The following constitutes the ruling of the court and has the force and effect therein described.

Signed December 5, 2014

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
BASE HOLDINGS, LLC,	§	CASE NO. 09-34269-SGJ-7
DEBTOR.	§	CHAPTER 7
	§	
CENTER OPERATING COMPANY, L.P.,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 09-03256
	§	
BASE HOLDINGS, LLC,	§	(CIV. ACTION #3:11-CV-3531-D)
DEFENDANT.	§	

SECOND REPORT AND RECOMMENDATION TO DISTRICT COURT: ADDRESSING THE AMENDED MOTION TO WITHDRAW THE REFERENCE [DE #192][1] FILED AUGUST 29, 2014, BY DEFENDANT, THE CHAPTER 7 BANKRUPTCY TRUSTEE FOR BASE HOLDINGS, LLC (BASED ON DEVELOPMENTS IN THE LAW)

I. Introduction.

As a reminder, the above-referenced adversary proceeding ("Adversary Proceeding") is, essentially, a landlord-tenant

[1] Note that references to "[DE #_]" throughout this Second Report and Recommendation refer to the record entry number at which a particular pleading appears in the docket maintained by the Bankruptcy Clerk for the above-referenced Adversary Proceeding.

dispute that erupted within a bankruptcy case. The Plaintiff, Center Operating Company, L.P. (the "Plaintiff" or "Landlord-Center"), is the landlord. Landlord-Center is the operator of the sports and special events complex near downtown Dallas, Texas that is known as American Airlines Center—the venue at which the Dallas Mavericks NBA basketball team and the Dallas Stars NHL hockey team each play (the "Arena"). The Arena anchors a larger development in Dallas known as Victory Park. The tenant in this landlord-tenant dispute is Base Holdings, LLC, which was a franchisee of the well-known restaurant corporation Brinker International, and was the operator of a Chili's Bar & Grill restaurant (the "Restaurant") at the southwest corner of the Arena. The Restaurant, unfortunately, had a short and unsuccessful life span. It operated for a mere nine months, starting in late 2008, before voluntarily seeking Chapter 11 bankruptcy relief, and then ultimately (and abruptly) closing. In fact, the tenant (the "Debtor" or "Tenant-Base" or "Defendant") moved to convert its Chapter 11 reorganization case to a Chapter 7 liquidation case, soon after the bankruptcy case and this Adversary Proceeding were filed; thus, the Chapter 7 Trustee, Robert Yaquinto, Jr. (the "Bankruptcy Trustee"), is now the party-defendant in this Adversary Proceeding and stands in the shoes of the tenant—although many of the pleadings still

refer to "Base Holdings, LLC"[2] as the Defendant.[3]

Soon after Tenant-Base filed its bankruptcy case (which was on July 6, 2009), the Landlord-Center commenced this Adversary Proceeding (on August 7, 2009), by filing a Complaint for Declaratory Judgment, which requested that the bankruptcy court declare the parties' rights under their June 2, 2008 Lease Agreement (herein so called). Specifically, the Complaint asserted that Tenant-Base had never paid any rent at all to Landlord-Center, and Landlord-Center sought a determination as to how the defined term "Chili's Opening Date" should be interpreted in the Lease Agreement, for purposes of calculating all rent due to Landlord-Center. The Complaint also asked for certain other declarations regarding the parties' rights, legal status, and potential liability to one another relating to the Lease Agreement—including, but not limited to, a determination that Landlord-Center had not materially breached the Lease Agreement and that any claims Tenant-Base might have for consequential or

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[2] Base Holdings, LLC was initially formed to develop a restaurant business (utilizing the Chili's concept, where possible) on ***military bases,*** and it even had contracts with the United States Navy and United States Army at one time. Apparently, any and all military contract rights and opportunities were transferred to a different entity, shortly before the bankruptcy filing. In any event, this explains the unusual name "Base Holdings, LLC."

[3] *See* Order Granting Trustee's Motion to Realign Parties, dated August 17, 2011. [DE # 89]

punitive damages were barred by the Lease Agreement. ***Landlord-Center also filed a proof of claim in the underlying bankruptcy case in the amount of $1,595,918.83, for various amounts allegedly due to it under the Lease Agreement***.[4] *See* Claim No. 7, in the Claims Register maintained in Bankruptcy Case No. 09-34269.[5] Note that Tenant-Base was still occupying its Restaurant-space in the Arena at the time that this Adversary Proceeding was commenced (thus, it still had all of its rights and remedies available to it, pursuant to Section 365 of the Bankruptcy Code).[6]

The Adversary Proceeding quickly grew more complicated. The

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[4] *See* Fed. R. Bankr. Pro. 3001-3002. The vast majority of this amount related to future rent that was alleged to be due under the 20-year Lease Agreement, as capped by section 502(b)(6) of the Bankruptcy Code, but approximately $298,000 of the claimed amount related to "unpaid pre-petition rent, construction and other charges."

[5] Tenant-Base did not file an objection to this proof of claim, *per se*. *See* Fed. R. Bankr. Pro. 3007(a) & (b). However, in its original Answer and Counterclaim (later described further), at paragraph 13, Tenant-Base stated, "Debtor admits that it has not paid Center the amounts Center has demanded for rent, employee parking, or $20,000 in additional expenses in connection with construction of the Restaurant. ***Debtor denies that these amounts are owed*** under the Lease and disputes Center's accounting" (emphasis added). Moreover, at paragraphs 43-47 of its Answer and Counterclaim, Tenant-Base states in various affirmative defenses, that it "***is not liable to Center*** because Center's breach of contract discharged Debtor's obligations," and because of "estoppel," "waiver," "Center's unclean hands," and "impossibility of performance" (emphasis added). [DE #5] These positions were carried over in the Second Amended Answer and Counterclaim of Tenant-Base that is its governing pleading. [DE #39]

[6] Such as the right to reject, assume, or assume and assign the Lease Agreement (with the latter two options requiring, among other things, a curing of defaults).

Debtor, Tenant-Base, vacated its space in the Arena less than a month after the Adversary Proceeding was filed, and thereafter filed an answer in this Adversary Proceeding that also asserted numerous ***counterclaims*** against Landlord-Center, including numerous torts (mostly fraud claims) and breach of contract. Tenant-Base also filed a ***separate*** adversary proceeding against Landlord-Center, asking the bankruptcy court to avoid Landlord-Center's statutory landlord lien that it was asserting (the "Lien Avoidance Adversary Proceeding"). A motion to consolidate the Lien Avoidance Adversary Proceeding with this Adversary Proceeding was filed by Landlord-Center, but the parties later reached an Agreed Judgment of Dismissal in the Lien Avoidance Adversary Proceeding. Additionally, insiders of Tenant-Base (specifically: its equity owner, Gilbert Aranza, and certain of his affiliates) filed a state court lawsuit against Landlord-Center, alleging the same type of claims as Tenant-Base alleged (as counterclaims) in this Adversary Proceeding. The bankruptcy court stayed this latter lawsuit, determining that insiders were essentially exercising control over claims that were property of the bankruptcy estate.

Many months then elapsed in the Adversary Proceeding. During these months, not only did Tenant-Base vacate the Restaurant space (which was followed by various legal skirmishes regarding personal property at the Restaurant), but, as

mentioned, a Bankruptcy Trustee was appointed for Tenant-Base. Then, a motion to dismiss counterclaims was heard and decided (on July 20, 2010)—with the bankruptcy court dismissing three of Tenant-Base's numerous counterclaims.[7] Additionally, a jury demand was made by Tenant-Base (which was objected to by Landlord-Center and stricken by the bankruptcy court, on August 18, 2010).[8]

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[7] The counterclaims that the bankruptcy court dismissed were the following: breach of warranty of quiet enjoyment; breach of warranty of suitability; and unjust enrichment. [DE #61]

[8] In ruling on the Debtor's jury demand, this court was guided by the Fifth Circuit decision in *In re Jensen,* 946 F.2d 369 (5th Cir. 1991), *abrogated on other grounds by In re Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In *Jensen*, the Fifth Circuit considered the question of whether a debtor effectively subjects his prepetition claims to the bankruptcy court's equitable power (and loses his right to a jury trial he might otherwise have) when he files a petition for bankruptcy. The Fifth Circuit concluded that a debtor does not. The Fifth Circuit elaborated that, in *Jensen*, as in the landmark *Granfinanciera* case, the debtors' claims (which were against third-party defendants who had not filed proofs of claim) did not "arise as part of the process of allowance and disallowance of claims." *Jensen*, 946 F.2d at 373; *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 58-59 (1989). Nor were the Jensens' claims "integral to the restructuring of debtor-creditor relations." *Jensen,* 946 F.2d at 374 (citing *Granfinanciera*). Rather they were essentially claims brought by the debtor-in-possession in a state court against non-creditor third parties to augment the bankruptcy estate (note that it was the defendants that had removed the action to bankruptcy court). The Fifth Circuit reconciled its holding with a similar but distinguishable case from the Seventh Circuit, *In re Hallahan,* 936 F.2d 1496 (7th Cir. 1991). In *Hallahan*, the debtor petitioned for bankruptcy while he was a defendant in a suit then pending against him in federal district court. The bankruptcy petition triggered the automatic stay, 11 U.S.C. § 362, and the plaintiff filed a proof of claim and complaint of dischargeability in the bankruptcy court. The court denied the debtor's request for a jury trial. The Seventh Circuit affirmed, deciding that a dischargeability proceeding is a type of equitable claim for which there is no jury right in the first place. The Fifth Circuit stated that it agreed with the ***result*** in *Hallahan,* but not the Seventh Circuit's ***reasoning*** with regard to ***why*** the debtor

In mid-2011, cross motions for summary judgment, responses, and supporting documentary evidence were filed—***solely dealing with Tenant-Base's (i.e., the estate's) various, remaining counterclaims against Landlord-Center.***[9] Landlord-Center moved for summary judgment on ***all*** of the remaining counterclaims asserted on behalf of the estate of Tenant-Base (*i.e.,* all of the counterclaims that had not been dismissed by the bankruptcy court on July 20, 2010). Tenant-Base moved for summary judgment on two of its counterclaims. The bankruptcy court took those cross-motions for summary judgment under advisement (in Fall of 2011)

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had no right to a jury trial. *Jensen*, 946 F.2d at 374. The Fifth Circuit stated that it believed the debtor in *Hallahan* was not entitled to a jury trial, not because the debtor had filed a petition in bankruptcy, but because the ***plaintiff in the action had submitted his claim against the debtor to the equitable jurisdiction of the bankruptcy court***. *Id.* The Fifth Circuit stated that filing a proof of claim denied ***both*** the plaintiff and the defendant, debtor, any right to jury trial that they otherwise might have had on that claim. *Id.*

In summary, this bankruptcy court believed that Tenant-Base had no jury trial right (under the holding of *Jensen*) since its counterclaims were ***against a plaintiff that had submitted its claims against the Debtor to the equitable jurisdiction of the bankruptcy court*** and ***because the overall dispute (claims and counterclaims) seemed to be part of the process of claims allowance and disallowance***.

[9] Specifically, the court refers to: (1) the Motion for Summary Judgment and Brief in Support [DE ## 77 & 78] (the "Plaintiff's MSJ"), filed by Landlord-Center; the Response thereto and Brief in Support [DE ## 90 & 91], filed by the Defendant, Tenant-Base; the Reply thereto [DE # 100] of the Plaintiff; (2) the Defendant's Motion for Partial Summary Judgment and Brief in Support [DE ## 84 & 85] (the "Defendant's Partial MSJ"); the Response thereto and Brief in Support of the Plaintiff [DE ## 94 & 95]; the Reply thereto [DE # 98] of the Defendant; and (3) all summary judgment evidence/appendices submitted with such pleadings [DE ## 79, 80, 86, 91 & 96].

after oral arguments. ***Around the time that this bankruptcy court was prepared to issue a written ruling on the cross-motions for summary judgment, Tenant-Base filed (on December 21, 2011) a motion to withdraw the reference and motion for remand*** [DE ## 113 and 114] (the "First Motion to Withdraw the Reference") in the Adversary Proceeding. Tenant-Base argued that, pursuant to the holding in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the bankruptcy court had no Constitutional authority to render a final judgment on the counterclaims of the estate.[10] [DE #114] The First Motion to Withdraw the Reference, arguing *Stern v. Marshall,* was filed a full six months after the Supreme Court's ruling, approximately five months after the cross-motions for summary judgment were filed, and 28-and-a-half months after the Adversary Proceeding was filed.

The bankruptcy court held a status conference on February 6, 2012, on Tenant-Base's First Motion to Withdraw the Reference and also on the motion for remand. Counsel for Tenant-Base announced that it was withdrawing its request for remand [DE # 113] and was simply urging withdrawal of the reference [DE # 114]. Based on

[10] As the District Court well knows, the Supreme Court stated in *Stern* that "[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id.* at 2609. The Court ultimately concluded that bankruptcy courts lack "the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Id.* at 2620.

the arguments made at the status conference and upon further review of the record, the bankruptcy court issued a Report and Recommendation to the District Court, dated July 3, 2012 (the "First Report and Recommendation"), recommending that the District Court ***deny*** the First Motion to Withdraw the Reference. The bankruptcy court also issued, on that same date, its own Memorandum Opinion and Order Addressing Cross-Motions for Summary Judgment on Defendant's Counterclaims, Specifically: (A) Granting Plaintiff's Motion for Summary Judgment on All Counterclaims, Except One Breach of Contract Claim; and (B) Denying Defendant's Motion for Partial Summary Judgment (the "Bankruptcy Court Summary Judgment Ruling"). The Bankruptcy Court Summary Judgment Ruling resolved all issues in the Adversary Proceeding ***except for one***: the bankruptcy court denied Plaintiff summary judgment on ***one*** breach of contract counterclaim of Tenant-Base, such counterclaim being that Plaintiff improperly charged rent before December 6, 2008. The bankruptcy court determined that there was a disputed fact issue regarding when the "Chili's Opening Date" should be deemed to have occurred and, thus, when Plaintiff should have been properly able to accrue rent; this meant that a trial would be necessary on that one issue. However, subsequently, on February 19, 2013, the parties entered into a Recital and Stipulation as to this one disputed fact issue, agreeing that the "Chili's Opening Date" should be deemed

December 8, 2008 [DE #162] and Tenant-Base would have no damages arising from any alleged breach on account of Plaintiff asserting an earlier opening date. Thus, nothing was left to be tried at the bankruptcy court.[11] The bankruptcy court was then in a position to enter a final judgment (the "Bankruptcy Court Final Judgment")—which it did on February 19, 2013. [DE #163][12]

II. The First Report and Recommendation.

In recommending that the District Court ***deny*** the First Motion to Withdraw the Reference, the bankruptcy court stated the following reasons that guided it at that time (*i.e.,* in July 2012):

> (a) the bankruptcy court perceived the counterclaims in this Adversary Proceeding to be ***distinguishable*** from those in *Stern v. Marshall*, in that it seemed ***necessary*** to resolve such counterclaims as part of the proof of claim allowance or disallowance process (*i.e.,* here, unlike in *Stern v. Marshall*, the plaintiff against whom the counterclaims were asserted still had a live, unresolved proof of claim that seemingly would not survive if the counterclaims were sustained);[13] and

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[11] The parties agreed that the Recital and Stipulation will be null and void if the Bankruptcy Court Summary Judgment Ruling is ultimately upset by a higher court on appeals.

[12] The February 19, 2013 Bankruptcy Court Final Judgment (which was drafted and submitted by the parties) declares December 6, 2008—not December 8, 2008—to be the agreed upon "Chili's Opening Date." In hindsight, the bankruptcy court presumes the Recital and Stipulation contains a typographical error since all other pleadings in the record have used December 6, 2008 as the relevant date. The parties have never mentioned this discrepancy.

[13] This court duly noted that the dissenters in *Stern v. Marshall* discussed a hypothetical scenario in which a tenant files a bankruptcy case and wishes to assert counterclaims in defense to a landlord's proof of claim for unpaid rent, and—under their interpretation of the

(b) the bankruptcy court believed (again, in July 2012, at the time of the Bankruptcy Court Summary Judgment Ruling) that Tenant-Base should be deemed to have ***consented*** to the bankruptcy court finally adjudicating this Adversary Proceeding: (i) by, first, filing the counterclaims in the bankruptcy court (which were amended twice in a seven-month period)[14], (ii) by filing a motion for summary judgment and signing a pretrial order—both ***after*** Stern v. Marshall—never mentioning that Tenant-Base would challenge adjudication of its counterclaims in the bankruptcy court, and (c) delaying filing a motion to withdraw the reference for more than two years (and more than six months after *Stern v. Marshall*).

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majority opinion in *Stern*—such a debtor-tenant would have to go to the federal district judge, not the bankruptcy judge, to have the counterclaims resolved. *Stern*, 131 S. Ct. at 2630 (dissent). The dissenters suggested that this would be an unfortunate "constitutionally required game of jurisdictional ping-pong" and would lead to inefficiency. *Id.* If the dissenters were correctly interpreting the majority's ruling in *Stern* (and this Article I judge loathes to suggest otherwise) then this bankruptcy court may, perhaps, err in suggesting that the facts in this Adversary Proceeding are distinguishable from *Stern*. However, the majority in *Stern* stressed that the "question is whether the action [the estate's counterclaim or other affirmative requests for relief] stems from the bankruptcy itself ***or would necessarily be resolved in the claims allowance process***." *Id.* at 2618. This bankruptcy court could not, at the time of its July 3, 2012 Report and Recommendation, see how it could possibly resolve Landlord-Center's $1.5 million, contractually-based proof of claim and request for declaratory relief without deciding the arguments made by Debtor in asserting its counterclaims (Tenant-Base argued everything from breach of the lease to fraud in the inducement claims against Landlord-Center). This seemed distinguishable from the situation in *Stern* where: (a) the stepson's/plaintiff's tort claims (for defamation) made in the bankruptcy court ***had already been disallowed*** prior to a trial on the debtor's counterclaims (for tortious interference with inheritance); and (b) the stepson (as a ***then-claimless*** counter-defendant), not the Debtor who sought bankruptcy protection, was the one challenging the bankruptcy court's Constitutional authority to adjudicate the dispute.

[14] In its original Answer and Counterclaims [DE #5, filed 9/18/09], First Amended Answer and Counterclaims [DE # 13, filed 10/23/09], and Second Amended Answer and Counterclaims [DE # 39, filed 4/22/10], Tenant-Base admitted "that the Court [bankruptcy court] has non-exclusive jurisdiction" over the lease dispute. *See* ¶¶ 3, 37 & 52 of each pleading.

In the alternative, the bankruptcy court proposed in its First Report and Recommendation that, ***if*** the District Court determined that the bankruptcy court had ***no*** Constitutional authority to enter final orders on the counterclaims, the District Court should:

> (a) consider the Bankruptcy Court Summary Judgment Ruling as a ***proposed*** ruling to be reviewed *de novo* (*i.e.*, as the bankruptcy court had already extensively reviewed the cross motions for summary judgment presented by the parties in mid-2011 and thereupon prepared a 72-page ruling);
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> (b) ***adopt***, if the District Court deemed it proper, the Bankruptcy Court's Summary Judgment Ruling and ***enter it as an Order of the District Court***; and
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> (c) deny actual withdrawal of the reference but, instead, refer all remaining matters in this Adversary Proceeding to the bankruptcy court,[15] with the proviso that the bankruptcy court shall make only ***proposed*** findings of fact and conclusions of law thereon to the District Court, for the District Court to consider *de novo* pursuant to 28 U.S.C. § 157(c)(1).

The bankruptcy court attached to its First Report and Recommendation the Bankruptcy Court's Summary Judgment Ruling. On January 30, 2013, the District Court adopted the First Report and Recommendation and, in so doing, denied the First Motion to Withdraw the Reference. It was soon thereafter, on February 19,

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[15] Recall that the parties later reached a Recital and Stipulation as to all remaining matters in the Adversary Proceeding, [DE #162], so ultimately there would be nothing left to refer to the bankruptcy court. *See* footnote 11, *supra*.

2013, that the parties entered into their Recital and Stipulation [DE #162], mentioned earlier, as to the one issue unresolved in the Bankruptcy Court Summary Judgment Ruling, such that the bankruptcy court was then in a position to enter the Bankruptcy Court Final Judgment—which it did on February 19, 2013. [DE #163] Tenant-Base thereafter appealed the Bankruptcy Court Summary Judgment Ruling and the Bankruptcy Court Final Judgment to the District Court on March 4, 2013. [DE #165]

III. Current Posture of the Adversary Proceeding—and Why this New "Second Report and Recommendation": the Law Has Evolved.

As the District Court is aware, the law has continued to evolve since *Stern v. Marshall* was decided. Significantly, the United States Court of Appeals for the Fifth Circuit issued two important opinions after the District Court's January 30, 2013 adoption of the First Report and Recommendation. One was *Frazin v. Haynes & Boone, L.L.P.*,[16] issued October 1, 2013, and the other was *BP RE, L.P. v. RML Waxahachie Dodge, L.L.C.*,[17] issued November 11, 2013. In these two opinions, the Fifth Circuit, most notably, addressed the viability of the concepts of ***consent and waiver*** in relation to a bankruptcy court's authority to

[16] *Frazin v. Haynes & Boone, L.L.P.* (*In re Frazin*), 732 F.3d 313 (5th Cir. 2013).

[17] *BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.),* 735 F.3d 279 (5th Cir. 2013).

finally adjudicate matters.

The *Frazin* case involved an appeal of a bankruptcy court's final adjudication of claims of a Chapter 13 debtor against his former law firm (for malpractice, breach of fiduciary duty and violations of the Texas Deceptive Trade Practices ("DTPA")). The exact context was as follows. The Chapter 13 debtor's former law firm filed a fee application for appellate work it had provided during the bankruptcy case. The chapter 13 debtor responded by filing a complaint in the bankruptcy court alleging acts of malpractice, breach of fiduciary duty, and DTPA violations. These same claims were asserted in an objection to the fee application. The bankruptcy court ultimately awarded the law firm fees, as requested, and in doing so, overruled the objections and disallowed the various state law claims that had been asserted against the law firm. On appeal, the chapter 13 debtor made the argument that, pursuant to *Stern*, the bankruptcy court should not have entered final orders on the various state law claims. The Fifth Circuit determined that, while the malpractice and breach of fiduciary duty counterclaims were "necessarily decided"[18] by the bankruptcy court in the process of

[18] *Frazin*, 732 F.3d at 321-22. The court noted that bankruptcy courts are permitted to award "reasonable compensation" to professionals by section 330 of the Bankruptcy Code, "based on a consideration of the benefit and necessity" of the services as well as the "nature, the extent, and the value of such services"; thus, in awarding fees, the bankruptcy court determined that there was benefit and value sufficient to award fees and, therein, the court had to necessarily reject the claims of malpractice and breach of fiduciary

ruling on the fee application and, thus, fell within the scope of what the bankruptcy court was Constitutionally permitted to do, to the contrary, aspects of the DTPA counterclaim were similar to the counterclaims in *Stern v. Marshall* (*i.e.,* it was not necessary to decide the DTPA claim to rule on the attorney fee application) and, thus, the bankruptcy court was without Constitutional authority to finally adjudicate it. Most importantly, the *Frazin* court stated in a footnote,[19] in response to arguments of the law firm that the debtor had either ***consented*** to bankruptcy court adjudication of his counterclaims or ***waived*** any objection to the contrary, by filing his counterclaims in the bankruptcy court and failing to object, that the notions of consent and waiver were not viable concepts in this context, because the Constitution's "separation of powers" doctrine was implicated (*vis-a-vis* the principle that only Article III courts can adjudicate disputes that arise under common law or state law). Institutional interests are at play, in this type of context, and parties cannot be expected to protect these institutional/structural interests and ought not to have the

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duty as part of the claims-allowance process. *Id.* at 320. Notably, the breach of fiduciary duty claim only sought fee forfeiture which, in the court's view, made it easily, essentially, an objection to the fee application.

[19] *Id.* at 320 n.3.

ability to waive them.[20]

In the *BP RE, L.P.* case, a Chapter 11 debtor filed an adversary complaint that alleged various state law torts and contract claims against a prospective purchaser of its real property. In *BP RE, L.P.*, the claims at issue were not statutory "core" claims (*i.e.,* they were not the type of claims enumerated in 28 U.S.C. § 157(b)(2)), but, rather, they were undeniably "non-core" claims (*i.e.,* they were claims that were ***related to*** the underlying bankruptcy case, in that the outcome of the underlying disputes could have a conceivable impact on the estate being administered, but they were not the type of claims that arose under the Bankruptcy Code or could only arise in a bankruptcy case). In the situation of non-core claims, a bankruptcy court, by statute, can finally adjudicate these non-core claims with "the consent of all the parties to the proceeding."[21] However, the Fifth Circuit held in *BP RE, L.P.* that a bankruptcy court lacks Constitutional authority to enter a final judgment in such a situation. The court stated that the fact that these claims, if successful, would have augmented the bankruptcy estate was not enough. The court held that the claims neither derived from nor depended upon any agency regulatory

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[20] *Id.*

[21] 28 U.S.C. § 157(c)(2).

regime and were not necessary to resolution of the estate but, instead, were at the heart of the federal judiciary's Article III powers. The Fifth Circuit stated that, where a bankruptcy court lacks Article III authority to enter final judgment on a non-core claim, a party cannot cure the Constitutional deficiency by consenting to having its claim heard in bankruptcy court. The separation of powers doctrine is implicated (in other words, only the judicial branch of government, consisting of judges with life terms and guaranty against salary reduction, should be adjudicating private, common law rights). When separation of powers is implicated, parties cannot cure the Constitutional difficulty with "consent." Thus, the Fifth Circuit held 28 U.S.C. § 157(c)(2) to be unconstitutional.

In summary, the Fifth Circuit made clear in late 2013 that it does not believe the notions of "consent" or "waiver" are viable, when it comes to a bankruptcy court's authority to finally adjudicate claims that (a) do not arise under the Bankruptcy Code, (b) do not arise only in a bankruptcy case, or (c) are not somehow ***necessary*** to resolution of the estate or the proof of claim allowance or disallowance process.

Finally, as the District Court is aware, the law has also continued to evolve at the United States Supreme Court since the District Court's January 30, 2013 adoption of the First Report and Recommendation. In mid-June 2014, the Supreme Court issued a

decision in *Exec. Benefits Ins. Agency v. Arkinson*.[22] The *Exec. Benefits* case, originating in the Ninth Circuit, involved fraudulent transfer claims (*i.e.,* state law claims brought by a bankruptcy trustee, pursuant to section 544 of the Bankruptcy Code). Interestingly, none of the parties in *Exec. Benefits* argued that the state law claims were ***not*** *Stern*-type claims (*i.e.,* all assumed that the fraudulent transfer claims, while statutorily identified in 28 U.S.C. § 157(b)(2)(H) as "core" claims, were analogous to those claims involved in *Stern*, in that they arose under state common law and, thus, there might be a Constitutional problem with a non-Article III court finally adjudicating them). Thus, the Supreme Court assumed that they ***were*** *Stern*-type claims without deciding. Although lawyers, judges, and pundits expected the Supreme Court to address the issue of whether consent "works" or not in bankruptcy, it did not. Rather, the Supreme Court, in affirming the Ninth Circuit, ruled as follows: (a) ***bankruptcy courts are not rendered powerless when there is a gap claim*** (*i.e.,* a *Stern*-type claim); rather, when, under *Stern*'s reasoning, the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the relevant statute (28 U.S.C. § 157(c)(1)) should be construed to permit a bankruptcy court to

[22] 134 S. Ct. 2165 (2014).

issue ***proposed*** findings of fact and conclusions of law to be reviewed *de novo* by the district court; in other words, treat *Stern* claims like statutory "non-core" claims and apply 28 U.S.C. § 157(c)(1); and (b) ***there was no need to address whether "consent" of the parties might allow adjudication of a Stern-type claim by a non-Article III court;*** rather, because the district court, on appeal, conducted a *de novo* review in *Exec. Benefits* (*i.e.,* it reviewed *de novo* the order granting summary judgment of the bankruptcy court—the standard of review that appellate courts always use with summary judgment orders where there are no disputed facts), the Supreme Court did not believe it needed to reach the issue of (i) whether the defendant consented to the bankruptcy court entering a final order, or (ii) whether consent is Constitutionally permissible, because the defendant received the very same *de novo* review of its dispute by an Article III court that it would have ***absent*** consent (*i.e.,* if the bankruptcy court had merely issued a ***proposed*** summary judgment).

On July 1, 2014, barely after the dust settled on the Supreme Court's mid-June 2014 decision in *Exec. Benefits,* the Supreme Court granted a petition for writ of certiorari in the case of *Wellness Int'l Network, Ltd. v. Sharif*.[23] *Wellness Int'l,* which will be argued in January 2015, once again presents

[23] 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (2014).

the opportunity for the Supreme Court to rule on whether litigants can consent to (or can waive the right to contest) a bankruptcy court finally adjudicating a matter that should otherwise be adjudicated by an Article III court. The exact two questions on which the Supreme Court granted certiorari were phrased as follows: (a) whether the presence of a subsidiary state property law issue, in an action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate,[24] means that such action does not "stem[] from the bankruptcy itself" and, therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding the action;[25] and (b) whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

In summary, there are two things that are the "current law" that were not the "current law" when the bankruptcy court issued its First Report and Recommendation, and when the District Court issued its January 30, 2013 adoption of the First Report and

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[24] The property at issue was a trust that was alleged to be an alter ego of the debtor and, thus, the property therein was alleged to be property of the debtor's estate.

[25] Rephrased, the issue is essentially whether an alter ego action is a *Stern*-type claim that a non-Article III court ought not to be adjudicating.

Recommendation (and, in so doing, denied the First Motion to Withdraw the Reference). First, the Fifth Circuit has unequivocally held that the notions of consent and waiver are not viable when it comes to the ability of a bankruptcy court to finally adjudicate either *Stern*-claims or non-core claims (with the Supreme Court likely to rule on this issue in the first-half of 2015). Second, the Supreme Court has held that bankruptcy courts are not rendered powerless when confronted with *Stern*-like claims—they are permitted to issue ***proposed*** findings of fact and conclusions of law to be reviewed *de novo* by the district court.

