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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8701 COLLINS DEVELOPMENT, LLC'S MOTION TO DISMISS CHAMPLAIN TOWER SOUTH CONDOMINIUM ASSOCIATION'S CROSSCLAIMS FILED ON MARCH 29, 2022

Defendant 8701 Collins Development, LLC (variously, "8701", "8701 Colins" or "8701 Development"), pursuant to Rule 1.140(b) of the Florida Rules of Civil Procedure, moves to dismiss Defendant Champlain Tower South Condominium Association, Inc.'s ("Association") Crossclaims[1] dated March 29, 2022 (the "Crossclaims").

INTRODUCTION

The Association's Crossclaims largely adopt the allegations of the Plaintiffs' Consolidated Second Amended Class Action Complaint and the subsequent Third Amended Class Action Complaint ("Complaint").[2] It stands to reason, then, that the Crossclaims suffer from the same procedural and substantive defects as the Second Amended Complaint from which the Crossclaims were derived – the pleading fails to satisfy Rule 1.110; it wrongly comingles claims among multiple defendants; it fails to differentiate among the actions of the multiple defendants; and fails to plead critical "ultimate facts" regarding its claims of vicarious liability, among other shortcomings. The Association's pleading, however, adds a new and conspicuous substantive flaw

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

[2] The recently filed Complaint differs from the Second Amended Class Action Complaint only by the joinder of four new defendants. The allegations of the Second Amended Class Action Complaint were largely carried over into the Complaint.

in its apparent effort to arrogate to the Association, the plaintiffs', and the putative plaintiff class's, individual claims for personal injury, wrongful death, and damage to personality, all claims that are necessarily personal to the individual plaintiffs (or their personal representatives) and which the Association, therefore, lacks standing to advance due to its legislatively limited authority over "matters of common interest" to its constituency. The Crossclaims, therefore, should be dismissed for all the reasons set for in 8701's Motion to Dismiss the Second Amended Class Action Complaint, which is adopted in all respects vis-à-vis the Association and its Crossclaims, but also because the Association lacks standing to pursue these claims and because it separately exceeded the bounds of its legislatively circumscribed authority, all as explained below.

PROCEDURAL BACKGROUND

1. On June 24, 2021, Champlain Towers suffered a partial collapse, and the remaining structure was demolished ten days later. Cross-cl. ¶ 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 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 Association' Class Lead Counsel and the Association' Steering Committee were established, the Court was advised that the Plaintiffs would be filing a

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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 thereafter 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 detailed subpoenas on each of 8701 Collins Development, LLC, Terra Group, LLC ("TG"), and Terra World Investments, LLC ("TWI"), all seeking documents regarding the ownership and development of Eighty Seven Park.

7. Based on the documents produced, Plaintiffs became aware of the roles of the relevant entities. To wit: "[NV5] was hired by 8701 Development to conduct a geotechnical and foundational analysis."[3] *Id.* 86:11-13.

8. 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]."[4] *Id.*

[3] Despite this understanding on September 30, 2021, the Crossclaims allege (wrongly) that "the Terra Defendants retained NV5." Cross-cl. ¶ 108.

[4] Despite this understanding on September 30, 2021, the Crossclaims allege (wrongly) that "the Terra Defendants undertook excavation and construction," and "used large tractor cranes to drive 40-foot sheet piles into the ground." Cross-cl. ¶ 104.

98:1-5. And Plaintiffs' counsel were also aware by September 30, 2021, that 87th Terrace was acquired by "8701 Collins [Development], LLC."[5] *Id.* 102:15-18.

9. The Consolidated Second Amended Class Action Complaint (the "Second Amended Complaint") was filed on November 16, 2021.

