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CAUSE NO. DC-09-14825

TACO MUNDO PRESTON OAKS, LP	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	
	§	DALLAS COUNTY, TEXAS
SOUTHEAST PRESTON/ROYAL, LTD.,	§	
TRADEMARK PRESTON OAKS, INC.	§	
	§	
Defendants.	§	M- <u>298</u> TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE:

Plaintiff Taco Mundo Preston Oaks, LP ("Taco Mundo") files its Original Petition against Defendant Southeast Preston/Royal, Ltd. ("Landlord") and Trademark Preston Oaks, Inc. ("Trademark") (collectively, the "Defendants") showing the following:

**I.
DISCOVERY CONTROL PLAN**

1. Discovery shall be conducted under Level 2 of Texas Rule of Civil Procedure 190.

**II.
SUMMARY OF CASE**

1. While a valid and enforceable lease was in effect between Taco Mundo and Landlord regarding certain property located in a shopping center at the southeast corner of Preston Road and Royal Lane, Landlord made certain fraudulent representations to Taco Mundo regarding the terms of the lease to induce Taco Mundo into a very unfavorable lease amendment. Specifically, Landlord stated that Taco Mundo would be in default of the lease if it was not open for business as a Mexian restaurant by September 15, 2009. Landlord would have the right to

terminate the lease anytime after September 15, 2009

2. At the time these statements were made, Landlord presented an amendment to the lease to Taco Mundo which greatly diminished its rights under the lease. Relying solely upon Landlord's fraudulent statements and not wanting to risk losing the leased space in which Taco Mundo had already invested over \$500,000 dollars in construction finish-out monies, Taco Mundo executed the amendment. On October 20, 2009, Landlord on the basis of the amendment, locked Taco Mundo out of the leased space and has since denied Taco Mundo entrance into the lease space.

3. To date, Landlord has neither provided Taco Mundo with any notice of default under the lease, nor informed Taco Mundo in any way (other than Landlord's refusal to return email or voicemail correspondence) that the lease has been terminated.

III. **PARTIES**

1. Plaintiff Taco Mundo Preston Oaks, LP is a limited partnership organized and existing under the laws of the State of Texas.

2. Defendant Southeast Preston/Royal, Ltd. is a limited partnership organized and existing under the laws of the State of Texas with its principal place of business in Texas located at 301 Commerce Street, Ste 3635, Fort Worth, TX 76102. Southeast may be served with process through its registered agent, Terry Montesi, at the Southeast's principal place of business.

3. Defendant Trademark Preston Oaks, Inc. is a corporation organized and existing under the laws of the State of Texas with its principal place of business in Texas located at 301 Commerce Street, Ste 3635, Fort Worth, TX 76102. Trademark may be served with process

through its registered agent, Terry Montesi, at Trademark's principal place of business.

IV.
JURISDICTION & VENUE

1. Jurisdiction is proper in this Court because the amount in controversy exceeds this Court's minimum jurisdictional limits.

2. Venue is proper in this Court because a substantial part of the acts or omissions giving rise to Plaintiffs' claims occurred in Dallas County, Texas. Tex. Civ. Prac. & Rem. Code Ann. § 15.002(a)(1) (Vernon 2005).

IV.
FACTUAL BACKGROUND

1. In August 2008, Caroline Galvan-Rodriguez ("Caroline"), the owner of Taco Mundo, began looking for space to place a casual dining restaurant of the Mexican variety in the North Dallas area. At that time, she noticed vacant space in the shopping center located at the southeast corner of Preston Road and Royal Lane which would fit Taco Mundo's needs (the "Premise").

2. Over the course of the next year, Taco Mundo and its representatives, employees, and contractors worked with Southwest Preston/Royal, Ltd. ("Landlord") and its representatives to prepare site plans which complied with the City of Dallas' building codes and federal laws such as the Americans with Disabilities Act ("ADA"). There were numerous issues with the design and construction of the premises, including, but not limited to, compliance with the ADA and accommodating back door access to the bakery tenant located adjacent to the Taco Mundo space.

