

CAUSE NO. \_\_\_\_\_

MARY SULLIVAN, Individually and	§	IN THE DISTRICT COURT OF
as Representative of the Estate of Anne	§	
Sullivan, Deceased, SABINA BEBEE,	§	
Individually and as Representative of	§	
the Estate of Robert Bebee, Deceased,	§	
NICOLE GARNER, as Representative	§	
of the Estate of Robert Garner, Deceased,	§	
and AMY YARBROUGH and ROBERT	§	
YARBROUGH,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
CRITERIUM SYSTEMS, INC., d/b/a	§	
SOUTHWEST INNS,	§	
MATHURIAHARENDRA, individually	§	
and d/b/a BHOJAN a/k/a BHOJAN	§	
INDIAN RESTAURANT, ROGER	§	
CHEN, and SHRI SIDHIVINAYAKA LLC	§	
<i>Defendants.</i>	§	_____ JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION AND**  
**REQUEST FOR DISCLOSURES**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Mary Sullivan, individually and on behalf of the Estate of Anne Sullivan, Deceased, Sabina Bebee, individually and on behalf of the Estate of Robert Bebee, Deceased, Nicole Garner, as Representative of the Estate of Robert Garner, and Amy Yarbrough and Robert Yarbrough, ("Plaintiffs") file this Original Petition and Request for Disclosures against the named defendants and show this Court and jury the following:

## I.

### DISCOVERY CONTROL PLAN

1.1 This suit should proceed according to a Level 3 Discovery Plan or docket control order entered by the court.

## II.

### REQUEST FOR DISCLOSURE

2.1 Plaintiff requests that all named Defendants disclose and provide to Plaintiffs the information and material provided for production in TRCP 194.2(a) through (l).

## III.

### PARTIES

3.1 Plaintiff Mary Sullivan is an individual residing in Houston, Harris County, Texas.

3.2 Plaintiff Sabina Bebee is an individual residing in Houston, Harris County, Texas.

3.3 Plaintiff Nicole Garner is an individual residing in Houston, Harris County, Texas.

3.4 Plaintiffs Amy Yarbrough and Robert Yarbrough are individuals residing Houston, Harris County, Texas.

3.5 Defendant **CRITERIUM SYSTEMS, INC.** is a Foreign Corporation, duly formed and existing under the laws of the State of California. Defendant is qualified to transact business in the State of Texas and may be served with process by serving its registered agent, Roger Chen, at 6855 Southwest Freeway, Houston, Texas 77074, or wherever he may be found.

3.6 Defendant **MATHURIA HARENDRA, Individually and d/b/a BHOJAN a/k/a BHOJAN INDIAN RESTAURANT** is a resident of Missouri City, Texas, Fort Bend County, and may be served with citation at her place of residence, 1123 Concord Place Drive, Missouri City, Texas 77459, or wherever she may be found.

3.7 **ROGER CHEN** is an individual and may be served by mailing or serving process of service on him at 6855 Southwest Freeway, Houston, Texas 77074 or wherever he may be found.

3.8 **SHRI SIDDHIVINAYAKA LLC** is a Texas Corporation and may be served with process by serving its registered agent Oza Kaushik at 5901 Hillcroft, #C4, Houston, Texas 77036.

#### **IV.**

#### **VENUE ALLEGATIONS**

4.1 The events complained of in the case occurred in Houston, Harris County, Texas. All conditions precedent have occurred and been performed by Plaintiffs.

#### **V.**

#### **NOTICE FACTS**

5.1 On May 31, 2013, Plaintiffs sustained legal injuries and/or lost life because of 1) the active and continuing negligence of the defendants; 2) failure of the defendants to warn of dangerous conditions of which they had actual knowledge and of which Plaintiffs had no knowledge; 3) failure of the defendants to warn of dangerous conditions that they had created and of which Plaintiffs had no knowledge; 4) defendants' unlawful or unpermitted use of the property where Plaintiffs sustained significant injuries and/or perished; 5) defendants' flagrant and repeated failure to comply with non-delegable life/safety laws, rules and regulations intended to prevent structural failure and improper storage of highly flammable fuel sources; 6) defendants' engaging in unpermitted and unlawful operations and uses of the property that created actual dangerous conditions and failing to warn Plaintiffs of same; 7) defendants' compromising the structural integrity of the building without warning Plaintiffs of same; 8) defendants' stockpiling fuel