IV. Bankruptcy Court's Report and Recommendation on Second Motion to Withdraw Reference.

Against this backdrop, Tenant-Base filed its Second Motion to Withdraw the Reference on or about August 29, 2014 [DE # 192]. The Second Motion to Withdraw the Reference was actually filed ***after*** the District Court—***noting the developing case precedent that had been rendered since its adoption of the First Report and Recommendation***–vacated and remanded the Bankruptcy Court's Summary Judgment Ruling and the Bankruptcy Court Final Judgment. This District Court action was accomplished in its written ruling on Appeal from the United Bankruptcy Court for the Northern District of Texas, dated March 5, 2014 (the "District Court March

5, 2014 Order on Appeal").[26] In the District Court March 5, 2014 Order on Appeal, the District Court expressed the following concerns regarding its earlier adoption of the First Report and Recommendation and the bankruptcy court having issued the Bankruptcy Court's Summary Judgment Ruling and the Bankruptcy Court Final Judgment: (a) one rationale for the First Report and Recommendation (adopted by the District Court) had been that Tenant-Base had impliedly (through delay and actions) consented to the bankruptcy court's adjudication of its counterclaims (and this theory was no longer viable post-*Frazin* and post-*BP RE)*; and (b) another rationale given by the bankruptcy court for its Constitutional authority to finally adjudicate Tenant-Base's counterclaims (even absent consent) was that resolution of the counterclaims was necessary to resolution of the Landlord-Center's proof of claim, but the District Court believed there were deficiencies in the record in assessing this on appeal because, *inter alia*, (i) it was unclear if Tenant-Base might be seeking the remedy of rescission, as an alternative to damages (and, if so, how this might favorably or unfavorably impact the bankruptcy court's conclusion that the counterclaims were inextricably intertwined with resolving Landlord-Center's proof

[26] To be clear, Tenant-Base appealed the Bankruptcy Court Summary Judgment and the Bankruptcy Court Final Judgment pursuant to 28 U.S.C. 158(a). This was the District Court's ruling on such appeal.

of claim);[27] and (ii) the District Court observed that no separate objection to proof of claim had been filed by Tenant-Base, and, thus, it appeared that its counterclaims might be free standing separate claims, not mere offsets or challenges to Landlord-Center's proof of claim—if so, there might be a Constitutional problem with the bankruptcy court finally adjudicating essentially free standing counterclaims. The District Court March 5, 2014 Order on Appeal instructed the bankruptcy court on remand to consider these and various other issues relating to *Stern* and the bankruptcy court's Constitutional authority to have finally adjudicated Tenant-Base's counterclaims.

The bankruptcy court conducted a status conference concerning the *Stern* Motion on November 17, 2014, pursuant to 11 U.S.C. § 105(d). After conferring with counsel for the parties to this proceeding at the status conference, the bankruptcy court submits the following additional information to the District Court:

A. Report.[28]

1. Opposition to Second Motion to Withdraw Reference. A

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[27] Tenant-Base has since represented in the bankruptcy court that it is not seeking the remedy of rescission, just damages. [DE #192, ¶¶ 24-32]

[28] The following information is provided pursuant to Loc. Bankr. R. 5011.1.

response to the Second Motion to Withdraw Reference was filed by Plaintiff, Landlord-Center [DE # 196]. However, in such response, the Plaintiff states that it is not genuinely opposed to the Second Motion to Withdraw Reference; rather Landlord-Center states that it has concluded that Tenant-Base "is entitled to *de novo* review by an Article III court of the Bankruptcy Court's ruling on the dismissal of certain claims [DE #61], granting of summary judgment [DE #132], and the issuing of an ultimate judgment, pursuant to stipulation of the parties to certain facts [DE # 161, 162], to enter a final take nothing judgment [DE #163]." Response, at p. 4. The parties further clarified at the November 17, 2014 status conference that—rather than a new round of briefing and decisions on the *Stern*-issues—that Landlord-Center was prepared to essentially concede that Tenant-Base was entitled to have an Article III court decide its counterclaims. Moreover, the parties were mutually requesting that the bankruptcy court simply grant the Second Motion to Withdraw the Reference and, in so doing, ***submit to the District Court, as proposals, pursuant to 28 U.S.C. § 157(c)(1)***, its earlier rulings on the dismissal of certain claims [DE #61], granting of summary judgment [DE #132], and the issuing of an ultimate judgment, pursuant to stipulation of the parties to certain facts [DE # 161-163]. The District Court could then,

pursuant to the instructions in *Exec. Benefits*,[29] look at these bankruptcy court proposals *de novo* and either adopt or reject them with the District Court's own Final Judgment.

2. No Stay. No motion to stay the Adversary Proceeding has been filed. The Adversary Proceeding has not been stayed by the bankruptcy court, pending a determination of the Second Motion for Withdrawal of the Reference, pursuant to Federal Rule of Bankruptcy Procedure 5011. However, the bankruptcy court intends to take no further action in this Adversary Proceeding, pending the District Court's resolution of the Second Report and Recommendation.

3. Core/Non-Core and Consent. As discussed above, the Adversary Proceeding technically involves statutory core matters, pursuant to 28 U.S.C. § 157(b)(2)(B) and (C), as it involves "allowance or disallowance of claims against the estate",[30] *vis-a-vis* Landlord-Center, and it involves "counterclaims by the estate against persons filing claims against the estate,"[31] *vis-a-vis* Tenant-Base. However, as the District Court knows, 28 U.S.C. § 157(b)(2)(C) was declared unconstitutional by the Supreme Court, at least as it applied to the facts in *Stern v. Marshall*. While this court initially thought, at the time of its

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[29] *Exec. Benefits*, 134 S. Ct. at 2165.

[30] 28 U.S.C. § 157(b)(2)(B).

[31] 28 U.S.C. § 157(b)(2)(C).

First Report and Recommendation, that Tenant-Base was, in essence, asserting claim objections against Landlord-Center in Tenant-Base's Answer and Counterclaims (no matter what Tenant-Base said)[32]—in that Tenant-Base was, without a doubt, disputing liability to Landlord-Center,[33] and while the bankruptcy court has continued to believe that it is likely impossible for Landlord-Center to have an allowed proof of claim in the underlying bankruptcy case, if Tenant-Base's counterclaims (arising from a common nucleus of operative facts) are allowed,[34] there are, without a doubt, genuine questions whether the

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[32] Tenant-Base takes the position that it is not objecting to Landlord-Center's proof of claim. [DE # 192, ¶¶ 35-45]

[33] As noted earlier, Tenant-Base did not file an objection, *per se,* to Landlord-Center's proof of claim. *See* Fed. R. Bankr. Pro. 3007(a) & (b). However, in its original Answer and Counterclaim, at paragraph 13, Tenant-Base stated, "Debtor admits that it has not paid Center the amounts Center has demanded for rent, employee parking, or $20,000 in additional expenses in connection with construction of the Restaurant. ***Debtor denies that these amounts are owed*** under the Lease and disputes Center's accounting" (emphasis added). Moreover, at paragraphs 43-47 of its Answer and Counterclaim, Tenant-Base states in various affirmative defenses, that it "***is not liable to Center*** because Center's breach of contract discharged Debtor's obligations," and because of "estoppel," "waiver," "Center's unclean hands," and "impossibility of performance" (emphasis added). [DE #5] These positions were carried over in the Second Amended Answer and Counterclaim of Tenant-Base that is its governing pleading. [DE #39]

[34] The essence of this Adversary Proceeding is undeniably as follows: Landlord-Center states "Tenant-Base, you owe me $x amount of rent under our contract and, not only do you not have any affirmative defenses to that, but you don't have any offsets or counterclaims either." Tenant-Base replies "I don't owe you money because your breaches of contract and torts excused me from having to pay rent and also damaged me." The arguably problematic part of all this is the "also damaged me" part. Moreover, Tenant-Base represents that all it really cares about is the damages.

bankruptcy court would have Constitutional authority to finally adjudicate the counterclaims—particularly if the real goal of Tenant-Base is to augment the estate rather than simply offset or eliminate Landlord-Center's claim. The bankruptcy court, therefore, believes that the prudent path here is to accept the mutual proposal of the parties that the bankruptcy court recommend withdrawal of the reference by the District Court.

4. Jury Trial Rights. As mentioned earlier, a jury trial was requested early in this Adversary Proceeding by Tenant-Base. Landlord-Center opposed the jury trial request. To the extent there is a jury trial right, the Defendant did not consent to the bankruptcy judge conducting the jury trial, pursuant to 11 U.S.C. § 157(e). The bankruptcy court ruled on August 18, 2010 that the Defendant does not have a right to a jury trial *See* footnote 8, herein, for the bankruptcy court's analysis of the jury trial right. This point will be moot if summary judgment ultimately is granted. In any event, the bankruptcy court believes there are no disputed, material facts.

5. Scheduling Order. The bankruptcy court has entered numerous scheduling orders in this Adversary Proceeding. There is currently no Scheduling Order in place, pending a ruling on this Second Report and Recommendation.

6. Trial Readiness. The parties are ready for the District court to rule on this Second Report and Recommendation and rule

on the bankruptcy court's proposals attached.

B. Recommendation.

The bankruptcy court recommends that the District Court grant the Second Motion to Withdraw the Reference and:

(a) immediately withdraw from the bankruptcy court the reference of the Adversary Proceeding;

(b) consider ***as proposals*** and review ***de novo, pursuant to 28 U.S.C. § 157(c)(1)***, the six attached items from the bankruptcy court, those items being:

(i) Order Granting in Part and Denying in Part Center Operating Company, L.P.'s Motion to Dismiss Base Holdings, LLC's Second Amended Counterclaim Company, dated July 19, 2010 (the "Partial Dismissal Order"), dismissing for failure to state a claim, three of Tenant-Base's counterclaims [DE #61];

(ii) the transcript dated June 28, 2010 [DE #56], memorializing the bankruptcy court's bench ruling that undergirded the Partial Dismissal Order;

(iii) the Bankruptcy Court's Summary Judgment Ruling, dated July 3, 2012 [DE #132], in which the bankruptcy court granted summary judgment in the Adversary Proceeding on all issues except for a declaratory judgment on what "Chili's Opening Date" meant and, thus, when Landlord-Center's rent claims began to accrue;

(iv) the Recital and Stipulation of the parties to

certain facts—*i.e.*, stipulating as to what the "Chili's Opening Date" should be deemed to mean [DE # 162], filed February 19, 2013;

(v) the Final Judgment, dated February 19, 2013, entered pursuant to the Bankruptcy Court Summary Judgment Ruling and the Recital and Stipulation [DE #163]; and

(vi) a form of "***Proposed Memorandum Opinion and Order on Cross Motions for Summary Judgment***" that, for sake of clarity, (1) updates both the title of the bankruptcy court's original July 3, 2012 Summary Judgment Ruling and the procedural background therein, and (2) incorporates the Recital and Stipulation of the parties as to the one fact issue that was unresolved at the time of the July 3, 2012 Summary Judgment Ruling—thus, it is this "***Proposed Memorandum Opinion and Order on Cross Motions for Summary Judgment***" that the bankruptcy court recommends that the District Court render a Final Judgment on, as contemplated in *Exec. Benefits,*[35] either adopting, rejecting or modifying the proposals of the bankruptcy court.

(c) in the event the District Court adopts the bankruptcy court's proposals, the Adversary Proceeding would be concluded (subject to further appeals to the Fifth Circuit or beyond), but in the event the District Court rejects or modifies the proposals

[35] *Exec. Benefits*, 134 S. Ct. at 2165.

of the bankruptcy court, then the District Court would itself try the issues it deems necessary (or refer issues to the bankruptcy court—for the court to hear and make new proposals to the District Court, pursuant to 28 U.S.C. § 157(c)(1)).

RESPECTFULLY SUBMITTED.

*****END OF SECOND REPORT AND RECOMMENDATION*****

ATTACHMENT 1

The following constitutes the ruling of the court and has the force and effect therein described.

United States Bankruptcy Judge

Signed July 19, 2010

IN THE UNITED STATES BANKURPTCY COURT
FOR THE Northern DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	**Case No. 09-34269-sgj-7**
BASE HOLDINGS, LLC	§	**Chapter 7**
	§	
Debtor.	§	
CENTER OPERATING COMPANY, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Adversary No. 09-03256**
	§	
BASE HOLDINGS, LLC,	§	
	§	
Defendant.	§	

ORDER GRANTING IN PART AND DENYING IN PART CENTER OPERATING COMPANY, L.P.'S MOTION TO DISMISS BASE HOLDINGS, LLC'S SECOND AMENDED COUNTERCLAIM
[Reference Docket No. 43]

On June 1, 2010, the Court held a hearing on Center Operating Company, L.P.'s ("Center") Motion to Dismiss Base Holdings, LLCs Second Amended Counterclaim [Doc. No. 43] (the "Motion to Dismiss"), the response thereto by Robert Yaquinto, Jr., Chapter 7 Trustee for Base Holdings, LLC ("Base"), Center's reply thereto, and the arguments of counsel. For the reasons stated by the Court in open Court on June 28, 2010, which constitutes the Court's findings of fact and conclusions of law and are incorporated herein by reference, the Court finds that the Motion to Dismiss should be GRANTED in part and DENIED in part.

IT IS THEREFORE

ORDERED that the Motion to Dismiss is **GRANTED** as to Base's counterclaims for breach of warranty of quiet enjoyment (to the extent Base intended to assert such a claim), breach of warranty of suitability, and unjust enrichment, and such claims are hereby dismissed with prejudice. It is further,

ORDERED, that the Motion to Dismiss is **DENIED** as to Base's counterclaims for Statutory Real Estate Fraud Under Texas Business & Commerce Code 27.01(a)(1), Statutory Real Estate Fraud Under Texas Business & Commerce Code 27.01(a)(2), Common Law Fraud in the Inducement by Affirmative Representation, Common Law Fraud in the Inducement by Nondisclosure, Common Law Fraud, String Along Fraud, negligent misrepresentation, breach of lease, and attorneys' fees and such claims are not dismissed and shall remain pending subject to further orders of this Court.

 # # # END OF ORDER # # #

ATTACHMENT 2

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	Case No. 09-34269-sgj
	)	Chapter 7
	)	
BASE HOLDINGS, LLC	)	
	)	
	)	
Debtor.	)	
	)	
_____	)	
CENTER OPERATING COMPANY, L.P.	)	Adversary No. 09-03256-sgj
	)	
Plaintiff,	)	Courtroom 1
	)	1100 Commerce Street
versus	)	Dallas, Texas 75242-1496
	)	
BASE HOLDINGS, LLC,	)	
	)	June 28, 2010
Defendant.	)	3:00 P.M.

TRANSCRIPT OF THE RULING IN THE MOTION TO DISMISS ADVERSARY PROCEEDING (DOC. 43).
BEFORE HONORABLE JUDGE STACEY G. C. JERNIGAN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Trustee, Robert Yaquinto:	Collins Basinger & Pullman, P.C. By: RICHARD D. PULLMAN, ESQ. H. JAY BOYER, ESQ. 5400 LBJ Freeway, Suite 525 Dallas, Texas 75240
For Center Operating Company:	Kane Russell Coleman & Logan By: BOYD AARON MOUSE, ESQ JOSEPH A. FRIEDMAN, ESQ. 1601 Elm Street, Suite 3700 Dallas, Texas 75201
ECRO:	DEH
TRANSCRIPTION SERVICE:	**TRANSCRIPTS PLUS, INC.** **435 Riverview Circle** **New Hope, Pennsylvania 18938** **Telephone: 215-862-1115** **Facsimile: 215-862-6639** **e-mail CourtTranscripts@aol.com**

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: Please be seated. All right. We are going on the record in Center Operating Company, LP versus Base Holdings, LLC, Adversary 09-3256.

Let's go ahead and get appearances from counsel on the record, please.

MR. PULLMAN: Your Honor, Richard Pullman and Jay Boyer representing Robert Yaquinto, Trustee.

THE COURT: Okay.

MR. FRIEDMAN: Your Honor, Joseph Friedman and Boyd Mouse, Kane Russell Coleman & Logan, representing Center Operating Company.

THE COURT: Okay. All right. The following will be the Court's ruling on the motion of plaintiff, Center Operating Company, LP, which I'll "Center," to dismiss the second amended counterclaims of Base Holdings, LLC, which I'll call "Base" or the debtor.

The motion to dismiss was filed at Docket Entry Number 43 in Adversary Number 09-3256, and was argued before this Court on or about June 1st, 2010.

The motion to dismiss argues that all counterclaims asserted by Base in the adversary proceeding must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

Additionally, the motion to dismiss argues that all counterclaims that are essentially fraud claims in nature,

based upon statutory or common law, must be dismissed pursuant to Federal Rule of Civil Procedure 9(b) for failure to plead fraud with the necessary particularity.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the motion to dismiss is granted in part, and denied in part.

The motion to dismiss is granted as to Base's counterclaim, if any, for breach of warranty of quiet enjoyment, also as to the counterclaim for breach of warranty of suitability, and also as to the counterclaim of unjust enrichment.

The motion to dismiss is denied as to all counterclaims for fraud, the counterclaim for negligent misrepresentation, the counterclaim for breach of lease, and the counterclaim for attorney's fees.

First, turning to the legal standard that applies to Rule 12(b)(6) motions, the standard is that a complaint, or in this case a counterclaim, is to be charitably construed with all well-pleaded factual allegations to be accepted as true and with any reasonable inferences from those facts to be drawn in favor of the nonmoving party.

Rule 12(b)(6) motions are disfavored in the law, and should be cautiously granted, and a well-pleaded complaint or counterclaim may proceed, even if it strikes the judge that actual proof of those facts may be speculative. Only when the allegations, however true, could not plausibly raise a claim of

entitlement to relief, should there be a dismissal in order to avoid minimum expenditure of time and money by the parties and by the Court.

The Twombly case from the United States Supreme Court is one of the most recent precedents regarding Rule 12(b)(6) motions, that's at 127 Supreme Court, 1955, 2007. Twombly speaks in terms of requiring complaints to articulate a plausible ground to infer a claim of cause of action. Asking for plausible grounds to infer a claim does not impose a probability requirement at the pleading stage, it simply calls for enough facts to raise a reasonable expectation that delivery could or will reveal evidence of a claim. And while a complaint does not need detailed factual allegations, the facts and grounds pleaded must amount to more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.

The factual allegations must be enough to raise a right to relief above the speculative level based upon the assumption that all of the allegations in the complaint are true, even if doubtful in fact.

The pertinent facts pleaded in this adversary proceeding are that on June 2nd, 2008, Base, which is or was a franchisee of Brinker International, entered into a lease agreement with Center, pursuant to which Center, among other things, leased to Base approximately 3,245 square feet on the

first floor of American Airlines Center in Dallas, Texas -- I'll all that AA Center -- for the construction and operation by Base of a Chili's Bar and Grill. The City of Dallas actually owns AA Center, but Center is the entity that manages AA Center, and thus is the landlord on the lease agreement.

The debtor filed a Chapter 11 case on July 6th, 2009. The case was subsequently voluntarily converted to Chapter 7.

On August 7th, 2009, Center filed the complaint, initiating this adversary proceeding, seeking a declaratory judgment pursuant to Texas Civil Practice and Remedies Code, Section 37.001, 28 U.S.C. 2201 and/or other applicable law against Base. In the complaint, Center requested that the Court declare the party's rights, status, and other legal relations under the lease and enter a declaratory judgment in favor of Center on various aspects regarding the interpretation of the lease.

The complaint also requested that the Court award Center attorney's fees.

In Base's second amended answer and second amended counterclaim, Docket Entry Number 39, that is now the subject of the motion to dismiss before the Court, Base asserted various counterclaims, including statutory real estate fraud under the Texas Business and Commerce Code, common law fraud in the inducement by affirmative representation, and also by nondisclosure, common law fraud, string along fraud, negligent

misrepresentation, unjust enrichment, breach of warranty of suitability, breach of lease, and a request for attorney's fees. These counterclaims essentially all revolve around Center's alleged failure to deliver necessary parking arrangements in connection with the lease agreement, and Center's alleged failure to fulfill its duties relating to zoning issues, as well as Center's alleged prevention of Base from advertising during circus performances at the AA Center, as well as preventing traffic flow into the Chili's restaurant.

At the time that the lease agreement was negotiated, allegedly Hillwood Center Partners and its affiliates, not Center, owned and controlled parking around the AA Center.

Center allegedly represented to Base that a parking agreement would be signed by Hillwood. Allegedly, unbeknownst to Base, Hillwood, on the one hand, and Center and Radical Cuban, an affiliate of Center, on the other, were in the midst of very contentious disputes.

Turning now to the various counterclaims, first with respect to the possible counterclaim of breach of warranty of quiet enjoyment. Base references the concept of quiet enjoyment approximately 17 times in its second amended answer and counterclaims and seems to link that concept with the allegations of failure to deliver parking arrangements, and perhaps also to the alleged prevention of advertising and traffic flow problems identified in its answer and

counterclaim.

To be clear, Base does not precisely plead breach of warranty of quiet enjoyment as a claim in its answer and counterclaim, but the repeated references to the concept might suggest that this was the intent of Base. As a matter of law, Base's repeated references to quiet enjoyment and Center's alleged failure to honor a warranty of quiet enjoyment cannot serve as a basis to support a claim for relief under the lease or applicable law.

First, the lease itself has an express warranty of quiet enjoyment at Section 7.1. In Section 7.1, the landlord agrees to warrant and defend the tenant in the quiet enjoyment and possession of the Premises. Where a lease contains an express warranty of quiet enjoyment, the terms of the lease govern the terms and scope of the warranty of quiet enjoyment. And here, the express warranty applies simply to the defined Premises under the lease, and clearly does not apply to parking. See Section 1.3 of the lease, which defines the Premises, and does not include parking.

Moreover, for the avoidance of doubt, Section 2.5 of the lease defines the Common Areas, and specifies that the common areas shall not be deemed a part Premises.

So, any attempts of Base to leak quiet enjoyment to parking or to activities that occurred in the common areas are contradicted by the express terms of the lease agreement.

But even if we somehow go outside the express terms of the lease agreement and look at common law dealing with breaches of implied warranties of quiet enjoyment, the elements in the common law are:

One, an intention of the landlord that the tenant no longer enjoy the premises;

Two, a material act by the landlord that substantially interferes with the intended use and enjoyment of the premises;

Three, the act permanently deprives the tenant of the use and enjoyment of the premises;

And, four, the tenant abandons the premises within a reasonable time after the commission of the act.

See, among other cases, Coleman v. Rotana, 778 S.W. 2d 867, which was cited by the parties in argument. The Coleman v. Rotana case is factually very similar to this adversary proceeding. And it held that certain restaurant tenants who were alleging various claims against their landlords, including a claim of warranty for quiet enjoyment for failure to provide adequate parking, did not have a claim as a matter of law because such a warranty only includes latent defects in the nature of a physical or structural defect which the landlord has the duty to repair. But also the latent defect must pertain to the premises, or the facility being leased itself.

Thus the breach of warranty of quiet enjoyment claim pertaining to the provision by the landlord of the inadequate parking did not survive in the Coleman v. Rotana case.

This Court finds the reasoning of Coleman v. Rotana persuasive and similarly holds here that any claim of breach of warranty of quiet enjoyment that is being alleged by Base in this adversary proceeding, whether express or implied, cannot survive as a matter of law and is dismissed, to the extent it is pleaded as a counterclaim.

Next, Base explicitly asserts a claim for breach of warranty of suitability. Similar to the analysis with regard to breach of warranty of quiet enjoyment, the Court finds that this counterclaim must be dismissed as a matter of law.

First, the case of Davidow v. Inwood North Professional Group, 747 S.W. 2d 373 from the Texas Supreme Court in 1988, appears to be where the warranty of suitability was first recognized by the Texas Supreme Court. The Texas Supreme Court stated there, “There is an implied warrant of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose. This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition.”

The case of Coleman v. Rotana, mentioned earlier, cited Davidow. And, again, based upon facts that were extremely similar to this adversary proceeding, found that inadequate parking is not the type of defect that the implied warranty of suitability encompasses. Concluding that this warranty only covers latent defects in the nature of a physical or structural defect, which the landlord has a duty to repair.

And not only must the defect alleged be within the scope of the warranty, but the facility alleged to be defective must be in the leased premises. And when the lease specifically speaks to the use of the parking area, there can be no implied warranty as to a matter specifically covered by the written terms of the lease.

To be clear, the allegations in Base's counterclaims are not directed to latent defects in the premises that are in the nature of physical and structural problems that prevent the Premises from being used for their intended purpose.

Thus, the count of breach of warranty of suitability must be dismissed as not plausible as a matter of law.

Next, the Court will address Base's unjust enrichment count. Base claims that Center benefitted by Base enclosing 120 feet of space, thus improving the AA Center.

Base also makes claims that Center benefitted from all of the electrical and plumbing work, as well as other construction that it built in the premises. The Center has

been unjustly enriched. The Court concludes that this claim must be dismissed as a matter of law.

With some exceptions not applicable here, when an express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi contract theory, such as unjust enrichment. See, for example, Fortune Production Company v. Conoco, Inc., 52 S.W. 3d 671, Texas Supreme Court, year 2000.

The Fortune case states, among other things, that:

A, when a valid express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi contract theory. That is because parties should be bound by their express agreements.

B, when a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement;

And, C, when a party claims that it is owed more than the payments called for under a contract, there can be no recovery for unjust enrichment if the same subject is covered by the express contract. A little bit repetitive, but it's clear to the point.

In this adversary proceeding, there are express provisions in the lease agreement that deal with the construction that the debtor performed at the Premises, as well as the obligations upon surrender of the premises at the

termination or expiration of the lease.

For example, Section 5.1 of the lease agreement provides as follows, “Construction of any tenant improvements including, but not limited to, consulting, architectural, landlord’s architect/consultants, or any other service fees for the premises shall be accomplished by tenant, and the cost of such construction will be borne by tenant.” See also Section 8.2 of the lease.

Moreover, there are provisions dealing with the parties’ rights regarding fixtures or improvements after termination of the lease, limitations on Base’s rights to advertise inside the AA Center, Center’s right to control access to public portions and common areas of the AA Center and, of course, parking.

Since all of these subject matters in dispute in this adversary proceeding are expressly governed by specific terms contained in the lease agreement, Base’s claims for unjust enrichment must fail as a matter of law and be dismissed.

Base either has claims for breach of contract regarding lease terms or not, but it cannot essentially pile on under a theory of unjust enrichment.

Next the Court will address the various fraud and negligent misrepresentation counterclaims. Specifically, the Court is referring to Base’s claims of statutory fraud under the Texas Business and Commerce Code, common law fraud,

including the "in inducement" by nondisclosure fraud claim, string along fraud, and negligent misrepresentation.

The Court finds this to be the hardest analysis of all here, but ultimately concludes that these counterclaims survive dismissal because the factual allegations pleaded by Base, assuming they are true, could plausibly raise a claim of entitlement to relief against Center.

Moreover, Base has sufficiently pleaded the fraud type claims with enough specificity, in the Court's view, by providing the who, what, when, and where of the complaint of events to put Center on notice of what the complaint of events are. In other words, the pleading passes muster under Rule 9(b).

While it is true that certain allegations are worded to be on information and belief, case law holds that if facts pleaded are peculiarly within the opposing party's knowledge, fraud pleadings may, in fact, be based on information and belief.

It is alleged by Base that certain facts are, indeed, within Center's peculiar knowledge. The Court must accept this at face value.

Turning to the details of the alleged misrepresentations, Base's fraud and negligent misrepresentation claims center around certain statements made by Joe Skenderian, on May 31st, 2007, November 2nd, 2007, June

2nd, 2008, and June 3rd, 2008 in which he represented allegedly that once he obtained the signed lease agreement from Base, he would obtain the signatures on the various attachments, compile the exhibits, which included the parking agreement between Center and Hillwood, and send out a complete lease package.

Base's second amended answer and counterclaim further details that the lease negotiations began in March, 2007, more than one year before the lease agreement was signed on June 2nd, 2008, and that parking was always an important issue in the lease negotiation process.

The second amended answer and counterclaim alleges that on May 31st, 2007, Joe Skenderian sent an e-mail stating, quote, "We will finalize the deal with Hillwood once we are closer to finalizing the overall lease. However, based on our discussions with Hillwood, there should not be any issues with Chili's getting access to Lot E."

The essence of the fraud and negligent misrepresentation claims is that Center knew that its disputes with Hillwood likely precluded Center from ever being able to obtain the Hillwood parking agreement. And yet, it continued to represent that the Hillwood parking agreement would be obtained. Thus, the statement that Center could/would deliver the Hillwood parking agreement was a material misrepresentation made to Base. The statement was either deliberate, or reckless, or negligent. It was a statement made with the

intent that Base would act on it. And Base did, in fact, act by investing millions of dollars into the premises to its alleged detriment.

Allegedly, Center/Skenderian made representations that it had no present intention to perform. In other words, Center allegedly knew it couldn't and wouldn't obtain and deliver the Hillwood parking agreement any time soon, if ever.

As earlier stated, these facts, assuming they are all true in the Court's view, could plausibly raise a claim of entitlement to relief against Center.

Now, one concern that the Court had in reading the pleadings was not even raised by the parties in their briefing and arguments. This concern deals with the merger clause that is in the lease agreement, specifically Section 22.11 of the lease agreement provides, quote, "This lease and the respective attachments and exhibits thereto and hereto constitute the entire agreement between the parties with respect to the subject matter of this lease. Tenant expressly acknowledges and agrees that the landlord has not made, and is not making, and tenant, in executing and delivering this lease, is not relying upon any warranties, representations, promises, or statements, except to the extent that the same are expressly set forth in this lease or in any other written agreement that may be made between the parties concurrently with the execution and delivery of the lease. All understandings and agreements

hereto had between the parties are merged in the lease and any other written agreements made concurrently herewith, which alone fully and completely express the agreement of the parties, and which are entered into after full investigation with neither partying relying upon any statement or representation not embodied in this lease, or in any other written agreements made concurrently herewith."

Although not an argument pressed by either party, the Court found in reviewing cases that there is State Court authority holding that where there is a disclaimer of reliance in a merger clause in a lease, the element of justifiable reliance is negated. And as a result, claims for fraud and negligent misrepresentation cannot survive. Specifically the Texas Court of Appeals held in Prudential Insurance Company of America versus Italian Cowboy Partners Limited, 270 S.W. 3d 192, which Texas Supreme Court has recently granted review in that case, that in certain circumstances when fraudulent or negligent misrepresentations have been made before a contract is executed, that a party may be prohibited from bringing fraud claims and negligent misrepresentation claims because of a negation of the reasonable reliance factor when the contract contains provisions where it is agreed that there are no representations outside of the contract, and that the writing constitutes the entire agreement of the parties.

