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9

10 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

11 UNLIMITED CIVIL JURISDICTION

12 LOGAN MENDEZ, KYLE NIEMIER, and NO. RG15765508  
NICOL LENOIR, each of them for themselves  
13 individually, and for all other persons similarly  
situated,

**ANSWER TO COMPLAINT**

14 Plaintiffs,

15 vs.

16 EMPYREAN TOWERS, LLC, PRIZE  
17 GROUP, LLC, RICHARD SIGNER, ALICE  
TSE, and DOES 1 TO 30,  
18

Defendants.  
19 \_\_\_\_\_/

20  
21 Defendant ALICE TSE (hereinafter “Defendant”) hereby responds to the Complaint for  
22 Damages filed herein by Plaintiffs as follows:

23 **GENERAL DENIAL**

24 1. Pursuant to California Code of Civil Procedure, including but not limited to  
25 Section 431.30 thereof, Defendant hereby denies each and every, all and singular, the  
26 allegations of the Complaint, and denies that Plaintiffs have been injured in the sum or sums  
27 alleged, in any other sum, or at all, in any manner or form whatsoever, by any act, omission, or  
28 obligation of this Defendant.

1 AFFIRMATIVE DEFENSES

2 FAILURE TO STATE A CLAIM

3 2. The Complaint for Damages fails to state sufficient facts to constitute any cause  
4 or causes of action against this answering Defendant.

5 COMPARATIVE FAULT

6 3. Plaintiffs and the putative class members were careless and negligent in and about  
7 the matters alleged in the Complaint for Damages, and said carelessness and/or negligence on the  
8 part of Plaintiffs proximately contributed to and/or caused the happening of the incident and of the  
9 injury, loss, and damages complained of, if any. If Plaintiffs and putative class members recover  
10 any damages, this answering Defendant is entitled to have the amount thereof abated, reduced, or  
11 eliminated to the extent that Plaintiffs' and putative class members' negligence and/or carelessness  
12 caused and/or contributed to said injury, loss, and/or damages, in whole or in part.

13 FAULT OF OTHERS

14 4. The injuries and/or damages alleged by Plaintiffs and putative class members were  
15 caused in whole or in part by the negligence and/or other conduct of persons, firms, corporations,  
16 and/or entities other than this answering Defendant, and said negligence is either imputed to  
17 Plaintiffs and putative class members by reason of said parties' relationship to Plaintiffs and  
18 putative class members and/or said negligence comparatively reduces the percentage of negligence,  
19 if any, of this answering Defendant.

20 FAILURE TO MITIGATE DAMAGES

21 5. If Plaintiffs and putative class members suffered any damages, as alleged in the  
22 Complaint for Damages or otherwise, said damages were due solely to the fact that Plaintiffs  
23 and putative class members failed to act in a manner which would have mitigated said alleged  
24 damages, in whole or in part.

25 IMPLIED WAIVER

26 6. The claims of Plaintiffs and putative class members are barred, in whole or in part,  
27 because the conduct of Plaintiffs and putative class members was such as to have constituted a  
28

1 waiver of said claims and/or acquiescence by Plaintiffs and putative class members in the conduct  
2 of this answering Defendant.

3 ESTOPPEL

4 7. Plaintiffs and putative class members are estopped from asserting the claims alleged  
5 in the Complaint for Damages, or otherwise.

6 UNCLEAN HANDS

7 8. Any recovery by Plaintiffs and putative class members is barred, in whole or in  
8 part, by the doctrine of unclean hands.

9 LACHES

10 9. Any recovery by Plaintiffs and putative class members is barred, in whole or in  
11 part, by the doctrine of laches.

12 CONSENT

13 10. Any recovery by Plaintiffs and putative class members is barred, in whole or in  
14 part, by virtue of the fact that Plaintiffs and putative class members consented, expressly or  
15 impliedly, to the acts and events set forth in the Complaint.

16 STATUTES OF LIMITATIONS

17 11. The purported causes of action alleged in the Complaint for Damages are barred, in  
18 whole or in part, by the applicable statutes of limitations, including but not limited to those  
19 contained in Sections 337, 338, 338.1, 339, 340, and 343 of the California Code of Civil Procedure.

20 OFFSET

21 12. If any damages are awarded to Plaintiffs and putative class members, the amount  
22 of damages must be offset by the amounts, if any, owed to this answering Defendant pursuant to  
23 any agreement found to exist between the parties, and for any damage Plaintiffs and putative  
24 class members caused this answering Defendant to incur.

