, the Complaint alleges that:

1. Terra Defendants owned and controlled the 87 Park project (Complaint ¶¶13-15);
2. DeSimone was hired to provide structural engineering services (Complaint ¶19);
3. defendant JMA was hired to provide construction and/or construction management services, including pile driving, soil compaction and dewatering (Complaint ¶17, 123, 158, 159, 177, 353, 370, 437), which Plaintiffs allege JMA subcontracted to ASAP Installations, Inc. (Complaint ¶99);
4. defendant NV5 was hired to provide construction inspection services, geotechnical engineering services, a pre-construction survey of CTS and vibration monitoring with respect to CTS (Complaint ¶18, 72, 73, 102-106, 115, 117, 119, 126, 135, 159, 201, 204, 383, 404);

5. non-party Geosonics USA, Inc., was hired to perform vibration monitoring as subcontractor to NV5 (Complaint ¶103, 112, 113, 115, 116, 119, 124, 126, 135);
6. non-party Florida Civil, Inc. was hired to perform dewatering engineering services and to draft a dewatering plan (Complaint ¶173); and
7. non-party ASAP Installations, Inc. was hired to perform sheet-pile driving in support of excavation as a subcontractor to JMA (Complaint ¶99, 100, 121, 122, 124).

Antithetical to reality, common sense, and the Complaint, the Motion to Certify makes the conclusory allegation that DeSimone performed vibratory sheet piling and that it ignored "technical evidence indicating that 80% of readings exceeded safe and allowable levels". (Motion to Certify at 6.) Yet, the Complaint makes clear that DeSimone was not hired to perform sheet piling (Complaint ¶¶19, 99, 100, 121, 122, 124) and was not hired to perform geotechnical services or vibration monitoring (Complaint ¶¶19, 18, 72, 73, 102-106, 115, 117, 119, 126, 135, 159, 201, 204, 383, 404). Further, excerpts of documentary evidence incorporated into the Complaint confirm that DeSimone was not a party to communications or the meetings in which sheet piling was discussed. (Complaint ¶¶ 72, 103-104, 106, 121, 124, 126, 130, 134-136, 158-159, 173, 177.)

For the first time in the Motion to Certify and again irreconcilable with the Complaint, Plaintiffs allege, without supporting affidavits or other evidence, that DeSimone received complaints from CTS residents, but "simply passed [these complaints] along to DeSimone's lawyers". (Motion to Certify at 6.) Notably, the only related allegation in the Complaint incorporates emails between Terra Group, JMA and an attorney representing either Terra Group or JMA (Complaint ¶134) and between that same attorney and legal representatives for the Association (Complaint ¶140), as well as emails between Terra Group and NV5 discussing Terra Groups handling of complaints from residents of CTS (Complaint ¶135). <u>**DeSimone is not**</u>

included on any of these communications or referenced in any way. Nor is DeSimone noted as present for an "Owner | Architect | Contractor ('OAC') Meeting" at which certain 87 Park Defendants and non-parties were present and purportedly discussed complaints from CTS residents (Complaint ¶136).

Finally, Plaintiffs claim that "[i]t is undisputed that the CTS Collapse occurred and directly caused the damages to all of the Plaintiffs and proposed Class Members" (Motion to Certify at 2), but Plaintiffs have not provided any statement of the specific damages they intend to seek, nor have Defendants been provided an opportunity to review or oppose the same. Unless and until Plaintiffs lay bare their proofs of damages caused by the collapse of CTS, DeSimone concedes nothing with respect to Plaintiffs' damages.

C. Plaintiffs Must Provide Supporting Evidence of Their Claims

Additionally, "if consequential to its consideration of whether to certify a class, a trial court may consider evidence on the merits of the case as it applies to the class certification requirements." Porsche Cars North America Inc. v. Diamond, 140 So.3d 1090, 1095 (Fla. 3rd DCA 2014), review denied, 157 So.3d 1042 (Fla. 2014). See also Babineau v. Fed. Exp. Corp., 576 F.3d 1183, 1190 (11th Cir. 2009) (when necessary to the court's analysis in determining whether plaintiffs have met their burden of showing numerosity, commonality, typicality and adequacy, courts "can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.")

