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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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**TG AND TWI'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS CONSOLIDATED SECOND AMENDED CLASS ACTION COMPLAINT**

Defendants Terra Group, LLC ("TG") and Terra World Investments, LLC ("TWI") hereby respectfully file their Reply in Support of their Motion to Dismiss Plaintiffs' Consolidated Second Amended Class Action Complaint ("Complaint" or "SAC").

## I. INTRODUCTION

Quantity does not equal quality. Plaintiffs' Omnibus Response to Defendants' Motions to Dismiss repeatedly references the SAC's 549 paragraphs. But Plaintiffs concede that neither TG nor TWI owned or developed Eighty-Seven Park. (Resp. at 4: "8701 Collins ***owned*** the 8701 Collins Avenue Property … and ***contracted*** with Moriarty.") (Emphasis added). Plaintiffs' Response admits that Plaintiffs (1) do not seek to hold TG or TWI vicariously liable "for the conduct of others,"[1] and (2) are not relying on "alter ego" or "piercing the corporate veil" theories as against TG or TWI.[2]

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[1] *See* Resp. at 21-22. ("Plaintiffs seek to hold each of the Terra Defendants *directly* liable for the collapse of CTS, ***not for the conduct of others***. . . . The Complaint seeks to impose liability on each of the Terra Defendants for duties they each *directly* owed to Plaintiffs and the putative class.") (Italics in original and bold added). The SAC alleges that the "conduct, actions, and inactions giving rise to this action and Defendants' liability ***were committed by agents, servants, employees, ostensible agents, and/or alter egos***" of the Terra Defendants. SAC ¶¶13-16. (Emphasis added).

[2] *Id.* at 24. ("***Plaintiffs do not bring a freestanding alter-ego claim***. While the Terra Defendants cite various cases addressing the doctrines of alter ego liability and piercing the corporate veil, **the Complaint contains neither kind of claim.**")(Emphasis added). The SAC, in contrast, alleges

Rather, Plaintiffs argue that their claims against the improperly commingled "Terra Defendants" are viable under "joint venturer" and agency theories of liability. (Resp. at 12-14.) These theories, however, are referenced in the SAC only in conclusory fashion, and are inadequately pleaded. Joint venturer[3] and agency liability theories must be specifically pleaded. *See Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990); *Fernandez v. Fla. Nat. Coll., Inc.*, 925 So. 2d 1096, 1101 (Fla. 3d DCA 2006).

Beyond the labels "joint venture" and "agent," the SAC is utterly devoid of allegations sufficient to establish a joint venture or agency among the commingled "Terra Defendants," or among any "Terra Defendant" and any other Defendant. The SAC impermissibly leaves 8701 Collins Development, LLC, TG and TWI guessing about who is principal, who is agent, what entities are within any supposed joint venture, much less why they should be considered joint venturers or agents.

To be sure, the words "joint venture" and "agent" appear in the SAC. As pertains to TG and TWI, these phrases each appear exactly four times and each in the same context. In paragraph 14, Plaintiffs allege: "[TG] 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." (SAC ¶ 14.) The SAC never explains what entities were "joint venturers" or agents with TG, never mind why or how. The same vague allegations are repeated

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that each of the "conduct, actions, and inactions giving rise to this action and Defendants' liability were committed by agents, servants, employees, ostensible agents, and/or **alter egos**" of the Terra Defendants. Compl. ¶¶13-16. (Emphasis added).

[3] Joint venturer liability is a form of vicarious liability. *See Metric Engineering, Inc. v Gonzalez*, 707 So.2d 354, 355 (Fla. 3d DCA 1998)("**Liability of one member of a joint enterprise for the acts of another is a vicarious liability** founded upon the relationship that has arisen between the parties."). (Emphasis added).

verbatim in paragraphs 15 and 16 as pertains to TWI and 8701 Collins Development, LLC, respectively. After that, the SAC sweeps TG, TWI and 8701 Collins Development, LLC into one collective— "Terra Defendants"—and nothing further is said about why they should be treated as a single actor. Once the collective "Terra Defendants" was referenced, the SAC illogically and without basis attempts to ascribe the conduct of individuals to all three separate entities.