25 ACCORD AND SATISFACTION

26 13. That, prior to the commencement of this action, this answering Defendant alleges  
27 that she duly performed, satisfied and discharged all duties and obligations she may have owed  
28 to Plaintiffs and putative class members arising out of any and all agreements, representations, or

1 contracts made by or on behalf of this answering Defendant. This action is therefore barred by  
2 the provisions of California Civil Code section 1473. This action is barred, in whole or in part,  
3 by the defense of accord and satisfaction.

4 ///

5 PRIVILEGE

6 14. This answering Defendant alleges that any and all acts and/or conduct of this  
7 answering Defendant complained of were privileged, justified, or both, including to, but not  
8 limited to, that all alleged efforts to recover possession of the premises by this answering  
9 Defendant were privileged pursuant to California Civil Code section 47(b) and (c), or otherwise  
10 involved the Defendant's exercise of their constitutional rights to free speech and petition.

11 SLAPP SUIT

12 15. This answering Defendant alleges that the statements she is alleged in the  
13 Complaint to have made were privileged and/or protected speech, and that the Complaint, and  
14 each cause of action therein, should be stricken under California Code of Civil Procedure  
15 §425.16, as it constitutes a SLAPP suit brought primarily to chill the valid exercise of this  
16 Defendant' constitutional rights of freedom of speech and petition for the redress of grievances.

17 DEFENDANT' PERFORMANCE

18 16. This action is barred, in whole or in part, by the fact that this answering Defendant  
19 already tendered to Plaintiffs and putative class members the full performance, if any, required to  
20 be tendered by Defendant, and Plaintiffs and putative class members accepted said performance as  
21 satisfaction of Defendant's complete performance under the agreement between the parties.

22 DEFENDANT'S GOOD FAITH

23 17. The actions complained of were made without malice or wrongful intent on the  
24 part of this answering Defendant and in a reasonable and good faith belief of their legal right to  
25 perform the actions complained of.

26 COMPLIANCE WITH STATE LAW

27 18. The alleged conduct of this answering Defendant was done and maintained under  
28 the express authority of laws and statutes of the State of California, including but not limited to

1 Civil Code section 1954.50 *et seq.*, thereby barring Plaintiffs and putative class members from  
2 relief against this answering Defendant.

3 PUNITIVE DAMAGES BARRED

4 19. Plaintiffs' and putative class members' claim for exemplary or punitive damages is  
5 barred by all standards of limitations regarding the determination and enforceability of punitive  
6 damages awards, including but not limited to those set forth in the decisions of BMW of North  
7 America v. Gore, 517 U.S. 559 (1996); Cooper Industries v. Leatherman Tool Group, 532 U.S. 424  
8 (2001); and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

9 FAILURE TO STATE CLAIM FOR PUNITIVE DAMAGES

10 20. Plaintiffs' Complaint for Damages fails to state facts sufficient to constitute any  
11 claim for exemplary or punitive damages because no act or omission of Defendant constituted  
12 malicious, oppressive, willful, wanton, reckless, and/or grossly negligent conduct.

13 PUNITIVE DAMAGES UNCONSTITUTIONAL

14 21. Plaintiffs and putative class members are not entitled to recover any exemplary or  
15 punitive damages, as alleged in the Complaint or otherwise, because any award of exemplary or  
16 punitive damages, as applied to the facts of this case, would violate Defendant's rights under the  
17 provisions of the United States and California Constitutions, including but not limited to the Due  
18 Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the  
19 Excessive Fines and Cruel and Unusual Punishment Clauses of the Eighth Amendment of the  
20 United States Constitution.

21 CLASS ACTION – CERTIFICATION PREREQUISITES

22 22. Plaintiffs cannot satisfy the prerequisites for class certification and therefore cannot  
23 represent the interest of others.

24 CLASS ACTION – STANDING

25 23. Plaintiffs lack standing to assert the legal rights or interests of others.

26 CLASS ACTION – LACK OF PREDOMINANCE

27 24. The types of claims alleged by Plaintiffs on behalf of themselves and/or the alleged  
28 putative group they purport to represent are matters in which individual questions dominate and

1 thus are not appropriate for class treatment.