But the Texas Court of Appeals noted in that case

that not every disclaimer of a reliance or merger clause will bar certain claims. And relying on the holdings set forth in Schlumberger Tech Corp. v. Swanson, 959 S.W. 2d 179, Texas Supreme Court, 1997, the court considered the following factors when deciding whether the right to bring misrepresentation claims was foreclosed:

One, whether the parties were attempting to end a situation in which they have become embroiled in a dispute over the value and feasibility of the subject project;

Two, whether highly competent and able legal counsel were involved in the negotiation of the lease;

Three, whether the parties were negotiating at arm's length;

And, four, whether the parties were knowledgeable and sophisticated in business. This ultimately requires a court to look at the facts surrounding the lease negotiation process.

The bottom line, it would appear to this Court that there is somewhat of a realistic possibility that the merger clause in the lease may ultimately bar the claims of fraudulent and negligent misrepresentation that have been pleaded by Base. But there may be disputed facts here that dictate whether the merger clause precludes Base's fraud claims. For example, maybe it is in dispute that highly competent and able legal counsel were involved. Maybe it is in dispute whether the parties were negotiating at arm's length. Maybe or maybe not,

but these are items that the parties will have to develop for either a motion for summary judgment or trial. But at this Rule 12(b)(6) stage, the fraud and negligent misrepresentation counterclaims survive.

Next, the Court will address the counterclaims for breach of lease. These counterclaims survive. Notably Base pleads that Center breached the lease by failing to resolve parking issues. Failing to provide the Hillwood parking agreement. Indeed, it is undisputed that the Hillwood parking agreement was not provided until September 1st, 2009, over a year after the original lease was signed. Refusing to allow debtor to advertise, and pass out handbills and coupons insides the AA Center, even though the lease allegedly allowed the same. Impeding the access of customers to the Chili's restaurant by barricading an entryway during the circus. Charging for rent before the rentals commenced on December 6th, 2008. Due to Center's alleged breach, debtor asserts that it lost its investment of approximately $3 million and the profits, which it reasonably expected to receive.

The Court will need to look at the facts and the lease in more detail and decide the merits of the allegations. But Base has argued plausible grounds to infer a claim of breach of contract and has presented enough facts to raise a right to relief above the speculative level based upon the assumption that all of the allegations in the counterclaims are

true.

Finally the counterclaim for attorney's fees must also survive. Base asserts that it's entitled to attorney's fees pursuant to Texas Civil Practice and Remedies Code, Section 38.001(8), which provides that "A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for an oral or written contract."

Obviously because the breach of contract claims arise, this claim is entitled to go forward.

So, in summary, the motion to dismiss is granted in part and denied in part. To reiterate, the motion to dismiss is granted as to breach of warranty of quiet enjoyment, breach of warranty of suitability, and unjust enrichment. These claims do not survive.

But the motion to dismiss is denied as to all counterclaims of fraud, the counterclaim for negligent misrepresentation, the counterclaim for breach of lease, and the counterclaim for attorney's fees.

All right. So, that is the Court's rather long bench ruling. I felt the need to do that since there was a lot to digest here.

I'm going to ask Mr. Mouse or Mr. Friedman to simply do a simple order, and you can say "based on the reasoning given by the Court on June 28th in open court." And then if

anyone wants to order the transcript, they'll have that with a detailed reasoning. So, if you could upload an order.

As far as housekeeping matters, I think the next one we have on our plate now is the motion to strike the jury trial demand. And now the jury trial issue simply revolves around breach of contract, fraud. I don't know if that materially changes your arguments one way or another, but shall we just set that in due course in the next -- sometime in July? Okay?

MR. FRIEDMAN: That would be fine, Your Honor. We can --

MR. PULLMAN: That's fine, Your Honor. Does anybody need -- I have no scheduling conflict in July.

(Laughter)

MR. PULLMAN: I don't know if -- however --

THE COURT: Aren't you lucky?

MR. PULLMAN: I have -- I mean as far as vacation.

THE COURT: I want your schedule.

MR. PULLMAN: I mean as far as vacation.

THE COURT: Okay.

MR. PULLMAN: No legitimate ones.

THE COURT: Okay. All right.

MR. PULLMAN: Are you guys okay?

THE COURT: Okay.

MR. FRIEDMAN: Yes, I'm going to have to consult my

calendar.

THE COURT: Okay. I'm going to ask you all to send an e-mail or call Traci Davis tomorrow after you get back and ask for a setting in due course. I'm guessing it's going to be very late July for the Court.

MR. FRIEDMAN: Late July.

THE COURT: Because we're pretty stacked at the moment.

And then we'll have to -- we'll have to make that a hearing on the motion to strike, and then a status conference to get a scheduling order in place.

MR. FRIEDMAN: Okay.

THE COURT: Okay? So, that's what we'll do. We'll see you in late July.

(Whereupon, at 3:31 P.M., the hearing was adjourned.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Karen Hartmann* AAERT CET**D0475 Date: July 9, 2010

TRANSCRIPTS PLUS, INC.

ATTACHMENT 3

The following constitutes the ruling of the court and has the force and effect therein described.

United States Bankruptcy Judge

Signed July 03, 2012

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	**Case No. 09-34269-SGJ-7**
BASE HOLDINGS, LLC,	§	**Chapter 7**
	§	
Debtor.	§	
CENTER OPERATING COMPANY, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Adversary No. 09-03256-SGJ**
	§	
BASE HOLDINGS, LLC,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER ADDRESSING CROSS-MOTIONS FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS, SPECIFICALLY: (A) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTERCLAIMS, EXCEPT ONE BREACH OF CONTRACT CLAIM; AND (B) DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION.

The above-referenced adversary proceeding ("Adversary

Proceeding") is, essentially, a landlord-tenant dispute that erupted within a bankruptcy case. The Plaintiff, Center Operating Company, L.P. (the "Plaintiff" or "Landlord-Center"), is the landlord. Landlord-Center is the operator of a sports and special events complex near downtown Dallas, Texas that is known as American Airlines Center—the hallowed ground at which the Dallas Mavericks NBA basketball team and the Dallas Stars NHL hockey team each play (the "Arena"). The Arena anchors a larger development in Dallas known as Victory Park. The tenant in this landlord-tenant dispute is Base Holdings, LLC, which was a franchisee of the well-known restaurant corporation Brinker International, and was the operator of a Chili's Bar & Grill restaurant (the "Restaurant") at the southwest corner of the Arena. The Restaurant, unfortunately, had a short and unsuccessful life span. It operated for a mere nine months, starting in late 2008, before voluntarily seeking Chapter 11 bankruptcy relief, and then ultimately (and abruptly) closing. In fact, the tenant ("Debtor" or "Tenant-Base" of "Defendant") moved to convert its Chapter 11 reorganization case to a Chapter 7 liquidation case, soon after the bankruptcy case and this Adversary Proceeding were filed; thus, the Chapter 7 Trustee, Robert Yaquinto (the "Bankruptcy Trustee"), is now the party-defendant in this Adversary Proceeding and stands in the shoes of the tenant—although many of the pleadings still refer to "Base

Holdings, LLC"[1] as the Defendant.[2]

Soon after Tenant-Base filed its bankruptcy case (which was on July 6, 2009), the Landlord-Center commenced this Adversary Proceeding (on August 7, 2009), by filing a Complaint for Declaratory Judgment, which requested that the bankruptcy court declare the parties' rights under their June 2, 2008 Lease Agreement (herein so called). Specifically, the Complaint asserted that Tenant-Base had never paid any rent at all to Landlord-Center, and Landlord-Center sought a determination as to how the defined term "Chili's Opening Date" should be interpreted in the Lease Agreement, for purposes of calculating all rent due to Landlord-Center. The Complaint also asked for certain other declarations regarding the parties' rights, status, and legal relations pursuant to the Lease Agreement. ***Landlord-Center also filed a proof of claim in the underlying bankruptcy case in the***

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[1] Apparently Base Holdings, LLC was initially formed to develop a restaurant business (utilizing the Chili's concept, where possible) on ***military bases,*** and it even had contracts with the United States Navy and United States Army at one time. Apparently, any and all military contract rights and opportunities were transferred to a different entity, shortly before the bankruptcy filing. Plaintiff MSJ App. 898. The court assumes that the Bankruptcy Trustee has been or will be fully investigating this. In any event, this explains the unusual name "Base Holdings, LLC."

[2] *See* Order Granting Trustee's Motion to Realign Parties, dated August 17, 2011. DE # 89.

Note that references to "DE # __" throughout this Memorandum Opinion and Order refer to the record entry number at which a particular pleading appears in the docket maintained by the Bankruptcy Clerk for this Adversary Proceeding.

amount of $1,595,918.83, for various amounts allegedly due to it under the Lease Agreement. *See* Claim No. 7, in the Claims Register maintained in Case No. 09-34269. Note that Tenant-Base was still occupying its Restaurant-space in the Arena at the time that this Adversary Proceeding was commenced (thus, it still had all of its rights and remedies available to it pursuant to Section 365 of the Bankruptcy Code).[3]

The Adversary Proceeding quickly grew more complicated. The Debtor, Tenant-Base, vacated its space in the Arena less than a month after the Adversary Proceeding was filed, and thereafter filed an answer in this Adversary Proceeding that also asserted numerous ***counterclaims*** against Landlord-Center, including numerous torts (mostly fraud claims) and breach of contract. Tenant-Base also filed a ***separate*** adversary proceeding against Landlord-Center, asking the bankruptcy court to avoid Landlord-Center's statutory landlord lien that it was asserting ("Lien Avoidance Adversary Proceeding"). A motion to consolidate the Lien Avoidance Adversary Proceeding with this Adversary Proceeding was filed by Landlord-Center, but the parties later reached an Agreed Judgment of Dismissal in the Lien Avoidance Adversary Proceeding. Additionally, insiders of the Tenant-Base (specifically: its equity owner, Gilbert Aranza, and certain of

[3] Such as the right to reject, assume, or assume and assign the Lease Agreement (with the latter two options requiring, among other things, a curing of defaults).

his affiliates) filed a state court lawsuit against Landlord-Center, alleging the same type of claims as the Debtor alleged (as counterclaims) in this Adversary Proceeding. The bankruptcy court stayed this latter lawsuit, determining that insiders were essentially exercising control over claims that were property of the bankruptcy estate.

Many months have now elapsed in the Adversary Proceeding. During these months, not only did Base-Tenant vacate the Restaurant space (which was followed by various legal skirmishes regarding personal property at the Restaurant), but, as mentioned, a Bankruptcy Trustee was appointed for Tenant-Base. Then, a motion to dismiss counterclaims was heard and decided (on July 20, 2010)—with the bankruptcy court dismissing three of Tenant-Base's many counterclaims. Additionally, a jury demand was made by Tenant-Base (which was objected to by Landlord-Center and stricken by the bankruptcy court, on August 18, 2010).[4]

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[4] In ruling on the Debtor's jury demand, this court was guided by the Fifth Circuit decision in *In re Jensen,* 946 F.2d 369 (5th Cir. 1991), *abrogated on other grounds by In re Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In *Jensen*, the Fifth Circuit considered the question of whether a debtor effectively subjects his prepetition claims to the bankruptcy court's equitable power (and loses his right to a jury trial he might otherwise have) when he files a petition for bankruptcy. The Fifth Circuit concluded that a debtor does not. The Fifth Circuit elaborated that, in *Jensen*, as in the landmark *Granfinanciera* case, the debtors' claims (which were against third-party defendants who had not filed proofs of claim) did not "arise as part of the process of allowance and disallowance of claims." *Jensen*, 946 F.2d at 373; *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 58-59 (1989). Nor were the Jensens' claims "integral to the restructuring of debtor-creditor relations." *Jensen,* 946 F.2d at 374 (citing *Granfinanciera*). Rather they were essentially claims brought by the

In mid-2011, cross motions for summary judgment, responses, and supporting documentary evidence were filed—***solely dealing with Tenant-Base's (i.e., the estate's) numerous, remaining counterclaims against Landlord-Center.***[5] Landlord-Center moved

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debtor-in-possession in a state court against non-creditor third parties to augment the bankruptcy estate (note that it was the defendants that had removed the action to bankruptcy court). The Fifth Circuit reconciled its holding with a similar but distinguishable case from the Seventh Circuit, *In re Hallahan,* 936 F.2d 1496 (7th Cir.1991). In *Hallahan*, the debtor petitioned for bankruptcy while he was a defendant in a suit then pending against him in federal district court. The bankruptcy petition triggered the automatic stay, 11 U.S.C. § 362, and the plaintiff filed a proof of claim and complaint of dischargeability in the bankruptcy court. The court denied the debtor's request for a jury trial. The Seventh Circuit affirmed, deciding that a dischargeability proceeding is a type of equitable claim for which there is no jury right in the first place. The Fifth Circuit stated that it agreed with the ***result*** in *Hallahan,* but not the Seventh Circuit's ***reasoning*** with regard to ***why*** the debtor had no right to a jury trial. *Jensen*, 946 F.2d at 374. The Fifth Circuit stated that it believed the debtor in *Hallahan* was not entitled to a jury trial, not because the debtor had filed a petition in bankruptcy, but because the ***plaintiff in the action had submitted his claim against the debtor to the equitable jurisdiction of the bankruptcy court***. *Id.* The Fifth Circuit stated that filing a proof of claim denied ***both*** the plaintiff and the defendant, debtor, any right to jury trial that they otherwise might have had on that claim. *Id.*

In summary, this bankruptcy court believed that Debtor/Tenant-Base had no jury trial right (under the holding of *Jensen*) since its counterclaims were ***against a plaintiff that had submitted its claims against the Debtor to the equitable jurisdiction of the bankruptcy court*** and ***because the overall dispute (claims and counterclaims) were part of the process of claims allowance and disallowance***.

[5] Specifically, the court refers to: (1) the Motion for Summary Judgment and Brief in Support [DE ## 77 & 78] (the "Plaintiff's MSJ"), filed by Landlord-Center; the Response thereto and Brief in Support [DE ## 90 & 91], filed by the Defendant, Tenant-Base; the Reply thereto [DE # 100] of the Plaintiff; (2) the Defendant's Motion for Partial Summary Judgment and Brief in Support [DE ## 84 & 85] (the "Defendant's Partial MSJ"); the Response thereto and Brief in Support of the Plaintiff [DE ## 94 & 95]; the Reply thereto [DE # 98] of the Defendant; and (3) all summary judgment evidence/appendices submitted with such pleadings [DE ## 79, 80, 86, 91 & 96].

for summary judgment on ***all*** of the counterclaims asserted on behalf of the estate of Tenant-Base (*i.e.,* all of the counterclaims that had not been dismissed by the bankruptcy court earlier). Tenant-Base moved for summary judgment on two of its counterclaims. The bankruptcy court took those cross-motions for summary judgment under advisement (in Fall of 2011) after oral arguments. Around the time that this bankruptcy court was prepared to issue a written ruling on the cross-motions for summary judgment, Tenant-Base filed (on December 21, 2011) a motion to withdraw the reference and motion for remand. Tenant-Base argued that, pursuant to the holding in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the bankruptcy court had no Constitutional authority to render a final judgment on the counterclaims of the estate (hereinafter, the "*Stern* Motion"). DE ## 112 & 113 (same pleading). The *Stern* Motion was filed a

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The court herein refers to the summary judgment evidence contained in the Appendix to Plaintiff's MSJ as "Plaintiff MSJ App. __" with the applicable page numbers used whenever there is a "___." Similarly, the court refers to the Appendix to Defendant's Response as "Defendant Resp. App. __."

The court refers to the summary judgment evidence contained in the Appendix to Defendant's Partial MSJ as "Defendant Partial MSJ App. " with the applicable page numbers used whenever there is a " ." Similarly, the court refers to the Appendix to Plaintiff's Response as "Plaintiff Resp. App. ."

Note, that in determining the merits of the Plaintiff's MSJ and the Defendant's Partial MSJ, the court also has discretion to take judicial notice of all documents filed with this court in the Action. *See Goldberg v. Craig (In re Hydro-Action, Inc.)*, 341 B.R. 186, 188 (Bankr. E.D. Tex. 2006) (citing Fed. R. Evid. 201(b), (f)).

full six months after the Supreme Court's ruling in *Stern v. Marshall*, approximately five months after the cross-motions for summary judgment were filed, and 28-and-a-half months after the Adversary Proceeding was filed.

The bankruptcy court held a status conference on February 6, 2012, on Tenant-Base's motion to withdraw the reference and motion for remand. Counsel for Base-Tenant announced that it was withdrawing its request for remand and was simply urging withdrawal of the reference. Based on the arguments made at the status conference, the bankruptcy court has issued a Report and Recommendation to the District Court,[6] respectfully recommending that the District Court ***deny*** the *Stern* Motion, and ***not*** withdraw the reference, based on the reasons that:

> (a) the counterclaims in this Adversary Proceeding are distinguishable from those in *Stern v. Marshall*, in that it seems ***necessary*** to resolve the counterclaims as part of the proof of claim allowance or disallowance process (*i.e.*, here, unlike in *Stern v. Marshall*, the plaintiff against whom the counterclaims are asserted still has a live, unresolved proof of claim that will not survive if the counterclaims are sustained);[7] and

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[6] The bankruptcy court has issued such Report and Recommendation simultaneously with this Memorandum Opinion and Order.

[7] This court duly notes that the dissenters in *Stern v. Marshall* discussed a hypothetical scenario in which a tenant files a bankruptcy case and wishes to assert counterclaims in defense to a landlord's proof of claim for unpaid rent, and—under their interpretation of the majority opinion in *Stern*—such a debtor-tenant would have to go to the federal district judge, not the bankruptcy judge, to have the counterclaims resolved. *Stern*, 131 S. Ct. at 2630 (dissent). The dissenters suggested that this would be an unfortunate "constitutionally required game of jurisdictional ping-pong" and would

(b) Debtor/Tenant-Base should be deemed to have ***consented*** to the bankruptcy court finally adjudicating this Adversary Proceeding: (i) by, first, filing the counterclaims in the bankruptcy court (which were amended twice in a seven-month period)[8], (ii) by filing a motion for summary judgment and signing a pretrial order—both ***after*** *Stern v. Marshall*—never mentioning that Tenant-Base would challenge adjudication of its counterclaims in the bankruptcy court, and (c) delaying filing a motion to withdraw the reference for more than two years (and more than six months after *Stern v. Marshall*).

In the alternative, the Report and Recommendation suggests that, if the District Court determines that the bankruptcy court has no Constitutional authority to enter final orders on the counterclaims, the District Court should:

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lead to inefficiency. *Id.* If the dissenters were correctly interpreting the majority's ruling in *Stern* (and this Article I judge loathes to suggest otherwise) then this bankruptcy court may be erring in finding that the facts in this Adversary Proceeding are distinguishable from *Stern*. However, the majority in Stern stressed that the "question is whether the action [the estate's counterclaim or other affirmative request for relief] stems from the bankruptcy itself ***or would necessarily be resolved in the claims allowance process***." *Id.* at 2618. This bankruptcy court fails to see how it can possibly resolve Landlord-Center's $1.5 million, contractually-based proof of claim and request for declaratory relief without deciding the arguments made by Debtor in asserting its counterclaims (Tenant-Base argues everything from breach of the lease to fraud in the inducement claims against Landlord-Center). This seems distinguishable from the situation in *Stern* where: (a) the stepson's/plaintiff's tort claims made in the bankruptcy court ***had already been disallowed prior to a trial on the debtor's counterclaims***; and (b) the stepson (as a then-claimless counter-defendant), not the Debtor who sought bankruptcy protection, was the one challenging the bankruptcy court's Constitutional authority to adjudicate the dispute.

[8] In its original Answer and Counterclaims [DE #5, filed 9/18/09], First Amended Answer and Counterclaims [DE # 13, filed 10/23/09], and Second Amended Answer and Counterclaims [DE # 39, filed 4/22/10], Tenant-Base admitted "that the Court [bankruptcy court] has non-exclusive jurisdiction" over the lease dispute. *See* ¶¶ 3, 37 & 52 of each pleading.

(a) consider this Memorandum Opinion and Order on the Cross-Motions for Summary Judgment as a ***proposed*** ruling;

(b) ***adopt*** the Memorandum Opinion and Order and ***enter it as an Order of the District Court***; and

(c) deny actual withdrawal of the reference but, instead, refer all remaining matters in this Adversary Proceeding to the bankruptcy court to conduct, with the proviso that the bankruptcy court shall make ***proposed*** findings of fact and conclusions of law thereon to the District Court for the District Court to consider *de novo* pursuant to 28 U.S.C. § 157(c)(1).

Based on all the foregoing, and further based upon the summary judgment record and arguments presented, the court is: (a) denying, in full, Defendant's Partial MSJ; (b) granting Plaintiff's MSJ on all of Tenant-Base's tort counterclaims; (c) granting Plaintiff's MSJ on all but one of Tenant-Base's breach of contract claims (*i.e.,* the one breach of contract claim of Tenant-Base that should survive is one alleging that Landlord-Center improperly charged rent before December 6, 2008). Due to genuine issues of disputed fact, a trial on the merits is needed on this one remaining breach-of-contract counterclaim. A trial on the merits is likewise needed on the Landlord-Center's proof of claim and its requests for declaratory judgment. This Memorandum Opinion and Order is issued pursuant to Federal Rule of Bankruptcy Procedure 7056.

II. JURISDICTION AND COURT AUTHORITY.

Bankruptcy subject matter jurisdiction exists in this

Adversary Proceeding, pursuant to 28 U.S.C. § 1334(b). This bankruptcy court has authority to exercise bankruptcy subject matter jurisdiction, pursuant to 28 U.S.C. § 157(a) and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984.

Additionally, at least ***statutory*** "core" matters are involved in this Adversary Proceeding, pursuant to 28 U.S.C. § 157(b)(2)(B) and (C). This Adversary Proceeding, as explained above, essentially involves a landlord's proof of claim; requests for declarations by the landlord regarding its lease with the debtor; and counterclaims by the bankruptcy estate back against the landlord. These are squarely "core" matters, pursuant to 28 U.S.C. § 157(b)(2)(B) and (C). However, 28 U.S.C. § 157(b)(2)(C) was recently declared unconstitutional by the Supreme Court, at least as it applied to the facts in *Stern v. Marshall*. As explained above (and also in the Report and Recommendation to the District Court issued this same date), notwithstanding the holding of *Stern v. Marshall*, the bankruptcy court believes that it has Constitutional authority to issue final orders or judgments in this Adversary Proceeding; moreover, the court believes that the parties have provided necessary consent for the bankruptcy court to enter final orders in this Adversary Proceeding. However, in the event this bankruptcy court is found

to lack Constitutional authority to enter this Memorandum Opinion and Order, this court submits this as a proposed ruling to the District Court.

III. PROCEDURAL POSTURE.

As referenced above, on August 7, 2009, Landlord-Center initiated this Adversary Proceeding, through the filing of its Complaint for Declaratory Judgment (the "Complaint") against Tenant-Base. The facts of this Adversary Proceeding revolve around Tenant-Base's failed Restaurant that was opened in late 2008. The disputes arise out of the Lease Agreement that was executed by Tenant-Base, as tenant, and Landlord-Center, as the landlord, on or about June 2, 2008 (the "Lease" or sometimes the "Lease Agreement"). In the Complaint, Landlord-Center seeks a declaratory judgment, requesting the court to declare Landlord-Center's and Tenant-Base's rights under the terms of the Lease.

On April 22, 2010, Tenant-Base filed its Second Amended Answer to the Complaint and Counterclaims (the "Counterclaims"), asserting various claims against Landlord-Center, including: (1) statutory fraud under the Texas Business & Commerce Code § 27.01(a); (2) statutory fraud under the Texas Business and Commerce Code § 27.01(a)(2); (3) common law fraud in the inducement by affirmative representation; (4) common law fraud in the inducement by non-disclosure; (5) common law fraud; (6) "string along fraud"; (7) negligent misrepresentation; (8) breach

of contract regarding the Lease; (9) breach of warranty of quiet enjoyment; (10) breach of warranty of suitability; (11) unjust enrichment; and (12) attorney's fees. In an Order entered on July 20, 2010, the bankruptcy court dismissed three of Tenant-Base's twelve counterclaims: those for breach of warranty of quiet enjoyment; breach of warranty of suitability; and unjust enrichment (the "MD Order") [DE # 61]. Thus, all that remains of Tenant-Base's counterclaims are the various fraud claims, the negligent misrepresentation claim, the breach of Lease claims, and the attorney's fees claim.

A. The Tort Claims: Landlord-Center's Alleged Misrepresentations Regarding Parking.

As to Defendant's fraud and negligent misrepresentation claims, these claims revolve around certain statements made by Mr. Joe Skendarian ("Skendarian"), a representative for Landlord-Center, prior to the Lease being executed, in which Skendarian represented that, once he obtained a signed Lease from Tenant-Base, he would obtain the signatures on the various attachments, compile the exhibits (which ***importantly*** included a parking agreement for Lot E of the Arena (the "Parking Agreement")), and send out a complete Lease package. Tenant-Base argues that the Parking Agreement was vital to the success of the Restaurant, and that the lack of a Parking Agreement ultimately caused the business to fail by September 2009, approximately 10 months after the Restaurant originally opened. Tenant-Base argues that

Landlord-Center's failure to deliver the Parking Agreement caused it to lose its total investment in the Restaurant of $3,000,000, as well as the profits which it reasonably expected to receive over the life of the Lease.

B. The Breach of Contract Claims: Landlord-Center's Failure to Deliver Parking; Alleged Interference with Advertising; Access; and Premature Charging of Rent

As to Tenant-Base's breach of Lease claim, Tenant-Base not only argues that Landlord-Center materially breached the Lease by not providing the Parking Agreement, but also that Landlord-Center breached the Lease by: (1) refusing to allow Tenant-Base to advertise and pass out handbills and coupons inside the Arena during the circus and a women of faith event; (2) impeding the access of customers to the Restaurant by barricading an entry way located immediately next to the Restaurant during the circus; and (3) charging for rent prior to the Lease commencing, which Tenant-Base alleges was on December 6, 2008. Tenant-Base also asserts that, due to Landlord-Center's breach, Tenant-Base has lost its total investment in the Restaurant of approximately $3,000,000 and the profits which it reasonably expected to receive over the life of the Lease.

For the reasons set forth below, the court holds that: (a) Tenant-Base should be denied summary judgment on its Counterclaims; (b) Landlord-Center should be granted summary judgment on all of Tenant-Base's tort counterclaims; and (c)

Landlord-Center should be granted summary judgment on all but one of Tenant-Base's breach of contract claims (as hereinafter described). Due to genuine issues of disputed fact, a trial on the merits is needed on this one remaining breach-of-contract counterclaim, as well as on Landlord-Center's proof of claim and its requests for declaratory judgment.

IV. UNDISPUTED MATERIAL FACTS.

A. The Negotiation of the Lease and the Parking Agreement

1. The Lease that is the subject of this Adversary Proceeding was for more than 3,000 square feet of space located at the southwest corner of the Arena. *See* Plaintiff MSJ App. 23, 26. With regard to parking arrangements, Section 3a of Exhibit C to the Lease is germane and it provides, in part, as follows:

> During ***Non-Event Dates***, Landlord shall provide parking for Tenant's Customers ***in Parking Lot E*** near the Premises, pursuant to the Proposal Regarding COC Retail Parking Easement between Anland North Commercial, L.P. and Anland North II and Landlord attached hereto as Appendix "1" including spaces for Handicap Parking . . . . If parking Lot E becomes unavailable due to relocation by the owner of such lot, Landlord shall provide the same number and designation of spaces in a lot as close in proximity to the original designated spaces as reasonably practical.

See Plaintiff MSJ App. 54 (emphasis added). "Non-Event Dates" are defined in Section 1 of Exhibit C to the Lease and are "those dates when the arena portion of the Center is not open to the public or other large groups of people for sporting, entertainment, or other public events." *See* Plaintiff MSJ App.

53. "Event Dates" means those dates when the arena portion of the Center is open to the public or other large groups of people for sporting, entertainment, or other public events." *Id.* Section 3b of Exhibit C of the Lease provides that "[d]uring Event Dates, Landlord is ***not*** required to provide parking for Tenants' Customers." *See* Plaintiff MSJ App. 54 (emphasis added). At the time the parties executed the Lease, ***Appendix 1 [i.e., the Parking Agreement] was not attached to the Lease***. *See* Plaintiff MSJ App. 2.

2. The Lease and the specific provision referenced above were the product of an earlier letter of intent (the "Letter of Intent") signed by Gilbert Aranza ("Aranza"), on behalf of Aranza Services Corporation ("ASC"), and Skenderian, on behalf of Landlord-Center, on or about March 7, 2007, over a year prior to the actual Lease being executed.[9] Aranza (as well as Skenderian) can fairly be characterized as sophisticated, in that Aranza has more than 20 years of experience in the restaurant industry and practiced law for approximately 15 years prior to that. *See* Plaintiff MSJ App. 674-75. Aranza also owns and/or operates numerous restaurants and businesses including spaces at DFW Airport and Dallas Love Field Airport. *See* Plaintiff MSJ App. 674. Skenderian, who is a Vice President of Landlord-Center,

[9] *See* Plaintiff MSJ App. 65-67. When the Lease was signed, Tenant-Base was ultimately substituted in for ASC as the "Tenant".

served as the liaison between Tenant-Base and Landlord-Center regarding the negotiation of the Lease. *See* Defendant Resp. App. 114.

