

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

IN RE: CHAMPLAIN TOWERS SOUTH CLASS REPRESENTATION
COLLAPSE LITIGATION,

CBL DIVISION

CASE NO: 2021-015089-CA-01

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**RESPONSE TO THE RECEIVER'S MOTION TO CONFIRM COMPLIANCE WITH
ARTICLE 6.7 OF THE JUNE 2022 SETTLEMENT AGREEMENT IN
CONTEMPLATION OF DISTRIBUTION AND OBJECTION TO THE
RELEASE OF THE SUBROGATION HOLDBACK SUM**

8701 Collins Development, LLC, Terra World Investments, LLC and Terra Group, LLC (collectively, the "8701 Defendants") file their Response to the Receiver's Motion to Confirm Compliance with Article 6.7 of the June 2022 Settlement Agreement in Contemplation of Distribution and Objection to the Release of Subrogation Holdback Sum, and state as follows:

INTRODUCTION

Pursuant to Article 6.7 ("Article 6.7") of the Settlement Agreement dated June 17, 2022 (the "June Settlement Agreement"), the Settlement Administrator¹ may distribute the \$30,000,000.00 Subrogation Holdback Sum only under certain specifically delineated conditions as set forth in the Settlement Agreement. As of the date of this filing, the 8701 Defendants have not been provided with evidence that these requirements have been fulfilled, and neither has the Court. Therefore, absent that evidence, it should go without saying that the movant has not carried its burden and its motion must be denied.

The focus of the Receiver's Motion to Confirm Compliance with Article 6.7 of the June 2022 Settlement Agreement in Contemplation of Distribution (the "Receiver's Motion") is that the

¹ Except as otherwise stated herein, all capitalized terms shall have the same meanings ascribed to them in the June Settlement Agreement.

August Final Order and Judgment and the August Bar Order (as defined in the Receiver’s Motion) somehow satisfy the requirements of Article 6.7, and, therefore, the Subrogation Holdback Sum may be distributed. The plain terms of the August Final Order and Judgment and the August Bar Order do not support this contention, however. In addition, and without divulging the details of confidential mediation communications, suffice it to say that the Settling Parties negotiated, at length, certain conditions to the disbursement of the Subrogation Holdback Sum that *specifically preclude* either the Final Order and Judgment (the “June Final Order and Judgment”) or the Receivership Bar Order (the “June Bar Order”) from satisfying the conditions of Article 6.7. The parties bargained for considerably more, as the June Settlement Agreement plainly provides.

The June Settlement Agreement provided for “*global peace*” and the Court has appropriately echoed this understanding on numerous occasions.² However, the 8701 Defendants, and other Settling Parties, have legitimate concerns that other actions may be commenced against the Settling Parties in the light of the following well-known record: (i) immediately after the execution of the June Settlement Agreement, the PSC negotiated additional settlements with Additional Settling Parties; (ii) shortly after the June Bar Order was issued, the PSC moved to modify it and *re-instate* certain Barred Claims; and (iii) both the August Bar Order and the August Final Order and Judgment putatively *allow* said claims. As a result, the 8701 Defendants’ insistence upon full compliance with Article 6.7 is not an elevation of form over substance; rather, it goes to the heart of the Settlement Agreement, which, again, was intended to assure “*global peace*” to the Settling Parties.

² See Hear. Tr., March 9, 2022, at 64:19: “*I would assume that most defendants who are settling this case are doing it in part to get global peace and a global resolution (...)*”; Hear. Tr., May 11, 2022, at 51:11: “*The defendants want global peace. They’re going to get it (...)*”; and Hear. Tr., May 18, 2022, at 71:20: “*(...) if it’s a payment of money in exchange for release and global peace, that is not particularly complicated to document.*”

As expressed on numerous occasions to the movant and the PSC, it is *impossible* for the 8701 Defendants to know which insurers may, or may not, have paid insurance proceeds to Settlement Class Members and which insurers, if any, have potential subrogation claims against the Settling Parties. Only the PSC and presumably the movant have access to that information. The 8701 Defendants, therefore, have a genuine concern that subrogation claims may exist. In light of this concern, the 8701 Defendants simply request that the PSC provide an affidavit attesting that all SCM Insurers have executed an Insurer Waiver, and that those executed Insurer Waivers have been provided to the Released Parties. Until such an attestation is provided, the 8701 Defendants' position will remain that the PSC has not provided evidence that the requirements under Article 6.7 have been fulfilled, that the movant has failed to carry its evidentiary burden, and that the Receiver's Motion must be denied.