10. Despite the voluminous discovery conducted before the filing of the Second Amended Complaint, and the Court's admonitions against overreaching claims unsupported by a thorough investigation, the Complaint indiscriminately lumped three separate corporate entities, *viz.,* 8701 Collins Development, LLC, TWI, and TG, together as "the Terra Defendants" and alleged, among other things, that all "collectively" "purchased the 8701 Property,"[6] "undertook excavation and construction"[7] and "used large tractor cranes,"[8] "retained NV5,"[9] "engaged in onsite vibratory compaction procedures,"[10] "performed the site dewatering in a dangerous manner,"[11] and "excavated against the CTS south foundation wall."[12]

11. At the same time, the Second Amended Complaint alleges 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,' located at 8701 Collins Avenue, Miami Beach, Florida."[13]

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[5] Despite this understanding on September 30, 2021, the Crossclaims allege (wrongly and impossibly) that "the Terra Defendants" acquired 87th Terrace. Cross-cl. ¶¶ 79.
[6] 2nd Amended Compl. ¶ 53.
[7] 2nd Amended Compl. ¶ 68.
[8] 2nd Amended Compl. ¶ 68.
[9] 2nd Amended Compl. ¶ 72.
[10] 2nd Amended Compl. ¶ 157.
[11] 2nd Amended Compl. ¶ 172.
[12] 2nd Amended Compl. ¶ 187.
[13] 2nd Amended Compl. ¶17.

12. The Association's Crossclaims largely reproduced the Second Amended Complaint's allegations, including those that gave rise to the 8701, TG and TWI's motions to dismiss.

APPLICABLE STANDARDS

"The primary purpose of a motion to dismiss is to request the trial court to determine whether the [pleading] 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 upon 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).

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

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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 (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 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 (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.[14]

[14] "[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

See, e.g., *Setai Hotel Acquisition, LLC v. Miami Beach Luxury Rentals, Inc.*, 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 the Association's Crossclaims require the dismissal of the repleading of the Crossclaims vis-à-vis 8701.

ARGUMENT

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

The Crossclaims fail to differentiate three separate corporate defendants—8701 Collins Development, LLC, TG, and TWI – by improperly comingling all three under the moniker, the "Terra Defendants." Cross-cl. ¶ 13. In doing so, the Crossclaims violate 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 plaintiff] 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

demurrer does not admit allegations that are contradicted by records of which the court may take judicial notice.").

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 Crossclaims must be re-pled for this failure alone.

Moreover, by "lumping" 8701 Collins Development, LLC, TWI and TG together as the "Terra Defendants," the Crossclaims fail to allege just what each Defendant supposedly did wrong. When a pleading 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).[15]

[15] *See also Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (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 Estate 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.) (explaining that "[t]here is no justification for referring to them

These considerations are particularly apropos here where the tragedy from which this case arises cries out for the utmost rigor and the Court has repeatedly advised counsel against pursuing speculative claims.[16] The Association's 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 Crossclaims allege that "the Terra Defendants undertook excavation and construction," Cross-cl. ¶ 103, as if all three distinct entities somehow occupied the cab of the excavator simultaneously to work the gears and excavate the site.[17] And this impossible allegation is even more difficult to comprehend in light of the allegation that John Moriarty & Associates of Florida, Inc. "was hired or retained ad [sic], or otherwise acted as the general contractor [for the

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[multiple defendant and non-party entities] as one, single entity in laying out the factual predicate in the complaint"); *Gibbs v. U.S.*, No. 3:11-cv-75-J-34TEM, 2011 WL 485899, at *2 (M.D. Fla. Feb. 7, 2011) (striking complaint where 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.) (dismissal necessary where "instead of clarifying the allegations as to 'each separate Defendant,' Plaintiff persists in 'lumping' them together," and where pleading "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.) (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.").

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

[17] This is not the only example of the Crossclaims' 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. Cross-cl. ¶ 370. 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. Cross-cl. ¶ 407.

construction of Eighty Seven Park]," Cross-cl. ¶ 16, and that it too (along with NV5 and Desimone) "excavated and built the 87th Terrace footpath in a manner that damaged CTS Building's south foundation wall," Cross-cl. ¶ 260. 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.

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 *K.R. 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 Crossclaims here suffer 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. The Association, we submit, will be unable

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to allege that 8701 was anything other than landowner and developer that contracted with third-parties for the construction work that the Crossclaims target.

