

**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

**PLAINTIFFS' REPLY TO DEFENDANTS TERRA GROUP, LLC AND TERRA
WORLD INVESTMENTS, LLC'S AFFIRMATIVE DEFENSES TO PLAINTIFFS'
CONSOLIDATED THIRD AMENDED CLASS ACTION COMPLAINT**

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, by and through their undersigned counsel, hereby file this Reply to Defendants TERRA GROUP, LLC and TERRA WORLD INVESTMENT LLC's Affirmative Defenses to Plaintiffs' Consolidated Third Amended Class Action Complaint dated March 29, 2022, and state:

1. Defendants' First Affirmative Defense is a claim that apportionment of fault is appropriate pursuant to section 768.81, Florida Statutes, and is not a plea of avoidance. *See Gatt v. Keyes Corp.*, 446 So. 2d 211 (Fla. 3d DCA 1984). But whether any apportionment of fault is appropriate will be determined by a jury. Moreover, to assert a *Fabre v. Marin*, 597 So. 2d 883 (Fla. 1992) defense, assigning liability to third-parties, Defendants must not only plead the identity of those third parties and defendants, but also "ha[ve] the burden of presenting at trial that the nonparty's fault contributed to the accident in order to include the nonparty's name on the jury

verdict.” *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996) (citing *W.R. Grace & Co.—Conn. v. Dougherty*, 636 So.2d 746, 748 (Fla. 2d DCA)). In addition, Plaintiffs deny Defendant’s allegations set forth in this Affirmative Defense as to the non-parties identified, and specifically assert as to the individual unit owners named that the defense is lacking in specificity as to their alleged negligent conduct. Moreover, as in *Engle v. Liggett Group, Inc.*, all individual defenses of this nature must be left to the individual damages phase of this consolidated action and are not appropriate for adjudication during the liability phase. Lastly, apportionment of fault under section 768.81 does not apply when liability is vicarious or derivative in nature, or as to the activities for which Defendants owed a nondelegable duty to Plaintiffs or are strictly liable. See *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003); *Continental Florida Materials v. Kusherman*, 91 So. 3d 159 (Fla. 4th DCA 2012).

2. Defendants’ Fourth Affirmative Defense fails to state a legal defense for failure to set forth sufficient ultimate facts to support the Defendants’ assertion that the “Plaintiffs’ claims are barred” by “intervening and/or superseding causes.” The Defendants fail to identify such superseding or intervening cause. Additionally, Defendants’ conduct may be the legal cause of Plaintiff’s damages, even if it operates in combination with some other cause which was itself a reasonably foreseeable consequence. Without waiving the foregoing, Plaintiffs deny this defense.

3. Defendants’ Seventh Affirmative Defense is duplicative of its First Affirmative Defense in that it seeks to ascribe blame to other Defendants and non-parties. Accordingly, Plaintiffs incorporate and reasserts the response to that defense above herein.

4. Defendants’ Ninth Affirmative Defense fails to state a legal defense for failure to set forth sufficient ultimate facts supporting the Defendants’ claim that they are entitled to a set-off for all “reimbursements and payments” received by Plaintiffs and is denied. The Florida Legislature has abolished joint and several liability for economic and noneconomic damages in

negligence actions. *See Port Charlotte HMA, LLC v. Suarez*, 210 So. 3d 187, 190 (Fla. 2d DCA 2016) (reversing order granting setoff). Any apportionment of fault will be determined by Fla. Stat. 768.81, if applicable. Furthermore, Defendants are not entitled to a set-off from benefits payable by collateral sources to the extent such collateral sources have a subrogation right, and even if some collateral source payments are appropriate for a setoff they may not be admitted into evidence at trial. *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1253 (Fla. 2015); *Gormley v. GTE Products Corp.*, 587 So.2d 455 (1991).

5. Defendants' Thirteenth Affirmative Defense is legally insufficient and is denied. Victims of a tortious conduct causing personal injury and their survivors have no legal duty to mitigate damages, which duty is exclusively a tenant of contract law. *See Sys. Components Corp. v. Florida Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009) (explaining that in tort cases, "[t]here is no actual 'duty to mitigate,' because the injured party is not compelled to undertake any ameliorative efforts"). To the extent that Defendants seek again to blame Plaintiffs for the collapse, this defense is duplicative of Defendants' First Affirmative Defense and, accordingly, Plaintiffs incorporate and reasserts the response to that defense above herein

6. Defendants' Fifteenth Affirmative Defense is specifically denied and is legally insufficient. Again, the Florida Legislature has abolished joint and several liability for damages in negligence actions, which operated to defeat third party causes of action for contribution. Defendant's fault will be apportioned, if appropriate, pursuant to section 768.81. *See T&S Enters. Handicap Accessibility, Inc. v. Wink Indus. Maintenance & Repair, Inc.*, 11 So. 3d 411 (Fla. 2d DCA 2009).

7. In addition to the foregoing, all other of Defendants' affirmative defenses are denied by operation of Florida Rule of Civil Procedure 1.110(e).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 18th day of April, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the Florida Court's e-Filing portal which will send a notice of electronic filing to all attorneys of record.

<p>Dated: April 18, 2022</p> <p><u>/s/ Harley S. Tropin</u> Harley S. Tropin (FBN 241253) Javier A. Lopez (FBN 16727) Jorge L. Piedra (FBN 88315) Tal J. Lifshitz (FBN 99519) Eric S. Kay (FBN 1011803) KOZYAK TROPIN & THROCKMORTON LLP 2525 Ponce de Leon Boulevard, 9th Floor Coral Gables, FL 33134 Tel: (305) 372-1800 hst@kttlaw.com</p> <p><i>Plaintiffs' Co-Chair Lead Counsel</i></p>	<p>Respectfully submitted,</p> <p><u>/s/ Rachel W. Furst</u> Rachel W. Furst (FBN 45155) Stuart Z. Grossman (FBN 156113) GROSSMAN ROTH YAFFA COHEN, P.A. 2525 Ponce de Leon Boulevard, Suite 1150 Coral Gables, FL 33134 Tel: (305) 442-8666 rwf@grossmanroth.com</p> <p><i>Plaintiffs' Co-Chair Lead Counsel</i></p>
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