3. The Letter of Intent negotiated between Aranza and Skenderian set forth the proposed terms of a potential lease agreement between ASC and Center for approximately 4,200 square feet of space in the Arena for the establishment of a Chili's Bar and Grill Restaurant. *See* Plaintiff MSJ App. 65-67. The Letter of Intent importantly acknowledged that adequate parking spaces were necessary for the Restaurant to be successful. *Id.*

4. At the time the Letter of Intent was executed, Landlord-Center controlled, and still controls, the Platinum Garage that is near the northeast corner of the Arena, which contains approximately 2,000 parking spaces, and the underground garage that is commonly referred to as the Gold Garage, which lies beneath the plaza just south of the Arena; however, Hillwood Development Company and/or its affiliated entities (including Anland North Commercial, L.P. and Anland North II, L.P.) (collectively, "Hillwood") actually owned the various surface parking lots located around the Arena, including Lot E, located on the northwest corner of the Arena (*i.e.,* the lot that Landlord-Center ultimately was obligated to make available for the Restaurant, pursuant to the Lease Agreement), and Lot A located on the southwest corner of the Arena (*i.e.,* the lot that

was closest to the Restaurant). *See* Plaintiff MSJ App. 3, Plaintiff Resp. App. 39 & Defendant Resp. App. 86-89.

5. Shortly after the parties entered into the Letter of Intent, Craig Courson ("Courson"), who was and remains an Executive Vice President and Chief Financial Officer of Landlord-Center, began negotiating with Hillwood on the terms of a parking agreement that would provide parking spaces in Lot E for the Restaurant. *See* Plaintiff MSJ App. 4. Courson handled the majority of the negotiations and communications with Hillwood regarding the parking issues and dealt almost exclusively with Mike Craver ("Craver"), who was formerly Associate General Counsel at Hillwood.[10] *See* Plaintiff MSJ App. 4.

6. Courson and Craver engaged in negotiations and exchanged various emails and drafts of an agreement for parking in Lot E for the Restaurant during 2007 and early 2008. *See* Plaintiff MSJ App. 4-7, 74-112, 114-143. However, by the time Tenant-Base and Landlord-Center signed the Lease on June 2, 2008, Hillwood and Landlord-Center had not yet signed the Parking Agreement that was referenced above in Section 3a of Exhibit C to the Lease. *See* Defendant Resp. App. 178.

[10] Courson also received emails attaching drafts of a potential parking agreement from time to time from Clay Pulliam and Kathy Cannon, who were also working at Hillwood. *See* Plaintiff MSJ App. 4.

B. Landlord-Center's Continued Negotiations with Hillwood Regarding the Parking Agreement

7. Although there was not a signed Parking Agreement by the time the Lease was executed, neither Craver nor anyone else at Hillwood ever communicated to Courson that Hillwood would not eventually sign the Parking Agreement for Lot E. *See* Plaintiff Resp. App. 47-48. In fact, Craver (who has moved out of state and no longer works in-house for Hillwood) even testified in a deposition that it was safe to say that, as of June 8, 2007, Hillwood and Landlord-Center had at least, a preliminary agreement regarding the Parking Agreement for the Restaurant. *See* Plaintiff Resp. App. 40. Moreover, as of late October 2007, Courson believed he had reached an agreement on all the material terms of the Parking Agreement with Hillwood regarding the provision of 50 spaces for Lot E. *See* Plaintiff MSJ App. 6-7, 136-144 & Plaintiff Resp. App. 42-43.

8. In March and April of 2008, Courson and representatives of Hillwood (along with counsel for Landlord-Center's lenders)[11] exchanged various emails and drafts of an agreement regarding the formal easement document regarding parking for the Restaurant in Lot E, which agreement contained the same terms as what Courson and Craver had previously agreed upon in October 2007. *See*

[11] Landlord-Center was required to get formal lender-approval for certain transactions including signature of the Lease Agreement as well as entering into the Parking Agreement. *See* Plaintiff MSJ App. 9, 253-375.

Plaintiff MSJ App. 9-10, 376-509.

9. Days after the Lease Agreement was signed, Craver then communicated to Courson for the first time that Hillwood's execution of the Parking Agreement for Lot E was tied to the parties executing a larger parking agreement between Landlord-Center and Hillwood referred to as the "Sixth Amendment." Plaintiff Resp. App. 46, 162.

10. Subsequent to this communication, Courson continued to make efforts to get the Parking Agreement finalized and signed. *See* Plaintiff MSJ App. 11-20, 510, 514-515, 517-563. Moreover, Craver even testified that, in his mind, none of the additional negotiations that took place after the Lease Agreement was signed had anything to do with the Parking Agreement, since those material terms had already been agreed upon. *See* Plaintiff Resp. App. 46-48, 163. Rather, the negotiations had mainly to do with the Sixth Amendment, and Craver appeared to focus his efforts to get that agreement finalized, so that he could get the necessary Hillwood signatures for the Parking Agreement. *Id.* at 48-49, 62-64.

C. The Completion of Construction and Opening of the Restaurant

11. At the time that Tenant-Base and Landlord-Center entered into the Lease Agreement, they had projected that the Restaurant would be open by approximately October 1, 2008. *See* Plaintiff MSJ App. 24. However, subsequent to signing the Lease

Agreement there were delays in both the permitting for and construction of the Restaurant.

12. Pursuant to the terms of the Lease, Tenant-Base agreed that it would be responsible for the construction of the tenant improvements and interior finish out of the Restaurant. *See* Plaintiff MSJ App. 27 (Section 2.2), 30 (Section 5.1), 33 (Section 7.4). Tenant-Base also agreed under the terms of the Lease, that it would be responsible for procuring and maintaining at its expense the necessary permits to construct and open the Restaurant. *Id.* at 33 (Section 7.4).

13. On May 27, 2008, Tenant-Base obtained a demolition permit for the demolition to be done for the construction of the Restaurant. *See* DE # 92, Statement of Stipulated Facts. On July 22, 2008, Tenant-Base obtained a building permit for the construction of the interior portion of the Restaurant. *Id.* However, Tenant-Base was unable to obtain a building permit for the construction of the exterior portion of the Restaurant, including the construction of a covered patio, because such permit required that the Victory Planned Development District, PD 582 (the "PD") be amended.[12] *See* Defendant Resp. App. 156-57. Tenant-Base was not responsible for procuring the PD amendment,

[12] Prior to the Lease being signed, Landlord-Center did undertake an analysis to determine whether the PD would need to be amended and determined that the addition of the patio would not require an amendment to the PD. *See* Defendant Resp. App. 156-157.

and such action had to be undertaken by Landlord-Center. *See* Defendant Resp. App. 159.

14. Landlord-Center ultimately got the PD amendment on the agenda for the Planning and Zoning Commission for Dallas on September 11, 2008, and the City of Dallas eventually issued the permanent building permit for the exterior of the building on October 2, 2008. *See* Defendant Resp. App. 194.

15. Aside from the permitting issues, Landlord-Center has also alleged (and Tenant-Base disputes) that there were delays caused by Tenant-Base's actions, particularly in getting the architectural designs, the mechanical, electrical, and plumbing ("MEP") designs, procuring furniture, fixtures, equipment, and work stoppages that occurred during the construction phase. *See* Defendant Resp. App. 157-158, 160-61.

D. The Restaurant Opens and Poor Operating Results Ensue

16. In late November of 2008, Tenant-Base opened the interior portion of the Restaurant, while the exterior portion of the Restaurant opened on December 6, 2008. *See* Plaintiff MSJ App. 686. From the beginning, the Restaurant underperformed, especially on Non-Event Days.[13] *See* Plaintiff MSJ App. 956-957. For example, Landlord-Center presented uncontroverted testimony from Bill Thompson ("Mr. Thompson"), who was the general manager

[13] There was uncontroverted summary judgment evidence that Aranza had projected that there would be about 180 Non-Event Days during any given year. *See* Plaintiff MSJ App. 694.

at the Restaurant from January 6, 2009 until it closed, that on Non-Event Days, he was given a sales goal of $10,000 in gross sales, and that the Restaurant would have $1,200 in gross sales on a good Non-Event Day, but that the average Non-Event Day would have gross sales of a mere $600. *Id.* However, on Event Days, particularly when there were Dallas Stars and Dallas Mavericks games, the Restaurant did what was expected and usually averaged around $10,000 in gross sales. *Id.*

17. Unfortunately, the Event-Day sales were simply not enough to make up for what was occurring on Non-Event Days and, in fact, Aranza testified that, for him, alarms started going off that the Restaurant was underperforming as soon as the end of December 2008. *See* Plaintiff MSJ App. 704. There was uncontroverted summary judgment evidence that the Victory Park Development generally struggled to bring in enough traffic on Non-Event Days to sustain restaurant and retail tenants throughout the area, and that several other restaurants that had previously opened around the Arena were forced to close around the same time that the Restaurant opened. *See* Plaintiff Resp. App. 52-55.

E. Parking for the Restaurant

18. It is undisputed, that there was still not a signed Parking Agreement by the time the Restaurant opened. It is also undisputed that Tenant-Base never sent any demand letter to

Landlord-Center complaining about a breach of the Lease due to the lack of parking available at the Restaurant. *See* Plaintiff MSJ App. 695. Parking during Event Days was clearly not an issue—since the Lease Agreement did not obligate Landlord-Center to provide any parking for the Restaurant during Event Days at the Arena. However, where were patrons parking on Non-Event Days?

19. Courson, who was negotiating the Parking Agreement between Landlord-Center and Hillwood, testified that he ate lunch at the Restaurant 2-3 times per week. *See* Plaintiff MSJ App. 12. Courson testified that, while dining at the Restaurant, he inquired on several occasions of the general manager, Mr. Thompson, whether there were any parking issues for the Restaurant patrons on Non-Event Days. *Id.* at 12-13. Mr. Thompson's answer was always the same: there were no issues with parking ***and customers were parking in Lot A***. *Id.* Moreover, Mr. Thompson also testified that when the Restaurant patrons inquired about where to park, ***he also told them to park in Lot A***. *See* Plaintiff MSJ App. 957-58.

20. To be clear, Lot A is located 82 feet directly across the alley and to the west of the Restaurant and is the closest parking lot to the Restaurant. *See* Plaintiff MSJ App. 70, 665, 669. ***Lot A is a free parking lot for the first two hours of use***. *See* Plaintiff MSJ App. 12. During Courson's visits to the

Restaurant, he testified he personally observed people park in Lot A and come into the Restaurant and never observed Lot A being full such that there were no available spaces. *Id.*

21. Craver, who was working for Hillwood on negotiating the Parking Agreement with Courson, also testified that he had lunch at the Restaurant at least once per week. *See* Plaintiff Resp. App. 52. Moreover, Craver could even see the Restaurant from his office window at Hillwood's offices across the street from the Restaurant. *See* Plaintiff Resp. App. 51-52. Craver also testified that, on numerous occasions, he saw that patrons coming to the Restaurant during lunch would park in Lot A. *See* Plaintiff Resp. App. 52.

22. Finally, and perhaps most importantly, there was also uncontroverted testimony from Tenant-Base's representative, Aranza, that he, too, was parking in Lot A once a week while the Restaurant was open. *See* Plaintiff MSJ App. 694-95. Moreover, Aranza could not recall a specific instance where a manager ever raised an issue with there being any problems with patrons not knowing where to park on Non-Event Days. *See* Plaintiff MSJ App. 695. In fact, Aranza testified that he was told by the managers that most of the guests that came for lunch on Non-Event Days were actually coming from the surrounding buildings and apartments and, thus, were not even parking. *Id.* Regardless of any of this, it is undisputed that the Restaurant was not able to

generate the traffic on Non-Event Days that it had originally projected. *See* Plaintiff MSJ App. 703.

F. Landlord-Center Declares Tenant-Base in Default Under the Lease and the Bankruptcy Filing

23. In an email dated May 13, 2009, Vickie Allen (on behalf of Aranza) wrote to Landlord-Center's Courson that Aranza could not continue to operate the Restaurant and asked if Landlord-Center would be available to meet to discuss a solution. *See* Plaintiff MSJ App. 843. However, Landlord-Center had already made the decision to declare a default under the Lease Agreement. *Id.*

24. On May 13, 2009, Landlord-Center sent Tenant-Base a letter claiming that Tenant-Base had breached the Lease because Tenant-Base allegedly owed past-due rent from October 2008 through May 2009 in the amount of $157,666.27. *See* Plaintiff MSJ App. 566. This represented the "Base Rental" for the months October 2008 through May 2009. *Id.* In the letter, Landlord-Center also claimed that Tenant-Base had breached the Lease because Tenant-Base owed $61,666.52 to various contractors who had worked on constructing the Restaurant, and that a lien had been placed on the leased premises.[14] *Id.*

[14] In fact, there were various letters submitted as part of the summary judgment evidence that support Aranza's inability to pay the contractors that had performed construction on the Restaurant. *See* Plaintiff MSJ App. 862-65. All of these letters state that Tenant-Base was unable to pay the respective contractor due to the fact that the project went significantly over budget and business, since the

25. On June 4, 2009, Tenant-Base responded to Landlord-Center's allegations via letter and informed Landlord-Center that Tenant-Base disputed Landlord-Center's claims for rent and reimbursement. *See* Plaintiff MSJ App. 610. In that letter, Tenant-Base notified Landlord-Center that, because the Tenant-Base was unable to obtain the building permit for the Restaurant "until September, 2008 (I believe)," that it was not obligated to pay rent as soon as Landlord-Center alleged, because there were delays beyond Tenant-Base's control. *Id.* The letter specifically referenced Section 1.5 of the Lease Agreement, which provides that "the date on which rent begins is extended day-for-day that the Chili's opening is delayed for reasons beyond our control." *Id.* Moreover, Tenant-Base notified Landlord-Center that Landlord-Center was also in breach of the Lease because it had failed to obtain and provide the Parking Agreement with Hillwood. *Id.*

26. Interestingly, on the same exact day, Tenant-Base sent an email to one of its lenders, First United Bank, stating that the Restaurant was not profitable because "the development we expected in the area surrounding the American Airlines Center did not happen" and "since day one, the Chili's has lost money on non-event days." *See* Plaintiff MSJ App. 898-99. Moreover, the

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opening of the Restaurant, had been extremely disappointing. *Id.* These liens were eventually paid off by Tenant-Base, however, in June 2009. *See* Defendant Resp. App. 196.

email stated that "Gilbert is currently working with Center Operating Company to find a solution, but we cannot continue to operate the Restaurant" and that "Gilbert expects to reach an agreement with them the week of June 22nd." *Id.*

27. Clearly, an agreement was not reached between Landlord-Center and Tenant-Base, though, because, by letter dated June 25, 2009, Landlord-Center provided Tenant-Base with written notice to vacate the leased premises. *See* Plaintiff MSJ App. 14-15, 614-617. Additionally, on July 2, 2009, Landlord-Center filed eviction proceedings against Tenant-Base in the Justice of the Peace Court; however, the proceedings were halted after Tenant-Base filed for chapter 11 bankruptcy on July 6, 2009. *See* Plaintiff MSJ App. 15.

G. Center and Hillwood Sign the Parking Agreement and the Restaurant Closes

28. The Restaurant continued to operate shortly after the bankruptcy filing, perhaps due to hopes of saving the venture, despite the fact that it was in the middle of the summer (rather than during the sports-busy fall and winter). *See* Defendant Resp. App. 195. In late July 2009, the Ringling Brothers Barnum & Bailey Circus (the "Circus") came to the Arena. *See* Defendant Resp. App. 197. The Circus was the first major "event" that came to the Arena since the bankruptcy filing. *Id.* During the Circus, Arena personnel apparently barricaded the south entrance

of the Arena. *See* Defendant Resp. App. 162, 197.[15] In addition, security officers, on behalf of Landlord-Center, prohibited Tenant-Base from handing out promotional materials/coupons during the Circus. *See* Defendant Resp. App. 197. Tenant-Base alleges that these actions were breaches of the Lease; however, no notice was given to Landlord-Center at the time of such alleged breaches. *See* Plaintiff MSJ App. 685-689.

29. Also during the pendency of the bankruptcy case, Courson continued to communicate with Craver at Hillwood in an effort to obtain Hillwood's signature on the Parking Agreement. *See* Plaintiff MSJ App. 15, 618-632. Landlord-Center and Hillwood were ultimately able to sign an agreement on September 1, 2009 (the "New Parking Agreement"). *See* Plaintiff MSJ App. 16, 633-646. Among other things, the New Parking Agreement provided for 50 spaces in Lot E for the Restaurant on Non-Event Days and, additionally (although not required under the terms of the Lease), on Event Days at times other than between two hours before and two hours after a sporting or entertainment event at the Arena. *See* Plaintiff MSJ App. 16. However, the New Parking Agreement was for less than one year, and was not the twenty-year agreement as originally contemplated by the Lease. *See* Plaintiff MSJ App. 633-646.

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[15] There was also evidence that the south entrance was barricaded for the Women of Faith event on August 21, 2009 and August 22, 2009. *Id.* at 1973

30. Despite finalizing the New Parking Agreement, Landlord-Center was never able to deliver it to Tenant-Base. *See* Plaintiff MSJ App. 16. On September 3, 2009, Tenant-Base closed the Restaurant without any prior notice to Landlord-Center. *Id*.

31. On August 7, 2009, Landlord-Center filed the Adversary Proceeding. Soon thereafter, Tenant-Base filed the Counterclaims. The bankruptcy case was ultimately converted to chapter 7 on December 3, 2009, and the Bankruptcy Trustee was appointed. Since his appointment, the Bankruptcy Trustee, through special counsel (former litigation counsel to the Debtor), has defended in the Adversary Proceeding and prosecuted the Counterclaim on behalf of Tenant-Base.

V. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate whenever a movant establishes that the pleadings, affidavits, and other evidence available to the court demonstrate that no genuine issue of material fact exists, and the movant is, thus, entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006*); Lockett v. Wal-Mart Stores, Inc*., 337 F. Supp. 2d 887, 891 (E.D. Tex. 2004). A genuine issue of material fact is present when the evidence is such that a reasonable fact finder could return a verdict for the non-movant. *Piazza's Seafood World, LLC,* 448 F.3d at 752 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S.

242, 248 (1986)). Material issues are those that could affect the outcome of the action. *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003). The court must view all evidence in a light most favorable to the non-moving party. *Piazza's Seafood World, LLC,* 448 F.3d at 752; *Lockett,* 337 F. Supp. 2d at 891. Factual controversies must be resolved in favor of the non-movant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994). If the movant satisfies its burden, the non-movant must then come forward with specific evidence to show that there is a genuine issue of fact. *Lockett,* 337 F. Supp. 2d at 891; *see also Ashe v. Corley,* 992 F.2d 540, 543 (5th Cir. 1993). The non-movant may not merely rely on conclusory allegations or the pleadings. *Lockett,* 337 F. Supp. 2d at 891. Rather, it must demonstrate specific facts identifying a genuine issue to be tried in order to avoid summary judgment. FED. R. CIV. P. 56(c)(1); *Piazza's Seafood World, LLC,* 448 F.3d at 752; *Lockett,* 337 F. Supp. 2d at 891. Thus, summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Landlord-Center has moved for summary judgment on all of

Tenant-Base's remaining counterclaims including: (1) all of Tenant-Base's fraud claims (including common law fraud in the inducement by affirmative representation, common law fraud in the inducement by non-disclosure, statutory real estate fraud, and string along fraud), (2) negligent misrepresentation, (3) breach of the Lease; and (4) request for attorney's fees. Tenant-Base has moved for summary judgment on only two of its fraud claims, specifically: (1) the common law fraud in the inducement claim by affirmative representation; and (2) the common law fraud in the inducement claim by non-disclosure.

VI. RULING AND REASONS THEREFORE.

A. Fraud Claims

1. Common Law Fraud, Common Law Fraud in the Inducement, and Statutory Real Estate Fraud

To prevail on a fraud claim under Texas common law, a plaintiff must first prove that (1) the defendant made a false, material representation to the plaintiff; (2) when the defendant made the representation the defendant knew it was false or made the representation recklessly and without knowledge of its truth; (3) the defendant made the representation with the intent that the plaintiff act on it; (4) the plaintiff actually and justifiably relied on the representation; and (5) the representation caused the plaintiff injury. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex.

2001); *Shandong Yinguang Chem. Indus. Joint Stock Co., Ltd. v. Potter*, 607 F.3d 1029, 1032–33 (5th Cir. 2010). A plaintiff's reliance on the defendant's false statement must be reasonable and justified. *Ortiz v. Collins*, 203 S.W.3d 414, 421 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

In addition to a generic common law fraud claim, Tenant-Base has brought two separate claims for common law "fraud in the inducement." Fraudulent inducement "is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001). It is undisputed that the alleged actions of Landlord-Center arise in the context of a contract: here, the Lease. The first fraud-in-the-inducement claim addresses Landlord-Center's alleged ***affirmative*** representations that it had the signed Parking Agreement with Hillwood when the Lease was signed. The other fraud-in-the-inducement claim relates to Landlord-Center's alleged failure to disclose that it did ***not*** have the signed Parking Agreement from Hillwood when the Lease was signed.

It is black letter law that the mere failure to perform a contract will not support a claim for fraudulent inducement. *Spoljaric v. Percival Tours, Inc.,* 708 S.W.2d 432, 435 (Tex. 1986); *Arete Partners, LP v. Gunnerman*, 594 F.3d 390, 394 (5th

Cir. 2010); *Lam v. Alpha Realtors, Inc.*, No. H-09-3041, 2010 WL 4569995, at *8 (S.D. Tex. Nov. 4, 2010); *Gimme The Best, LLC v. Sungard Vericenter, Inc.*, No. 08-cv-2873, 2010 WL 1388993, at *3 (S.D. Tex. Apr. 1, 2010). Rather, a promise to do an act in the future is actionable fraud only "when made with the intention, design and purpose of deceiving, and with no intention of performing the act." *Spoljaric*, 708 S.W.2d at 434. "Otherwise, the distinction between contract and tort established by Texas law would be virtually abolished." *Sungard*, 2010 WL 1388993, at *4. Fraudulent inducement also requires the plaintiff to prove that it actually entered into a binding agreement based on the representation. *Hasse v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).

As to Tenant-Base's statutory real estate fraud claims, which apply to transactions involving real estate, the Texas Business and Commerce Code provides a separate avenue through which a plaintiff can recover on a theory of fraud. Section 27.01(a) of the Texas Bus. & Comm. Code provides that a plaintiff must prove that either (1) there was a false representation of a past or existing material fact, made for the purpose of inducing a person to enter into a contract, and relied on by that person in entering into that contract, or (2) there was a false material promise to do an act that was made with the intention of not

fulfilling it, for the purpose of inducing that person to enter into a contract, and relied on by that person in entering into that contract. *See* Tex. Bus. & Com. Code Ann. § 27.01(a) (West 1983). Other than the fact that statutory real estate fraud does not require proof that the defendant knew a representation was false or made it recklessly without knowledge, as a prerequisite to the recovery of actual damages, the basic elements of Texas common law fraud and statutory real estate fraud are essentially the same. *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 611 (Tex. App.—Waco 2000, pet. denied).

There are, as shown above, several common elements necessary to prove any of these above-identified fraud theories—most notably: the requirement of a misrepresentation of "material fact"[16]; an ***intent or purpose inherent in the misrepresentation***

[16] A fact is material if "a reasonable person would attach importance to and would be induced to act on [it] in determining his choice of actions in the transaction in question" and there is an accompanying duty to disclose. *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 478-79 (Tex. App.—Fort Worth 2004, no pet.); *Miller v. Kennedy & Minshew, P.C.*, 142 S.W.3d 325, 345 (Tex. App.—Fort Worth 2003, pet. denied). Note that a duty to disclose a material fact arises in the following situations: (1) when there is a fiduciary relationship between the parties; (2) when defendant makes a partial disclosure and conveys a false impression; (3) when defendant obtains new information that makes an earlier representation misleading or untrue; or (4) when a defendant voluntarily discloses information, the whole truth must be disclosed. *See EnviroGLAS Prods., Inc. v. EnviroGLAS Prods., LLC*, 705 F. Supp. 2d 560, 572 (N.D. Tex. 2010) (explaining that "Texas law provides" that a duty to disclose arises when "one makes a partial disclosure and conveys a false impression" as well as three other circumstances); *see also Miller*, 142 S.W.3d at 345-46; *Berry v. Indianapolis Life Ins. Co.*, 600 F. Supp. 2d 805, 820 (N.D. Tex. 2009) (stating that "Plaintiffs are correct that a duty to disclose can arise in an arms-length business

of inducing the plaintiff to act; and reliance on the plaintiff by the representation. As to the element of intent/purpose in particular, a promise to do an act in the future is actionable fraud only "when made with the intention, design, and purpose of deceiving, and with no intention of performing the act." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986). While a party's intent is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made. *Id.* "Failure to perform, standing alone, is no evidence of the promissor's intent not to perform when the promise was made. However, that fact is a circumstance to be considered with other facts to establish intent." *Id.* at 435; *Arete Partners. L.P. v. Gunnerman*, 594 F.3d 390, 394-395 (5th Cir. 2010). The Supreme Court of Texas has also noted that, usually, successful claims for fraudulent inducement have involved confessions by the defendant or its agents of the requisite intent. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006).

Based upon the summary evidence presented, the court has concluded that summary judgment in favor of Landlord-Center, not

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transaction without a fiduciary or confidential relationship"). Note also that, even "[a] representation literally true is actionable if used to create an impression substantially false." *State Nat'l Bank of El Paso v. Farah Mfg. Co., Inc.*, 678 S.W.2d 661, 681 (Tex. App.—El Paso 1984, writ dism'd by agr.), *called into question on other grounds*, *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 724 (Tex. 2001).

Tenant-Base, is appropriate as to ***all*** of Tenant-Base's common law fraud claims and statutory real estate fraud claims. Specifically, viewing the summary judgment evidence in the light most favorable to Base-Tenant, all of the summary judgment evidence demonstrates that:

> (a) there is no genuine issue of any material fact that exists as to the critical element of a ***misrepresentation*** (or even false impression) regarding the Parking Agreement;
>
> (b) there is no genuine issue of any material fact that exists as to the critical element of a possible intent or purpose by Landlord-Tenant to induce Base-Tenant into entering into the Lease Agreement with false statements/omissions concerning the Parking Agreement;
>
> (c) there is no genuine issue of any material fact that exists as to the critical element of reliance; and
>
> (d) perhaps, most glaring of all, there is no summary judgment evidence at all from which a reasonable fact finder could find damages to Base-Tenant caused by a lack of a Parking Agreement.

First, there is no summary judgment evidence at all that a false statement was made by Landlord-Center, to the effect that it already had the executed Parking Agreement with Hillwood on June 2, 2008—nor is there any summary judgment evidence suggesting that Landlord-Center falsely created an impression of that. Moreover, there is no summary judgment evidence that creates a genuine issue of material fact that Landlord-Center did not intend to provide Tenant-Base with the Parking Agreement and that it did not intend to perform its obligations under the

Lease. In fact, there was an abundance of summary judgment evidence presented from Courson, Skenderian, and Craver showing that the Landlord-Center always intended to provide both ample parking for the Restaurant as well as the signed Parking Agreement with Hillwood.

Courson (of Landlord-Center) testified that "at the time the parties entered into the Lease and thereafter, Center intended to perform all of its obligations under the Lease, including providing the parking Agreement for Lot E." *See* Plaintiff MSJ App. 11. This is consistent with the testimony of Craver (Hillwood's former in-house general counsel), who negotiated the Parking Agreement with Courson on behalf of Hillwood and testified as follows:

> Q. From the time period of April 14th, 2008 that we see in Exhibit 145, to June 2nd or 3rd, 2008, do you recall having any additional communications or negotiations with Mr. Courson regarding the parking agreement for the Chili's restaurant?
> A. I do not.
> Q. As of approximately June 2nd or 3rd, 2008, did you continue to believe that you had reached agreement on all material terms of the parking agreement for the Chili's restaurant with Mr. Courson that's reflected in Exhibit 145 that we looked at previously?
> A. Yes. *See* Defendant's Resp. App. 174.
> ***
> Q. And during that time, is it correct that you really didn't have any additional negotiations regarding the Chili's parking agreement because, as you said previously, that had—those material terms had previously agreed upon?
> A. Yes.
> Q. That was—that agreement was kind of just sitting

> to the side, already agreed upon, but it just hasn't been executed?
> A. That's correct. *See* Plaintiff Resp. App. 47.

In order to raise a genuine issue of material fact on this issue, Tenant-Base attempts to point to evidence showing that, despite the fact that the Parking Agreement had not been formally signed by Hillwood, Courson communicated to Skenderian (whom Courson knew was working with Tenant-Base on finalizing the terms of the Lease), that the Parking Agreement had "been signed off by both Lenders attorney and Hillwood." *See* Plaintiff MSJ App. 10. Tenant-Base asserts that Courson knew that this statement would be further communicated to Tenant-Base in order to fraudulently induce Tenant-Base to sign the Lease. However, this does not create a possible fact issue as to fraudulent inducement. Rather, the statement is consistent with all of the other summary judgment evidence that reflects an apparent belief on the part of Landlord-Center that providing the Parking Agreement to Tenant-Base (as required under the Lease) would be no problem. All of the unrefuted summary judgment evidence shows that the delay in procuring the signed Parking Agreement from Hillwood resulted from the fact that the Parking Agreement was a small piece of an even bigger parking agreement (referred to as the Sixth Amendment) that was being negotiated between Landlord-Center and Hillwood. In fact, there was unrefuted summary judgment evidence showing that Hillwood was not going to formally sign the Parking

Agreement until it had finished negotiating the terms of the Sixth Amendment with Landlord-Center. The unrefuted summary judgment evidence was that Hillwood's position on this issue was never formally communicated to Landlord-Center until ***after*** the Lease Agreement had already been executed. Specifically, it was not until June 11, 2008, that Hillwood's position was formally communicated to Landlord-Center:

> Q. Mr. Craver, is it correct that prior to the time the parties entered into the lease, again, as of June 2nd of 2008, that you never personally communicated to Mr. Courson that Hillwood's signature or execution of the parking agreement for Chili's was conditioned on the parties entering into any other agreements?
> A. I'm not sure how to answer that. I would say that in our initial agreement, our initial outline that we got, we had a—the Chili's portion of this deal was part of a larger deal. It's a small piece of the large transaction that involved the Plaza, and I felt that the agreement was conditioned upon there being a larger agreement on the Plaza also being signed, so I felt we were in agreement as to the Plaza—I mean, as to the parking on Lot E in Chili's, that we had negotiated that agreement and it was completed and put to bed.
> And we were still trying to figure out the agreement regarding the Plaza at the time, so I felt that they were tied together, so I would—I don't know if I ever communicated that to Craig, I though it was apparent from the letter of intent that they were together, you know, that we needed to have one signed or they were all going to be signed together, so I tried to answer your question.
> Q. And is it correct that you're not aware that anyone else with Hillwood ever communicated that to Mr. Courson either—again, as of June 2nd, 2008?
> A. I would say other than the fact that they were on the letter of intent, that they were listed on

the same letter of intent, I don't remember ever communicating that to Craig or anybody from Hillwood ever communicating that to Craig. *See* Plaintiff Resp. App. 45.