II. The Crossclaims Fail to Satisfy Rule 1.110(b).

The Crossclaims are 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 the Association's derivative or vicarious theories of liability. *See, e.g.*, Fla. R. Civ. P. 1.110(b) ("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 . . . ."); *Taplett v. TRG Oasis (Tower Two), Ltd.*, 2009 WL 8030450 at *1 (M.D. Fla. Aug. 13, 2009) (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 Association' claims against defendants Roy Stillman and Bayrock Group where the pleading "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*, 155 So. 3d at 1177 ("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 the Association allege not only the elements of the claim, but also the facts supporting the elements.

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> ***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, 743 So. 2d at 1162 (emphasis added; internal citation omitted). "It is insufficient to plead opinions, theories, legal conclusions or argument." *Id.* The Crossclaims fail to plead the *ultimate facts* supporting Association' derivative or vicarious causes of action vis-à-vis 8701.

For example, the Crossclaims attempt to link 8701 to the CTS collapse with the conclusory allegation that "[**b]y and through their agents, servants, workmen, employees, ostensible agents, joint venturers, and/or alter egos** the Terra Defendants 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, or any of the other Terra Defendants, to vicarious liability for their alleged misconduct. Cross-cl. ¶14 (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**.

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Id. (emphasis added). Thus, the Association 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 facts that establish either actual or apparent agency.'"). The Crossclaims fail to do so and should be dismissed as a result.

Finally, this is not a trivial insistence upon the Rules. The Rules 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 pleader's theory of its case. If an agency relationship is the basis of the vicarious liability, it must be pled specifically in order for the purported agency to be evaluated. 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," Cross-cl. ¶14, 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. The Association pled no such facts, and so the Crossclaims must be dismissed.

III. Negligence

The Crossclaims also fail substantively insofar as it seeks to hold 8701 liable in negligence for the acts of others. But under Florida law, a landowner simply is **not** liable for injuries caused

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by an independent contractor's negligence.[18] *Baxley v. Dixie Land & Timber Co.*, 521 So. 2d 170, 172 (Fla. 1st DCA 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 Crossclaims allege that "[b]y and through their agents, servants, workmen, employees, ostensible agents, joint venturers, and/or alter egos the Terra Defendants owned, operated, constructed, managed, supervised and/or developed a construction project known as 'Eighty-Seven Park,' located at 8701 Collins Avenue, Miami Beach, Florida," Cross-cl. ¶14, and that Defendant JMA "was hired or retained ad [sic], or otherwise acted as the general contractor [for the construction of Eighty Seven Park]." Cross-cl. ¶ 16. This allegation of JMA's independent contractor status, however, defeats the Association's 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 Corp. 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 Labor*, 460 So. 2d 996 (Fla. 2d DCA 1984). *See also. Keith v. News & Sun Sentinel Company*, 667 So. 2d 167 (Fla. 1995); *Miami Herald Publishing Company v. Kendall*, 88 So. 2d

[18] 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.

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.*, 2008 WL 5381390, at *1 (N.D. Fla. Dec. 19, 2008) (building code imposes no 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) (no duty under Florida common law requiring owner to supervise independent contractor). Absent well-pled allegations of ultimate facts of 8701's own affirmative negligence or of facts sufficient to satisfy an exception to the independent contractor rule, Count VIII must be dismissed.

Next, the Crossclaims' conclusory allegations of vicarious negligence liability independently fail due to the Crossclaims' failure to adequate 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*, 571 So. 2d at 422; *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 Crossclaims do not contain any such allegations, and it should be dismissed as a result.

To the extent the Association is alleging that 8701 is an "alter ego" of any of the other "Terra Defendants" or of any other Defendant, *see* Cross-cl. ¶ 14, this effort fails as well. As the

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Association recognizes, *id.* ¶¶ 10-12, TG, TWI and 8701 Collins Development, LLC are all limited liability companies. 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). Moreover, "[a] member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company solely by reason of being or acting as a member or manager." *Id.* As the Third District has recognized, "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); *see also Dr. Chago Prods., LLC v. In Da House Digital Prods., Inc.*, 2015 WL 11216725 at *2 (S.D. Fla. Dec. 8, 2015) (dismissing claims where plaintiff failed to allege that individual defendants were members or managers of limited liability company and "failed to demonstrate why each individual Counter-Defendant should be held responsible for acts undertaken by the limited liability company"). 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 Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1117-21 (Fla. 1984), to state such a claim the Crossclaim "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." *Lipsig v. Ramlawi*, 760 So. 2d 170, 187 (Fla. 3d

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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 Crossclaims do not contain any of these allegations. If the Association is claiming that 8701 is the "alter ego" of any other Defendant, it has failed to plead any facts to support an alter ego theory of liability.