3. In March 2009, Landlord presented Taco Mundo with a draft lease for the Premise. Under the proposed lease, the commencement date is defined as the date on which the

Landlord delivers the Demised Premises. This lawsuit concerns the operation of the following two provisions of the proposed lease:

Provision 24. a. **Failure to Open.** The failure of the Tenant to open for business in the Demised Premises within one hundred fifty (150) days from the Commencement Date, subject to Permitted Delays, and continuously operate thereafter.

Provision 40. n. **Inability to Perform.** This Lease and the obligations of the parties hereto shall not be affected or impaired because either party is unable to fulfill any of its obligations hereunder or is delayed in doing so, if such inability or delay is caused by reason of force majeure, strike, labor troubles, acts of God, acts of government, unforeseeable unavailability of materials or labor, or any other cause beyond the control of the affected party (the "Permitted Delays").

Taco Mundo executed and returned its counterpart of the lease to Landlord in mid-April. At that time, Landlord refused to execute and deliver a fully executed lease to Taco Mundo.

4. Shortly after Taco Mundo signed the lease, Landlord provided Taco Mundo access to the proposed premises to begin making improvements. In reliance upon Landlord's assertion that it would execute the lease, Taco Mundo began work on the premises in mid-May. While Landlord provided physical access to the premises in approximately April 2009, Landlord did not provide legal possession of the premises until July 2009, at the earliest.

5. On May 5, 2009, Landlord forwarded to Jack Breard, Landlord's leasing representative, with certain proposed changes to the lease in the form of slip sheets which Landlord wanted Taco Mundo to approve and include in the lease. In the May 5 that transmittal to Landlord's representative, David Howard, Landlord's transactional attorney, states:

We [Landlord] cannot authorize the release of the document until we receive the letter agreement attached authorizing the slip pages and **the lease is not effective** until the slip page authorization has been received and Landlord has executed the Lease with the slip pages inserted. (Underlining and bold added for emphasis.)

On July 9, Jack Breard forwarded David Howard's email with the required letter and slip pages to Taco Mundo. To date, Taco Mundo has never executed the letter agreement authorizing the slip pages. While Taco Mundo never executed the *required* slip page authorization, they began the major phase of construction of the space after receiving the proposal from Jack Breard.

6. Landlord has continually refused to execute and deliver the lease to Taco Mundo. In fact, prior to Landlord's litigation counsel forwarding an alleged copy of the lease to Taco Mundo's counsel in October 2009, Taco Mundo had never been provided a fully executed copy of the lease. Surprisingly, the lease provided by Landlord's litigation counsel contains the slip pages referenced in 14 above which were never approved or initialed/signed off on by Taco Mundo.

7. On August 27, 2009, representatives from Taco Mundo met with Ed Coury and Stephanie Drews, the designated project representatives for Landlord. At that meeting, Landlord's representatives continually represented that Taco Mundo would be in breach of their lease if the restaurant was not open for business by September 15, 2009. Under the terms of the lease, these assertions were false. Pursuant to the terms of the partially-executed lease agreement, Taco Mundo had 150 days from the Commencement Date of the lease to open for business. Because the Commencement Date could have not have happened prior to July 2009, the earliest Taco Mundo could have been in breach of its lease would have been some time in December of 2009 before any adjustments for Permitted Delays as defined by the lease.

8. Upon information and belief, Landlord made this representation with fraudulent intent to induce Taco Mundo into execution of a lease amendment which would shorten the date

by which the restaurant had to be open from one which could be extended due to Permitted Delays (see Provision 24. a. above) to a date certain (October 15, 2009). These representations were made by Landlord to force an event of default upon Taco Mundo for which Landlord could terminate the lease and reap the benefits of the cost of construction which Taco Mundo had previously invested in the finish-out of the premises. At that time, all parties knew an October 15, 2009 opening date was impossible for Taco Mundo to meet.