sources inside a building that was not permitted or allowed to be used in such a fashion; 9) defendants' operating ignition sources in an unauthorized manner; 10) defendants' trespassing upon the permitted uses of the structure that injured Plaintiffs, and which trespass was a cause of Plaintiffs' damages; 11) defendants' trespassing upon the lawful or authorized uses of the building and/or negligently advising Plaintiffs after they arrived at the scene to enter the building because of the presence of others which was false or unsupported by the known facts; 12) defendants' compromising the structure in violation of applicable building and fire codes; 13) defendants' maintaining and/or installing roof coverings without proper inspections, engineering and/or lawful approval; 14) defendants' willfully and wantonly placing Plaintiffs' lives in peril without any warning or correction of dangerous conditions; 15) defendants' failing to comply with applicable laws and non-delegable duties; and 16) defendants' inviting Plaintiffs into a dangerous condition after their arrival on the premises.

5.2 Plaintiffs died and/or sustained significant injuries after they entered and/or was invited into a death-trap created by defendants and/or of which they were aware. For several minutes at the scene on May 31, 2013 defendants had the opportunity to advise Plaintiffs of dangerous conditions. Indeed they or their agents negligently told Plaintiffs and other firefighters that people were inside the burning building and invited them into the property for their benefit. Defendants and/or their agents stood around and watched Plaintiffs and others prepare themselves to enter the building, at their invitation, in the brave quest to save victims they were told were in the building. Defendants failed to inform/warn Plaintiffs of dangerous conditions they had created or were aware of that existed prior to her arrival. Defendants' conduct was more than mere negligence, even though it was at least that; it was also unconscionable conduct, constituted negligence *per se*, legal malice and gross negligence. Defendants' conduct, including the

invitation to enter the building, caused Plaintiffs to go into the building to search for others were also acts of active or continuing negligence for which defendants are now liable.

5.3 Plaintiffs sustained significant injuries and/or died not solely from the fire that brought them to the scene but also because of the active and continuing negligence of the defendants that invited them into the dangerous conditions they had created or of which they were aware. Plaintiffs had no knowledge they were entering a building that was out-of-code and had been on fire for longer than had been reported. Their death and/or injuries are even more tragic because they were invited into the building by the very property owners/occupiers they had come to help. Indeed, the invitation to enter the building made Plaintiffs a business invitee deserving of the duties owed to invitees. Defendants' active encouragement of Plaintiffs to enter the building to find souls that were not there, and/or active silence in the face of false claims that people were inside in need of rescue by Plaintiffs, constitutes unconscionable conduct and negligence deserving of exemplary damages.

## **VI.**

### **THE FIREMAN'S RULE IS INAPPLICABLE**

6.1 Defendants may try to escape liability by asking the court to adopt the "fireman's rule" that has not been sanctioned by the Texas Supreme Court under facts similar to those involved in this case. This defense fails for at least three reasons: 1) the Texas Supreme Court has not officially adopted the fireman's rule and there is conflicting Texas case law authority permitting firefighters to recover damages sustained after arriving at a fire scene; 2) even if the rule were recognized in Texas it would apply to premises liability claims and be available only to owner/occupiers of property and not to all defendants named in this case, especially trespassers; and 3) the conduct complained of in this case falls under several exceptions to the rule (i.e.,

continuing/active negligence; created/known dangers; invitation after arrival, changed status, willful/wanton conduct, etc.)

6.2 While there are lower level courts that have recognized the “fireman’s rule,” there are other Texas cases that have allowed firefighters to recover damages sustained during their efforts to fight a fire. The Fifth Circuit Court of Appeals, interpreting Texas law, observed in the case of *Harris v. Atchison, Topeka and Santa Fe Railway Co.*, 538 F.2d 682 (1976) that the Texas Supreme Court has not expressly adopted the fireman's rule to bar a firefighter’s recovery. In addressing this point, the *Harris* court writes:

At the outset we are confronted with Phillips' argument that the “firemen’s rule” should preclude recovery. Although many jurisdictions forbid recoveries by firemen for injuries suffered at the scene of negligently caused conflagrations, Texas has no such rule. Its courts have sustained recoveries by firemen on at least three occasions. In *Houston Belt & Terminal Ry. Co. v. O’Leary*, 136 S.W. 601 (Tex.Civ.App.1911, writ ref’d), defendant railroad negligently allowed a boxcar containing fireworks to collide with other cars during switching operations. Plaintiff’s intestate, the chief engineer of the fire department, approached the boxcar to extinguish the fire. One of a recurring series of explosions fatally injured him. A jury verdict for plaintiff rejected defense assertions of *volenti non fit injuria* and contributory negligence. The court affirmed, concluding that each explosion constituted an independent negligent act. 136 S.W. at 605.