Inescapably, sometimes the demands of class certification and whether the plaintiff can succeed on the merits overlap, so "the principle that a district court should not evaluate the merits of plaintiffs' claims should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether [the] plaintiff has met

his burden of establishing each of the [] class action requirements." Babineau, 576 F.3d at 1190. To that end, a court may, if necessary, "look beyond the pleadings and examine the parties' claims, defenses, and evidence to ensure that class certification would comport with Rule 23's standards." Id.

In Babineau, class certification was denied to a proposed class of employees against their employer, Federal Express, for purported underpayment of wages where the plaintiffs failed to present sufficient evidence that the subject employees were actually engaged in work activities during the periods in question. Id. The proposed class was made up of employees that routinely punched in before the start of their scheduled shift and plaintiff sought payment of wages for the period between punching in and the scheduled start of the work shift. Id. On appeal, the plaintiffs argued that the lower court abused its discretion in requiring that plaintiffs present evidence that went to the merits of their claims. Id. The Eleventh Circuit Court of Appeals held that the lower court's reasoning was sound in that it was necessary to examine the merits of the claims and potential defenses in order to make a determination of whether plaintiffs had met their burden of complying with Rule 23(a) of the Federal Rules of Civil Procedure.[4] Id.

Here, as in Babineau, the underlying claims are the subject of significant dispute, and are also pending extensive investigation – investigations that have only just begun. Plaintiffs' mere allegations that all class members are similarly situated is not sufficient to satisfy FRCP 1.220(a). Plaintiffs' unsupported (and self-contradictory) claims that CTS was damaged by construction at neighboring property 87 Park (which construction finished *years* prior to the collapse) is nothing more than speculation. Plaintiffs bear the burden of proof for the Motion to Certify, Pinnacle

[4] Florida's class action rule is patterned upon Federal Rule of Civil Procedure 23." Leibell, 84 So.3d at 1083 fn.5).

Condo. Ass'n, Inc., 262 So. 3d 262, yet have failed to present any. Therefore, the Motion to Certify must be denied.

D. Plaintiffs' Reliance on Cases that Involved Significant Evidence is Misplaced

In the Motion to Certify, Plaintiffs cite to cases involving a "phased approach" to a class action and class actions involving mass torts. (Motion to Certify at 11-12.) However, Plaintiffs ignore the details of these cases and each courts' identification and emphasis on the **evidentiary support** underlying their respective class action certification decisions. For example:

> Plaintiffs allege, and **provided evidence** . . . . * * * Although Plaintiffs **produced deposition testimony** . . . .
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> * * *
>
> Plaintiff's **Construction Expert**, Dave Ingram, **opined** that Defendants failure . . . .
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> * * *
>
> Plaintiffs have also **proffered evidence** that other class members in the affected area were similarly affected . . . .

Las Olas Company Inc. v. FP&L Co., 2020 WL 9874296 *2-3 (Fla. Cir. Ct. Dec. 14, 2020);[5]

> Whether particular **experts' reports** satisfy the criteria of Fed. R. Evid. 702, for example, is a subject addressed to the district court in the first instance (the judge has not ruled yet) and reviewable on appeal from a final decision. Likewise we do not express any view on the question whether the **evidence compiled so far** supports plaintiffs' contention that the tiles are defective.

[5] Plaintiffs appear to rely significantly on the Las Olas case. But, Plaintiffs fail to understand that the plaintiffs in that case **provided substantial evidence** to support the class certification determination. Moreover, the plaintiffs in Las Olas produced an **expert witness** to opine as to defendant's **liability**. The trial court criticized the defendants because "[d]efendants have offered no expert testimony on **liability** issues in **opposing** certification and have not otherwise challenged [plaintiffs'] expert testimony." Id. at *7.

Here, as noted, Plaintiffs have failed to offer any evidence whatsoever, **particularly expert witness reports or testimony**, opining as to how DeSimone could possibly be **liable**. Thus, unlike in Las Olas, here, Plaintiffs have failed to carry their burden by not even retaining an expert witness to provide a theory on the alleged **liability** of DeSimone. Furthermore, if the Plaintiffs here had, in fact, provided an expert report, DeSimone almost certainly would have taken the deposition of the expert and – unlike in Las Olas – would have provided an expert witness to challenge Plaintiffs' expert. Thus, Las Olas is not a favorable decision for the Plaintiffs here considering that they have failed to follow the evidentiary protocol described in such decision.