Later, in paragraph 336, Plaintiffs, using the same boilerplate labels deployed in paragraphs 13-16, allege: "The Terra Defendants, acting by and through their ***agents***, servants, workmen, employees, ***ostensible agents, joint venturers***, and/or alter egos, both generally and in the following particular respects, breached the duties owed to Plaintiffs …." (SAC ¶ 336.) The SAC then contains a laundry list of supposed wrongs by some entities or individuals—exactly who is never identified and how they are joint venturers is never explained. These threadbare legal labels do not satisfy the requirement to plead joint venturer or agency liability.

Plaintiffs' attempt to excuse the Complaint's shortcomings on the ground they need discovery: "***Plaintiffs cannot possibly at this very preliminary stage allege which Terra entities did what***,"[4] and "***Plaintiffs cannot, at this stage of the litigation, bring allegations that are tied more specifically to any one of the Terra Defendants***."[5] However, under Florida law, TG and

[4] Despite the purported impossibility of alleging "which Terra entities did what," the Complaint alleges that the "Terra Defendants" did it all: they all "purchased the 8701 Property," "undertook excavation and construction," "used large tractor cranes," "retained NV5," "engaged in onsite vibratory compaction procedures," "performed the site dewatering," and "excavated against the CTS south foundation wall." (SAC ¶¶ 53, 68, 72, 157, 172, 187.)

[5] *Id.* at 10, 23; *see also* at 17 ("Plaintiffs cannot confirm at this stage of the proceedings which of these related corporate entities employed or directed the proverbial excavator operator or whether more than one of the Terra Defendants did. . . ."). Notwithstanding these concessions, the SAC nonetheless alleges that the "Terra Defendants," all of them, "used large tractors to drive 40-foot sheet piles into the ground." SAC ¶ 68. A litigant must conduct a reasonable investigation before asserting a claim or defense. *See L.L. v. Zipperer*, 484 So.2d 92 (Fla. 5th DCA 1986) (plaintiffs joined County as defendant based on assumption that Orange County Health Department was an

TWI are entitled to notice of how liability can attach to them as distinct entities that Plaintiffs admit did not own or develop Eighty-Seven Park. If they were joint venturers of 8701 Collins Development, LLC or if that entity acted as agent of that entity (or vice versa), the SAC must allege the basis for such an allegation. Florida law requires this.

Moreover, as the Court well knows and the record confirms, (Mot. Exhibits 1-7) an unprecedented amount of pre-pleading discovery consisting of hundreds of gigabytes of data from 8701 Collins Development, LLC alone was conducted ***before*** the SAC was filed. Plaintiffs know that only 8701 Collins Development, LLC acquired the subject property.[6] Plaintiffs know that 8701 Collins Development, LLC owned and developed the property, not TG or TWI. These facts are of record, and they are conceded. Florida law requires that the corporate form be respected, absent some reason—not pleaded here—to disregard it. *See Wilson v. Wilson*, 211 So. 3d 313, 319 (Fla. 3d DCA 2017) (holding that "[t]hose who utilize the laws of this state in order to do business in the corporate form ***have every right to rely on the rules of law which protect them against personal liability*** unless it be shown that the corporation is formed or used for some illegal, fraudulent or other unjust purpose which justifies piercing of the corporate veil" and reversing judgment against corporate shareholder because no justification to disregard corporate form was "raised by the pleadings below") (emphasis added).

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agency of the County, without even undertaking "minimal investigation" to determine if the health unit was a county agency before filing suit); *Parrino v. Ayers*, 469 So.2d 837 (Fla. 5th DCA 1985) (plaintiffs merely assumed that defendant trespassed on their land or was in actual possession of their land and relied on no evidence in commencing lawsuit); *Florida Department of Transportation v. James*, 681 So.2d 886 (Fla. 3d DCA 1996) (litigant had a duty to make a good faith, reasonable effort to determine whether property was conveyed to another before raising a defense).

[6] By September 30, 2021, Plaintiffs knew the identity of the developer and identity of the owner of 87th Terrace. Hr'g Tr. 98:1-5 and 102:15-18, Sept. 30, 2021.

Put simply, TG and TWI are entitled to notice of the basis for the claims against them as separate legal entities that did not own or develop Eighty-Seven Park.[7] The SAC plainly does not adequately plead agency or joint venturer theories of liability. Its legal labels are insufficient. *Point Conversions, LLC v. Omkar Hotels, Inc.*, 321 So. 3d 326, 331 (Fla. 1st DCA 2021), *review dismissed,* No. SC21-937, 2021 WL 2579753 (Fla. June 23, 2021) (Court should "disregard legal conclusions included within the allegations"). The SAC should be dismissed as against TWI and TG.