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Not only do Texas courts have no objection to recoveries by firemen, they are even willing to indulge in strained reasoning to permit such recoveries. The Texas Supreme Court adopted the *O’Leary* theory of continuing acts of negligence in allowing a fireman to recover in a case arising out of the same accident as *O’Leary*. *Houston Belt & Terminal Ry. Co. v. Johansen*, 107 Tex. 336, 179 S.W. 853 (1915). Despite scholarly criticism, the continuing negligence theory remains viable in Texas. *McAfee v. Travis Gas Corp.*, 137 Tex. 314, 153 S.W.2d 442 (1941); *Acme Products Co. v. Wenzel*, 448 S.W.2d 139 (Tex.Civ.App. Houston (1st Dist.) 1969, no writ).

Id. At 686-87. The *Harris* court makes clear that Texas courts frown on absolute bars to recovery and that firefighters do not leave their rights to recover damages caused by another's negligence at the door of their employment. The court continues “[g]iven the recent trend in Texas to eliminate

absolute bars to recovery...we feel safe in holding that public safety officers do not lose the right to sue for damages upon accepting public employment.” *Id.* at 688. Just as in *Harris*, Plaintiffs did "not lose [their] right to sue for damages upon accepting public employment,” especially not for conduct as egregious and/or intentional as the defendants’ acts and omissions in this case.

6.3 Further, not all of the defendants in this case are owner/occupiers. The individually-named defendants are in fact non-premises owners who retained or exercised control over the offensive conduct complained of in this suit. Their decisions and control caused the enhanced injuries and deaths involved in this case. The conduct was unconscionable, negligent, non-delegable, unlawful and grossly negligent for which they can be held individually liable. Chen and Mathuria were at least negligent and grossly negligent by insisting on monies not being spent on needed repairs; alterations being made without legal authority; flagrantly disregarding city ordinances governing life/safety measures needed for operations on the premises; debating non-delegable responsibilities for safety measures and compliance with laws while endangering the public and Plaintiffs; instructing or permitting unlawful restaurant and motel operations on the property that were not authorized; disregarding the need for action to protect fuel sources from fire exposure; undercapitalizing operations to address lawful demands; failing to make timely repairs and address fire hazards and defective equipment on the property; conspiring to sell the real property and/or dissipate other corporate assets to defraud creditors and Plaintiffs as a judgment creditor.

6.4 All defendants are liable for all least the following non-exhaustive conduct

1. Controlling the operation and maintenance of defective equipment and fire hazards on the property;
2. Preventing necessary actions to address life/safety deficiencies that contributed to the conditions causing the death of Plaintiffs and damages to the family;

3. Conspiring to and encouraging the trespass upon and use of property not permitted for use;
4. Failing to remedy dangerous conditions and equipment and/or warn of their existence;
5. Refusing to repair the premises and equipment to address known or created dangerous conditions; and
6. Negligently enticing or instructing Plaintiffs and others that people were inside the building to be reserved.
7. Continuing negligent conduct after Plaintiffs' arrival on the premises;
8. Permitting unlawful activities to occur on the premises.

## **VII.**

### **ROOF COVERING AND ATTIC ALLEGATIONS**

7.1 In 2004, Defendant Criterion knew it was purchasing an aged property built in circa 1960s. The property also exhibited many renovations and additions. Public records reveal that such changes were made that had to be in compliance with updated building and fire codes. Defendants' alterations to the property placed stresses on the property from its original purpose and construction. Such stresses created dangerous and unlawful conditions on the premises that contributed to the death and/or injuries of Plaintiffs and other firefighters. Such alterations included the placement of alternative and multiple layers of covering on the roof without first undertaking needed structural and engineering studies to determine the appropriateness of same. Such negligence created an increased danger of building collapse. Some of these conditions included the danger of entrapment, compromised load-bearing walls, non-compliant fire conditions on the premises, and promoted the risk of roof collapse. Thus, while the firefighters arrived at the scene to fight a fire, they were unaware of the alterations that created dangerous



conditions. Plaintiffs also expressly plead continuing/active negligence and changed status against all defendants and for inviting Plaintiffs to enter the building to rescue people who weren't in the building.