ARGUMENT

Pursuant to Article 6.7, the Subrogation Holdback Sum may be released only “*after the SCM Subrogation Deadline*,” which is defined by Section 2.1.125 of the June Settlement Agreement. For its part, the SCM Subrogation Deadline definition provides that the Subrogation Holdback Sum may be distributed after the earlier of the following to occur:

- a) The PSC delivers to the Settling Parties executed Insurer Waivers from (i) Universal, and (ii) **all SCM Insurers** (§2.1.125(a));
- b) A final and non-appealable order is entered that fulfills each of the following requirements: (i) the order permanently dismisses **with prejudice** the Universal Action and all other SCM Insurer Subrogation Claims; (ii) the order enjoins and permanently bars all SCM Insurer Subrogation Claims; and (iii) the order may not be the Final Order and Judgment nor the Receivership Bar Order (§2.1.125(b)); or

c) The date of June 24, 2025, passes. (§2.1.125(c)).³

The movant has failed to demonstrate, as a threshold factual matter, that any of these conditions were satisfied.⁴

I. THE REQUIREMENTS OF SECTION 2.1.125(a) HAVE NOT BEEN SATISFIED AS OF THE DATE OF THIS FILING.

Pursuant to Section 2.1.125(a), the Subrogation Holdback Sum may be distributed if “*the PSC delivers to the Settling Parties executed Insurer Waivers from Universal and **all SCM Insurers** as provided in this Settlement Agreement.*” (Emp. added).

According to Section 2.1.123 of the June Settlement Agreement, SCM Insurer means “*any insurer of any Settlement Class Member that has paid or pays any insurance proceeds to, or on behalf of, any Settlement Class Member, on or before the Effective Date, **including** those insurers listed on the Schedule of SCM Insurers attached as Exhibit G hereto and made a part hereof.*” (Emp. added).

That is, the definition of SCM Insurer encompasses *any* insurer that made a payment to a Settlement Class Member before the Effective Date of the June Settlement Agreement.⁵ Accordingly, the definition is *not* limited to the insurers identified on Exhibit G to the June Settlement Agreement (“Exhibit G”), which itself plainly explains that the list of SCM Insurers

³ For obvious reasons, this Response will not argue why this condition has not yet been met.

⁴ “[U]nsworn representations of counsel about factual matters do not have any evidentiary weight in the absence of a stipulation.” *Chase Home Loans, LLC v. Sosa*, 104 So.3d 1240, 1241 (Fla. 3d DCA 2012)(citing [Lazcar Int'l, Inc. v. Caraballo](#), 957 So. 2d 1191, 1192 (Fla. 3d DCA 2007)). There is no such stipulation here. Moreover, “[i]t is of no moment in establishing facts that attorneys are 'officers of the court' as we often read when an unsworn representation is made.” *Id.* (citing [Bauman](#), 425 So. 2d at 35 n.3). Absent an affidavit attesting to the satisfaction of the Settlement Agreement’s conditions, the movant has failed to carry its evidentiary burden and establish the facts necessary for its motion to be granted.

⁵ See Section 2.1.64 of the June Settlement Agreement for the definition of the Effective Date.

included therein is “incomplete.”⁶ Furthermore, given that the latest date to qualify as an “SCM Insurer” was weeks after the negotiation and Execution Date of the June Settlement Agreement, it is simply impossible to argue that the list included on Exhibit G is exhaustive or was ever meant to be.

The Receiver’s Motion argues, without any factual support,⁷ that all Insurer Waivers required by the June Settlement Agreement have been provided to the Settling Parties. *See* Receiver’s Motion at ¶ II. As of the date of this filing, the 8701 Defendants can confirm having received executed Insurer Waivers from Universal and certain other SCM Insurers, but it is impossible to know if the received Insurer Waivers are complete and, critically, whether they are from “all SCM Insurers” absent a sworn statement. By way of example, the waiver provided by St. Johns Insurance Company, Inc. lists policy numbers but does not include the name of each insured to whom a payment was made, as identified on Exhibit G. Furthermore, and of critical importance, it is impossible for the 8701 Defendants, and the Court, to know if any SCM Insurers, other than those listed on Exhibit G, made insurance payments to the Settlement Class Members before the Settlement Agreement Effective Date, unless the PSC provides this information in a sworn statement.

To illustrate the point, the Receiver’s Motion reveals the existence of a claim of lien against a distribution by a SCM Insurer that is **not** listed on Exhibit G, and of which the 8701 Defendants were not previously aware. *See* Receiver’s Motion at ¶ II, footnote 5. Therefore, the PSC, the party with the obligation to deliver Insurer Waivers (as opposed to the Receiver, the movant here), must provide evidence that it has fulfilled its obligation and provided executed Insurer Waivers from

⁶ *See* Exhibit G, providing that “[t]he foregoing list of Universal’s insured that resided within, or owned Units at, Champlain Towers South is incomplete.”