***

Q. I am going to hand you Exhibit 149. Is Exhibit 149 a true and correct copy of a string e-mails between you and Charles Aster at Kane, Russell, Coleman & Logan regarding a sixth amendment?

A. Yes.

Q. What was the sixth amendment?

A. The sixth amendment was—the sixth amendment to the parking agreement, it's called the Easement and Parking Rights Agreement, that is between various Victory entities and the American Airlines Center regarding providing 3,000 parking spaces to the American Airlines Center for arena parking on Victory land and so this was a sixth amendment to that document.

Q. Do you know whether the sixth amendment or the—any of the terms that were to be put in the sixth amendment were contained in that initial bulletpoint document in Exhibit 7?

A. I don't recall, but I could look.

Q. Let's go ahead and do that. Thank you.

A. It was not included.

Q. On the very bottom e-mail of Exhibit 149 you are communicating to Mr. Aster, Center Operating Company's counsel for its lender, that you had a call with Mr. Courson; is that correct?

A. Yes.

Q. And can you tell me what you told him during that call or what you discussed, and if 149 refreshes your recollection, great.

A. I don't remember the call with Craig, but from this e-mail, it appears that I talked to him about needing—Craig needed to get the Chili's parking agreement signed and we needed to get the sixth amendment drafted or complete in order to—in order for us to sign the Chili's document.

Q. So you recall—or based on this email, if we interpret the e-mail correctly, you had communicated to Mr. Courson on June 11th via telephone that in order for Hillwood to sign the Chili's parking agreement, the parties also needed to sign the Plaza agreement and the sixth amended agreement; is that fair?

A. Yes.

Q. As far as you know, Mr. Craver, is this the first time that you'd ever communicated specifically to Mr. Courson that Center Operating would need to sign some other agreements in order for Hillwood to sign off on the Chili's parking agreement?

A. I would say other than the letter of intent, which you know implies that they're tied together, I—this is—this is the only communication that I'm aware of that I had with Craig regarding that. *See* Plaintiff Resp. App. 46.

***

Q. So this would be also the first time—this would be the very first time—this would be the very first time in your mind that you ever communicated to Mr. Courson specifically that the sixth amendment signing was tied to getting Chili's restaurant agreement signed?

A. Right. I don't have any recollection of me verbally telling them that and so this would be the only communication I'm aware of regarding that. *See* Plaintiff Resp. App. 46 & 162.

The above testimony, which is unrefuted in any other evidence, is that Courson did not have any reason to believe, before the Lease Agreement was signed, that Landlord-Center had not reached closure with Hillwood on Restaurant parking arrangements, or that the Parking Agreement was in any way contingent on the Sixth Amendment being signed.

There is also unrefuted summary judgment evidence showing Landlord-Center's subsequent behavior after the Lease Agreement was signed and such unrefuted behavior does not suggest anything other than an intent to provide the Parking Agreement to Tenant-Base. There were multiple emails submitted into the summary judgment record showing Courson's diligent efforts to obtain the

signed Parking Agreement from Hillwood long after the Lease was signed. *See* Plaintiff MSJ App. 11-16, 510-514, 562-565, 612, 618-632. Craver confirmed Courson's efforts as well and testified as follows:

> Q. And subsequent to June 11th on the e-mail on 149, you continued to have extensive negotiations with Mr. Courson regarding the sixth amendment?
> A. Yes.
> Q. And those were continuous throughout the period of time?
> A. Yes.
> Q. Was Mr. Courson diligent during that period of time, in your mind, in attempting to get an agreement reached on the sixth amendment?
> A. Yes.
> Q. And during that time, is it correct that you really didn't have any additional negotiations regarding the Chili's parking agreement, because, as you said previously, that had—those material terms had previously been agreed upon?
> A. Yes.
> Q. That was—that agreement was kind of just sitting to the side, already agreed upon, but it just hadn't been executed?
> A. That's correct. *See* Plaintiff Resp. App. 46-47.
> ***
> Q. As far as you could—could tell, Craig Courson was being diligent in trying to get that Chili's agreement signed?
> A. Yes.
> Q. Now, these conver—communications, you don't recall the date but they did occur sometime after June 11, 2008, the date that's referenced in 149?
> A. I believe so, yes. *See* Plaintiff Resp. App. 47.
> ***
> Q. So after—on or after June of '08, you do recall the parties continued to work together to try to get the sixth amendment done?
> A. Yes.
> Q. And that—that happened continuously throughout these months?

A. That's right.
Q. I hand you what's been marked as Exhibit 150. Is this a true and correct copy of an e-mail from Craig Courson to you and others, dated September 16, 2008, regarding parking?
A. Yes.
Q. And Mr. Courson is e-mailing Charles Aster and he says, quote, I believe we have reached consensus on our parking deal, period, end quote. And then he goes on to describe some of the deal points that you and—and he had discussed; is that fair?
A. Yes. Uh-huh.
Q. Okay. At this point in September of '08 time frame, do you recall generally believing that there was a general consensus about reaching agreement on the parking deal?
A. Yes.
Q. And the parking deal that's being referred to here is the sixth amendment. You weren't continuing to negotiate the Chili's parking agreement were you?
A. That's correct. Yes. This was only—this—we were not talking about the Chili's agreement at all in here. We're talking about the sixth amendment to the parking agreement.
Q. Okay. So based upon the status of your discussions and negotiations with Mr. Courson as of around September 16th, 2008, you believe that Mr. Courson was at least somewhat justified in believing that you had reached a consensus on the parking agreement?
A. Yes. *See* Plaintiff Resp. App. 48; 163.

In summary, there is simply no summary judgment evidence creating any genuine issue of material fact as to whether Landlord-Center fraudulently intended to induce Tenant-Base to sign the Lease.[17]

[17] In Paragraph 57 of the Counterclaims, Tenant-Base also made allegations regarding a dispute between Hillwood and entities referred to as Radical Cuban and Radical Arena regarding profit distributions made by Landlord-Center to Radical Arena and a subsequent lawsuit filed by Hillwood against Radical Cuban and others and that "Center had knowledge of the Radical Cuban-Hillwood feud." Moreover, in Paragraph 58, Tenant-Base alleges that "Center knew that the feud

Landlord-Center is also entitled to summary judgment for another significant reason. Perhaps more significant than the lack of summary judgment evidence suggesting misrepresentations or an intent or purpose to induce, is the utter absence of ***any*** evidence that Tenant-Base suffered any injury as a result of Landlord-Center's alleged misrepresentations and non-disclosures (*i.e.*, direct damages) or that a lack of parking proximately caused damages or injury to Tenant-Base (*i.e.*, consequential damages). Specifically, the court cannot conclude that Landlord-Center's inability to promptly provide the signed Parking Agreement caused Tenant-Base any damages, ***as a lack of parking—by all accounts—was not the reason that the Restaurant performed so poorly***. Rather, the lackluster performance within the Victory Park Development (as least in 2008-2009), as well as the extremely miserable economy at the time that the Restaurant was opened, was (from all presented evidence) the cause for the Restaurant's demise.

First, it is undisputed that there was ample parking available in nearby Lot A—free for patrons of the Restaurant. There was significant summary judgment evidence offered showing

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between Hillwood and Radical Cuban would prevent the signing of the Hillwood Agreement." Courson testified that these allegations are, in fact, absolutely false. *See* Plaintiff MSJ App. 12. Interestingly, this theory was completely abandoned by Tenant-Base and not even addressed as a genuine issue of material fact in its Partial MSJ or in its Response to the Plaintiff's MSJ.

that many (if not all) of the driving-patrons who came to the Restaurant during Non-Event Days actually parked in Lot A. Even Aranza stated that he would park in Lot A when he came to visit the Restaurant. Moreover, there was no summary judgment evidence presented by Tenant-Base showing that there was ever an issue with parking at the Restaurant—in fact, all summary judgment evidence was to the contrary. First, Mr. Thompson, the general manager for the Restaurant, testified as follows with regard to Lot A:

> Q. You did observe customers parking there?
> A. I did observe some customers parking there.
> Q. Okay. So when you received inquiries when you were trying to market the restaurant about parking, you told them, "You can park in lot A?"
> A. I did. *See* Plaintiff MSJ App. 957-58.
> ***
> Q. How did you know to tell your customers to park in lot A when you had inquiries?
> A. Why?—Because I parked there.
> Q. Okay. You parked there every day that you worked, correct?
> A. No, not every day.
> Q. On nonevent days?
> A. On occasion.
> Q. Where else did you park?
> A. I parked in—
> Q. I'm going to hand you what's been marked as Exhibit 6—On Page 1, does this appear to be the photograph of the AAC and the surrounding parking areas?
> A. Yes.
> Q. And you recognize that lot A here is just directly across the alleyway from where the restaurant was?
> A. Yes, I knew where lot A was, but when I would park otherwise on nonevent days, I would park in this lot, and I think it's F lot.
> Q. Okay.
> A. Is that F?

Q. I believe so.
A. Okay.
Q. Just so we're clear, though, the lot A that you're referring to where you told customers they could park, is that the one that's outlined in yellow and denoted lot A and it's directly across the street, the alley from the restaurant, correct?
A. Correct. *See* Plaintiff MSJ App. 958.
***
Q. [Y]ou do recall there was a sign out there that said its two hour free parking?
A. There was, yeah. *See* Plaintiff MSJ App. 959.
***
Q. Do you know where else, if any, of the Chili's customers parked on nonevent dates other than to A?
A. No—I have no idea.
Q. You didn't personally observe any of your customers walking up from other parking areas?
A. I witnessed them walking through the plaza from time to time and, actually, a lot of our nonevent business came from the arena folks themselves. *See* Plaintiff MSJ App. 959.
***
Q. On nonevent days, did you ever observe lot A as being completely full?
A. No.
Q. There were always spaces available there on nonevent days?
A. I'm pretty certain. *See* Plaintiff MSJ App. 960-961.

Similarly, Aranza also testified that:

Q. Did you ever go try to do an analysis of whether your customers had any trouble finding the restaurant or parking for the restaurant?
A. No, sir. *See* Plaintiff MSJ App. 682.
***
Q. Did you ever park in Lot A during the time that Base operated the restaurant?
A. I parked in Lot A.
Q. Did you park there on non-event days?
A. I parked there on non-event days.
Q. Did you park there on event days as well?
A. No.
Q. On the nonevent dates that you parked there, do

you recall that lot was a free lot for the first two hours?
A. I recall I received a ticket. You punch a button, you get a ticket, and you park.
Q. But did you recall though you get the ticket, it's a free exit if you exit within 2 hours?
A. Yes. *See* Plaintiff MSJ App. 694-95.
***
Q. About how many times did you park in Lot A during nonevent dates during the time that the restaurant was opened and in operation?
A. Maybe once a week. *See* Plaintiff MSJ App. 695.
***
Q. During the time that the restaurant was opened, did you ever have any discussion [with] any of the managers at the restaurant about where the tenants—the patrons were parking or whether there was any confusion about where they could or should park on nonevent days?
A. I spoke to the managers a lot about what they knew where our guests came from, and this was particularly at lunch.
Q. What did they tell you?
A. They told us they came from the surrounding buildings or apartments. What I could gather is they walked there.
Q. Okay. That's what you expected when you put in the restaurant that you would gather lunchtime traffic from people who were in the neighborhood?
A. I expected to get some walk-ins, yes.
Q. At any time did any manager of the restaurant ever raise the issue with there being any problems with patrons not knowing where to park on nonevent dates or have any trouble getting to the restaurant due to parking?
A. I can't recall a conversation with the manager.
Q. What about any other employee of the restaurant.
A. I can't recall a conversation with them. See Plaintiff MSJ App. 695.
***
Q. Mr. Aranza, as far as you know sitting here today, there was ample parking for the Chili's Restaurant customers parking during nonevent dates?
A. I can't say that.
Q. You don't know one way or the other?

A. You are correct.
Q. Any you never investigated it?
A. You're correct. *See* MSJ App. 695.

There was also significant summary judgment evidence regarding the lackluster development of the Victory Park area and its inability (at least in 2008-2009) to live up to its once lofty expectations, as well as summary judgment evidence that the poor economy contributed to the anemic performance of the Restaurant. First, Craver testified about the struggles of Victory Park to retain tenants. Specifically, Craver identified at least six (6) restaurant/food and beverage tenants (N9ne, Nove, La Condesa, the Boardroom, Paciugo, and a coffee shop) and eight (8) retail tenants that vacated Victory Park in or around the 2008 and 2009 time period. *See* Plaintiff Resp. App. 52-55. Second, by letters dated April 6, 2009 and April 23, 2009 to various contractors who were demanding payment for work done on the construction of the Restaurant, Aranza stated as follows:

> Base Holdings, LLC simply cannot pay the balance due to [the contractor], or others, for this project due to the fact that the project was significantly over budget and business since opening the restaurant has been extremely disappointing. ***As you might know, the restaurant business, and in particular the restaurant business around the American Airlines Center has been seriously affected by the economy***. *See* Plaintiff MSJ App. 716-717, 863-866 (emphasis added).

Similarly, by e-mail to representatives of its lenders, dated June 4, 2009, Tenant-Base stated, in part, as follows:

> I appreciate you working with us on this. ***As Gilbert explained, the development we expected in the area surrounding the American Airlines Center did not happen and, since day one, the Chili's has lost money on non-event days.*** Gilbert's affiliated company subsidized the operations there while we marketed and advertised, but it is now clear this restaurant will not be profitable.
>
> Gilbert has been in close touch with both Brinker and the landlord, Center Operating Co. Brinker has no interest in operating the Restaurant. Gilbert is currently working with Center Operating Co. to find a solution, but we cannot continue to operate the restaurant . . . . *See* Plaintiff MSJ App. 856, 885, 898(emphasis added).

Moreover, Aranza also testified:

> Q. You reiterated or you touched on this a little earlier. I want to go back. Why do you believe the restaurant did not achieve the level of sales that you had projected?
> A. Well, you can see I clearly didn't get the terms [sic-should be "turns"] I projected.
> Q. Why is it that you believe you didn't get the turns you projected?
> A. I know it wasn't because of our quality of ops. The Brinker folks were in that restaurant continuously and always reported back positive things about our unit. I can't tell you.
> Q. Well, let me refresh your recollection is what you started to talk about earlier, you talked about office buildings not going in?
> A. The office buildings—
> Q. The Victory development?
> A. The office buildings weren't leased or occupied when we thought they were going to be occupied.
> Q. What office buildings were you referring to?
> A. The ones right there in the plaza on each side.
> Q. It was primarily the Victory Park neighborhood that you were relying upon to drive, for example, those lunch sales you projected?
> A. We thought we were going to get more traffic from office buildings, even on the other side of town. There was not a name-brand full-service

casual restaurant until you got to Knox Street, the Chili's on Knox street, so we thought we would get a lot more people driving over.

Q. You just didn't get that traffic?

A. Don't know why we didn't get it, but didn't get it.

Q. What else about Victory had you thought would occur that didn't occur other than the office building? Obviously, that was significant.

A. Several restaurants closed before we opened.

Q. Why did they close?

A. Don't know

Q. Do you think it was because of the same problems you encountered later, you just didn't get the traffic down there?

A. May have been.

Q. Did you do any research into how Victory Park was doing at the time you had made these projections before going forward?

A. I went to Victory Park a few times during the day and at night, and didn't sense what was happening.

Q. Is it correct to say that Victory was kind of on a downward spiral at the time you started building the restaurant?

A. I didn't see it that way then.

Q. But in hindsight is that what occurred?

A. It certainly has occurred since.

Q. Since you opened the restaurant?

A. Yes.

Q. You mentioned several restaurants had moved out of Victory. Did you say before you opened the restaurant?

A. I don't remember when they closed down. I was disappointed to see the restaurant directly across from the Chili's closed, and the restaurant on the same side a few doors down.

Q. What were the names of those restaurants?

A. I don't remember. Nine, and I don't remember the two restaurants.

Q. Do you know if Nine closed down before you opened?

A. I don't remember. *See* Plaintiff MSJ App. 703-704.

***

Q. Victory didn't drive the traffic as you'd hoped; fair to say?

A. I don't know what didn't drive the traffic as

I hoped.

Q. But Victory certainly didn't?
A. It did not help that those restaurants closed. *See* Plaintiff MSJ App. 704.
***
Q. You weren't going to get close [to Mr. Aranza's sale projections], were you?
A. I don't think we're going to get close, but we didn't have the buildings occupied when we thought they were going to be occupied. The buildings in front of the plaza were supposed to be occupied earlier than they actually were. We had other restaurants open in the area that were going to be a magnet. There were reasons why we were — why we could have been projecting 3 million that we didn't get. *See* Plaintiff MSJ App. 701.
***
Q. All right. The questions I was asking were just comparing net sales to your net sales projections. You weren't going to get close, were you?
A. We weren't going to hit the projections.
Q. Those projections turned out to be materially overstated?
A. I don't know if "overstated" is the correct word. I didn't do as good a job there as I did on almost every one of my other restaurant projections.
Q. And, again, you were solely responsible for making the projections, the actual numbers we looked at earlier; correct?
A. Yes. *See* Plaintiff MSJ App. 701.

In summary, there is no evidence in the record that the failure of the Restaurant had anything to do with a lack of parking. Rather various other factors, including the dismal economy and the disappointingly slow development of Victory Park, were the obvious contributing factors. Tenant-Base is attempting to shift the loss of its entire investment in the Restaurant to Landlord-Center. The summary judgment evidence and law do not support this, particularly where the reasons that caused the

Restaurant to ultimately fail were risks that Tenant-Base accepted knowingly and that occurred through no fault of Landlord-Center. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997). There are no facts or law presented that would allow Tenant-Base to transform Landlord-Center into an insurer of Tenant-Base's investment in the Restaurant. *Id*. In sum, there is no genuine issue of material fact suggesting that Tenant-Base may have suffered damages as a result of Landlord-Center's actions and Tenant-Base's fraud claims fail as a matter of law.

2. String Along Fraud

Tenant-Base has also asserted a separate string-along fraud claim. Landlord-Center has first argued that "string along fraud" does not exist under Texas law. This does not appear to be accurate. In fact, string-along fraud has been held to be an ongoing course of fraud that may begin before a contract is executed or can start after the contract is entered into and continues during the course of the contract's performance. For example, in *Southwell-Gray v. Jones*, No. Civ. 300CIV1539-H, 2001 WL 493165, at *3-5 (N.D. Tex. May 4, 2001), the district court granted summary judgment for plaintiff on fraud claims based on defendants' continuing misrepresentations—both before and after the parties entered into a loan agreement—that defendants would repay a loan, even though they had no intent to do so. The court

recognized that the fraud claim for inducing continued performance was distinct from other types of claims, explaining that "[t]his is not merely a case of failure to perform the contract, but one in which the evidence indicates Defendants had no intention of doing so" based on "pre-Agreement representations and . . . repeated representations made during and after the term of the Agreement, regarding the status of Plaintiff's loan principal and Defendants' intention to return it." *Southwell-Gray v. Jones*, No. Civ. 300CIV1539-H, 2001 WL 493165, at *5 (N.D. Tex. May 4, 2001).

Similarly, in *Kajima Int'l, Inc. v. Formosa Plastics Corp., USA*, 15 S.W.3d 289, 293 (Tex. App.—Corpus Christi 2000, pet. denied), a defendant plant owner was liable for fraudulently inducing a contractor's continued performance under a construction contract. In *Kajima*, the court rejected defendant's argument that "by allowing recovery for fraud after execution of the contracts, every case in which breach of contract is alleged and a contracting party has asked another party for continued performance will require a fraud submission." *Id.* Rather, the court expressly recognized fraud induced after a contract is executed, stating, "[w]e can find no opinion precluding recovery for fraud because the fraud occurred after execution of a contract, and we decline to do so here." *Id.*

Other Texas federal and state courts, including the Fifth

Circuit, have seemingly recognized string-along or ongoing fraud to induce continued contractual performance as a valid cause of action that is separate and distinct from a breach of contract claim.[18] All of the cases cited recognize that such fraud claims are separate and apart from other types of claims, including claims for breach of contract. That is because the legal duty not to fraudulently procure performance under a contract "is separate and independent from the duties established by the contract itself." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46-47 (Tex. 1998).

Despite the foregoing, here, the court does not find, based on the summary judgment evidence, that there is any genuine issue of material fact suggesting Landlord-Center perpetrated any type

[18] *See, e.g., GWTP Inv., L.P. v. SES Americom, Inc.*, 497 F.3d 478, 483 (5th Cir. 2007) (reversing district court's judgment that plaintiff's fraud claim "was just a repackaged contract claim," holding that defendant's misrepresentations made after the parties entered into an unenforceable oral agreement were actionable in fraud); *Nat'l Ctr. for Policy Analysis v. Fiscal Assocs., Inc.*, No. CIV. A. 3:97CV2660L, 2002 WL 433038, at *5-6 (N.D. Tex. Mar. 15, 2002) (recognizing fraud claim based on defendants' post-contract promises of performance); *Bray Int'l, Inc. v. Computer Assocs. Int'l, Inc.*, No. CIV H-02-0098, 2005 WL 3371875, at *6 (S.D. Tex. Dec. 12, 2005) (recognizing validity under Texas law of string-along fraud where defendant failed to disclose defective condition of software to induce plaintiff to install and use the newest software version and thus to remain defendant's customer); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 586-87 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (affirming fraud verdict where plaintiff supplier was induced to manufacture and deliver wallboard to nonpaying defendant distributor based on defendant's non-disclosure of its true financial condition and organizational structure); *Dimon v. Trendmaker, Inc.*, No. 14-96-01081-CV, 1998 WL 19861, at *8-9 (Tex. App.—Houston [14th Dist.] Jan. 22, 1998, no writ) (not designated for publication) (reversing summary judgment on fraud claim based on years of post-contract misrepresentations that induced continued performance).

of string along fraud against Tenant-Base. In addition to the same misrepresentations that Tenant-Base argues for its other fraud claims, Tenant-Base also cites to statements that Landlord-Center made after the Lease was signed in which Landlord-Center (through either Courson or Skenderian) assured and promised Tenant-Base that the Parking Agreement would be signed. As stated above, the summary judgment evidence was utterly lacking of any hint that Landlord-Center ***fraudulently*** misrepresented or ***fraudulently*** failed to disclose, either before or after the Lease, the status of the Parking Agreement. Moreover, the court cannot find that there is a genuine issue of fact regarding whether Tenant-Base has suffered any direct or consequential damages as a result of Landlord-Center's alleged string along fraud. Accordingly, Tenant-Base's claim for string along fraud fails as a matter of law.

B. Negligent Misrepresentation Claim

The elements of the tort of negligent misrepresentation under Texas law are: (1) a defendant provided information in the course of his business, or in a transaction in which defendant had a pecuniary interest; (2) the information supplied was false; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; (4) the plaintiff justifiably relied on the information; and (5) the plaintiff

suffered damages proximately caused by the reliance. *Larsen v. Carlene Langford & Assocs., Inc.*, 41 S.W.3d 245, 249-50 (Tex. App.-Waco 2001, pet. denied).[19] Tenant-Base must show justifiable and reasonable reliance on the representations Landlord-Center made regarding the Parking Agreement. *See Ortiz v. Collins,* 203 at 423 (justifiable and reasonable reliance is a necessary element of a claim for fraudulent misrepresentation); *Larsen*, 41 S.W.3d at 249-50 (justifiable reliance is a necessary element of a claim for negligent misrepresentation); *Solano v. Landamerica Commonwealth Title of Fort Worth, Inc.*, No. 2-07-152-CV, 2008 WL 5115294, at *9-10 (Tex. App.-Fort Worth Dec. 4, 2008, no pet.) (affirming summary judgment where no evidence of detrimental reliance). In the case of negligent misrepresentation: (a) the difference between the value of what the plaintiff received in the transaction and its purchase price or other value given for it; and (b) the pecuniary loss suffered by a plaintiff, in reliance on the defendant's actions, are sufficient to sustain a claim. *Sloane*, 825 S.W.2d at 442-43 (Tex. 1991); RESTATEMENT (SECOND) OF TORTS § 552B (2011).

In its negligent misrepresentation claim, Tenant-Base

[19] The second prong of negligent misrepresentation has sometimes been differently phrased as "the defendant supplie[d] false information for the guidance of others in their business," and the fourth and fifth prongs have sometimes been differently phrased as "the plaintiff suffer[ed] pecuniary loss by justifiably relying on the representation." *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

asserts damages based upon two representations: (1) Landlord-Center stating that the Parking Agreement was signed; and (2) Landlord-Center stating that the PD would not need to be amended. Specifically, Tenant-Base refers to an email dated June 3, 2008 that Skenderian sent to Allen, as a representative of Tenant-Base, that "[o]nce I receive the signed lease, I will obtain the signatures on the various attachments, compile the exhibits and send out a complete lease package." Tenant-Base equates this to Landlord-Center saying that the Parking Agreement was, in fact, executed by Hillwood.

First, as to Skenderian's statement, Craver specifically testified that:

> Q. From the time period of April 14th, 2008 that we see in Exhibit 145, to June 2nd or 3rd, 2008, do you recall having any additional communications or negotiations with Mr. Courson regarding the parking agreement for the Chili's restaurant?
> A. I do not.
> Q. As of approximately June 2nd or 3rd 2008, did you continue to believe that you had reached agreement on all material terms of the parking agreement for the Chili's restaurant with Mr. Courson that's reflected in Exhibit 145 that we looked at previously?
> A. Yes. *See* Defendant Resp. App. 174.
> ***
> Q. And during that time, is it correct that you really didn't have any additional negotiations regarding the Chili's parking agreement because, as you said previously, that had—those material terms had previously agreed upon?
> A. Yes.
> Q. That was—that agreement was kind of just sitting to the side, already agreed upon, but it just hadn't been executed?

A. That's correct. *See* Plaintiff Resp. App. 47.

Thus, the unrefuted summary judgment evidence shows that Landlord-Center had, at least, a reasonable and justifiable belief that it had finalized the Parking Agreement with Hillwood at the time the Lease was executed. Skenderian's statement to Tenant-Base indicated that he would ***obtain*** the signatures on the various attachments, but this is not the same thing as saying the Parking Agreement was signed. A reasonable fact finder cannot interpret there to have been a false fact communicated to Tenant-Base as to whether Hillwood had signed the Parking Agreement. Moreover, there is unrefuted summary judgment evidence reflecting that Landlord-Center had a reasonable belief that the material terms of the Parking Agreement had been agreed to and finalized with Hillwood. There is no summary judgment evidence from which a reasonable fact finder could infer a lack of reasonable care in suggesting a Parking Agreement would be forthcoming.

As to the PD being amended, there is no dispute that the PD ultimately had to be amended, so in fact, Landlord-Center's statement to Tenant-Base was false in this regard. Thus, the court must determine whether or not there is a genuine issue of material fact as to whether Landlord-Center was reasonable in its belief that the PD did not need to be amended. First, Craver testified that the determination of whether the planned development would need to be amended for the Restaurant was "very

complicated" and that he did not think that the "average person would know that" or even that the "average zoning consultant" would know because "it's not apparent from our zoning." *See* Plaintiff Resp. App. 60-61.

Second, as to the initial analysis that Landlord-Center took with regard to the PD amendment, Skenderian testified that "based on past practices and our understanding of the planned development, we believed no amendment to the planned development was required at that time." *See* Defendant Resp. App. 157. Although Landlord-Center was ultimately wrong, and the PD had to be amended, Skenderian testified that "ceratin parts of our analysis were generally accepted" but that the "city had a different interpretation" with regard to whether an amendment ultimately needed to be made. *Id.* Putting together Skenderian's and Craver's testimony, the court concludes that no genuine dispute has been shown as to whether Landlord-Center exercised reasonable care with regard to its communications to Tenant-Base on whether the PD needed to be amended. Landlord-Center clearly took the initial step of analyzing whether the PD needed to be amended, but, undoubtedly, because such process is complicated and ultimately depends on the decision making of a third party (*i.e.*, the city), the court does not think there is any fact issue created as to whether Landlord-Center was negligent in representing to Tenant-Base that an amendment to the PD was

unnecessary.

Finally, the court also concludes that there is not a genuine issue of material fact as to whether Tenant-Base's alleged damages could have been proximately caused by Landlord-Center's statements about both the Parking Agreement and the PD amendment. Specifically, Tenant-Base has asserted damages against Landlord-Center for its construction costs of approximately $3,000,000, as well as the lost profits it expected to receive. *See* Counterclaims, paragraph 131. First, lost profits are not available to Tenant-Base as damages for a negligent misrepresentation claim. *See Sloane*, 825 at 442-43; *see also Sterling Chemicals, Inc. v. Texaco, Inc.*, 259 S.W.3d 793, 797 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (finding that loss profits are not recoverable for a negligent misrepresentation claim). Moreover, any "benefit of the bargain" or "expectancy" damages, which are the amounts necessary to put the plaintiff in as good of position as it would have been had the contract been performed, are also not recoverable under a negligent misrepresentation claim. *See Reed v. Carecentric National, LLC, et al. (In re Soporex, Inc.)*, 446 B.R. 750, 763-764 (Bankr. N.D. Tex. Mar. 7, 2011). This is known as the "economic loss rule," which provides that a plaintiff may not bring a negligent mispresentation claim unless the plaintiff establishes an injury that is distinct, separate, and independent

from the economic losses recoverable on a breach of contract claim. *See Sterling Chemicals*, 259 S.W.3d at 797. Here, all of the damages that Tenant-Base asserts under its negligent misrepresentation claim are for an economic loss or for benefit of the bargain damages to the subject matter of the Lease, and Aranza admitted as much in his deposition. Specifically, Aranza testified that:

> Q: Well, we can break it down. Negligent misrepresentation, as you see in the Counterclaim, involves the provision of false information. What false information is Base contending or does it believe supports its claims for negligent misrepresentation?
> A. Well, certainly the issues having to deal with the parking agreement, and the whole issue dealing with obtaining building permits and planned development and parking issues that surrounded the issuance of those building permits.
> Q. Can you give us facts, Mr. Aranza? Who said what and when?
> A. As I told you earlier, it is all the minutes, the weekly progress minutes who said what, when.
> Q. What specifically are you claiming is false information that gives rise to this claim for which you are seeking damages?
> A. The false information was repeatedly parking will be dealt with tomorrow. Tomorrow, tomorrow, or next week, next week.
> Q. Is there anything else you can tell us?
> A. No, sir.
> Q. How did providing such false information cause Base injury?
> A. I think I've answered that in conjunction with 1 and 2 also.
> Q. And as it relates to damages for negligent mispresentation claim, are those damages the same dealing with the subject matter of the lease that we've talked about?
> A. Yes, sir.
> Q. And what amount of damages are those? Are those

> the same amounts, for example the $3.3 million that you're claiming for breach of contract action?
> A. It's all the amount of damages. We're claiming both the amount I expended and the amount for lost profits.
> Q. So that's the 3.3 million that you're claiming for breach of the lease, plus this unspecified amount of lost profits you believe may be up to 10 million.
> A. Correct.
> Q. And those are damages arising out of the subject matter of the lease. Correct?
> A. Correct. *See* Plaintiff MSJ App. 689-90.