IKO Roofing Shingle Products Liability Litigation, 757 F.3d 599, 603-604 (7th Cir. 2014) (reversing and remanding class certification), cert. denied, 574 U.S. 1153 (2015);

> To establish such damages, **[plaintiffs] relied solely on the testimony of [expert witness] Dr. James McClave.** Dr. McClave designed a regression model comparing actual cable prices . . . with hypothetical cable prices . . . .
>
> * * *
>
> At the **evidentiary hearing**, **[Plaintiffs' expert witness], Dr. McClave** expressly admitted that the model calculated damages resulting from "the alleged anticompetitive conduct as a whole" and did not attribute damages to any one particular theory of anticompetitive impact.

Comcast Corp. v. Behrend, 569 U.S. 27, 31-37 (2013) (reversing Court of Appeals for the Third Circuit's decision to certify a class);[6]

> Central Wesleyan moved for class certification in this action on December 27, 1988. Prior to that motion, **the district court had ordered limited discovery of only certification issues.** Central Wesleyan, 143 F.R.D. at 634. During this precertification period, plaintiff repeatedly requested **discovery** concerning defendants' sales of asbestos products to colleges and universities other than Central Wesleyan—what the parties call "product identification" **discovery**. Id. Defendants refused to provide this information, arguing that it went to the action's merits, not to certification. Id. Plaintiff responded that it needed this **discovery** in order to defend the typicality of its claims and the suitability of its class representation. Id. The district court eventually permitted the **discovery** in its grant of conditional certification. Id. at 642.

Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 183 (4th Cir. 1993);[7]

> The parties have tendered either jointly or on their own behalf **four experts in the law of class actions:** Professors Coffee, Issacharoff, Klonoff, and Miller. The Court cites to, or in some instances quotes from, the opinions of these experts at various points in the analysis below of class certification issues. However, the Court underscores that at all times it has exercised its independent legal judgment on each and every class certification issue. The Court cites to the declarations of these experts where they summarize the governing legal rules embodied in the text of

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[6] In its decision, the Supreme Court stressed that the moving party cannot rely on its pleading, but must **"be prepared to prove"** the elements of class certification and that the party "must also satisfy through **evidentiary proof** at least one of the provisions of Rule 23(b)." Id. at 33.

[7] As discussed in Footnote 3, **precertification discovery** is not only common, but almost always necessary. In fact, DeSimone's counsel can confidently state that he has never been involved in a class action determination where precertification discovery was not conducted so that the plaintiff could support the alleged class action and class definition with **evidentiary proof.**

> Rule 23 and/or in the case law of the federal courts. Since these same scholars have often criticized abusive class actions, however, it is significant that all four of them, from their various perspectives, support this class settlement and believe that it is certifiable.

In Re. Oil Spill by the Oil Rig Deepwater Horizon, 910 F.Supp.2d 891, 914 (E.D. La. 2012), affirmed, 739 F.3d 790 (5th Cir. 2014);[8]

> **Plaintiffs' motion rests primarily on the testimony, at the hearing in November of 1979, of Joyce Elaine Bourinski, Beverly Ann Gorman and Terrill Schukraft.** Each of them claimed some physical injury stemming from emotional distress attributed to the TMI incident. This portion of the Class III discussion will be limited to the question of certifying the physical injury claims which are linked with emotional distress.[footnote omitted].
>
> * * *
>
> The **testimony of the three plaintiffs at the certification hearing** demonstrates that the claims for emotional distress and resulting physical injury are diverse and personal.

In re Three Mile Island Litigation, 87 F.R.D. 433, 440-441 (M.D. Pa. 1980) (denying class certification based on testimony at evidentiary hearing).[9]

Accordingly, Plaintiffs' reliance on the above cited cases is misplaced[10] since such cases stand for the proposition that class certification – especially a liability class, as discussed in the

[8] The Deepwater Horizon case involved a settlement class action, not a liability class action. Prior to the certification of the settlement class action, not only did the parties proffer the opinions and testimony of four experts, but as noted by the court:

> [T]he parties engaged in an extraordinary amount of discovery within a compressed time period to prepare for the Phase One Trial. This included taking 311 depositions, producing approximately 90 million pages of documents, and exchanging more than 80 expert reports on an intense and demanding schedule. Depositions were conducted on multiple tracks and on two continents. Discovery was kept on course by weekly discovery conferences before Magistrate Judge Shushan. The Court also held monthly status conferences with the parties.