⁷ *See supra* note 3.

“all SCM Insurers”, as required by Section 2.1.125 of the June Settlement Agreement. Once this evidence has been provided, the 8701 Defendants, and the Court, can confirm compliance with the Settlement Agreement and, absent any other defects, the 8701 Defendants will not oppose distribution of the Subrogation Holdback Sum. As previously explained, an affidavit from the PSC certifying that all Insurer Waivers have been provided to the Settling Parties would be acceptable to the 8701 Defendants for these purposes, and that evidence, presumably, should be acceptable to the Court.

Finally, the 8701 Defendants are uncertain why the Receiver argues, as its sole argument for compliance with Section 2.1.125(a), that Article 3 of the June Settlement Agreement has been satisfied by its filing of a *Notice of Compliance with Agreed Order*, given that the *Notice of Compliance with Agreed Order* and Article 3 only address *CTSCA Insurer Waivers* and *WDC Representatives Releases*, and neither pertains to the SCM Insurers, critical to the satisfaction of the condition to the release of the Subrogation Holdback Sum.⁸ The argument, therefore, is

⁸ Sections 3.1 through 3.2 state:

3.1: CTSCA Insurer Waivers. As a condition precedent to the disbursement of any funds from the Settlement Fund to any Settlement Class Member, the Receiver shall cause each CTSCA Insurer to execute and deliver to each Settling Party’s counsel an Insurer Waiver in substantially the form of **Exhibit D** attached hereto and made a part hereof.

3.2: Individual Releases from WDC Representatives

3.2.1: No later than five (5) days after the Execution Date, the PSC shall deliver to counsel for each Settling Party a list setting forth the identities of each WDC Representative that is represented by the PSC and the corresponding decedent and shall use its best efforts to deliver to counsel for each Settling Party a list setting forth the identities of each WDC Representative that is not represented by the PSC and the corresponding decedent.

3.2.2: As a condition to participation in the Claims Administration Process, each WDC Representative that is not a Non-Participating WDC shall execute a WDC Representative Release in substantially the form of **Exhibit E** attached hereto. As a condition precedent to the disbursement of any funds from the Settlement Fund to any Settlement Class Member, the PSC shall deliver to counsel for each Settling Party executed WDC Representative Releases from all WDC Representatives that are not Non-Participating WDCs.

3.2.3: The Claim Form may contemplate liquidated Monetary Award in the amount of One Million and 00/100 Dollars (\$1,000,000.00) for certain WDC Representatives (“Liquidated WDC Award”). No Liquidated WDC Award shall be awarded to any person or entity except for a person or entity that (a) is a WDC Representative, and (b) executes a WDC Representative Release as provided herein.

misplaced, and of no moment to the threshold question of whether the Receiver’s Motion establishes the conditions of disbursement as a matter of fact.

II. THE REQUIREMENTS OF SECTION 2.1.125(b) HAVE NOT BEEN SATISFIED AS OF THE DATE OF THIS FILING.

Pursuant to Section 2.1.125(b), the Subrogation Holdback Sum may be distributed if:

[T]he Court, or such other appropriate state or federal courts or tribunals, enter final, non-appealable orders (other than the Final Order and Judgment or the Receivership Bar Order) that (i) permanently dismiss with prejudice, as against the Released Parties, the Universal Action and all other SCM Insurer Subrogation Claims, and (ii) enjoin and permanently bar all SCM Insurers from commencing, continuing, or maintaining all SCM Insurer Subrogation Claims against any Released Party.

Contrary to the Receiver’s Motion’s interpretation of Section 2.1.125(b) that “*if the Court ... enter[s] final, non-appealable orders’ freeing the Settling Parties from any potential claims, then the subrogation Holdback Sum may be distributed*”, the requirements of Section 2.1.125(b) go beyond simply “freeing the Settling Parties from any potential claims” and contain specifically bargained for and cumulative sub-conditions that must all be satisfied before the Subrogation Holdback Sum may be released. The Settling Parties specifically bargained for layers of protection against future claims and they are entitled to the full benefit of their bargain before the Subrogation Holdback Sum may be released.⁹

The Settling Parties, the PSC, and the Receiver all agreed that before the Subrogation Holdback Sum may be released, the Universal Action should be dismissed with prejudice, by a final and non-appealable order, *other than the Final Order and Judgment or the Receivership Bar Order*. As previously stated, the Parties to the Settlement Agreement negotiated this requirement at length and included clear language in the Settlement Agreement requiring a final