## VIII.

### PREMISES LIABILITY

8.1 To the extent any of the defendants can make it to appear they were lawful owner/occupiers of the premises where the fire started, Plaintiffs assert that as to those defendants only Plaintiffs were owed the legal duties owed to at least a business invitee at the time of their death. Cf., *Harris*, supra. The danger to Plaintiffs was not merely the fire they came to fight, but also the created and/or unknown dangers on the premises of which defendants failed to disclose or warn Plaintiffs. Had Plaintiffs been warned of these dangers they would not have exposed themselves to the perils of a collapsing building or would have taken other measures to prepare for such eventuality. Also, by inviting Plaintiffs to go into the structure, defendants made Plaintiffs invitees – not licensees.

8.2 Alternatively, if any defendant makes it to appear that (1) it was an owner/occupier that caused the fire in question, and (2) that Plaintiffs are to be accorded the duties owed to a licensee, which Plaintiffs deny, then Plaintiffs assert that only the lawful owner/occupier causing can assert the fireman's rule—none other. If applicable, as a licensee Plaintiffs were owed the duty of being informed of created or known dangerous conditions of which they had no knowledge. They were also owed a duty not to be injured by willful, wanton or grossly negligent conduct, and to be protected from the defendants' active or continuing negligence. Defendants breached these duties.

## **IX.**

### **CONTINUING/ACTIVE NEGLIGENCE ALLEGATIONS**

9.1 Best evidence suggests that a length of time passed before Plaintiffs entered the building at the invitation of the defendants. There they became entrapped and sustained significant injuries and/or died. There was more than sufficient time for the defendants, collectively and singularly, to warn or inform Plaintiffs and others of latent and non-obvious dangerous conditions in the building that created increased risk of harm/injury and death to the firefighters. Too, there was enough time for the defendants not to have negligently represented to Plaintiffs that people were still inside the building. Such affirmative and negligent conduct caused Plaintiffs to further risk their lives to try to locate the alleged lost soul(s). Such conduct by defendants constitutes continuing negligence for which defendants can and should be held liable for actual and punitive damages. There was also a continuing duty for defendants to affirmatively disclose to Plaintiffs that they had materially altered the integrity of the building and/or that the fire had been burning for a long time before Plaintiffs' arrival. Their silence in the face of known danger also constitutes continuing negligence. Plaintiffs expressly plead the continuing/active negligence doctrine against all defendants.

## **X.**

### **NEGLIGENCE PER SE**

10.1 Defendants, jointly and severally, are liable for negligence *per se* and for cumulative violations of non-delegable life/safety laws. Their conduct created dangerous conditions that contributed to the damages and deaths complained of in this litigation. Their violations were of such a cumulative, repetitive and frequent nature as to constitute more than

mere negligence and rise to the level of willful, wanton, reckless and unconscionable conduct deserving of actual and punitive damages. At least the following known laws and regulations are believed to have been repetitively violated by defendants:

- a. Houston Fire Code sections 107.1 – 107.5, 109.1, 901.4, 901.4.1, 901.4.2, 901.4.4, 901.6, 901.6.1, 901.6.2, 901.7, 901.8, and 901.9;
- b. Appendix L (Life Safety Code) section L102.3;
- c. Houston Building Code sections 104(h), 106, 204, 302(a), Table 5D, 1706(a), Table 17A, 3304(g), 3304(h), 8926(o)1.(a);
- d. Appeals Board Guidelines sections 2C and 2D;
- e. Texas Accessibility Standards sections 4.1 – 4.35, 4.1.6, 4.28, 4.28.2, and 4.28.3; and
- f. City of Houston Ordinance 110 et seq.

Pleading additionally, and more specifically, Plaintiffs assert that violations were of legal requirements for the building and uses in question for the structure. Compliance with such law was non-delegable.

## **XI.**

### **NEGLIGENCE**

11.1 Defendants, jointly and severally, were also negligent and their negligence was a proximate cause of Plaintiffs' injuries and damages.

11.2 Defendants knew or should have known of the multiple code violations, omissions, as well as the building's compromised structure and duty not to invite Plaintiffs into the dangerous structure; each of which posed an unreasonable risk of harm, death, and serious bodily injury to Plaintiffs, yet defendants failed to warn Plaintiffs of the unreasonable and dangerous conditions on the premises.