2 CLASS ACTION – LACK OF NUMEROSITY

3 25. The alleged putative group that Plaintiffs purport to represent is not so numerous  
4 that joinder is impossible.

5 CLASS ACTION – LACK OF COMMONALITY

6 26. Plaintiffs are not similarly situated to other potential members of the alleged  
7 putative group they purport to represent and thus are inadequate representatives of the alleged  
8 putative group.

9 CLASS ACTION – LACK OF TYPICALITY

10 27. Certain interests of the alleged putative group are in conflict with the interests of all  
11 or certain subgroups or members of the putative group.

12 CLASS ACTION – LACK OF SUPERIORITY

13 28. Plaintiffs have not shown and cannot show that class treatment of the purported  
14 causes of action in their Complaint is superior to other methods of adjudicating the controversy.

15 CLASS ACTION – LACK OF MANAGEABILITY

16 29. Plaintiffs' Complaint and each purported cause of action alleged therein cannot  
17 proceed as a purported class because of difficulties likely to be encountered that render the action  
18 unmanageable.

19 CLASS ACTION – LACK OF ACSERTAINABILITY

20 30. Plaintiffs' Complaint and each purported cause of action alleged therein cannot  
21 proceed as a purported class because the alleged putative class is not ascertainable, nor are its  
22 members identifiable.

23 CLASS ACTION – VIOLATION OF DUE PROCESS

24 31. Certification of a class, as applied to the facts and circumstances of this case, would  
25 constitute a denial Defendant' due process rights, both substantive and procedural, in violation of  
26 the Fourteenth Amendment to the United States Constitution and the California Constitution.

27 32. Defendant expressly reserves the right to supplement this Answer with such  
28 additional affirmative defenses based on subsequently discovered facts obtained through discovery.

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WHEREFORE, this answering Defendant prays for relief as follows:

1. For judgment in favor of this answering Defendant on each of the purported causes of action in Complaint for Damages;
2. For dismissal of the Complaint in its entirety, with prejudice;
3. For Plaintiffs to take nothing by way of the instant action;
4. For this answering Defendant to be awarded their costs and attorney's fees incurred in this action, to the extent that this Court finds that attorney's fees are recoverable herein;
5. For such other and further relief as the Court deems just and proper

Dated: August 7, 2015

HAAPALA, THOMPSON & ABERN LLP

By: \_\_\_\_\_  
STEVEN SHERIFF ABERN  
Attorneys for Defendant ALICE F. TSE

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1 **PROOF OF SERVICE**

2 Cristy L. Houchins certifies and declares as follows:

3 I am employed in the County of Alameda, State of California. I am over the age of  
4 18 years, and not a party to this action. My business address is 1939 Harrison Street, Suite 800,  
5 Oakland, California, 94612-3527.

6 On August 7, 2015, I served the foregoing document described as: **ANSWER TO**  
7 **COMPLAINT** on all interested parties in this action, in the manner set forth below.

- 8  **By Facsimile:** By personally transmitting a true copy of the document(s) via an  
9 electronic facsimile machine maintained at 510-273-8534, between the hours of  
10 8:00 a.m. and 5:00 p.m., to the numbers listed below.
- 11  **By Electronic Mail:** By personally transmitting a true copy of the document(s) via an  
12 electronic mail account maintained at the law firm of Haapala, Thompson & Abern,  
13 LLP, between the hours of 8:00 a.m. and 5:00 p.m., to the e-mail address listed below.  
14 The transmission was reported as complete and without error.
- 15  **By Messenger Service:** By arranging for said document(s) to be picked up by an agent  
16 for \_\_\_\_\_ to be delivered on the date set forth below, to the address set  
17 forth below. [A declaration by the messenger is retained in our file, or filed with the  
18 original of this document with the court.]
- 19  **By Mail:** By placing the document(s) listed above in an envelope addressed as set forth  
20 below, with postage thereon fully prepaid, in the United States mail at Oakland,  
21 California. I am readily familiar with the business practice at my place of business for  
22 collection and processing of correspondence for mailing with the United States Postal  
23 Service. Correspondence so collected and processed is deposited with the United States  
24 Postal Service that same day in the ordinary course of business with postage fully  
25 prepaid.
- 26  **Overnight Delivery:** By placing the document(s) in an envelope addressed as set forth  
27 below. I am readily familiar with the office's practice for overnight delivery, and that  
28 correspondence would be placed for pickup by Golden State Overnight on the same day,  
and that the document(s) served was placed for deposit in accordance with the office  
practice for same at Oakland, California, for which delivery fees were paid or provided.