9. On September 9, 2009, Landlord presented Taco Mundo with a lease amendment establishing the required opening date as October 15, 2009 and forcing Taco Mundo to waive all remedies under the lease. On September 14, 2009, Landlord sent an email to Taco Mundo explaining that if the amendment was not signed by September 15, 2009 that Taco Mundo would be in breach of the lease and Landlord could terminate at will.

10. In reliance on these representations and fearing the loss of the significant investment of time and money, Taco Mundo executed the amendment to the lease.

11. Over the course of the next month, Taco Mundo attempted to complete construction of the leased premise, but was precluded from doing so by several items outside of its control, most of all the extraordinary amount of rain which Dallas County experienced during the time period.

12. On October 19, 2009 (after the October 15th “deadline” set forth in the September lease amendment), representatives from Taco Mundo met with Landlord to discuss the progress on the site. At that time, Landlord indicated that Taco Mundo had time to finish the project and to open. In reliance on these statements, Taco Mundo advanced additional monies to its contractor and pushed forward to completion of the premises.

13. On October 20, 2009, without notice, Landlord locked Taco Mundo out of the premises and has since denied it access. As a result, Taco Mundo has suffered and continues to suffer damages for which it now sues.

14. Pursuant to Texas Business Organizational Code § 153.152, Trademark is liable for all liabilities of Southeast as Southeast's general partner and has thus been sued in that capacity.

VI
CAUSES OF ACTION

Count 1 –Declaratory Judgment Claim

15. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Taco Mundo realleges the allegations contained in the above paragraphs as if fully set forth herein.

16. There is a justiciable controversy concerning the rights and obligations of Taco Mundo and Landlord, as they relate to the lease of the Premises. Specifically, Taco Mundo holds that the commencement date of the lease occurred in July and thus, the earliest default under provision 24.a. would not have occur until December 2009, while Landlord denies this commencement date and holds the lease commenced in April 2009.

17. There is not another pending case between Taco Mundo and Landlord by which either party has requested a determination of this issue.

18. All parties with an interest in the determination of these issues are parties to this action. They are the only parties in interest.

19. Accordingly, Taco Mundo requests that the Court enter a judgment which declares that the lease commenced in July 2009.

20. Taco Mundo also seeks from Landlord its reasonable and necessary attorneys' fees and court costs incurred to prosecute this action as permitted under Section 37.009 of the Texas

Civil Practice & Remedies Code.

21. Pursuant to Texas Business Organizational Code § 153.152, Trademark is liable for all liabilities of Landlord as Landlord's general partner and has thus been sued in that capacity.

Count 2 – Common Law Fraud/Fraudulent Inducement

22. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Taco Mundo realleges the allegations contained in the above paragraphs as if fully set forth herein.

23. Prior to the execution of the Amendment, Landlord made certain misrepresentations to Taco Mundo regarding the terms of the Lease as it related to Taco Mundo's deadline to open for business.

24. At the time the representations were made, Landlord knew of the falsity of these statements and/or made the representations with reckless disregard as to the truth.

25. Landlord made these misrepresentations with the intention that Taco Mundo would act on them by entering into the Amendment and continue to invest significant time, money, and operational resources into the construction of the finish-out of the Premise.

26. In fact, Taco Mundo did rely on the representations of Landlord and executed the Amendment. As a result of the terms embodied within the Amendment, Taco Mundo has suffered actual damages in an amount yet to be determined but in excess of the minimum jurisdictional limits of this Court.

27. Further, because Taco Mundo will establish fraud by clear and convincing evidence, Taco Mundo is entitled to exemplary damages under Texas Civil Practice & Remedies Code Section 41.003(a)(1)&(2).

28. Pursuant to Texas Business Organizational Code § 153.152, Trademark is liable

for all liabilities of Landlord as Landlord's general partner and has thus been sued in that capacity.

Count 3 – Fraud in a Real Estate Transaction

29. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Taco Mundo realleges the allegations contained in the above paragraphs as if fully set forth herein.