Id. at 901.

[9] In Three Mile Island there were three classes, Class I, II, and III. Class I and II were not really at issue in the decision because both sides agreed to those class definitions. Id. at 438-440. Class III was at issue and, as noted, certification was denied after an evidentiary hearing based on the plaintiffs' testimony.

[10] Plaintiffs also cited the cases of Sala v. Amtrak, 120 F.R.D. 494 (E.D. Pa. 1988) and Allapattah Ser. Inc. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003). Sala was a railroad derailment case involving one defendant – Amtrak – where the defendant did not appear to challenge the plaintiff's certification of the class regarding evidentiary issues, i.e., an Amtrak train derailed and no other defendants were implicated. Similarly, in Allapattah, there was only one defendant – Exxon – and the case involved a breach of contract where all contracts were materially identical and Exxon acted in the same manner as to all gas dealers:

Las Olas decision – must be premised on evidentiary support and not the Complaint's allegations or mere speculation and supposition.

Again, here, Plaintiffs proffered no evidence or expert testimony as to how DeSimone could possibly be liable. Rather, Plaintiffs relied entirely on the allegations of their Complaint and newly conjured allegations that appear nowhere in their Complaint. The Court cannot certify a liability class when Plaintiffs presented no evidence that DeSimone is liable, not even an expert report. Plaintiffs violated fundamental, rudimentary, and basic principles of class action litigation; thus, their Motion to Certify must be denied.

II. The Proposed Liability Class Lacks Adequacy of Representation Because Conflicts of Interest Exist Between Members of the Liability Class.

It is well-settled that certification will be denied where there exists a potential, irreconcilable conflict of interest among class members. In Cricket Club Condominium, Inc. v. Stevens, 695 So.2d 826 (3rd DCA 1997), the District Court of Appeals reversed a trial court's grant of certification on the grounds that the proposed class representative was inadequate because he was engaged in a separate lawsuit against other members of the proposed class, which presented a potential irreconcilable conflict of interest. Absentee members of the proposed class that do not or cannot opt-out will be bound by the class, so adequacy of representation is necessary to satisfy due process requirements. City of Tampa v. Addison, 979 So. 2d 246, 253 (Fla. 2nd DCA 2007).

Here, the Liability Class includes both unit owners and non-unit owners (Complaint ¶¶308-310), notwithstanding that unit owners may be potentially liable to non-unit owners that were

> [A]ll of the dealer agreements were **materially similar** and Exxon purported to reduce the price of wholesale gas for **all** dealers . . . ."

Allapattah at 1261. Additionally, the class certification analysis is less than one page in Allapattah; thus, it appears that Exxon conceded virtually all aspects of the class certification determination.

tenants or invitees in such units. See e.g. Mansur v. Eubanks, 401 So. 2d 1328, 1329–30 (Fla. 1981) (owner of a residential dwelling unit, who leases it to a tenant for residential purposes, has a duty of care to tenant); Leon v. Pena, 274 So. 3d 410, 412 (4th DCA 2019) (landowner or occupier owes an invitee a duty of care). In fact, the unit owners of CTS may also be personally liable for the acts and omissions of the Association pursuant to Florida Statutes Section 718.119(2).

Plaintiffs have failed to address this real conflict of interest in their Complaint or the Motion to Certify, nor do cases cited by plaintiffs address any similar circumstances. See e.g. Las Olas Company Inc. v. FP&L Co., 2020 WL 9874296 (certifying a liability class of plaintiffs consisting of businesses damaged by a water main break with no allegations that any member of the proposed class shared liability or contributed to damages). Given this potential irreconcilable conflict of interest, the Motion to Certify must be denied.

WHEREFORE, for the foregoing reasons and upon the foregoing authority, defendant DeSimone hereby requests this Honorable Court for an Order denying the Motion to Certify.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2022, a true and correct copy of the foregoing Response to Motion to Certify was filed with the Clerk of Court by using the ECF system which will send a notice of electronic filing to all parties appearing in this case.

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