## **XII.**

### **DECLARATORY JUDGMENT RELIEF**

12.1 Plaintiffs seek declaratory judgment relief and attorney's fees relating to Defendants' violation of non-delegable laws relating to life/safety issues.

## **XIII.**

### **AGENCY AND RESPONDEAT SUPERIOR**

13.1 Defendants are liable under theories of ostensible, apparent, implied, and express agency. Defendants encouraged, permitted and/or allowed the conduct of their individual employees, agents, representatives and/or invitees to be held out to the public, tenants, governmental offices, Plaintiffs and firefighters as being authorized and lawful. The defendants also conspired with one or more of each other causing the damages complained of herein or to cover-up the cause of the fire/death and damages complained of herein. Defendants are liable under theories of conspiracy, *respondeat superior*, principal/agent liability and conspiracy.

## **XIV.**

### **GROSS NEGLIGENCE**

14.1 Plaintiffs would further show that each of the acts, conduct and omissions on the part of defendants set forth herein, taken singularly or in combination, constitutes gross negligence, legal malice and were proximate cause(s) of the injuries and/or death of Plaintiffs and the damages and injuries to Plaintiffs. The conduct, acts and omissions of defendants involved an extreme degree of risk, considering the probability and magnitude of the potential harm; defendants had subjective awareness of the risks involved, but nevertheless proceeded with conscious indifference to the rights, safety, and welfare of the Plaintiffs. Such gross negligence/legal malice entitles Plaintiffs to recover exemplary damages.

## **XV.**

### **GOVERNMENTAL IMMUNITY**

15.1 Plaintiffs further allege and intend to show that any attempt by defendants to hold any governmental entity liable or proportionately responsible for Plaintiffs' damages is barred by governmental immunity, sovereign immunity, official immunity, the rescuer doctrine and/or the sudden emergency doctrine and is not allowed or recognized under the Texas Tort Claims Act. No proportionate liability can exist against a governmental entity that owed no legal duty under the facts of this case.

## **XVI.**

### **WRONGFUL DEATH AND SURVIVAL ACTIONS**

16.1 Plaintiffs bring claims pursuant to the Texas Wrongful Death Statute, §§71.002 and 71.004 of the Texas Civil Practice and Remedies Code, and as a survival action pursuant to the Texas Survival Statute, §71.021 et seq. of the Texas Civil Practices and Remedies Code, as well as loss of consortium, personal injury and other economic loss claims. Plaintiffs' claims are within the jurisdictional limits of the Court.

## **XVII.**

### **FRAUDULENT CONVEYANCE ALLEGATIONS**

17.1 An asset review of the corporate defendants suggests that they will lack the wealth and assets to satisfy a likely adverse award of damages in this case. Plaintiffs have learned of efforts by Chen and Criterium to try to sell the property owned by Criterium in a manner that would remove those assets from attachment or collection efforts. The effort by Chen and Criterium, if successful, would constitute a fraudulent conveyance and would be intended to deprive Plaintiffs and likely judgment creditors in this suit of sufficient assets to make them whole.

Thus, Plaintiffs sue Chen and Criterium for attempted fraudulent conveyance and/or fraudulent conveyance and seeks injunctive relief to safeguard any sales proceeds derived from such sale from being dissipated if a sale occurs. Additionally, Plaintiffs seek damages from Chen and Criterium for the purposeful undercapitalization of Criterium in the face of potential judgment creditors. Compensatory damages for the Plaintiffs, collectively, are more than \$1,000,000 and not more than \$5,000,000.00.

#### **XVIII.**

##### **JURY DEMAND**

18.1 Plaintiffs demand a jury trial and the appropriate jury fee will be paid in accordance with law.

#### **XIX.**

##### **DAMAGES/PRAAYER**

19.1 For the above reasons, each named Plaintiff seeks judgment against the named defendants in at least the following particulars:

- 1) Joint and several liability against all defendants under all available legal theories, including civil conspiracy, agency law, retention of control liability and criminal negligence;
- 2) Compensatory damages of not less than \$1,000,000.00 nor more than \$5,000,000.00;
- 3) Punitive damages in the discretion of the jury;
- 4) Injunctive relief and judgment against defendants' attempt at fraudulent conveyance of assets;
- 5) Costs, interests (pre-and post-), and attorney fees as permitted at law;
- 6) Declaratory judgment relief; and

7) All other relief to which Plaintiffs may be entitled.

Respectfully submitted,

/s/ Benjamin L. Hall, III

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