30. As stated above, Landlord made certain misrepresentations to Taco Mundo regarding the terms of the Lease related to Taco Mundo's deadline to open for business. At the time the representations were made, Defendants knew of the falsity of these statements or made the representations with reckless disregard as to truth. Defendants made these misrepresentations with the intention that Taco Mundo would act on them by entering into the Amendment and continue to invest significant time, money, and operational resources into the construction of the finish-out of the Property.

31. In fact, Taco Mundo did rely on the representations of Defendants and executed the Amendment. As a result of the amended terms embodied within the Amendment, Taco Mundo has suffered actual damages in an amount yet to be determined but in excess of the minimum jurisdictional limits of this Court. These damages include, among other things: Taco Mundo's consequential and incidental damages.

32. Further, under Tex. Bus. & Com. Code § 27.01 (d) and (e), Taco Mundo seeks recovery of exemplary damages, as well as its attorneys' fees, expert witness fees, costs of copies of depositions, and costs of court.

33. Pursuant to Texas Business Organizational Code § 153.152, Trademark is liable for all liabilities of Landlord as Landlord's general partner and thus is sued in that capacity.

(Pleading in the Alternative)

Count 4 – Negligent Misrepresentation

34. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Taco Mundo realleges the allegations contained in the above paragraphs as if fully set forth herein.

35. Prior to entering into the Amendment with Taco Mundo, Landlord made numerous representations to Taco Mundo. These representations included, but are not limited to the following:

- a. Taco Mundo will be in breach of the Lease if not open for business by September 15, 2009; and
- b. Landlord may terminate the lease after September 15, 2009 for the same .

36. These representations were made to the Taco Mundo for the purpose of inducing Taco Mundo to enter into the proposed Amendment.

37. Landlord made these representations without exercising reasonable care in ascertaining the truth or authenticity of the statements.

38. Taco Mundo relied upon these representations when entering into the Amendment.

39. Landlord's negligent misrepresentations caused Taco Mundo's damages in an amount in excess of the minimum jurisdictional amount.

40. But for Landlord's negligent misrepresentations, Taco Mundo would not have entered into the Amendment with Landlord and would not have suffered damages.

**VI.
PRAYER**

WHEREFORE, Plaintiff Taco Mundo Preston Oaks, LP respectfully requests that Defendants Southeast Preston/Royal, Ltd. and Trademark Preston Oaks, Inc. be cited to appear and answer, and that upon final trial, judgment be entered in favor of Taco Mundo Preston Oaks,

LP as follows:

1. Declaratory Judgment by the Court in favor of Taco Mundo that the lease commenced in July 2009.
2. Rescission of the amendment;
3. Actual damages;
4. Exemplary damages as allowed by law;
5. Statutory and exemplary damages as allowed by Chapter 27 of the Texas Business & Commerce Code;
6. Pre-judgment and post-judgment interest at the maximum rate allowed by law;
7. Reasonable attorney's fees and costs as allowed by law; and
8. Such other and further relief to which Taco Mundo may be justly entitled.

Respectfully submitted,

Cherry Petersen Landry Albert LLP

By: /s/ W. "Trey" R. Dyer, III
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ATTORNEYS FOR PLAINTIFF



DALLAS COUNTY CIVIL DISTRICT COURT COVER SHEET

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STYLED TACO MUNDO PRESTON OAKS, LP

v. SOUTHEAST PRESTON/ROYAL LTD.

