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

COMPLEX BUSINESS LITIGATION DIVISION

IN RE: CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION.

CLASS REPRESENTATION

CASE NO. 2021-015089-CA-01

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PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO CERTIFY LIABILITY CLASS

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, hereby reply in support of their Motion to Certify a Liability Class Pursuant to Florida Rules of Civil Procedure 1.220(b)(3), 1.220(d)(1), and 1.220(d)(4) (the "Motion") and in response to the response in opposition to the Motion filed by Defendant John Moriarty & Associates of Florida, Inc. ("Moriarty") on February 23, 2022 (the "Response").

INTRODUCTION

Notably, only one of the Defendants in this case opposes conditional certification of a liability class - Moriarty.[1] Moriarty contends that certification is premature and that the class definition is too broad. Neither contention defeats the Motion.

[1] Defendants 8701 Collins Development, LLC, Terra World Investments, LLC, and Terra Group, LLC filed responses indicating that they do not oppose certification, but reserve certain rights. Defendants Becker, Morabito, and DeSimone have settled the claims against them, though Morabito did file a cursory response. DeSimone filed a Notice withdrawing its Response in Opposition. NV5, Inc. has not filed any response to the Motion and has represented to undersigned counsel that it will not oppose the certification requested.

As set forth in the Motion, certification is the most efficient and expeditious way to adjudicate liability here, where nearly 100 individuals perished, and all victims have claims arising from the same incident. Plaintiffs narrowly seek *conditional* certification of only a *liability issue* class pursuant to Rules 1.220(b)(3), (d)(l), and (d)(4), and demonstrate in the Motion that each element of the applicable Rules has been met. Common questions of law and fact predominate, and a single class trial is the superior method of adjudication of the Defendants' liability. Given the nature of this tragedy, separate liability trials for each of the victims would be impracticable, wasteful, and entirely unnecessary. The Court should grant the Motion and permit the victims to proceed to trial under the established class mechanism provided for in the Florida Rules of Civil procedure and authorized by *Engle v. Liggett Group, Inc.,* 945 So. 2d 1246, 1267-71 (Fla. 2006) and exemplified in *Las Olas Co. v. Fla. Power & Light Co.,* No. CACE19019911-18, 2020 WL 9874296 (Fla. 17th Cir. Ct. Dec. 14, 2020), *aff'd per curiam Infratech Corp. v. Las Olas Co.,* 320 So. 3d 751 (Fla. 4th DCA 2021), *reh'g denied* (Fla. 4th DCA July 13, 2021), which is currently pending and where Undersigned Counsel, Adam Moskowitz, is Co-Lead Counsel.

ARGUMENT

A. LIABILITY CLASS IS RIPE FOR CERTIFICATION.

Moriarty begins its argument by conceding that Plaintiffs' certification plan is valid: it acknowledges Plaintiffs' proposed plan for a bifurcated trial, with a "liability phase" first, as authorized by the Florida Supreme Court in *Engle*. Resp. 4-5. Moriarty nonetheless argues that certification "at this time" is improper. The Court should reject this argument.

The putative class action has been pending for approximately seven months, the Court has resolve motions to dismiss, and discovery is well underway. Rule 1.220 itself provides that the Court's determination of whether a class is maintainable should be made "[a]s soon as practicable after service of any pleading alleging the existence of a class." Fla. R. Civ. P. 1.220(d)(1). And,

the Florida Supreme Court has further explained, "[a] trial court must make its determination as to class certification at an early stage in a cause of action, i.e., 'certainly before trial, and typically before discovery is completed.'" *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 105 (Fla. 2011) (quoting *Engle,* 945 So. 2d at 1266)).

Certification of the Liability Class now is warranted to permit all parties and their counsel to work toward a single liability trial in March 2023, as already prescribed in the Court's Case Management Order, dated January 20, 2022. Delay would only prejudice the parties in their preparation, and no legal justification exists to postpone, given that Plaintiffs have met all relevant elements of Rules 1.220.

1. <u>Plaintiffs need not submit a trial plan as a prerequisite to certification of an issue-only class.</u>

Moriarty claims that Plaintiffs have not proposed "a workable trial plan," and, so, have not shown that certification of a liability class would "materially advance" and render the litigation "more efficient and manageable." Resp. 6 (quoting *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 671–72 (M.D. Fla. 2001)). This argument fails.

A robust trial plan—arrived at with the Court's involvement—will be forthcoming. That plan necessarily will consider all contingencies in this rapidly evolving matter, including the expected departure from the case of several defendants and possibly a putative subclass, due to the success of the early mediations.

However, a trial plan is not necessary to demonstrate manageability or predominance. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1279 (11th Cir. 2009) ("We do not mean to say that submission of a trial plan by the plaintiff is necessarily a prerequisite, as a matter of law, for a finding of superiority in every case."). Clearly, this is a "single-incident mass tort," which directly caused damage to all Plaintiffs and proposed Class Members. *Las Olas*, 2020 WL 9874296, at *4.

