

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

CASE NO.: 2021-015089-CA-01

SECTION: CA43

JUDGE: Michael Hanzman

In re:

CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION

**JOHN MORIARTY & ASSOCIATES OF FLORIDA, INC.'S RESPONSE
AND REQUEST FOR CLARIFICATION IN RESPONSE TO THE
RECEIVER'S MOTION SEEKING APPROVAL OF AN ALLOCATION
SETTLEMENT AGREEMENT AND ENTRY OF A BAR ORDER**

Defendant JOHN MORIARTY & ASSOCIATES OF FLORIDA, INC. ("JMAF"), submits this response to the Motion for (I) Approval of Allocation Settlement Agreement Among Receiver, Unit Owners, and Wrongful Death Class; (II) Approval of Form, Content, and Manner of Notice of Settlement and Bar Order; (III) Entry of Bar Order; and (IV) Scheduling a Hearing, with Incorporated Memorandum of Law (the "Motion") filed by Michael I. Goldberg as court-appointed receiver for Champlain Towers South Homeowners Association, Inc. (the "Receiver"). Pursuant to this response, JMAF seeks clarification from this Court regarding the Bar Order requested by the Motion.

BACKGROUND

On March 4, 2022, the Receiver filed the Motion, seeking approval of an Allocation Settlement Agreement (the "Agreement") among the Receiver, Unit Owners, and Wrongful Death Class, as further defined therein. The Agreement is *expressly contingent* on entry of the Bar Order attached to the Agreement as Exhibit A. *See* Motion, p. 3. Although the proposed Bar Order was not attached to the Agreement at the time the Motion was filed, the proposed Bar Order was subsequently filed by the Receiver on March 15, 2022. *See* Receiver's Notice of

Filing “Exhibit A” to the Allocation Settlement Agreement. The proposed Bar Order defines the “Barred Persons,” “Barred Conduct,” and “Barred Claims” which would be impacted by its entry.

JMAF seeks clarification on whether the Bar Order would bar JMAF and other non-settling defendants from seeking to allocate liability and percentages of fault to parties to the Agreement through the comparative fault provisions of Section 768.81, *Florida Statutes*, and *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), which have been asserted as affirmative defenses in this case by JMAF and other defendants, and/or the “empty chair” doctrine.

ARGUMENT

Bar orders are uncommon remedies, encountered where the barring of future claims against a settling party is essential to achieving a settlement. *See e.g. Securities and Exchange Commission v. Quiros*, 966 F.3d 1195 (11th Cir. 2020) (“A bar order is an extraordinary remedy” that should be entered “cautiously and infrequently and only where essential, fair, and equitable.”) (quoting *In re Seaside Eng’g & Surveying, Inc.*, 780 F.3d 1070, 1079 (11th Cir. 2015)). A bar order is essential when it is “integral to settlement.” *Id.* (quoting *In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996)). The purpose of a bar order is to prevent further liability for the settling defendants in order to facilitate settlement. *See In re U.S. Oil and Gas Litigation*, 967 F.2d 489, 494 (11th Cir. 1992).

In considering the entry of bar orders, courts appear to contemplate that non-settling parties retain the ability to assert affirmative defenses relating to the settling parties. *See e.g. Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989) (“Obviously, there will be a certain amount of ‘fingerpointing’ at the ‘empty chair.’”); *In re Sunrise Securities Litigation*, 698 F.Supp. 1256, 1260 (E.D. Penn. 1988) (noting that “non-settling defendants have every incentive

to minimize their liability by arguing at trial that the settling defendants were at fault.”). The proposed Bar Order, if entered, provides that it precludes Barred Claims “to the broadest extent permitted by law” against the released parties (subject to a Tenant-Guest Carve-Out set forth therein). Because “claims” at least arguably could be construed to include allegations of comparative fault and/or “empty chair” arguments, it is not clear whether the proposed Bar Order is intended to impact the non-settling defendants’ ability to pursue comparative fault and *Fabre* affirmative defenses, and make “empty chair” arguments, against parties released by the Agreement.

JMAF does not believe that the proposed Bar Order is intended to, or properly could, bar JMAF or other non-settling defendants from pursuing comparative fault and *Fabre* affirmative defenses, or making “empty chair” arguments relating to parties to the Agreement. However, because the Bar Order, if entered, would provide a very broad bar of claims “to the fullest extent permitted by law” and “claims” potentially could be construed to include comparative fault, *Fabre*, and “empty chair” defenses and arguments, JMAF seeks clarification from this Court that the Bar Order will not prevent JMAF from asserting such affirmative defenses and arguments against parties released by the Agreement.

For the foregoing reasons, JMAF respectfully requests that the Court clarify that the proposed Bar Order, if entered would not preclude the assertion of comparative fault, *Fabre*, and “empty chair” defenses and arguments against parties released by the Bar Order and grant any such other and further relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed on March 23, 2022 with the Court via the Florida courts ePortal filing system, which will send notification of such filing to all attorneys of record.

/s/ Seth M. Schimmel

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