Thus, having admitted that the remainder of Tenant-Base's damages asserted under its negligent misrepresentation claim arise under the Lease itself and are "benefit of the bargain" damages, the court concludes that Tenant-Base has not shown any basis for recoverable damages, as a matter of law, and, thus, summary judgment should be granted in favor of Landlord-Center on the negligent misrepresentation claim.

C. Breach of Contract

The elements of a breach of contract claim are: (a) the existence of a valid, enforceable contract; (b) the plaintiff is a proper party to sue for the breach; (c) the non-breaching party performed or tendered performance; (d) the defendant breached the contract; and (e) the defendant's breach caused the damages sought. *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 739 (Tex. App.—Fort Worth 2008, pet. dism'd). Tenant-Base alleges six separate breaches on the part of

Landlord-Center in its Counterclaims: (1) failing to provide quiet enjoyment of the premises; (2) failing to fully resolve the parking issues; (3) failing to provide the Hillwood Parking Agreement (4) refusing to allow Tenant-Base to advertise and pass out handbills and coupons inside the Arena, even though the Lease allows the same; (5) impeding the access of customers to the Chili's Restaurant by barricading the entry way located immediately next to the Restaurant during the Circus; and (6) charging rent before the rental commenced on December 6, 2008. The first alleged breach has already been addressed in the MD Order, which specifically dismissed any claims for breaches based upon Landlord-Center's failure to provide quiet enjoyment of the premises. The remaining breaches are discussed in detail below.

1. The Closing of the South Entrance and Preventing Disbursement of Marketing Materials

As to the next two alleged breaches by Landlord-Center (*i.e.*, refusing to allow Tenant-Base to hand out flyers and coupons inside the Arena and impending access of customers to the Restaurant by closing the south entrance of the Arena during the Circus), the court observes that such actions were actually permitted under the terms of the Lease. The Rules and Regulations regarding the Lease are contained in Exhibit "B" to the Lease. Section 6 of Rules and Regulations, entitled "Marketing and Advertising" provides that "Tenant is strictly

prohibited from any type of marketing or advertising on property owned by Landlord without Landlord's written approval, which approval may be withheld in Landlord's sole discretion. *See* MSJ App. 51. It is undisputed that Tenant-Base had no such written approval and Landlord-Center only instructed Tenant-Base to refrain from marketing inside the Arena after it received a complaint from someone at the Circus. *See* Defendant Resp. App. 162. Thus, Landlord-Center could not have breached the Lease when it requested Tenant-Base to refrain from passing out marketing materials at the Circus.

Section 4 of the Rules and Regulations entitled "Common Areas," provided in part that "Landlord reserves the right to control and operate the public portions of the Center and the public facilities, as well as facilities furnished for the common use of the tenants, in such manner as Landlord, in its reasonable judgment, deems best for the benefit of the tenants generally." *See* MSJ App. 50. The Arena has multiple entrances on all sides and since the Arena opened, Landlord-Center from time to time has closed some entrances during particular events held at the Arena. *See* MSJ App. 1105-1106. These decisions are apparently made, on a case-by-case basis, for logistical reasons that include, among other things, whether such events are anticipated to have lower attendance and/or whether an event requires access to the interior space adjacent to an entrance for the staging of

equipment. *Id.* at 1106. For example, during the one-year period from September 1, 2008 through August 31, 2009, the main South entrances to the Arena were closed on approximately 27 dates for events. *Id.* These closures, however, did not include the separate outside entrance to the Restaurant, which entrance was located near the southwest corner of the Arena. *Id.* The Circus has been held at the Arena every summer since 2001, and the south entrances have been closed at various times over the years. *Id.* It was within Landlord-Center's decision making authority to decide whether or not it chose to keep the South entrance open and, since there is clear evidence that this is not the first time such a closure has happened, the court cannot discern any genuine issue of material fact as to whether a breach occurred due to such closures.[20]

2. Lack of Parking Agreement

Next, the court will turn to whether Landlord-Center's failure to provide the Parking Agreement constituted a breach of the Lease. First, it is not disputed that the Landlord-Center had an obligation to provide for parking for Chili's customers in Parking Lot E, pursuant to a referenced agreement that would be between Landlord-Center and Hillwood (the latter being the owner of Lot E). But, as a matter of contract interpretation, the

[20] Moreover, Tenant-Base did not present any summary judgment evidence showing that such closures were prompted by any type of ill motive towards Tenant-Base.

court does believe that Landlord-Center's failure to promptly provide the Parking Agreement (for several months; the Parking Agreement was eventually signed September 1, 2009) was a ***material*** breach of the Lease. However, assuming it was not a material breach, Tenant-Base's recovery on such breach would be contingent upon whether ***it,*** in fact, performed its obligations under the Lease, which included paying rent.

It is undisputed that Tenant-Base never paid a month of rent under the Lease. Tenant-Base, alleges, however, that it was excused from performing due to Landlord-Center's failure to provide the Parking Agreement. It is a "fundamental principle of contract law that a material breach by one contracting party excuses performance by the other party, and an immaterial breach does not." *Coastal Ref. & Mktg., Inc. v. U.S. Fid. & Guar. Co.*, 218 S.W.3d 279, 294 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). In *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994), the Texas Supreme Court stated that "[i]n determining the materiality of a breach, courts will consider, among other things, the extent to which the non-breaching party will be deprived of the benefit that it could have reasonably anticipated from full performance."[21] In assessing materiality

[21] *Hernandez* also provided that the court should consider other factors when determining materiality of a breach including: (1) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (2) the extent to which the party failing to perform or to offer to perform will

"the less the non-breaching is deprived of the expected benefit, the less the material breach." *Id.*

Again, as set above, the court cannot conclude that Landlord-Center's failure to provide the Parking Agreement was a ***material*** breach of the Lease. And this, likewise, means that Tenant-Base's failure to pay rent is not excused. The court will not repeat itself in citing the significant, lengthy and unequivocal testimony from Craver, Courson, Aranza, and Mr. Thompson regarding how parking was not a problem for patrons visiting the Restaurant. Rather, their testimony was consistent and unequivocal that the lack of patrons (having nothing to do with parking) caused the Restaurant's problems. Without a doubt, at the time Landlord-Center and Tenant-Base signed the Lease, it was certainly agreed that parking was necessary for the Restaurant (thereby necessitating the need for a Parking Agreement with Hillwood). Was there a breach by Landlord-Center to the extent it did not provide Parking Lot E to Tenant-Base? Yes. But, with regard to the issue of materiality, the undisputed summary judgment evidence shows that, subsequent to the Restaurant opening, patrons (including Aranza himself),

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suffer forfeiture; (3) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (4) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Id.* at 693, n.2.

always had a place to park. In fact, by all accounts, patrons almost always parked in the much-closer Lot A. Lot A was free to the public for two hours during Non-Event Days. In fact, Lot E (for which Tenant-Base bargained) was hundreds of feet away from the Restaurant. Tenant-Base never once relayed to Landlord-Center, within the roughly 10 month period the Restaurant was open, that it had any parking concerns.

A similar situation occurred in the case of *Earl Hayes Rents Cars& Trucks v. City of Houston*, 557 S.W.2d 316 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). In *Earl Hayes*, a parking facilities operator entered into a contract with the City of Houston whereby the operator had the right to operate parking facilities at the Houston Intercontinental Airport. *Id.* at 318. As compensation to the City, the operator agreed to pay the City a percentage of gross revenues or, alternatively, minimum annual guaranteed payments. *Id.* After the airport and parking facilities opened, the City was unable to make available to the operator the specified number of parking spaces and to furnish the operator with directional signs and office space as required by the contract. The operator expended its own funds to construct the office space and provide signs. *Id.* When the City failed to reimburse the operator for such expense, the operator withheld payments that it owed under the contract. *Id.* at 319-

320. The City then evicted the operator and operated the parking facilities for the balance of the term of the contract. *Id.* at 320. The operator sued the City for breach of contract and the City counterclaimed for breach of contract, with each party claiming that the other owed amounts under the contract. *Id.* The Court of Appeals held that the City did not materially breach the contract, stating as follows:

> There is evidence in the record from which the trial court could have concluded that the City's failure to furnish the required number of parking spaces, office facilities and signs was not of such a nature, under the circumstances, as to excuse Hayes' [plaintiff's] obligation to pay the required compensation. Not every breach of performance will excuse the other party from performance. Where the obligations imposed upon one party are independent of or subsidiary to the obligations imposed upon the other, a breach by one party may not constitute such a repudiation of the contract as will excuse the other party from continued performance. *Id.* at 320.
> ***
> The City's failure to perform its obligations under the contract did not render performance by HAYES [plaintiff] impossible, and HAYES [plaintiff] continued to operate the facilities under the contract. The trial court was justified in concluding that HAYES [plaintiff] had elected to continue the contract in effect and that the City's breach did not excuse HAYES' [plaintiff's] failure to perform. *Id.* at 321.

Similar to the court in *Hernandez*, the court interprets the Lease such that Tenant-Base was not excused from performing its obligations under the Lease, when it was clearly possible to continue operating despite the absence of the Parking Agreement. In sum, this court cannot conclude that the alleged breach of

which Tenant-Base complains was material, and that, thus, Tenant-Base's performance under the Lease was excused.

3. Rent

Finally, the court is confronted with the issue of whether Landlord-Center's decision to charge rent before the Restaurant actually opened was a breach of the Lease (Tenant-Base argues the "Chili's Opening Date" should be deemed to have been no sooner than December 6, 2008 and Landlord-Center argues that the "Chili's Opening Date" should be deemed to have occurred early in October 2008). The court concludes that there exists genuine issues of material fact as to when the Lease term actually commenced, and accordingly, the court does not grant summary judgment on this alleged breach. Specifically, Tenant-Base alleges that delays in opening the Restaurant were beyond its reasonable control. There seems to be disputed evidence regarding whether this was, in fact, the case (it appears that there may have been permitting issues, construction issues, financing issues, and even other issues at play). Additionally, as this issue is also subject to Landlord-Center's declaratory judgment relief set forth in its Complaint, the court believes it is necessary to hear full evidence on this at a trial.[22]

[22] The court should note that Tenant-Base, at one time, alleged that Landlord-Center's failure to provide the Parking Agreement delayed the opening of the Restaurant, specifically, because it impacted Landlord-Center's ability to procure the PD amendment. The court observes that there now seems to be no summary judgment evidence

D. Attorney's Fees

Since a small portion of Tenant-Base's breach of contract claim has survived summary judgment, and Tenant-Base, if successful, may be able to recover attorney's fees pursuant to Tex. Civ. Prac. & Rem. Code § 38.001, summary judgment is not appropriate as to Tenant-Base's attorney's fees claim. Thus, this claim will be decided at a future trial on Tenant-Base's remaining breach of contract claim.

CONCLUSION

Based on the foregoing:

A. The bankruptcy court denies, in full, Defendant's Partial MSJ.

B. The bankruptcy court grants Plaintiff's MSJ on all of Tenant-Base's live tort counterclaims (*i.e.,* all of Tenant-Base's fraud claims and its negligence misrepresentation claim).

C. The bankruptcy court grants Plaintiff's MSJ, in part, as to Tenant-Base's breach of contract claims. Specifically, Landlord-Center is entitled to summary judgment on the alleged breaches asserted by Tenant-Base that Landlord-Center: (i) failed to provide the Hillwood Parking Agreement and/or to fully

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suggesting that the absence the Parking Agreement impacted/delayed the procurement of the PD amendment. Not only is there no summary judgment suggesting this, but it appears that Tenant-Base no longer alleges this and it will be undisputed for purposes of the upcoming Trial. *See* MSJ App. 650-51, 690, 878; *See also* Plaintiff Resp. App. 51.

resolve parking issues (such breach(es) not being material and, thus, precluding any recovery by Tenant-Base due to its nonperformance of Tenant-Base's obligation to pay rent), (ii) refused to allow Tenant-Base to advertise and pass out handbills and coupons inside the Arena, and (iii) impeded the access of customers to the Restaurant by barricade.

D. The bankruptcy court denies Plaintiff's MSJ, in part, as to Tenant-Base's breach of contract claim alleging that Landlord-Center improperly charged rent before December 6, 2008. A trial on the merits is needed regarding when the "Chili's Opening Date" should be deemed to have occurred and, thus, when Landlord-Center should be properly allowed to accrue rent.

IT IS SO ORDERED.

END OF MEMORANDUM OPINION AND ORDER

ATTACHMENT 4

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ATTORNEYS FOR CENTER OPERATING COMPANY, L.P.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	**CASE NO. 09-34269-SGJ-11**
BASE HOLDINGS, LLC,	§	**CHAPTER 11**
	§	
DEBTOR.	§	
	§	
CENTER OPERATING COMPANY, L.P.	§	
	§	
PLAINTIFF,	§	
	§	
V.	§	**ADVERSARY NO. 09-03256-SGJ**
	§	
BASE HOLDINGS, LLC	§	
	§	
DEFENDANT.	§	

RECITAL AND STIPULATION

Plaintiff, Center Operating Company, L.P. ("Center"), and Defendant, Robert Yaquinto, Jr., Chapter 7 Trustee for Base Holdings, LLC (the "Trustee") hereby recite, and therefore, stipulate and agree as follows:

RECITAL

On July 3, 2012, the Court issued its Memorandum Opinion and Order Addressing Cross-Motions for Summary Judgment on Defendant's Counterclaims, Specifically: (A) Granting Plaintiff's Motion for Summary Judgment on all Counterclaims, Except One Breach of Contract

Claim; and (B) Denying Defendant's Motion for Partial Summary Judgment [Doc. No. 132] (the "Summary Judgment Ruling") pursuant to which the Court: (a) denied, in full, the Trustee's Partial Motion for Summary Judgment [Docket Nos. 84 and 88]; (b) granted Center's Motion for Summary Judgment [Docket Nos. 77 and 79] ("Center's MSJ") on all of the Trustee's tort counterclaims; (c) granted Center's MSJ on all but one of the Trustee's breach of contract claims (i.e., the breach of contract claim of the Trustee that Center improperly charged rent before December 6, 2008).

STIPULATIONS

1. The "Chili's Opening Date" under the Lease Agreement dated June 2, 2008, between Center and Base Holdings, LLC ("Base") is agreed to be December 8, 2008.

2. The Trustee has no damages arising from any alleged breach of the Lease Agreement on account of any efforts of Center to assert Chili's Opening Date earlier than December 8, 2008, because Base never paid rent under the Lease Agreement.

3. If the Summary Judgment Ruling is overturned on appeal, these stipulations are null and void.

AGREED AS TO FORM AND SUBSTANCE:

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ATTORNEYS FOR THE CHAPTER 7 TRUSTEE

ATTACHMENT 5

The following constitutes the ruling of the court and has the force and effect therein described.

United States Bankruptcy Judge

Signed February 19, 2013

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	**CASE NO. 09-34269-SGJ-11**
BASE HOLDINGS, LLC,	§	**CHAPTER 11**
	§	
DEBTOR.	§	
	§	
CENTER OPERATING COMPANY, L.P.	§	
	§	
PLAINTIFF,	§	
	§	
V.	§	**ADVERSARY NO. 09-03256-SGJ**
	§	
BASE HOLDINGS, LLC	§	
	§	
DEFENDANT.	§	

FINAL JUDGMENT

On this day, the Court considered the announcement of the parties in lieu of trial in this adversary proceeding. The parties advised they had reached a Stipulation regarding the

remaining contested factual issues which has been filed as Docket No. 161 (the "Stipulation"). In light of the Court's prior ruling on summary judgment as set forth in the motions, Memorandum Opinion and Order Addressing Cross-Motions for Summary Judgment on Defendant's Counterclaims, Specifically: (A) Granting Plaintiff's Motion for Summary Judgment on all Counterclaims, Except One Breach of Contract Claim; and (B) Denying Defendant's Motion for Partial Summary Judgment [Doc. No. 132], and the Stipulation, the Court finds this matter is ripe for entry of a final judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

A. The Chili's Operating Date under the Lease Agreement dated June 2, 2008, between Center Operating Company, L.P. and Base Holdings, LLC ("Base") is hereby declared to be December 6, 2008.

B. The Trustee shall take nothing on all counts of his counterclaim.

C. All other relief requested by any party is denied.

D. Each party shall bear their own costs and attorneys' fees in this matter.

 # # #END OF JUDGMENT# # #

APPROVED AS TO FORM:

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ATTORNEYS FOR THE CHAPTER 7 TRUSTEE

ATTACHMENT 6

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	**Case No. 09-34269-SGJ-7**
BASE HOLDINGS, LLC,	§	**Chapter 7**
	§	
Debtor.	§	
CENTER OPERATING COMPANY, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Adversary No. 09-03256-SGJ**
	§	
BASE HOLDINGS, LLC,	§	
	§	
Defendant.	§	

PROPOSED MEMORANDUM OPINION AND ORDER ADDRESSING CROSS-MOTIONS FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS

I. Introduction.

The above-referenced adversary proceeding (the "Adversary Proceeding") is, essentially, a landlord-tenant dispute that erupted within a bankruptcy case. The Plaintiff, Center

Operating Company, L.P. (the "Plaintiff" or "Landlord-Center"), is the landlord. Landlord-Center is the operator of the sports and special events complex near downtown Dallas, Texas that is known as American Airlines Center—the venue at which the Dallas Mavericks NBA basketball team and the Dallas Stars NHL hockey team each play (the "Arena"). The Arena anchors a larger development in Dallas known as Victory Park. The tenant in this landlord-tenant dispute is Base Holdings, LLC, which was a franchisee of the well-known restaurant corporation Brinker International, and was the operator of a Chili's Bar & Grill restaurant (the "Restaurant") at the southwest corner of the Arena. The Restaurant, unfortunately, had a short and unsuccessful life span. It operated for a mere nine months, starting in late 2008, before voluntarily seeking Chapter 11 bankruptcy relief, and then ultimately (and abruptly) closing. In fact, the tenant (the "Debtor" or "Tenant-Base" or "Defendant") moved to convert its Chapter 11 reorganization case to a Chapter 7 liquidation case, soon after the bankruptcy case and this Adversary Proceeding were filed; thus, the Chapter 7 Trustee, Robert Yaquinto, Jr. (the "Bankruptcy Trustee"), is now the party-defendant in this Adversary Proceeding and stands in the shoes of the tenant—although many of the pleadings still

refer to "Base Holdings, LLC"[1] as the Defendant.[2]

Soon after Tenant-Base filed its bankruptcy case (which was on July 6, 2009), the Landlord-Center commenced this Adversary Proceeding (on August 7, 2009), by filing a Complaint for Declaratory Judgment, which requested that the bankruptcy court declare the parties' rights under their June 2, 2008 Lease Agreement (herein so called). Specifically, the Complaint asserted that Tenant-Base had never paid any rent at all to Landlord-Center, and Landlord-Center sought a determination as to how the defined term "Chili's Opening Date" should be interpreted in the Lease Agreement, for purposes of calculating all rent due to Landlord-Center. The Complaint also asked for certain other declarations regarding the parties' rights, legal status, and potential liability to one another relating to the Lease Agreement—including, but not limited to, a determination that Landlord-Center had not materially breached the Lease Agreement and that any claims Tenant-Base might have for consequential or

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[1] Base Holdings, LLC was initially formed to develop a restaurant business (utilizing the Chili's concept, where possible) on ***military bases,*** and it even had contracts with the United States Navy and United States Army at one time. Apparently, any and all military contract rights and opportunities were transferred to a different entity, shortly before the bankruptcy filing. In any event, this explains the unusual name "Base Holdings, LLC."

[2] *See* Order Granting Trustee's Motion to Realign Parties, dated August 17, 2011. [DE # 89]

punitive damages were barred by the Lease Agreement. ***Landlord-Center also filed a proof of claim in the underlying bankruptcy case in the amount of $1,595,918.83, for various amounts allegedly due to it under the Lease Agreement***.[3] *See* Claim No. 7, in the Claims Register maintained in Bankruptcy Case No. 09-34269.[4] Note that Tenant-Base was still occupying its Restaurant-space in the Arena at the time that this Adversary Proceeding was commenced (thus, it still had all of its rights and remedies available to it, pursuant to Section 365 of the Bankruptcy Code).[5]

The Adversary Proceeding quickly grew more complicated. The

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[3] *See* Fed. R. Bankr. Pro. 3001-3002. The vast majority of this amount related to future rent that was alleged to be due under the 20-year Lease Agreement, as capped by section 502(b)(6) of the Bankruptcy Code, but approximately $298,000 of the claimed amount related to "unpaid pre-petition rent, construction and other charges."

[4] Tenant-Base did not file an objection to this proof of claim, *per se*. *See* Fed. R. Bankr. Pro. 3007(a) & (b). However, in its original Answer and Counterclaim (later described further), at paragraph 13, Tenant-Base stated, "Debtor admits that it has not paid Center the amounts Center has demanded for rent, employee parking, or $20,000 in additional expenses in connection with construction of the Restaurant. ***Debtor denies that these amounts are owed*** under the Lease and disputes Center's accounting" (emphasis added). Moreover, at paragraphs 43-47 of its Answer and Counterclaim, Tenant-Base states in various affirmative defenses, that it "***is not liable to Center*** because Center's breach of contract discharged Debtor's obligations," and because of "estoppel," "waiver," "Center's unclean hands," and "impossibility of performance" (emphasis added). [DE #5] These positions were carried over in the Second Amended Answer and Counterclaim of Tenant-Base that is its governing pleading. [DE #39]

[5] Such as the right to reject, assume, or assume and assign the Lease Agreement (with the latter two options requiring, among other things, a curing of defaults).

Debtor, Tenant-Base, vacated its space in the Arena less than a month after the Adversary Proceeding was filed, and thereafter filed an answer in this Adversary Proceeding that also asserted numerous ***counterclaims*** against Landlord-Center, including numerous torts (mostly fraud claims) and breach of contract. Tenant-Base also filed a ***separate*** adversary proceeding against Landlord-Center, asking the bankruptcy court to avoid Landlord-Center's statutory landlord lien that it was asserting (the "Lien Avoidance Adversary Proceeding"). A motion to consolidate the Lien Avoidance Adversary Proceeding with this Adversary Proceeding was filed by Landlord-Center, but the parties later reached an Agreed Judgment of Dismissal in the Lien Avoidance Adversary Proceeding. Additionally, insiders of Tenant-Base (specifically: its equity owner, Gilbert Aranza, and certain of his affiliates) filed a state court lawsuit against Landlord-Center, alleging the same type of claims as Tenant-Base alleged (as counterclaims) in this Adversary Proceeding. The bankruptcy court stayed this latter lawsuit, determining that insiders were essentially exercising control over claims that were property of the bankruptcy estate.

Many months then elapsed in the Adversary Proceeding. During these months, not only did Tenant-Base vacate the Restaurant space (which was followed by various legal skirmishes regarding personal property at the Restaurant), but, as

mentioned, a Bankruptcy Trustee was appointed for Tenant-Base. Then, a motion to dismiss counterclaims was heard and decided (on July 20, 2010)—with the bankruptcy court dismissing three of Tenant-Base's numerous counterclaims.[6] Additionally, a jury demand was made by Tenant-Base (which was objected to by Landlord-Center and stricken by the bankruptcy court, on August 18, 2010).[7]

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[6] The counterclaims that the bankruptcy court dismissed were the following: breach of warranty of quiet enjoyment; breach of warranty of suitability; and unjust enrichment. [DE #61]

[7] In ruling on the Debtor's jury demand, this court was guided by the Fifth Circuit decision in *In re Jensen,* 946 F.2d 369 (5th Cir. 1991), *abrogated on other grounds by In re Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In *Jensen*, the Fifth Circuit considered the question of whether a debtor effectively subjects his prepetition claims to the bankruptcy court's equitable power (and loses his right to a jury trial he might otherwise have) when he files a petition for bankruptcy. The Fifth Circuit concluded that a debtor does not. The Fifth Circuit elaborated that, in *Jensen*, as in the landmark *Granfinanciera* case, the debtors' claims (which were against third-party defendants who had not filed proofs of claim) did not "arise as part of the process of allowance and disallowance of claims." *Jensen*, 946 F.2d at 373; *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 58-59 (1989). Nor were the Jensens' claims "integral to the restructuring of debtor-creditor relations." *Jensen,* 946 F.2d at 374 (citing *Granfinanciera*). Rather they were essentially claims brought by the debtor-in-possession in a state court against non-creditor third parties to augment the bankruptcy estate (note that it was the defendants that had removed the action to bankruptcy court). The Fifth Circuit reconciled its holding with a similar but distinguishable case from the Seventh Circuit, *In re Hallahan,* 936 F.2d 1496 (7th Cir. 1991). In *Hallahan*, the debtor petitioned for bankruptcy while he was a defendant in a suit then pending against him in federal district court. The bankruptcy petition triggered the automatic stay, 11 U.S.C. § 362, and the plaintiff filed a proof of claim and complaint of dischargeability in the bankruptcy court. The court denied the debtor's request for a jury trial. The Seventh Circuit affirmed, deciding that a dischargeability proceeding is a type of equitable claim for which there is no jury right in the first place. The Fifth Circuit stated that it agreed with the ***result*** in *Hallahan,* but not the Seventh Circuit's ***reasoning*** with regard to ***why*** the debtor

In mid-2011, cross motions for summary judgment, responses, and supporting documentary evidence were filed—***solely dealing with Tenant-Base's (i.e., the estate's) various, remaining counterclaims against Landlord-Center.***[8] Landlord-Center moved for summary judgment on ***all*** of the remaining counterclaims asserted on behalf of the estate of Tenant-Base (*i.e.,* all of the counterclaims that had not been dismissed by the bankruptcy court on July 20, 2010). Tenant-Base moved for summary judgment on two of its counterclaims. The bankruptcy court took those cross-motions for summary judgment under advisement (in Fall of 2011)

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had no right to a jury trial. *Jensen*, 946 F.2d at 374. The Fifth Circuit stated that it believed the debtor in *Hallahan* was not entitled to a jury trial, not because the debtor had filed a petition in bankruptcy, but because the ***plaintiff in the action had submitted his claim against the debtor to the equitable jurisdiction of the bankruptcy court***. *Id.* The Fifth Circuit stated that filing a proof of claim denied ***both*** the plaintiff and the defendant, debtor, any right to jury trial that they otherwise might have had on that claim. *Id.*

In summary, this bankruptcy court believed that Tenant-Base had no jury trial right (under the holding of *Jensen*) since its counterclaims were ***against a plaintiff that had submitted its claims against the Debtor to the equitable jurisdiction of the bankruptcy court*** and ***because the overall dispute (claims and counterclaims) seemed to be part of the process of claims allowance and disallowance***.

[8] Specifically, the court refers to: (1) the Motion for Summary Judgment and Brief in Support [DE ## 77 & 78] (the "Plaintiff's MSJ"), filed by Landlord-Center; the Response thereto and Brief in Support [DE ## 90 & 91], filed by the Defendant, Tenant-Base; the Reply thereto [DE # 100] of the Plaintiff; (2) the Defendant's Motion for Partial Summary Judgment and Brief in Support [DE ## 84 & 85] (the "Defendant's Partial MSJ"); the Response thereto and Brief in Support of the Plaintiff [DE ## 94 & 95]; the Reply thereto [DE # 98] of the Defendant; and (3) all summary judgment evidence/appendices submitted with such pleadings [DE ## 79, 80, 86, 91 & 96].

after oral arguments.

After various procedural skirmishes which are described in detail in the bankruptcy court's Second Report and Recommendation to the District Court, dated December 5, 2014, the bankruptcy court eventually issued, on July 3, 2012, a Memorandum Opinion and Order Addressing Cross-Motions for Summary Judgment on Defendant's Counterclaims, Specifically: (A) Granting Plaintiff's Motion for Summary Judgment on All Counterclaims, Except One Breach of Contract Claim; and (B) Denying Defendant's Motion for Partial Summary Judgment (the "Bankruptcy Court July 3, 2012 Summary Judgment Ruling"). The Bankruptcy Court July 3, 2012 Summary Judgment Ruling purported to resolve all issues in the Adversary Proceeding ***except for one***: the bankruptcy court denied Plaintiff summary judgment on ***one*** breach of contract counterclaim of Tenant-Base, such counterclaim being that Plaintiff improperly charged rent before December 6, 2008. The bankruptcy court determined that there was a disputed fact issue regarding when the "Chili's Opening Date" should be deemed to have occurred and, thus, when Plaintiff should have been properly able to accrue rent; this meant that a trial would be necessary on that one issue. However, subsequently, on February 19, 2013, the parties entered into a Recital and Stipulation as to this one disputed fact issue, agreeing that the "Chili's Opening Date" should be deemed December 8, 2008 [DE #162] and Tenant-Base would have no

damages arising from any alleged breach on account of Plaintiff asserting an earlier opening date. Thus, nothing was left to be tried at the bankruptcy court.[9] The bankruptcy court then issued a final judgment on February 19, 2013 (the "February 19, 2013 Bankruptcy Court Final Judgment"). [DE #163][10]

The district court subsequently vacated the February 19, 2013 Bankruptcy Court Final Judgment and remanded disputes in this Adversary Proceeding to the bankruptcy court, in connection with Tenant-Base's appeal of the same, on March 5, 2014. [DE ## 181-182] In doing so, the District Court expressed concern that developments in the law, since *Stern v. Marshall*[11] was decided—specifically various decisions subsequent to the Bankruptcy Court July 3, 2012 Summary Judgment Ruling[12]–call into question the

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[9] The parties agreed that the Recital and Stipulation would be null and void if the Bankruptcy Court July 3, 2012 Summary Judgment Ruling was ultimately upset by a higher court on appeals. The court understands that the parties still agree to this Recital and Stipulation, at the current time, notwithstanding the District Court's vacation and remand on March 5, 2013, of the February 19, 2013 Bankruptcy Court Final Judgment.