Liability for the victims' injuries is uniform. Common questions predominate as to Defendants' negligence and whether that negligence caused or contributed to the collapse of CTS. Mot. 18; *see also id.* at *2.

Moriarty unpersuasively cites cases where plaintiffs happened to have no "trial plan," but that, critically, were not single-incident mass torts and posed starkly different factual circumstances from this matter. In *Rahman v. Mott's LLP*, 693 Fed. Appx. 578, 580 (9th Cir. 2017), the Ninth Circuit reviewed a district court's denial of a motion for class certification in a case where plaintiff alleged that the defendant's statement "No Sugar Added" failed to comply with FDA regulations. *In re Paxil Litigation* involved claims about a prescription medication that plaintiffs took "at various times, with different dosages, and for different underlying ailments," many times while also taking other prescription drugs, "with or without medical supervision," and with varying symptoms and injuries. 212 F. R.D. 539, 548 (C.D. Cal. 2003). *In re Amla Litigation* concerned a hair relaxer, which raised individual questions about how each plaintiff applied and used the hair care product. *Id.* at 765. In *Rink v. Cheminova*. 203 F.R.D. 648, the court denied the certification of several classes related to the aerial spraying of a pesticide because it found predominance lacking, and in doing so, specifically distinguished the facts from "***a mass tort arising from an isolated occurrence or accident***," as exists here. *Id.* (emphasis added).[2]

Moriarty also contends that because Plaintiffs did not propose a detailed trial plan, their "speculation about disposition of damages cannot sustain certification of a liability-only class." Resp. 9. But, again, Moriarty cites a handful of federal cases that are unpersuasive. Notably, *Rahman* did not hold that Plaintiffs "must present a reasonable plan for resolving the case as a

[2] *Packard v. City of N.Y.*, 2020 WL 1479016 (S.D.N.Y. Mar. 25, 2020) addressed the excludability of plaintiffs' expert in a putative class action for violations of protestors' civil rights during their arrest. *Packard* appears wholly inapposite to the issues before the Court.

whole, including damages," as Moriarty claims. Resp. 7. Rather, *Rahman* held that the determination of whether "certification of a liability-only class" is "'appropriate'" can turn on whether that certification "would materially advance the litigation," which itself ***may*** involve considerations about how the case will proceed through damages. *Rahman*, 693 Fed. Appx. at 579. *Rahman* held nothing more.

Here, a trial plan is not necessary to demonstrate the manageability of the case to its conclusion. There is little mystery regarding where Plaintiffs seek to steer this case through certification, given that Plaintiffs have made clear that the case is premised on *Engle* and the recent adoption of *Engle* in *Las Olas.* Notably, the court in *Las Olas* did not contemplate any such trial plan at the certification phase, let alone require one. As in *Engle,* Plaintiffs expect that damages may ultimately be resolved through individual damages trials. However, there are alternatives to that course, if agreeable to the non-settling Defendants and the Class. For example, certain subclasses might be amenable to an aggregated damages trial following the liability phase. Alternatively, or additionally, the parties may be able to agree to a mediated resolution of claimants' individual damages and dispense with the need for individual trials. The Court has already preliminarily approved a plan to resolve the individual damages claims of the economic loss subclass.

Point being, the course of the litigation thus far, the Court's administration of this case, and the precedent show that all phases of this case can be—and are being—managed.

2. <u>Additional Discovery Is Unnecessary.</u>

Moriarty next argues that the Court should "postpone" certification until there has been discovery to determine "whether differences exist among putative class members regarding liability issues." Resp. 10. According to Moriarty, "comparative fault" must first be determined as

to "each unit owner and Board member" because it could defeat certification, or would have to be "reconsidered." *Id.* Here, Moriarty misreads *Engle* and its progeny.

Comparative fault determinations as to individual class members must be left to the individual damages phase and are not appropriate to parse during the liability phase of this case, which will focus solely on the liability of the Defendants. In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the Florida Supreme Court confirmed the propriety of the classwide determination of the "common issues" of liability, which were completed in the "Phase I" liability trial, but made clear that class treatment was not feasible as to individual comparative fault and damages issues, to be taken up in "Phase III": "Phase III of the trial plan is not feasible because individualized issues such as legal causation, **comparative fault**, and damages predominate." *Engle,* 945 So. 2d at 1268 (emphasis added). But that these individualized issues were left to a later phase did not defeat the class certification of a liability class in the first phase. *See also Sosa*, 73 So. 3d at 107 ("Individualized damage inquiries will also not preclude class certification.").