⁹ See *Platinum Luxury Auctions, LLC v. Concierge Auctions, LLC*, 227 So.3d 685 (Fla. 3d DCA 2017)(court with retained jurisdiction to enforce settlement agreement “must conform with the terms of the agreement”).

and non-appealable order *different* than the Final Order and Judgment or the Receivership Bar Order. The August Final Order and Judgment and August Bar Order, which are, at best, merely duplicative of the otherwise contractually insufficient June Final Order and Judgment and June Bar Order do not satisfy Section 2.1.125(b)'s conditions to release the Subrogation Holdback Sum. This is especially true if, as the Receiver's Motion argues, the Settling Parties are released by the August Settlement Agreement and Beneficiaries of the August Bar Order. *See* Receiver's Motion at 5 and 10.

Regardless, the Universal Action has *not* been dismissed with prejudice. Thus, even if the August Final Order and Judgment and August Bar Order satisfied the first prong of Section 2.1.125(b), they would not satisfy the second prong, which requires that the Universal Action be dismissed *with prejudice*. It has not been, as any review of the docket in the Universal Action reveals.¹⁰ Thus, the dismissal *with prejudice* requirement has not been fulfilled. This fact alone precludes the satisfaction of Section 2.1.125(b), and defeats the Receiver's Motion to the extent it travels under that Section.

CONCLUSION

The conditions required under Article 6.7 and Section 2.1.125 of the June Settlement Agreement have not been met as of the date of this filing and the movant has offered no evidence that the conditions have been satisfied. Accordingly, until the PSC provides satisfactory evidence that these critical conditions have been met, the Court should not enter an order directing the distribution of the \$30,000,000.00 Subrogation Holdback Sum. Naturally, once these requirements

¹⁰ "A court may take judicial notice of the following matters, to the extent that they are not embraced within s. 90.201 . . . Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States." *See* § 90.202(6), Fla. Stat. Accordingly, the 8701 Defendants ask that the Court take judicial notice of the Notice of Voluntary Dismissal Without Prejudice filed in the matter styled *Universal Prop. & Caus. Ins. Co. v. Champlain Towers South Condo. Assn., Inc., et al.*, Case No 2022-001944-CA-01 (Cir. Ct. Feb. 1, 2022), a copy of which is attached as Exhibit 1.

are fulfilled and established with evidence sufficient to support a subsequent motion, the Defendants will not oppose the distribution of the Subrogation Holdback Sum.

WHEREFORE, the Defendants respectfully requests that the Court (i) deny Receiver’s Motion to Confirm Compliance with Article 6.7 of the June Settlement Agreement in Contemplation of Distribution; (ii) refrain from authorizing the distribution of the \$30,000,000.00 Subrogation Holdback Sum until the requirements of Article 6.7 have been fulfilled, and (iii) grant such other and further relief as the Court deems just and proper.

Dated: November 30, 2022

Respectfully submitted,
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By: /s/ Michael J. Thomas
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CERTIFICATE OF SERVICE

WE HEREBY 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 30th day of November 2022.

 /s/ Michael J. Thomas
MICHAEL J. THOMAS

EXHIBIT “1”

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

CASE NO.: 2022-001944-CA-01
COMPLEX BUSINESS LITIGATION DIV.
IN RE: CHAMPLAIN TOWERS SOUTH
COLLAPSE LITIGATION
CASE NO.: 2021-015089-CA-01

UNIVERSAL PROPERTY & CASUALTY
INSURANCE COMPANY a/s/o MAX
FRIEDMAN AND ELLEN FRIEDMAN, et al.
Plaintiff,

vs.

CHAMPLAIN TOWERS SOUTH
CONDOMINIUM ASSOCIATION, INC.;
MORABITO CONSULTANTS, INC.;
WILLCOTT ENGINEERING, INC.; SCOTT
STEWART; 8701 COLLINS
DEVELOPMENT, LLC; JOHN MORIARTY
& ASSOCIATES OF FLORIDA, INC.; NV5,
INC.; NV5 GLOBAL, INC.; TERRA
WORLD INVESTMENTS, LLC; TERRA
GROUP, LLC; and BIZZI & PARTNERS
DEVELOPMENT, LLC

Defendants.

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY a/s/o MAX FRIEDMAN AND ELLEN FRIEDMAN, et al, by and through the undersigned counsel, and files this Notice of Voluntary Dismissal without Prejudice as to all parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically uploaded via Florida e-filing portal, which served a copy of same to all counsel of record on September 15, 2022.

By: /s/ Jourdan Weltman, Esq.

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