IV. The Association Lacks Standing to Sue for Unit Owners' Personal Injury and Personal Property Damage Claims.

Finally, the Association alleges that it seeks recovery for "resultant deaths, injuries and losses." Cross-cl. ¶296. The Association, however, is a statutory creature of limited jurisdiction and lacks standing to maintain any claim for personal injury to, or the wrongful death of, any of its individual members, and it similarly lacks standing to maintain any claim for damage to their respective personalty. Chapter 718, Florida's Condominium Act, legislatively authorizes the condominium form of property ownership and grants condominium associations certain limited rights to act on behalf of their members, including the right to sue and be sued in a representative capacity, but only when the association is acting "**on behalf of *all* unit owners concerning matters of common interest**." *See* § 718.111(3), Fla. Stat. (emphasis added). The Association, therefore, may not advance individualized claims of personal injury, wrongful death, or damage to personalty because all such claims are personal to the claimants and exceed the scope of the Association's narrow, legislatively circumscribed authority.

A condominium association's authority to initiate legal action is limited by Section 718.111(3) of the Condominium Act, which provides that "the association may institute, maintain, settle, or appeal actions or hearings in its name **on behalf of all unit owners concerning matters of common interest to most or all unit owners**, including, but not limited to, the common elements; the roof and structural components of a building or other improvements . . . ." § 718.111(3), Fla.

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Stat. (2017) (emphasis added). Similarly, Rule 1.221 of the Florida Rules of Civil Procedure provides that a condominium association may "institute, maintain, settle, or appeal actions or hearings in its name on behalf of **all association members concerning matters of common interest to the members**, including, but not limited to: (1) the common property, area, or elements; (2) the roof or structural components of a building, or other improvements . . . ." Fla. R. Civ. P. 1.221 (2018) (emphasis added). Since not all unit owners perished, not all unit owners suffered personal injuries, and not all unit owners owned and suffered the loss of the same personality, the Association cannot satisfy either Section 718.111(3) or Rule 1.221's conditions to the Association's standing to sue in a representative capacity. *See, e.g., Avila South Condo. Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977); *Akoya Condo. Ass'n, Inc. v. 3M Co.*, 2015 WL 12724122 (Fla. Cir. Ct. Aug. 3, 2015)(aff'd per curiam, 199 SO. 3d 527)(Fla. 3d DCA 2016)(citing *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993)); *Central Carillon Beach Condo. Ass'n, Inc. v. Garcia*, 2018 WL 1404113 (Fla. 3d DCA Mar. 21, 2018)(affirming order quashing class certification in association's challenge to Value Adjustment Board's proposed assessments for all units because individual units were assessed in the name of the individual unit owners, not their associations); *Malco Industries, Inc. v. Featherock Homeowners Association, Inc.*, 854 So. 2d 755 (Fla. 2d DCA 2003)(mobile homeowners' association lacked standing to sue for declaratory relief over the interpretation of a settlement agreement that affected only a few homeowners).

By way of example, in *2711 Hollywood Beach Condo. Ass'n. v. TRG Holiday, Ltd.*, 2018 WL 3371781 (Fla. Cir. Ct. 2018) the court held that condominium associations "do[] not have standing to claim damages to other property not owned by the association that is located *within* units owned by individual unit owners . . . . these are matters of individual owner interest, not the

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common interest of all owners. *Id.* at *8 (citing *Akoya Condo.*, 2015 WL 12724122 (Fla. Cir. Ct. 2015), *aff'd*, 199 So.3d 527 (Fla. 3d DCA 2016)). *Akoya*, upon which the TRG Holiday court relied, is similarly on point and instructive.