Years later, in *Philip Morris USA, Inc. v. Douglas*, the Florida Supreme Court reaffirmed this finding, that comparative fault issues are properly left to the later phase of *Engle* trials, citing a host of authorities: "we are not alone in holding that a defendant's common liability may be established through a class action and given binding effect in subsequent individual damages actions. *See, e.g., Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) (recognizing that a class action may be decertified after the liability trial and that the liability findings may be used in subsequent damages actions); *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 628–29 (5th Cir. 1999) (holding a defendant's common liability to all class members for negligence may be tried by one jury and that plaintiff-specific matters such as causation, damages, and **comparative negligence** may then be tried by different juries in separate cases that do not revisit

the first jury's findings regarding the defendant's conduct); *Daenzer v. Wayland Ford, Inc.,* 210 F.R.D. 202, 205 (W.D. Mich. 2002) (following summary judgment on liability the court decertified the class for individual damages trials and stated that "[t]he Court's decision as to liability is res judicata in any damages action individual class members decide to bring"); *In re Copley Pharm., Inc.,* 158 F.R.D. 485, 492 (D. Wy. 1994) ("[T]he Defendant's liability for the contaminated Albuterol . . . may be tried to a single jury in a unified trial. Then, if the Plaintiffs are successful, class members may pursue their individual cases in separate trials to determine if they suffered an injury from the contaminated Albuterol, and if so, the proper measure of any damages."). 110 So. 3d 419, 429 (Fla. 2013) (emphasis added). These cases the Florida Supreme Court cited in *Philip Morris* are equally applicable here.

Again, the path forward here is well established by *Engle.* No further discovery will weigh upon the liability certification question, given that "[w]hen determining whether to certify a class, a trial court should focus on the prerequisites for class certification and not the merits of a cause of action." *Sosa,* 73 So. 3d at 105. Plaintiffs have carried their burden as to the elements of class certification, a matter soundly within this Court's discretion. *See id.* at 102 ("[A]n appellate court reviews a trial court's grant of class certification for an abuse of discretion.").

B. THE CLASS DEFINITION IS NOT OVERBROAD.

Moriarty additionally argues that the proposed class definition is overboard because it includes "statutory survivors" in addition to the decedent's "personal representatives." Resp. 11. Even if this were correct (it is not), the Court can grant certification and revise the class definition to only "personal representatives" if it sees fit. *See, e.g., Belcher v. Ocwen Loan Servicing, LLC*, 8:16-CV-690-T-23AEP, 2018 WL 1701963, at *6 (M.D. Fla. Mar. 9, 2018) ("[T]he Court may revise Belcher's class definitions so that the class and subclass can be administratively feasible.").

While Moriarty is correct that only a decedent's personal representative is authorized to recover damages for the benefit of survivors, Plaintiffs' issue class definition was crafted to encompass those who may receive compensation as a result of this lawsuit, irrespective of their standing to bring a lawsuit in their individual capacity. Notably, the *Engle* class was defined as all Florida "citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Engle*, 945 So. 2d at 1256. Also, Plaintiffs are mindful that there may be some decedents as to whom no Estate has yet been opened or a personal representative appointed.

The issue Moriarty raises is one of claims administration, rather than a defect that ought to defeat certification of this liability class.

CONCLUSION

Plaintiffs have established that certification of a liability-only class will materially advance this litigation. As Plaintiffs argue in their motion, if "Defendants are successful in obtaining no liability verdicts at trial, this single action may resolve claims against them for *all* of the proposed victims." Mot. 13. This is what happened in *Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275 (N.D. Fla. 2017), another single-incident mass tort case where a liability trial was held on behalf of a certified liability issue class. Moreover, certification of an issue class provides a "more efficient and desirable" procedure as compared to hundreds of expensive, overlapping, repetitive, and individual trials on the cause of the collapse of CTS—again, a "single-incident mass tort." *Las Olas*, 2020 WL 9874296, at *4. In fact, Undersigned Counsel just finished conducting a similar liability trial on behalf of the certified liability issue class of businesses in *Las Olas* and obtained a favorable verdict determining liability and apportioning fault for causing a single-incident mass tort among all defendants (both parties and *Fabre* defendants) just three months ago.

Plaintiffs' motion sets forth the common liability issues as to all Defendants, which apply uniformly to all putative Class Members. Mot. 2–9. As Plaintiffs already have argued, "[c]ertifying the Liability Class and holding one liability trial will enable the Liability Class to prove these allegations in one fell swoop, *and more importantly*, not require each victim to expend tens of millions of dollars each (which they do not have) to separately retain adequate counsel and experts to conduct this litigation." *Id.* at 9. Certification of a liability-only class will materially advance the litigation of this matter.

For the foregoing reasons, the Court should grant the Motion to Certify a Liability Class.

Respectfully submitted March 7, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed on March 7, 2022, with the Clerk of the Court by using the Florida Courts E-Filing Portal, which will send a Notice of Electronic Filing on all counsel of record.

/s/ Adam M. Moskowitz
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