## II. <u>ARGUMENT</u>

### A. Plaintiffs' Improper Comingling of the "Terra Defendants" is Not Salvaged By a <u>Purported Joint Venture or Agency Theories of Liability</u>.

In *KR Exchange Servs., Inc. v. Fuerst, Humphrey, Ittleman,* PL, 48 So.3d 889 (Fla. 3d DCA 2010) the Third DCA expressed its disapproval of the use of collective definitions to "improperly refer" to distinct defendants collectively as "defendants," or in this case as the "Terra Defendants," and of failing to "differentiate among the various defendants' actions and statements" in a pleading. *KR*, 48 So 3d at 893 ("In addition, 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."). *KR,* and the other Florida and Federal precedent cited in the Motion to Dismiss, are on point and dispositive of the question of the impropriety of the Complaint's use of the collective term "Terra Defendants" to refer to three admittedly separate limited liability companies.

[7] *See Magnum Constr. Mgt., LLC v. WSP USA Solutions, Inc.*, 522 F. Supp. 3d 1202, 1206 (S.D. Fla. 2021)(comingled pleading "fail[s] . . . to give the defendants adequate notice of the claims against them and the ground upon which the claim rests."); *Bentley v. Bank of Am., N.A.*, 773 F. Supp. 2d 1367, 1373 (S.D. Fla. 2011)(commingled defendants "do not have notice of the purported conduct they are alleged to have committed.").

Plaintiffs' Response to the motions to dismiss claims that TG and TWI may be brought into this case under a "joint venture" theory of liability whereby the three entities (and perhaps others, *see* SAC ¶ 336)—8701 Collins Development, LLC, TG and TWI—purportedly formed a joint venture to construct Eighty-Seven Park. (Resp. at 11) ("In cases such as this, where various corporate entities act in concert, Florida courts have held that joint venture liability is appropriate.") Plaintiffs suggest that the mere invocation of the phrase "joint venture" satisfies the requirement to plead ultimate facts demonstrating why joint venturer liability should attach and excuse the Complaint's improper comingling of the three separate companies.

The SAC fails to include allegations sufficient to articulate that theory. In fact, it makes ***none*** of the essential "joint venture" allegations at all. "A mere allegation that a joint venture was created is purely a legal conclusion," such that the ultimate facts that gave rise to the joint venture must be alleged. *Kislak v. Kreedian*, 95 So.2d 510, 514 (Fla. 1957). In addition to alleging the existence of a joint venture, the plaintiff ***must*** also ***plead*** "the following five elements as part of the contract, whether express or implied, for a joint venture to exist: '(1) a community of interest in the performance of a common purpose; (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in any losses which may be sustained." *Marriott Int'l., Inc. v. American Bridge*, 193 So.3d 902 (Fla. 3d DCA 2016). "Florida courts have interpreted these requirements to preclude a finding that a partnership or joint venture exists where any factor is missing." *See Williams v. Obstfeld*, 314 F.3d 1270 (11th Cir. 2002) (citing *Kislak*, 95 So.2d at 514; *Dreyfuss v. Dreyfuss*, 701 So.2d 437 (Fla. 3d DCA 1997); *Austin v. Duval County Sch. Bd.*, 657 So.2d 945 (Fla. 1st DCA 1995)).

The Complaint lacks any of these critical allegations. If Plaintiffs' theory against TG and TWI is "joint venture," it must be re-pled to allege each of these necessary elements of a joint venture. *See Kislak*, 95 So.2d at 517 (reversing denial of motion to dismiss where joint venture

elements not pled in complaint);[8] *see also Ceithaml v. Celebrity Cruises, Inc.*, 207 F.Supp.3d 1345 (S.D. Fla. 2016) ("Ceithaml does not adequately allege the existence of a joint venture and cannot hold Celebrity vicariously liable for WRAVE's negligence under a joint venture theory."). *Kislak* is on point, unavoidable, and requires dismissal of the Complaint if a "joint venture theory" of liability is to be pursued.