In *Akoya*, the court granted 3M Company a final summary judgment against a plaintiff condominium association that asserted claims of products liability arising out of a purported incompatibility between 3M's fire caulk and CPVC pipes. 2015 WL 12724122 at * 1. The association claimed that leaks in the CPVC pipes damaged the fire sprinkler system and other parts of the building, as well as "a handful of items of property not owned by Akoya, but instead owned by individual condominium unit owners," to wit, an interior unit door, a medicine cabinet, a living room carpet, a mirror and artwork. The Court found that the association lacked standing to sue for damage to the contents of the individual units:

> **To the extent that Akoya seeks to recover damages to property not owned by Akoya, but rather owned by individual unit owners within the Akoya, the Court determines that Akoya lacks standing to recover such damages**... Florida Rule of Civil Procedure 1.221 and Florida Statutes 718.111(3) permit a condominium association such as Akoya to bring claims in its capacity as a representative of the unit owners, but only to resolve a controversy of common interest to all units. (citations omitted). **Here, the damage to the limited items of property owned by individual unit owners is not common to all units. Accordingly, Akoya lacks standing to pursue damages to the specific items of property owned by a handful of unit owners**. As the only damages sought in this case which Akoya has standing to seek are damages to the Akoya building itself, 3M is entitled to summary judgment on Akoya's Counts I and II for negligent products liability as they are barred by Florida's economic loss rule.

Id. at *3 (emphasis added).[19] The Third District Court of Appeal affirmed the Court's ruling *per curiam*. *Akoya*, 199 So.3d 527 (Fla. 3d DCA 2016). The same rationale should apply to the

[19] *Tropical Condo. LLC v. Tropicana Condo. Ass'n., Inc.*, 2015 WL 13186638 (Fla. Cir. Ct. 2015) is to the same effect. In the order granting the plaintiff's motion to dismiss a condominium

Association's putative claims for personal injury and wrongful death, as those claims are even less common among the unit owners and at least as personal – if not more so – as the claims of damage to personality.

Separately, even if the Association could establish standing under Section 718.111(3) of the Condominium Act, it could still not maintain any action for wrongful death because only a decedent's personal representative has standing to advance such a claim under Florida's Wrongful Death Act. *See Roughton v. R.J. Reynolds Tobacco Co.*, 129 So.3d 1145, 1150 (Fla. 1st DCA 2013). "By statute, **the personal representative is the only party with standing to bring a wrongful death action** to recover damages for the benefit of the decedent's survivors and the estate." *Id.* (citing *Wagner, Vaughan, McLaughlin & Brennan, P.A. v. Kennedy Law Group*, 64 So.3d 1187, 1191 (Fla.2011)). *See also Grape Leaf Capital, Inc. v. Lafontant*, 316 So.3d 760, 761 n.1 (Fla. 3d DCA 2021)("A wrongful death case can only be pursued by the personal representative for the benefit of the beneficiaries."); *Kadlecik v. Haim,* 79 So.3d 892, 893 (Fla. 5th DCA 2012)(same). And the Association, "a not-for profit corporation" organized "in accordance with Florida Statute Chapter 718," Cross-cl. ¶¶7, 31, may not act as a personal representative. *See In re Estate of Montanez*, 687 So.2d 943, 946 (Fla. 3d DCA 1997)("Section 733.305, Florida Statutes (1993), only allows corporations to serve as personal representatives of an estate when they are trust companies, banking corporations, savings associations, and savings and loan associations.").

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

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association's counterclaims, the court noted that, the association "has not alleged that the Counterclaim is being asserted on behalf of *all* its members concerning a matter of common interest to the members" and, therefore, held that the "Association has not and cannot assert that *all* unit owners have a common interest in the claim. . . . Accordingly, the Association lacks standing to assert its Counterclaim." 2015 WL 13186638 at *1.

Dated: April 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CONFERENCE

WE HEREBY CERTIFY that on January 18, 2022 I conferred with counsel for the Association in a good faith effort to resolve the issues addressed in this motion by agreement but was unable to do so. I FURTHER 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 8th day of April, 2022.

/s/ Christopher L. Barnett
CHRISTOPHER L. BARNETT