[10] The February 19, 2013 Bankruptcy Court Final Judgment (which was drafted and submitted by the parties) declares December 6, 2008—not December 8, 2008—to be the agreed upon "Chili's Opening Date." In hindsight, the bankruptcy court presumes the Recital and Stipulation contains a typographical error since all other pleadings in the record have used December 6, 2008 as the relevant date. The parties have never mentioned this discrepancy.

[11] *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

[12] *Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313 (5th Cir. 2013); *BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.)*, 735 F.3d 279 (5th Cir. 2013). *See also Exec. Benefits Ins. Agency v. Arkinson (In re Bellingham Ins. Agency)*, 134 S. Ct. 2165

bankruptcy court's authority to have issued the Bankruptcy Court July 3, 2012 Summary Judgment Ruling and the February 19, 2013 Bankruptcy Court Final Judgment.

Against this backdrop, Tenant-Base filed a Second Motion to Withdraw the Reference on or about August 29, 2014 [DE # 192]. The bankruptcy court conducted a status conference concerning such motion on November 17, 2014, pursuant to 11 U.S.C. § 105(d). After conferring with counsel for the parties to this proceeding at the status conference, the bankruptcy court submitted a Second Report and Recommendation dated December 5, 2014, recommending that the District Court:

(a) immediately withdraw from the bankruptcy court the reference of the Adversary Proceeding;

(b) consider ***as proposals*** and review ***de novo, pursuant to 28 U.S.C. § 157(c)(1)***, six items that were attached thereto from the bankruptcy court[13];

(2014); *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (2014).

[13] Such items attached were: (i) Order Granting in Part and Denying in Part Center Operating Company, L.P.'s Motion to Dismiss Base Holdings, LLC's Second Amended Counterclaim Company, dated July 19, 2010 (the "Partial Dismissal Order"), dismissing for failure to state a claim, three of Tenant-Base's counterclaims [DE #61]; (ii) the transcript dated June 28, 2010 [DE #56], memorializing the bankruptcy court's bench ruling that undergirded the Partial Dismissal Order; (iii) the Bankruptcy Court's Summary Judgment Ruling, dated July 3, 2012 [DE #132], in which the bankruptcy court granted summary judgment in the Adversary Proceeding on all issues except for a declaratory judgment on what "Chili's Opening Date" meant and, thus, when

(c) render a Final Judgment, as contemplated in *Exec. Benefits*,[14] either adopting, rejecting or modifying the proposals of the bankruptcy court.

Below is the ***"Proposed Memorandum Opinion and Order on Cross Motions for Summary Judgment"*** that the bankruptcy court recommends that the District Court either adopt, reject, or modify, pursuant to 28 U.S.C. § 157(c)(1) and Federal Rule of Civil Procedure 56. The bankruptcy court is proposing that the District Court: (a) deny, in full, Defendant's Partial MSJ; (b) grant Plaintiff's MSJ on all of Tenant-Base's tort counterclaims; (c) grant Plaintiff's MSJ on all but one of Tenant-Base's breach of contract claims (*i.e.,* the one breach of contract claim of Tenant-Base that should survive is one alleging that Landlord-Center improperly charged rent before December 6, 2008); (d) accept the parties Recital and Stipulation dated February 19, 2013, on the one disputed fact as to the "Chili's Opening Date"

Landlord-Center's rent claims began to accrue; (iv) the Recital and Stipulation of the parties to certain facts—*i.e.,* stipulating as to what the "Chili's Opening Date" should be deemed to mean [DE # 162], filed February 19, 2013; (v) the Final Judgment, dated February 19, 2013, entered pursuant to the Bankruptcy Court Summary Judgment Ruling and the Recital and Stipulation [DE #163]; and (vi) a form of "***Proposed Memorandum Opinion and Order on Cross Motions for Summary Judgment***" (*i.e.,* this document) that, for sake of clarity, (1) updates both the title of the bankruptcy court's original July 3, 2012 Summary Judgment Ruling and the procedural background therein, and (2) incorporates the Recital and Stipulation of the parties as to the one fact issue that was unresolved at the time of the July 3, 2012 Summary Judgment Ruling.

[14] *Exec. Benefits*, 134 S. Ct. at 2165.

under the Lease Agreement (that such date was December 6, 2008), so that no trial on the merits is needed on the one otherwise-remaining breach of contract counterclaim of Tenant-Base, which was an assertion that Landlord-Center improperly charged rent before December 6, 2008—no rent shall then be deemed to have accrued before such date; and (e) enter Final Judgment that Tenant-Base take nothing on all counts on its counterclaim, denying all other relief, and ordering that each party shall bear its own costs and attorney's fees.

PROPOSED MEMORANDUM OPINION AND ORDER ADDRESSING CROSS-MOTIONS FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS

II. JURISDICTION AND COURT AUTHORITY.

Bankruptcy subject matter jurisdiction exists in this Adversary Proceeding, pursuant to 28 U.S.C. §§ 1334(b) and 157(a). Additionally, ***statutory*** "core" matters are involved in this Adversary Proceeding, pursuant to 28 U.S.C. § 157(b)(2)(B) and (C). This Adversary Proceeding, as explained above, essentially involves a landlord's proof of claim; requests for declarations by the landlord regarding its lease with the debtor; and counterclaims by the bankruptcy estate back against the landlord. These are squarely "core" matters, pursuant to 28 U.S.C. § 157(b)(2)(B) and (C). However, as alluded to above, 28 U.S.C. § 157(b)(2)(C) was recently declared unconstitutional by the Supreme Court, at least as it applied to the facts in *Stern*

v. Marshall. Therefore, in an abundance of caution, and pursuant to guidance from the Supreme Court in *Exec. Benefits*,[15] the bankruptcy court has heard matters in the Adversary Proceeding and presents as a proposal, pursuant to 28 U.S.C. § 157(c)(1), this ruling on the Plaintiff's MSJ and the Defendant's Partial MSJ.

III. PROCEDURAL POSTURE.

As referenced above, on August 7, 2009, Landlord-Center initiated this Adversary Proceeding, through the filing of its Complaint for Declaratory Judgment (the "Complaint") against Tenant-Base. The facts of this Adversary Proceeding revolve around Tenant-Base's failed Restaurant that was opened in late 2008. The disputes arise out of the Lease Agreement that was executed by Tenant-Base, as tenant, and Landlord-Center, as the landlord, on or about June 2, 2008 (the "Lease" or sometimes the "Lease Agreement"). In the Complaint, Landlord-Center seeks a declaratory judgment, requesting the court to declare Landlord-Center's and Tenant-Base's rights under the terms of the Lease.

On April 22, 2010, Tenant-Base filed its Second Amended Answer to the Complaint and Counterclaims (the "Counterclaims"), asserting various claims against Landlord-Center, including: (1) statutory fraud under the Texas Business & Commerce Code § 27.01(a); (2) statutory fraud under the Texas Business and

[15] *Exec. Benefits*, 134 S. Ct. at 2165.

Commerce Code § 27.01(a)(2); (3) common law fraud in the inducement by affirmative representation; (4) common law fraud in the inducement by non-disclosure; (5) common law fraud; (6) "string along fraud"; (7) negligent misrepresentation; (8) breach of contract regarding the Lease; (9) breach of warranty of quiet enjoyment; (10) breach of warranty of suitability; (11) unjust enrichment; and (12) attorney's fees. In an Order entered on July 20, 2010, the bankruptcy court dismissed three of Tenant-Base's twelve counterclaims: those for breach of warranty of quiet enjoyment; breach of warranty of suitability; and unjust enrichment (the "MD Order") [DE # 61]. Thus, all that remains of Tenant-Base's counterclaims are the various fraud claims, the negligent misrepresentation claim, the breach of Lease claims, and the attorney's fees claim.

A. The Tort Claims: Landlord-Center's Alleged Misrepresentations Regarding Parking.

As to Defendant's fraud and negligent misrepresentation claims, these claims revolve around certain statements made by Mr. Joe Skendarian ("Skendarian"), a representative for Landlord-Center, prior to the Lease being executed, in which Skendarian represented that, once he obtained a signed Lease from Tenant-Base, he would obtain the signatures on the various attachments, compile the exhibits (which ***importantly*** included a parking agreement for Lot E of the Arena (the "Parking Agreement")), and

send out a complete Lease package. Tenant-Base argues that the Parking Agreement was vital to the success of the Restaurant, and that the lack of a Parking Agreement ultimately caused the business to fail by September 2009, approximately 10 months after the Restaurant originally opened. Tenant-Base argues that Landlord-Center's failure to deliver the Parking Agreement caused it to lose its total investment in the Restaurant of $3,000,000, as well as the profits which it reasonably expected to receive over the life of the Lease.

B. The Breach of Contract Claims: Landlord-Center's Failure to Deliver Parking; Alleged Interference with Advertising; Access; and Premature Charging of Rent

As to Tenant-Base's breach of Lease claim, Tenant-Base not only argues that Landlord-Center materially breached the Lease by not providing the Parking Agreement, but also that Landlord-Center breached the Lease by: (1) refusing to allow Tenant-Base to advertise and pass out handbills and coupons inside the Arena during the circus and a Women of Faith event; (2) impeding the access of customers to the Restaurant by barricading an entry way located immediately next to the Restaurant during the circus; and (3) charging for rent prior to the Lease commencing, which Tenant-Base alleges was on December 6, 2008. Tenant-Base also asserts that, due to Landlord-Center's breach, Tenant-Base has lost its total investment in the Restaurant of approximately $3,000,000 and the profits which it reasonably expected to

receive over the life of the Lease.

For the reasons set forth below, the court holds that: (a) Tenant-Base should be denied summary judgment on its Counterclaims; (b) Landlord-Center should be granted summary judgment on all of Tenant-Base's tort counterclaims; and (c) Landlord-Center should be granted summary judgment on all but one of Tenant-Base's breach of contract claims (as hereinafter described). Due to genuine issues of disputed fact, a trial on the merits is needed on this one remaining breach-of-contract counterclaim, as well as on Landlord-Center's proof of claim and its requests for declaratory judgment.

IV. UNDISPUTED MATERIAL FACTS.

A. The Negotiation of the Lease and the Parking Agreement

1. The Lease that is the subject of this Adversary Proceeding was for more than 3,000 square feet of space located at the southwest corner of the Arena. *See* Plaintiff MSJ App. 23, 26. With regard to parking arrangements, Section 3a of Exhibit C to the Lease is germane and it provides, in part, as follows:

> During ***Non-Event Dates***, Landlord shall provide parking for Tenant's Customers ***in Parking Lot E*** near the Premises, pursuant to the Proposal Regarding COC Retail Parking Easement between Anland North Commercial, L.P. and Anland North II and Landlord attached hereto as Appendix "1" including spaces for Handicap Parking . . . . If parking Lot E becomes unavailable due to relocation by the owner of such lot, Landlord shall provide the same number and designation of spaces in a lot as close in proximity to the original designated spaces as reasonably practical.

See Plaintiff MSJ App. 54 (emphasis added). "Non-Event Dates" are defined in Section 1 of Exhibit C to the Lease and are "those dates when the arena portion of the Center is not open to the public or other large groups of people for sporting, entertainment, or other public events." *See* Plaintiff MSJ App. 53. "Event Dates" means those dates when the arena portion of the Center is open to the public or other large groups of people for sporting, entertainment, or other public events." *Id.* Section 3b of Exhibit C of the Lease provides that "[d]uring Event Dates, Landlord is ***not*** required to provide parking for Tenants' Customers." *See* Plaintiff MSJ App. 54 (emphasis added). At the time the parties executed the Lease, ***Appendix 1 [i.e., the Parking Agreement] was not attached to the Lease***. *See* Plaintiff MSJ App. 2.

2. The Lease and the specific provision referenced above were the product of an earlier letter of intent (the "Letter of Intent") signed by Gilbert Aranza ("Aranza"), on behalf of Aranza Services Corporation ("ASC"), and Skenderian, on behalf of Landlord-Center, on or about March 7, 2007, over a year prior to the actual Lease being executed.[16] Aranza (as well as Skenderian) can fairly be characterized as sophisticated, in that Aranza has more than 20 years of experience in the restaurant

[16] *See* Plaintiff MSJ App. 65-67. When the Lease was signed, Tenant-Base was ultimately substituted in for ASC as the "Tenant".

industry and practiced law for approximately 15 years prior to that. *See* Plaintiff MSJ App. 674-75. Aranza also owns and/or operates numerous restaurants and businesses including spaces at DFW Airport and Dallas Love Field Airport. *See* Plaintiff MSJ App. 674. Skenderian, who is a Vice President of Landlord-Center, served as the liaison between Tenant-Base and Landlord-Center regarding the negotiation of the Lease. *See* Defendant Resp. App. 114.

3. The Letter of Intent negotiated between Aranza and Skenderian set forth the proposed terms of a potential lease agreement between ASC and Center for approximately 4,200 square feet of space in the Arena for the establishment of a Chili's Bar and Grill Restaurant. *See* Plaintiff MSJ App. 65-67. The Letter of Intent importantly acknowledged that adequate parking spaces were necessary for the Restaurant to be successful. *Id.*

4. At the time the Letter of Intent was executed, Landlord-Center controlled, and still controls, the Platinum Garage that is near the northeast corner of the Arena, which contains approximately 2,000 parking spaces, and the underground garage that is commonly referred to as the Gold Garage, which lies beneath the plaza just south of the Arena; however, Hillwood Development Company and/or its affiliated entities (including Anland North Commercial, L.P. and Anland North II, L.P.) (collectively, "Hillwood") actually owned the various surface

parking lots located around the Arena, including Lot E, located on the northwest corner of the Arena (*i.e.,* the lot that Landlord-Center ultimately was obligated to make available for the Restaurant, pursuant to the Lease Agreement), and Lot A located on the southwest corner of the Arena (*i.e.,* the lot that was closest to the Restaurant). *See* Plaintiff MSJ App. 3, Plaintiff Resp. App. 39 & Defendant Resp. App. 86-89.

5. Shortly after the parties entered into the Letter of Intent, Craig Courson ("Courson"), who was and remains an Executive Vice President and Chief Financial Officer of Landlord-Center, began negotiating with Hillwood on the terms of a parking agreement that would provide parking spaces in Lot E for the Restaurant. *See* Plaintiff MSJ App. 4. Courson handled the majority of the negotiations and communications with Hillwood regarding the parking issues and dealt almost exclusively with Mike Craver ("Craver"), who was formerly Associate General Counsel at Hillwood.[17] *See* Plaintiff MSJ App. 4.

6. Courson and Craver engaged in negotiations and exchanged various emails and drafts of an agreement for parking in Lot E for the Restaurant during 2007 and early 2008. *See* Plaintiff MSJ App. 4-7, 74-112, 114-143. However, by the time Tenant-Base and Landlord-Center signed the Lease on June 2, 2008,

[17] Courson also received emails attaching drafts of a potential parking agreement from time to time from Clay Pulliam and Kathy Cannon, who were also working at Hillwood. *See* Plaintiff MSJ App. 4.

Hillwood and Landlord-Center had not yet signed the Parking Agreement that was referenced above in Section 3a of Exhibit C to the Lease. *See* Defendant Resp. App. 178.

B. Landlord-Center's Continued Negotiations with Hillwood Regarding the Parking Agreement

7. Although there was not a signed Parking Agreement by the time the Lease was executed, neither Craver nor anyone else at Hillwood ever communicated to Courson that Hillwood would not eventually sign the Parking Agreement for Lot E. *See* Plaintiff Resp. App. 47-48. In fact, Craver (who has moved out of state and no longer works in-house for Hillwood) even testified in a deposition that it was safe to say that, as of June 8, 2007, Hillwood and Landlord-Center had at least, a preliminary agreement regarding the Parking Agreement for the Restaurant. *See* Plaintiff Resp. App. 40. Moreover, as of late October 2007, Courson believed he had reached an agreement on all the material terms of the Parking Agreement with Hillwood regarding the provision of 50 spaces for Lot E. *See* Plaintiff MSJ App. 6-7, 136-144 & Plaintiff Resp. App. 42-43.

8. In March and April of 2008, Courson and representatives of Hillwood (along with counsel for Landlord-Center's lenders)[18] exchanged various emails and drafts of an agreement regarding the

[18] Landlord-Center was required to get formal lender-approval for certain transactions including signature of the Lease Agreement as well as entering into the Parking Agreement. *See* Plaintiff MSJ App. 9, 253-375.

formal easement document regarding parking for the Restaurant in Lot E, which agreement contained the same terms as what Courson and Craver had previously agreed upon in October 2007. *See* Plaintiff MSJ App. 9-10, 376-509.

9. Days after the Lease Agreement was signed, Craver then communicated to Courson for the first time that Hillwood's execution of the Parking Agreement for Lot E was tied to the parties executing a larger parking agreement between Landlord-Center and Hillwood referred to as the "Sixth Amendment." Plaintiff Resp. App. 46, 162.

10. Subsequent to this communication, Courson continued to make efforts to get the Parking Agreement finalized and signed. *See* Plaintiff MSJ App. 11-20, 510, 514-515, 517-563. Moreover, Craver even testified that, in his mind, none of the additional negotiations that took place after the Lease Agreement was signed had anything to do with the Parking Agreement, since those material terms had already been agreed upon. *See* Plaintiff Resp. App. 46-48, 163. Rather, the negotiations had mainly to do with the Sixth Amendment, and Craver appeared to focus his efforts to get that agreement finalized, so that he could get the necessary Hillwood signatures for the Parking Agreement. *Id.* at 48-49, 62-64.

C. The Completion of Construction and Opening of the Restaurant

11. At the time that Tenant-Base and Landlord-Center

entered into the Lease Agreement, they had projected that the Restaurant would be open by approximately October 1, 2008. *See* Plaintiff MSJ App. 24. However, subsequent to signing the Lease Agreement there were delays in both the permitting for and construction of the Restaurant.

12. Pursuant to the terms of the Lease, Tenant-Base agreed that it would be responsible for the construction of the tenant improvements and interior finish out of the Restaurant. *See* Plaintiff MSJ App. 27 (Section 2.2), 30 (Section 5.1), 33 (Section 7.4). Tenant-Base also agreed under the terms of the Lease, that it would be responsible for procuring and maintaining at its expense the necessary permits to construct and open the Restaurant. *Id.* at 33 (Section 7.4).

13. On May 27, 2008, Tenant-Base obtained a demolition permit for the demolition to be done for the construction of the Restaurant. *See* DE # 92, Statement of Stipulated Facts. On July 22, 2008, Tenant-Base obtained a building permit for the construction of the interior portion of the Restaurant. *Id.* However, Tenant-Base was unable to obtain a building permit for the construction of the exterior portion of the Restaurant, including the construction of a covered patio, because such permit required that the Victory Planned Development District, PD

582 (the "PD") be amended.[19] *See* Defendant Resp. App. 156-57. Tenant-Base was not responsible for procuring the PD amendment, and such action had to be undertaken by Landlord-Center. *See* Defendant Resp. App. 159.

14. Landlord-Center ultimately got the PD amendment on the agenda for the Planning and Zoning Commission for Dallas on September 11, 2008, and the City of Dallas eventually issued the permanent building permit for the exterior of the building on October 2, 2008. *See* Defendant Resp. App. 194.

15. Aside from the permitting issues, Landlord-Center has also alleged (and Tenant-Base disputes) that there were delays caused by Tenant-Base's actions, particularly in getting the architectural designs, the mechanical, electrical, and plumbing (the "MEP") designs, procuring furniture, fixtures, equipment, and work stoppages that occurred during the construction phase. *See* Defendant Resp. App. 157-158, 160-61.

D. The Restaurant Opens and Poor Operating Results Ensue

16. In late November of 2008, Tenant-Base opened the interior portion of the Restaurant, while the exterior portion of the Restaurant opened on December 6, 2008. *See* Plaintiff MSJ App. 686. From the beginning, the Restaurant underperformed,

[19] Prior to the Lease being signed, Landlord-Center did undertake an analysis to determine whether the PD would need to be amended and determined that the addition of the patio would not require an amendment to the PD. *See* Defendant Resp. App. 156-157.

especially on Non-Event Days.[20] *See* Plaintiff MSJ App. 956-957. For example, Landlord-Center presented uncontroverted testimony from Bill Thompson ("Mr. Thompson"), who was the general manager at the Restaurant from January 6, 2009 until it closed, that on Non-Event Days, he was given a sales goal of $10,000 in gross sales, and that the Restaurant would have $1,200 in gross sales on a good Non-Event Day, but that the average Non-Event Day would have gross sales of a mere $600. *Id.* However, on Event Days, particularly when there were Dallas Stars and Dallas Mavericks games, the Restaurant did what was expected and usually averaged around $10,000 in gross sales. *Id.*

17. Unfortunately, the Event-Day sales were simply not enough to make up for what was occurring on Non-Event Days and, in fact, Aranza testified that, for him, alarms started going off that the Restaurant was underperforming as soon as the end of December 2008. *See* Plaintiff MSJ App. 704. There was uncontroverted summary judgment evidence that the Victory Park Development generally struggled to bring in enough traffic on Non-Event Days to sustain restaurant and retail tenants throughout the area, and that several other restaurants that had previously opened around the Arena were forced to close around the same time that the Restaurant opened. *See* Plaintiff Resp.

[20] There was uncontroverted summary judgment evidence that Aranza had projected that there would be about 180 Non-Event Days during any given year. *See* Plaintiff MSJ App. 694.

App. 52-55.

E. Parking for the Restaurant

18. It is undisputed, that there was still not a signed Parking Agreement by the time the Restaurant opened. It is also undisputed that Tenant-Base never sent any demand letter to Landlord-Center complaining about a breach of the Lease due to the lack of parking available at the Restaurant. *See* Plaintiff MSJ App. 695. Parking during Event Days was clearly not an issue—since the Lease Agreement did not obligate Landlord-Center to provide any parking for the Restaurant during Event Days at the Arena. However, where were patrons parking on Non-Event Days?

19. Courson, who was negotiating the Parking Agreement between Landlord-Center and Hillwood, testified that he ate lunch at the Restaurant two to three times per week. *See* Plaintiff MSJ App. 12. Courson testified that, while dining at the Restaurant, he inquired on several occasions of the general manager, Mr. Thompson, whether there were any parking issues for the Restaurant patrons on Non-Event Days. *Id.* at 12-13. Mr. Thompson's answer was always the same: there were no issues with parking ***and customers were parking in Lot A***. *Id.* Moreover, Mr. Thompson also testified that when the Restaurant patrons inquired about where to park, ***he also told them to park in Lot A***. *See* Plaintiff MSJ App. 957-58.

20. To be clear, Lot A is located 82 feet directly across the alley and to the west of the Restaurant and is the closest parking lot to the Restaurant. *See* Plaintiff MSJ App. 70, 665, 669. ***Lot A is a free parking lot for the first two hours of use***. *See* Plaintiff MSJ App. 12. During Courson's visits to the Restaurant, he testified he personally observed people park in Lot A and come into the Restaurant and never observed Lot A being full such that there were no available spaces. *Id.*

21. Craver, who was working for Hillwood on negotiating the Parking Agreement with Courson, also testified that he had lunch at the Restaurant at least once per week. *See* Plaintiff Resp. App. 52. Moreover, Craver could even see the Restaurant from his office window at Hillwood's offices across the street from the Restaurant. *See* Plaintiff Resp. App. 51-52. Craver also testified that, on numerous occasions, he saw that patrons coming to the Restaurant during lunch would park in Lot A. *See* Plaintiff Resp. App. 52.

22. Finally, and perhaps most importantly, there was also uncontroverted testimony from Tenant-Base's representative, Aranza, that he, too, was parking in Lot A once a week while the Restaurant was open. *See* Plaintiff MSJ App. 694-95. Moreover, Aranza could not recall a specific instance where a manager ever raised an issue with there being any problems with patrons not knowing where to park on Non-Event Days. *See* Plaintiff MSJ App.

695. In fact, Aranza testified that he was told by the managers that most of the guests that came for lunch on Non-Event Days were actually coming from the surrounding buildings and apartments and, thus, were not even parking. *Id.* Regardless of any of this, it is undisputed that the Restaurant was not able to generate the traffic on Non-Event Days that it had originally projected. *See* Plaintiff MSJ App. 703.

F. Landlord-Center Declares Tenant-Base in Default Under the Lease and the Bankruptcy Filing

23. In an email dated May 13, 2009, Vickie Allen (on behalf of Aranza) wrote to Landlord-Center's Courson that Aranza could not continue to operate the Restaurant and asked if Landlord-Center would be available to meet to discuss a solution. *See* Plaintiff MSJ App. 843. However, Landlord-Center had already made the decision to declare a default under the Lease Agreement. *Id.*

24. On May 13, 2009, Landlord-Center sent Tenant-Base a letter claiming that Tenant-Base had breached the Lease because Tenant-Base allegedly owed past-due rent from October 2008 through May 2009 in the amount of $157,666.27. *See* Plaintiff MSJ App. 566. This represented the "Base Rental" for the months October 2008 through May 2009. *Id.* In the letter, Landlord-Center also claimed that Tenant-Base had breached the Lease because Tenant-Base owed $61,666.52 to various contractors who had worked on constructing the Restaurant, and that a lien had

been placed on the leased premises.[21] *Id.*

25. On June 4, 2009, Tenant-Base responded to Landlord-Center's allegations via letter and informed Landlord-Center that Tenant-Base disputed Landlord-Center's claims for rent and reimbursement. *See* Plaintiff MSJ App. 610. In that letter, Tenant-Base notified Landlord-Center that, because the Tenant-Base was unable to obtain the building permit for the Restaurant "until September, 2008 (I believe)," that it was not obligated to pay rent as soon as Landlord-Center alleged, because there were delays beyond Tenant-Base's control. *Id.* The letter specifically referenced Section 1.5 of the Lease Agreement, which provides that "the date on which rent begins is extended day-for-day that the Chili's opening is delayed for reasons beyond our control." *Id.* Moreover, Tenant-Base notified Landlord-Center that Landlord-Center was also in breach of the Lease because it had failed to obtain and provide the Parking Agreement with Hillwood. *Id.*

26. Interestingly, on the same exact day, Tenant-Base sent an email to one of its lenders, First United Bank, stating that

[21] In fact, there were various letters submitted as part of the summary judgment evidence that support Aranza's inability to pay the contractors that had performed construction on the Restaurant. *See* Plaintiff MSJ App. 862-65. All of these letters state that Tenant-Base was unable to pay the respective contractor due to the fact that the project went significantly over budget and business, since the opening of the Restaurant, had been extremely disappointing. *Id.* These liens were eventually paid off by Tenant-Base, however, in June 2009. *See* Defendant Resp. App. 196.

the Restaurant was not profitable because "the development we expected in the area surrounding the American Airlines Center did not happen" and "since day one, the Chili's has lost money on non-event days." *See* Plaintiff MSJ App. 898-99. Moreover, the email stated that "Gilbert is currently working with Center Operating Company to find a solution, but we cannot continue to operate the Restaurant" and that "Gilbert expects to reach an agreement with them the week of June 22nd." *Id.*

27. Clearly, an agreement was not reached between Landlord-Center and Tenant-Base, though, because, by letter dated June 25, 2009, Landlord-Center provided Tenant-Base with written notice to vacate the leased premises. *See* Plaintiff MSJ App. 14-15, 614-617. Additionally, on July 2, 2009, Landlord-Center filed eviction proceedings against Tenant-Base in the Justice of the Peace Court; however, the proceedings were halted after Tenant-Base filed for chapter 11 bankruptcy on July 6, 2009. *See* Plaintiff MSJ App. 15.

G. Center and Hillwood Sign the Parking Agreement and the Restaurant Closes

28. The Restaurant continued to operate shortly after the bankruptcy filing, perhaps due to hopes of saving the venture, despite the fact that it was in the middle of the summer (rather than during the sports-busy fall and winter). *See* Defendant Resp. App. 195. In late July 2009, the Ringling Brothers Barnum & Bailey Circus (the "Circus") came to the Arena. *See* Defendant

Resp. App. 197. The Circus was the first major "event" that came to the Arena since the bankruptcy filing. *Id.* During the Circus, Arena personnel apparently barricaded the south entrance of the Arena. *See* Defendant Resp. App. 162, 197.[22] In addition, security officers, on behalf of Landlord-Center, prohibited Tenant-Base from handing out promotional materials/coupons during the Circus. *See* Defendant Resp. App. 197. Tenant-Base alleges that these actions were breaches of the Lease; however, no notice was given to Landlord-Center at the time of such alleged breaches. *See* Plaintiff MSJ App. 685-689.

29. Also during the pendency of the bankruptcy case, Courson continued to communicate with Craver at Hillwood in an effort to obtain Hillwood's signature on the Parking Agreement. *See* Plaintiff MSJ App. 15, 618-632. Landlord-Center and Hillwood were ultimately able to sign an agreement on September 1, 2009 (the "New Parking Agreement"). *See* Plaintiff MSJ App. 16, 633-646. Among other things, the New Parking Agreement provided for 50 spaces in Lot E for the Restaurant on Non-Event Days and, additionally (although not required under the terms of the Lease), on Event Days at times other than between two hours before and two hours after a sporting or entertainment event at the Arena. *See* Plaintiff MSJ App. 16. However, the New Parking

[22] There was also evidence that the south entrance was barricaded for the Women of Faith event on August 21, 2009 and August 22, 2009. *Id.* at 1973

Agreement was for less than one year, and was not the twenty-year agreement as originally contemplated by the Lease. *See* Plaintiff MSJ App. 633-646.

30. Despite finalizing the New Parking Agreement, Landlord-Center was never able to deliver it to Tenant-Base. *See* Plaintiff MSJ App. 16. On September 3, 2009, Tenant-Base closed the Restaurant without any prior notice to Landlord-Center. *Id*.