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Plaintiff(s) <input type="checkbox"/> Pro Se Address _____ Telephone/Fax _____ E-mail _____ <input checked="" type="checkbox"/> Attorney for Plaintiff(s) State Bar No. 24036512 Address 8350 N Central Expressway, Suite 800 Dallas, Texas 75206 Telephone/Fax Telephone: 214.265.7007 Facsimile: 214.265.7008 E-mail tdyer@cplalaw.com	Defendant(s) (list separately) SOUTHEAST PRESTON/ROYAL, LTD. TRADEMARK PRESTON OAKS, INC.
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PARTIES MUST CHECK ONE CASE TYPE AND MAY CHECK ONE SUB-TOPIC

<input type="checkbox"/> Administrative Appeal <input type="checkbox"/> Bill of Review <input type="checkbox"/> Certiorari <input type="checkbox"/> Code Violations <input type="checkbox"/> Condemnation <input type="checkbox"/> Construction <input type="checkbox"/> Construction <input type="checkbox"/> Debt Contract <input type="checkbox"/> Defamation <input type="checkbox"/> Other Commercial Dispute <input type="checkbox"/> Antitrust/Unfair Comp <input type="checkbox"/> Consumer/DTPA <input type="checkbox"/> Franchise <input checked="" type="checkbox"/> Fraud/Misrep <input type="checkbox"/> Intellectual Property <input type="checkbox"/> Non-Competes <input type="checkbox"/> Partnership <input type="checkbox"/> Securities/Stock <input type="checkbox"/> Tortious Interference <input type="checkbox"/> Other Commercial <input type="checkbox"/> Discipline <input type="checkbox"/> Discovery <input type="checkbox"/> Rule 202 Depositions <input type="checkbox"/> Commissions <input type="checkbox"/> Subpoena <input type="checkbox"/> Letters Rogatory <input type="checkbox"/> Other Discovery <input type="checkbox"/> Employment <input type="checkbox"/> Discrimination <input type="checkbox"/> Retaliation	<input type="checkbox"/> Termination <input type="checkbox"/> Other Employment <input type="checkbox"/> Foreclosure <input type="checkbox"/> R 736 <input type="checkbox"/> Other than R 736 <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Insurance <input type="checkbox"/> Mass Tort MDL/Rule 11 <input type="checkbox"/> Asbestos <input type="checkbox"/> Baycol <input type="checkbox"/> Breast Implant <input type="checkbox"/> Friesione <input type="checkbox"/> Phen-Feu <input type="checkbox"/> Silica <input type="checkbox"/> Other Multi-Party <input type="checkbox"/> Motor Vehicle Accident <input type="checkbox"/> Other Personal Injury <input type="checkbox"/> Assault/Battery <input type="checkbox"/> Product <input type="checkbox"/> Premises <input type="checkbox"/> Other Personal Injury <input type="checkbox"/> Name Change <input type="checkbox"/> Post-Judgment <input type="checkbox"/> Professional Liability <input type="checkbox"/> Accounting <input type="checkbox"/> Legal <input type="checkbox"/> Med/Mal <input type="checkbox"/> Other Prof. Liab <input type="checkbox"/> Property	<input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Trespass/Try Title <input type="checkbox"/> Other Property <input type="checkbox"/> Prejudgment Remedy <input type="checkbox"/> Seizure/Forfeiture <input type="checkbox"/> Tax <input type="checkbox"/> Tax Appraisal <input type="checkbox"/> Tax Delinquency <input type="checkbox"/> Tax Land Bank <input type="checkbox"/> Tax Personal <input type="checkbox"/> Tax Real <input type="checkbox"/> Workers Comp <input type="checkbox"/> Other <p><u>ADDITIONAL SUB-TOPICS</u></p> <input type="checkbox"/> Attachment <input type="checkbox"/> Bill of Discovery <input type="checkbox"/> Class Action <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Garnishment <input type="checkbox"/> Interpleader <input type="checkbox"/> License <input type="checkbox"/> Mandamus <input type="checkbox"/> Receiver <input type="checkbox"/> Sequestration <input type="checkbox"/> Severance <input type="checkbox"/> TRO/Injunction <input type="checkbox"/> Turnover
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DISCOVERY LEVEL Level 1 Level 2 Level 3

(Local Rule 1.08 Certification Must be completed and signed)

This case is not subject to transfer pursuant to Local Rule 1.07, or
 This case is related to another case filed or disposed of in Dallas County

Court _____ Style _____

Case No. _____

Attorney's Signature _____