Second, Plaintiffs argue that "the people involved in the construction of Eighty-Seven Park – from the boots on the ground overseeing and directing the physical work to the managerial level staff who hired and deployed those persons – ***all acted as agents of 8701 Collins Development, LLC, Terra Group, and Terra World***,"[9] as if the "Terra Defendants'" purported agency relationships—with some unidentified population of others—somehow justifies the Complaint's pleading shortcomings. They do not. To the contrary, the contention that "the people involved in the construction of Eighty-Seven Park" were somehow the "agents" of the collective "Terra Defendants" places the Complaint squarely within the ambit *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990), and requires "specific" re-pleading of the Plaintiffs' agency (and other vicarious liability) allegations. *Goldschmidt*, after all, was an "agency" case, and the Florida Supreme Court clearly held that a "defendant could not be found liable under a theory of vicarious liability that was not specifically pled." 571 So.2d at 423. And to eliminate any doubt as to whether an agency relationship must be specifically pleaded in this context the Court continued, "***[b]ecause the complaint failed to set forth any ultimate facts that establish either actual or apparent agency***

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[8] Plaintiffs argue that "Defendants leave unmentioned Plaintiffs' allegation that 8701 Collins was a mere 'shell company' that Terra Group and Terra World established to carry out their development of Eighty-Seven Park." (Resp. at11.) The "shell company" reference was left unmentioned because it does not satisfy the pleading requirement for joint venturer, agency or vicarious liability as set forth in *American Bridge* and *Kislak*.

[9] Resp. at 14. (Emphasis added).

***or any other basis for vicarious liability***, the [plaintiffs] did not allege any ground entitling them to relief." *Id.* (emphasis added).

Meanwhile, agency can be actual or apparent. To establish apparent agency "facts supporting [the following] three elements ***must be alleged***: '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 on the representation.'" *Saralegui v. Sacher, Zelman,* 19 So.3d 1048, 1051-52 (Fla. 3d DCA 2009) (quoting *Ocana v. Ford Motor Co.,* 992 So.2d 319, 326 (Fla. 3d DCA 2008)) (emphasis added). To establish actual agency, the following must be ***pleaded*** and ***proved***: "(1) acknowledgment 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." *Fernandez v. Fla. Nat'l Coll., Inc.,* 925 So.2d 1096, 1101 (Fla. 3d DCA 2006) (quoting *Goldschmidt*, 571 So. 2d at 424 n. 5). Again, beyond the label "agent," (and sometimes "ostensible agent," SAC ¶¶ 13-16, 336) none of these agency elements are pleaded.

Therefore, applying *Goldschmidt* in this case, if any Defendant or other actor is a purported agent of TG, TWI, 8701 Collins Development, LLC, or all, Plaintiffs must specifically plead the relationship, the identity of the purported principal and the agent, and the ultimate facts giving rise to the purported "agency." *See Ilgen v. Henderson Props., Inc.*, 683 So.2d 513, 515 (Fla. 2d DCA 1996)(defining agency pleading requirements). The Complaint does not (and cannot) include these allegations and fails to satisfy *Goldschmidt*.[10]

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[10] The argument that "the determination of the existence, or not, of [an] agency relationship presents a factual matter for the jury," Resp. at 14, is premature since agency has not been properly pleaded. *See Goldschmidt*, 571 So. 2d at 424. Whether a question is a jury question presumes the question is adequately framed by the pleadings. Here, as in *Goldschmidt*, the agency question is not. *Id.* ("Although we agree the existence of any agency relationship is normally one for the jury to resolve, there was no evidentiary question in this case for the jury to resolve.")(Internal citation omitted).

### B. Plaintiffs Have Alleged Only One Non-Delegable Duty Arising from an Ultrahazardous Activity.

TG and TWI adopt by reference the argument of 8701 Collins Development, LLC to the effect that Plaintiffs have insufficiently pleaded negligence and strict liability against any of 8701 Collins Development, LLC, TG or TWI. TG and TWI would only add that as entities that never owned and did not develop Eighty-Seven Park, TG and TWI had no duties of any kind.

## III. CONCLUSION

For the reasons set forth in 8701 Collins Development, LLC, TG and TWI's Motions to Dismiss, and above, the Complaint must be dismissed with leave to amend.

Dated: February 3, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that foregoing document was filed with the Florida Courts e-filing Portal this this 3rd day of February, 2022 and that all counsel of record were electronically served via the Florida Courts e-filing Portal.

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