23 **SEE SERVICE LIST**

24 I declare under penalty of perjury under the laws of the State of California that the above  
25 is true and correct. Executed on August 7, 2015, at Oakland, California.

26 \_\_\_\_\_  
27 Cristy L. Houchins



**SERVICE LIST**

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<p>Andrew Wolff, Esq. (SBN 195092)          Chris Beatty, Esq. (SBN 250040)          Law Offices of Andrew Wolff, PC          1970 Broadway, Suite 210          Oakland, CA 94612          Telephone: 510-834-3300          Facsimile: 510-834-3377          Email: <a href="mailto:Andrew@awolfflaw.com">Andrew@awolfflaw.com</a>  <a href="mailto:Chris@awolfflaw.com">Chris@awolfflaw.com</a></p> <p><u>Attorneys for Plaintiffs in</u>  <u><i>Fisher, et al. v. Empyrean Towers LLC, et al.</i></u>  <u>and <i>Mendez, et al. v. Empyrean Towers LLC,</i></u>  <u><i>et al.</i></u></p>	<p>Steven Morger, Esq.          L/O of Wendel, Rosen, Black &amp; Dean LLP          1111 Broadway Ave., Suite 2400          Oakland, CA 94607          Telephone: 510-622-7532          Facsimile: 510-808-4677          Email: <a href="mailto:smorger@wendel.com">smorger@wendel.com</a></p> <p>Attorneys for Defendant RICHARD SINGER</p>
<p>Charles R. Ostertag (SBN 289328)          Alamere Law          802 B Street          San Rafael, CA 94901          Telephone: 415-938-7823          Facsimile: 415-873-3197          Email: <a href="mailto:costertag@alamerelaw.com">costertag@alamerelaw.com</a></p> <p>Attorneys for Plaintiffs in:  <i>Candy, et al. v. Empyrean Towers LLC, et al.</i></p>	<p>Barbara J. Parker (SBN 069722)          Doryanna Moreno (SBN 140976)          Otis McGee (SBN 071885)          Richard Illgen (SBN 126803)          Melosa Granda (SBN 286068)          Oakland City Attorney's Office          One Frank H. Ogawa Plaza, 6<sup>th</sup> Floor          Oakland, CA 94612          Telephone: 510-238-6629          Facsimile: 510-238-6500          Email: <a href="mailto:mgranda@oaklandcityattorney.org">mgranda@oaklandcityattorney.org</a></p> <p><u>Attorneys for Plaintiffs in</u>  <u><i>People of CA/City of Oakland v. Empyrean</i></u>  <u><i>Towers LLC, et al.</i></u></p>
<p>Steven Whitworth, Esq.          Law Office of Steve Whitworth          705 F Street          Sacramento, CA 95814          Telephone: 916-668-5970  <b>Cell: 916-389-4030</b>          Facsimile: 916-668-5971          Email: <a href="mailto:steve@stevewhitworth.com">steve@stevewhitworth.com</a></p> <p><u>Co-Counsel for Defendants</u>  <u><i>Alice Tse and Empyrean Towers LLC</i></u></p>	<p>Patricia Lyon, Esq.          French &amp; Lyon, P.C.          1990 N. California Blvd., Suite 300          Walnut Creek, CA 94596          Telephone: 415-597-7849          Cell: 925-899-5212          Facsimile: 415-243-8200          Email: <a href="mailto:phlyon@frenchandlyon.com">phlyon@frenchandlyon.com</a></p> <p><u>Attorneys in Related Case:</u>  <u><i>East West Bank v. Prize Group, LLC</i></u>  <u>RG15773057</u></p>
<p><u>Bankruptcy Counsel</u></p> <p>Chris Kuhner          Eric Nyberg          Kornfield, Nyberg, Bendes &amp; Kuhner          510/273-8845  <a href="mailto:c.kuhner@kornfieldlaw.com">c.kuhner@kornfieldlaw.com</a></p>	<p>Court-Appointed Receiver:</p> <p>Mark S. Adams (SBN 68300)          California Receivership Group, LLC          150 S. Barrington Ave., Suite 100          Los Angeles, CA 90049          Telephone: 310-471-8181</p>

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