31. On August 7, 2009, Landlord-Center filed the Adversary Proceeding. Soon thereafter, Tenant-Base filed the Counterclaims. The bankruptcy case was ultimately converted to chapter 7 on December 3, 2009, and the Bankruptcy Trustee was appointed. Since his appointment, the Bankruptcy Trustee, through special counsel (former litigation counsel to the Debtor), has defended in the Adversary Proceeding and prosecuted the Counterclaim on behalf of Tenant-Base.

V. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate whenever a movant establishes that the pleadings, affidavits, and other evidence available to the court demonstrate that no genuine issue of material fact exists, and the movant is, thus, entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006*); Lockett v. Wal-Mart Stores, Inc*., 337 F. Supp. 2d 887, 891 (E.D. Tex. 2004). A genuine issue of material fact is present when the

evidence is such that a reasonable fact finder could return a verdict for the non-movant. *Piazza's Seafood World, LLC,* 448 F.3d at 752 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). Material issues are those that could affect the outcome of the action. *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003). The court must view all evidence in a light most favorable to the non-moving party. *Piazza's Seafood World, LLC,* 448 F.3d at 752; *Lockett,* 337 F. Supp. 2d at 891. Factual controversies must be resolved in favor of the non-movant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994). If the movant satisfies its burden, the non-movant must then come forward with specific evidence to show that there is a genuine issue of fact. *Lockett,* 337 F. Supp. 2d at 891; *see also Ashe v. Corley,* 992 F.2d 540, 543 (5th Cir. 1993). The non-movant may not merely rely on conclusory allegations or the pleadings. *Lockett,* 337 F. Supp. 2d at 891. Rather, it must demonstrate specific facts identifying a genuine issue to be tried in order to avoid summary judgment. FED. R. CIV. P. 56(c)(1); *Piazza's Seafood World, LLC,* 448 F.3d at 752; *Lockett,* 337 F. Supp. 2d at 891. Thus, summary judgment is appropriate if the non-movant

"fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Landlord-Center has moved for summary judgment on all of Tenant-Base's remaining counterclaims including: (1) all of Tenant-Base's fraud claims (including common law fraud in the inducement by affirmative representation, common law fraud in the inducement by non-disclosure, statutory real estate fraud, and string along fraud), (2) negligent misrepresentation, (3) breach of the Lease; and (4) request for attorney's fees. Tenant-Base has moved for summary judgment on only two of its fraud claims, specifically: (1) the common law fraud in the inducement claim by affirmative representation; and (2) the common law fraud in the inducement claim by non-disclosure.

VI. RULING AND REASONS THEREFORE.

A. Fraud Claims

1. Common Law Fraud, Common Law Fraud in the Inducement, and Statutory Real Estate Fraud

To prevail on a fraud claim under Texas common law, a plaintiff must first prove that (1) the defendant made a false, material representation to the plaintiff; (2) when the defendant made the representation the defendant knew it was false or made the representation recklessly and without knowledge of its truth; (3) the defendant made the representation with the intent that

the plaintiff act on it; (4) the plaintiff actually and justifiably relied on the representation; and (5) the representation caused the plaintiff injury. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001); *Shandong Yinguang Chem. Indus. Joint Stock Co., Ltd. v. Potter*, 607 F.3d 1029, 1032–33 (5th Cir. 2010). A plaintiff's reliance on the defendant's false statement must be reasonable and justified. *Ortiz v. Collins*, 203 S.W.3d 414, 421 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

In addition to a generic common law fraud claim, Tenant-Base has brought two separate claims for common law "fraud in the inducement." Fraudulent inducement "is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001). It is undisputed that the alleged actions of Landlord-Center arise in the context of a contract: here, the Lease. The first fraud-in-the-inducement claim addresses Landlord-Center's alleged ***affirmative*** representations that it had the signed Parking Agreement with Hillwood when the Lease was signed. The other fraud-in-the-inducement claim relates to Landlord-Center's alleged failure to disclose that it did ***not*** have the signed Parking Agreement from Hillwood when the Lease was signed.

It is black letter law that the mere failure to perform a contract will not support a claim for fraudulent inducement. *Spoljaric v. Percival Tours, Inc.,* 708 S.W.2d 432, 435 (Tex. 1986); *Arete Partners, LP v. Gunnerman*, 594 F.3d 390, 394 (5th Cir. 2010); *Lam v. Alpha Realtors, Inc.*, No. H-09-3041, 2010 WL 4569995, at *8 (S.D. Tex. Nov. 4, 2010); *Gimme The Best, LLC v. Sungard Vericenter, Inc.*, No. 08-cv-2873, 2010 WL 1388993, at *3 (S.D. Tex. Apr. 1, 2010). Rather, a promise to do an act in the future is actionable fraud only "when made with the intention, design and purpose of deceiving, and with no intention of performing the act." *Spoljaric*, 708 S.W.2d at 434. "Otherwise, the distinction between contract and tort established by Texas law would be virtually abolished." *Sungard*, 2010 WL 1388993, at *4. Fraudulent inducement also requires the plaintiff to prove that it actually entered into a binding agreement based on the representation. *Hasse v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).

As to Tenant-Base's statutory real estate fraud claims, which apply to transactions involving real estate, the Texas Business and Commerce Code provides a separate avenue through which a plaintiff can recover on a theory of fraud. Section 27.01(a) of the Texas Bus. & Comm. Code provides that a plaintiff must prove that either (1) there was a false representation of a

past or existing material fact, made for the purpose of inducing a person to enter into a contract, and relied on by that person in entering into that contract, or (2) there was a false material promise to do an act that was made with the intention of not fulfilling it, for the purpose of inducing that person to enter into a contract, and relied on by that person in entering into that contract. *See* Tex. Bus. & Com. Code Ann. § 27.01(a) (West 1983). Other than the fact that statutory real estate fraud does not require proof that the defendant knew a representation was false or made it recklessly without knowledge, as a prerequisite to the recovery of actual damages, the basic elements of Texas common law fraud and statutory real estate fraud are essentially the same. *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 611 (Tex. App.—Waco 2000, pet. denied).

There are, as shown above, several common elements necessary to prove any of these above-identified fraud theories—most notably: the requirement of a misrepresentation of "material fact"[23]; an ***intent or purpose inherent in the misrepresentation***

[23] A fact is material if "a reasonable person would attach importance to and would be induced to act on [it] in determining his choice of actions in the transaction in question" and there is an accompanying duty to disclose. *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 478-79 (Tex. App.—Fort Worth 2004, no pet.); *Miller v. Kennedy & Minshew, P.C.*, 142 S.W.3d 325, 345 (Tex. App.—Fort Worth 2003, pet. denied). Note that a duty to disclose a material fact arises in the following situations: (1) when there is a fiduciary relationship between the parties; (2) when defendant makes a partial disclosure and conveys a false impression; (3) when defendant obtains new information that makes an earlier representation misleading or untrue; or (4) when a defendant voluntarily discloses

of inducing the plaintiff to act; and reliance on the plaintiff by the representation. As to the element of intent/purpose in particular, a promise to do an act in the future is actionable fraud only "when made with the intention, design, and purpose of deceiving, and with no intention of performing the act." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986). While a party's intent is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made. *Id.* "Failure to perform, standing alone, is no evidence of the promissor's intent not to perform when the promise was made. However, that fact is a circumstance to be considered with other facts to establish intent." *Id.* at 435; *Arete Partners. L.P. v. Gunnerman*, 594 F.3d 390, 394-395 (5th Cir. 2010). The Supreme Court of Texas has also noted that, usually, successful claims for fraudulent inducement have involved confessions by the

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information, the whole truth must be disclosed. *See EnviroGLAS Prods., Inc. v. EnviroGLAS Prods., LLC*, 705 F. Supp. 2d 560, 572 (N.D. Tex. 2010) (explaining that "Texas law provides" that a duty to disclose arises when "one makes a partial disclosure and conveys a false impression" as well as three other circumstances); *see also Miller*, 142 S.W.3d at 345-46; *Berry v. Indianapolis Life Ins. Co.*, 600 F. Supp. 2d 805, 820 (N.D. Tex. 2009) (stating that "Plaintiffs are correct that a duty to disclose can arise in an arms-length business transaction without a fiduciary or confidential relationship"). Note also that, even "[a] representation literally true is actionable if used to create an impression substantially false." *State Nat'l Bank of El Paso v. Farah Mfg. Co., Inc.*, 678 S.W.2d 661, 681 (Tex. App.—El Paso 1984, writ dism'd by agr.), *called into question on other grounds*, *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 724 (Tex. 2001).

defendant or its agents of the requisite intent. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006).

Based upon the summary evidence presented, the court has concluded that summary judgment in favor of Landlord-Center, not Tenant-Base, is appropriate as to ***all*** of Tenant-Base's common law fraud claims and statutory real estate fraud claims. Specifically, viewing the summary judgment evidence in the light most favorable to Base-Tenant, all of the summary judgment evidence demonstrates that:

> (a) there is no genuine issue of any material fact that exists as to the critical element of a ***misrepresentation*** (or even false impression) regarding the Parking Agreement;
>
> (b) there is no genuine issue of any material fact that exists as to the critical element of a possible intent or purpose by Landlord-Tenant to induce Base-Tenant into entering into the Lease Agreement with false statements/omissions concerning the Parking Agreement;
>
> (c) there is no genuine issue of any material fact that exists as to the critical element of reliance; and
>
> (d) perhaps, most glaring of all, there is no summary judgment evidence at all from which a reasonable fact finder could find damages to Base-Tenant caused by a lack of a Parking Agreement.

First, there is no summary judgment evidence at all that a false statement was made by Landlord-Center, to the effect that it already had the executed Parking Agreement with Hillwood on June 2, 2008—nor is there any summary judgment evidence suggesting that Landlord-Center falsely created an impression of

that. Moreover, there is no summary judgment evidence that creates a genuine issue of material fact that Landlord-Center did not intend to provide Tenant-Base with the Parking Agreement and that it did not intend to perform its obligations under the Lease. In fact, there was an abundance of summary judgment evidence presented from Courson, Skenderian, and Craver showing that the Landlord-Center always intended to provide both ample parking for the Restaurant as well as the signed Parking Agreement with Hillwood.

Courson (of Landlord-Center) testified that "at the time the parties entered into the Lease and thereafter, Center intended to perform all of its obligations under the Lease, including providing the parking Agreement for Lot E." *See* Plaintiff MSJ App. 11. This is consistent with the testimony of Craver (Hillwood's former in-house general counsel), who negotiated the Parking Agreement with Courson on behalf of Hillwood and testified as follows:

> Q. From the time period of April 14th, 2008 that we see in Exhibit 145, to June 2nd or 3rd, 2008, do you recall having any additional communications or negotiations with Mr. Courson regarding the parking agreement for the Chili's restaurant?
> A. I do not.
> Q. As of approximately June 2nd or 3rd, 2008, did you continue to believe that you had reached agreement on all material terms of the parking agreement for the Chili's restaurant with Mr. Courson that's reflected in Exhibit 145 that we looked at previously?
> A. Yes. *See* Defendant's Resp. App. 174.

> ***
> Q. And during that time, is it correct that you really didn't have any additional negotiations regarding the Chili's parking agreement because, as you said previously, that had—those material terms had previously agreed upon?
> A. Yes.
> Q. That was—that agreement was kind of just sitting to the side, already agreed upon, but it just hasn't been executed?
> A. That's correct. *See* Plaintiff Resp. App. 47.

In order to raise a genuine issue of material fact on this issue, Tenant-Base attempts to point to evidence showing that, despite the fact that the Parking Agreement had not been formally signed by Hillwood, Courson communicated to Skenderian (whom Courson knew was working with Tenant-Base on finalizing the terms of the Lease), that the Parking Agreement had "been signed off by both Lenders attorney and Hillwood." *See* Plaintiff MSJ App. 10. Tenant-Base asserts that Courson knew that this statement would be further communicated to Tenant-Base in order to fraudulently induce Tenant-Base to sign the Lease. However, this does not create a possible fact issue as to fraudulent inducement. Rather, the statement is consistent with all of the other summary judgment evidence that reflects an apparent belief on the part of Landlord-Center that providing the Parking Agreement to Tenant-Base (as required under the Lease) would be no problem. All of the unrefuted summary judgment evidence shows that the delay in procuring the signed Parking Agreement from Hillwood resulted from the fact that the Parking Agreement was a small piece of an

even bigger parking agreement (referred to as the Sixth Amendment) that was being negotiated between Landlord-Center and Hillwood. In fact, there was unrefuted summary judgment evidence showing that Hillwood was not going to formally sign the Parking Agreement until it had finished negotiating the terms of the Sixth Amendment with Landlord-Center. The unrefuted summary judgment evidence was that Hillwood's position on this issue was never formally communicated to Landlord-Center until ***after*** the Lease Agreement had already been executed. Specifically, it was not until June 11, 2008, that Hillwood's position was formally communicated to Landlord-Center:

> Q. Mr. Craver, is it correct that prior to the time the parties entered into the lease, again, as of June 2nd of 2008, that you never personally communicated to Mr. Courson that Hillwood's signature or execution of the parking agreement for Chili's was conditioned on the parties entering into any other agreements?
> A. I'm not sure how to answer that. I would say that in our initial agreement, our initial outline that we got, we had a—the Chili's portion of this deal was part of a larger deal. It's a small piece of the large transaction that involved the Plaza, and I felt that the agreement was conditioned upon there being a larger agreement on the Plaza also being signed, so I felt we were in agreement as to the Plaza—I mean, as to the parking on Lot E in Chili's, that we had negotiated that agreement and it was completed and put to bed.
> And we were still trying to figure out the agreement regarding the Plaza at the time, so I felt that they were tied together, so I would—I don't know if I ever communicated that to Craig, I though it was apparent from the letter of intent that they were together, you know, that we needed

to have one signed or they were all going to be signed together, so I tried to answer your question.

Q. And is it correct that you're not aware that anyone else with Hillwood ever communicated that to Mr. Courson either—again, as of June 2nd, 2008?

A. I would say other than the fact that they were on the letter of intent, that they were listed on the same letter of intent, I don't remember ever communicating that to Craig or anybody from Hillwood ever communicating that to Craig. *See* Plaintiff Resp. App. 45.

***

Q. I am going to hand you Exhibit 149. Is Exhibit 149 a true and correct copy of a string e-mails between you and Charles Aster at Kane, Russell, Coleman & Logan regarding a sixth amendment?

A. Yes.

Q. What was the sixth amendment?

A. The sixth amendment was—the sixth amendment to the parking agreement, it's called the Easement and Parking Rights Agreement, that is between various Victory entities and the American Airlines Center regarding providing 3,000 parking spaces to the American Airlines Center for arena parking on Victory land and so this was a sixth amendment to that document.

Q. Do you know whether the sixth amendment or the—any of the terms that were to be put in the sixth amendment were contained in that initial bulletpoint document in Exhibit 7?

A. I don't recall, but I could look.

Q. Let's go ahead and do that. Thank you.

A. It was not included.

Q. On the very bottom e-mail of Exhibit 149 you are communicating to Mr. Aster, Center Operating Company's counsel for its lender, that you had a call with Mr. Courson; is that correct?

A. Yes.

Q. And can you tell me what you told him during that call or what you discussed, and if 149 refreshes your recollection, great.

A. I don't remember the call with Craig, but from this e-mail, it appears that I talked to him about needing—Craig needed to get the Chili's parking agreement signed and we needed to get the sixth amendment drafted or complete in order to—in order

> for us to sign the Chili's document.
> Q. So you recall—or based on this email, if we interpret the e-mail correctly, you had communicated to Mr. Courson on June 11th via telephone that in order for Hillwood to sign the Chili's parking agreement, the parties also needed to sign the Plaza agreement and the sixth amended agreement; is that fair?
> A. Yes.
> Q. As far as you know, Mr. Craver, is this the first time that you'd ever communicated specifically to Mr. Courson that Center Operating would need to sign some other agreements in order for Hillwood to sign off on the Chili's parking agreement?
> A. I would say other than the letter of intent, which you know implies that they're tied together, I—this is—this is the only communication that I'm aware of that I had with Craig regarding that. *See* Plaintiff Resp. App. 46.
> ***
> Q. So this would be also the first time—this would be the very first time—this would be the very first time in your mind that you ever communicated to Mr. Courson specifically that the sixth amendment signing was tied to getting Chili's restaurant agreement signed?
> A. Right. I don't have any recollection of me verbally telling them that and so this would be the only communication I'm aware of regarding that. *See* Plaintiff Resp. App. 46 & 162.

The above testimony, which is unrefuted in any other evidence, is that Courson did not have any reason to believe, before the Lease Agreement was signed, that Landlord-Center had not reached closure with Hillwood on Restaurant parking arrangements, or that the Parking Agreement was in any way contingent on the Sixth Amendment being signed.

There is also unrefuted summary judgment evidence showing Landlord-Center's subsequent behavior after the Lease Agreement

was signed and such unrefuted behavior does not suggest anything other than an intent to provide the Parking Agreement to Tenant-Base. There were multiple emails submitted into the summary judgment record showing Courson's diligent efforts to obtain the signed Parking Agreement from Hillwood long after the Lease was signed. *See* Plaintiff MSJ App. 11-16, 510-514, 562-565, 612, 618-632. Craver confirmed Courson's efforts as well and testified as follows:

> Q. And subsequent to June 11th on the e-mail on 149, you continued to have extensive negotiations with Mr. Courson regarding the sixth amendment?
> A. Yes.
> Q. And those were continuous throughout the period of time?
> A. Yes.
> Q. Was Mr. Courson diligent during that period of time, in your mind, in attempting to get an agreement reached on the sixth amendment?
> A. Yes.
> Q. And during that time, is it correct that you really didn't have any additional negotiations regarding the Chili's parking agreement, because, as you said previously, that had—those material terms had previously been agreed upon?
> A. Yes.
> Q. That was—that agreement was kind of just sitting to the side, already agreed upon, but it just hadn't been executed?
> A. That's correct. *See* Plaintiff Resp. App. 46-47.
> ***
> Q. As far as you could—could tell, Craig Courson was being diligent in trying to get that Chili's agreement signed?
> A. Yes.
> Q. Now, these conver—communications, you don't recall the date but they did occur sometime after June 11, 2008, the date that's referenced in 149?
> A. I believe so, yes. *See* Plaintiff Resp. App.

47.
***

Q. So after—on or after June of '08, you do recall the parties continued to work together to try to get the sixth amendment done?
A. Yes.
Q. And that—that happened continuously throughout these months?
A. That's right.
Q. I hand you what's been marked as Exhibit 150. Is this a true and correct copy of an e-mail from Craig Courson to you and others, dated September 16, 2008, regarding parking?
A. Yes.
Q. And Mr. Courson is e-mailing Charles Aster and he says, quote, I believe we have reached consensus on our parking deal, period, end quote. And then he goes on to describe some of the deal points that you and—and he had discussed; is that fair?
A. Yes. Uh-huh.
Q. Okay. At this point in September of '08 time frame, do you recall generally believing that there was a general consensus about reaching agreement on the parking deal?
A. Yes.
Q. And the parking deal that's being referred to here is the sixth amendment. You weren't continuing to negotiate the Chili's parking agreement were you?
A. That's correct. Yes. This was only—this—we were not talking about the Chili's agreement at all in here. We're talking about the sixth amendment to the parking agreement.
Q. Okay. So based upon the status of your discussions and negotiations with Mr. Courson as of around September 16th, 2008, you believe that Mr. Courson was at least somewhat justified in believing that you had reached a consensus on the parking agreement?
A. Yes. *See* Plaintiff Resp. App. 48; 163.

In summary, there is simply no summary judgment evidence creating any genuine issue of material fact as to whether Landlord-Center fraudulently intended to induce Tenant-Base to

sign the Lease.[24]

Landlord-Center is also entitled to summary judgment for another significant reason. Perhaps more significant than the lack of summary judgment evidence suggesting misrepresentations or an intent or purpose to induce, is the utter absence of ***any*** evidence that Tenant-Base suffered any injury as a result of Landlord-Center's alleged misrepresentations and non-disclosures (*i.e.*, direct damages) or that a lack of parking proximately caused damages or injury to Tenant-Base (*i.e.*, consequential damages). Specifically, the court cannot conclude that Landlord-Center's inability to promptly provide the signed Parking Agreement caused Tenant-Base any damages, ***as a lack of parking—by all accounts—was not the reason that the Restaurant performed so poorly***. Rather, the lackluster performance within the Victory Park Development (as least in 2008-2009), as well as the extremely miserable economy at the time that the Restaurant was opened, was (from all presented evidence) the cause for the

[24] In Paragraph 57 of the Counterclaims, Tenant-Base also made allegations regarding a dispute between Hillwood and entities referred to as Radical Cuban and Radical Arena regarding profit distributions made by Landlord-Center to Radical Arena and a subsequent lawsuit filed by Hillwood against Radical Cuban and others and that "Center had knowledge of the Radical Cuban-Hillwood feud." Moreover, in Paragraph 58, Tenant-Base alleges that "Center knew that the feud between Hillwood and Radical Cuban would prevent the signing of the Hillwood Agreement." Courson testified that these allegations are, in fact, absolutely false. *See* Plaintiff MSJ App. 12. Interestingly, this theory was completely abandoned by Tenant-Base and not even addressed as a genuine issue of material fact in its Partial MSJ or in its Response to the Plaintiff's MSJ.

Restaurant's demise.

First, it is undisputed that there was ample parking available in nearby Lot A—free for patrons of the Restaurant. There was significant summary judgment evidence offered showing that many (if not all) of the driving-patrons who came to the Restaurant during Non-Event Days actually parked in Lot A. Even Aranza stated that he would park in Lot A when he came to visit the Restaurant. Moreover, there was no summary judgment evidence presented by Tenant-Base showing that there was ever an issue with parking at the Restaurant—in fact, all summary judgment evidence was to the contrary. First, Mr. Thompson, the general manager for the Restaurant, testified as follows with regard to Lot A:

> Q. You did observe customers parking there?
> A. I did observe some customers parking there.
> Q. Okay. So when you received inquiries when you were trying to market the restaurant about parking, you told them, "You can park in lot A?"
> A. I did. *See* Plaintiff MSJ App. 957-58.
> ***
> Q. How did you know to tell your customers to park in lot A when you had inquiries?
> A. Why?—Because I parked there.
> Q. Okay. You parked there every day that you worked, correct?
> A. No, not every day.
> Q. On nonevent days?
> A. On occasion.
> Q. Where else did you park?
> A. I parked in—
> Q. I'm going to hand you what's been marked as Exhibit 6—On Page 1, does this appear to be the photograph of the AAC and the surrounding parking areas?

A. Yes.
Q. And you recognize that lot A here is just directly across the alleyway from where the restaurant was?
A. Yes, I knew where lot A was, but when I would park otherwise on nonevent days, I would park in this lot, and I think it's F lot.
Q. Okay.
A. Is that F?
Q. I believe so.
A. Okay.
Q. Just so we're clear, though, the lot A that you're referring to where you told customers they could park, is that the one that's outlined in yellow and denoted lot A and it's directly across the street, the alley from the restaurant, correct?
A. Correct. *See* Plaintiff MSJ App. 958.
***
Q. [Y]ou do recall there was a sign out there that said its two hour free parking?
A. There was, yeah. *See* Plaintiff MSJ App. 959.
***
Q. Do you know where else, if any, of the Chili's customers parked on nonevent dates other than to A?
A. No—I have no idea.
Q. You didn't personally observe any of your customers walking up from other parking areas?
A. I witnessed them walking through the plaza from time to time and, actually, a lot of our nonevent business came from the arena folks themselves. *See* Plaintiff MSJ App. 959.
***
Q. On nonevent days, did you ever observe lot A as being completely full?
A. No.
Q. There were always spaces available there on nonevent days?
A. I'm pretty certain. *See* Plaintiff MSJ App. 960-961.

Similarly, Aranza also testified that:

Q. Did you ever go try to do an analysis of whether your customers had any trouble finding the restaurant or parking for the restaurant?
A. No, sir. *See* Plaintiff MSJ App. 682.
***

Q. Did you ever park in Lot A during the time that Base operated the restaurant?
A. I parked in Lot A.
Q. Did you park there on non-event days?
A. I parked there on non-event days.
Q. Did you park there on event days as well?
A. No.
Q. On the nonevent dates that you parked there, do you recall that lot was a free lot for the first two hours?
A. I recall I received a ticket. You punch a button, you get a ticket, and you park.
Q. But did you recall though you get the ticket, it's a free exit if you exit within 2 hours?
A. Yes. *See* Plaintiff MSJ App. 694-95.
***
Q. About how many times did you park in Lot A during nonevent dates during the time that the restaurant was opened and in operation?
A. Maybe once a week. *See* Plaintiff MSJ App. 695.
***
Q. During the time that the restaurant was opened, did you ever have any discussion [with] any of the managers at the restaurant about where the tenants—the patrons were parking or whether there was any confusion about where they could or should park on nonevent days?
A. I spoke to the managers a lot about what they knew where our guests came from, and this was particularly at lunch.
Q. What did they tell you?
A. They told us they came from the surrounding buildings or apartments. What I could gather is they walked there.
Q. Okay. That's what you expected when you put in the restaurant that you would gather lunchtime traffic from people who were in the neighborhood?
A. I expected to get some walk-ins, yes.
Q. At any time did any manager of the restaurant ever raise the issue with there being any problems with patrons not knowing where to park on nonevent dates or have any trouble getting to the restaurant due to parking?
A. I can't recall a conversation with the manager.
Q. What about any other employee of the restaurant.

> A. I can't recall a conversation with them. See Plaintiff MSJ App. 695.
> ***
> Q. Mr. Aranza, as far as you know sitting here today, there was ample parking for the Chili's Restaurant customers parking during nonevent dates?
> A. I can't say that.
> Q. You don't know one way or the other?
> A. You are correct.
> Q. Any you never investigated it?
> A. You're correct. *See* MSJ App. 695.

There was also significant summary judgment evidence regarding the lackluster development of the Victory Park area and its inability (at least in 2008-2009) to live up to its once lofty expectations, as well as summary judgment evidence that the poor economy contributed to the anemic performance of the Restaurant. First, Craver testified about the struggles of Victory Park to retain tenants. Specifically, Craver identified at least six (6) restaurant/food and beverage tenants (N9ne, Nove, La Condesa, the Boardroom, Paciugo, and a coffee shop) and eight (8) retail tenants that vacated Victory Park in or around the 2008 and 2009 time period. *See* Plaintiff Resp. App. 52-55. Second, by letters dated April 6, 2009 and April 23, 2009 to various contractors who were demanding payment for work done on the construction of the Restaurant, Aranza stated as follows:

> Base Holdings, LLC simply cannot pay the balance due to [the contractor], or others, for this project due to the fact that the project was significantly over budget and business since opening the restaurant has been extremely disappointing. ***As you might know, the restaurant business, and in particular the restaurant business***

> ***around the American Airlines Center has been seriously affected by the economy***. *See* Plaintiff MSJ App. 716-717, 863-866 (emphasis added).

Similarly, by e-mail to representatives of its lenders, dated June 4, 2009, Tenant-Base stated, in part, as follows:

> I appreciate you working with us on this. ***As Gilbert explained, the development we expected in the area surrounding the American Airlines Center did not happen and, since day one, the Chili's has lost money on non-event days.*** Gilbert's affiliated company subsidized the operations there while we marketed and advertised, but it is now clear this restaurant will not be profitable.
>
> Gilbert has been in close touch with both Brinker and the landlord, Center Operating Co. Brinker has no interest in operating the Restaurant. Gilbert is currently working with Center Operating Co. to find a solution, but we cannot continue to operate the restaurant . . . . *See* Plaintiff MSJ App. 856, 885, 898(emphasis added).

Moreover, Aranza also testified:

> Q. You reiterated or you touched on this a little earlier. I want to go back. Why do you believe the restaurant did not achieve the level of sales that you had projected?
> A. Well, you can see I clearly didn't get the terms [sic-should be "turns"] I projected.
> Q. Why is it that you believe you didn't get the turns you projected?
> A. I know it wasn't because of our quality of ops. The Brinker folks were in that restaurant continuously and always reported back positive things about our unit. I can't tell you.
> Q. Well, let me refresh your recollection is what you started to talk about earlier, you talked about office buildings not going in?
> A. The office buildings—
> Q. The Victory development?
> A. The office buildings weren't leased or occupied when we thought they were going to be occupied.
> Q. What office buildings were you referring to?

A. The ones right there in the plaza on each side.
Q. It was primarily the Victory Park neighborhood that you were relying upon to drive, for example, those lunch sales you projected?
A. We thought we were going to get more traffic from office buildings, even on the other side of town. There was not a name-brand full-service casual restaurant until you got to Knox Street, the Chili's on Knox street, so we thought we would get a lot more people driving over.
Q. You just didn't get that traffic?
A. Don't know why we didn't get it, but didn't get it.
Q. What else about Victory had you thought would occur that didn't occur other than the office building? Obviously, that was significant.
A. Several restaurants closed before we opened.
Q. Why did they close?
A. Don't know
Q. Do you think it was because of the same problems you encountered later, you just didn't get the traffic down there?
A. May have been.
Q. Did you do any research into how Victory Park was doing at the time you had made these projections before going forward?
A. I went to Victory Park a few times during the day and at night, and didn't sense what was happening.
Q. Is it correct to say that Victory was kind of on a downward spiral at the time you started building the restaurant?
A. I didn't see it that way then.
Q. But in hindsight is that what occurred?
A. It certainly has occurred since.
Q. Since you opened the restaurant?
A. Yes.
Q. You mentioned several restaurants had moved out of Victory. Did you say before you opened the restaurant?
A. I don't remember when they closed down. I was disappointed to see the restaurant directly across from the Chili's closed, and the restaurant on the same side a few doors down.
Q. What were the names of those restaurants?
A. I don't remember. Nine, and I don't remember

the two restaurants.

Q. Do you know if Nine closed down before you opened?
A. I don't remember. *See* Plaintiff MSJ App. 703-704.
***
Q. Victory didn't drive the traffic as you'd hoped; fair to say?
A. I don't know what didn't drive the traffic as I hoped.
Q. But Victory certainly didn't?
A. It did not help that those restaurants closed. *See* Plaintiff MSJ App. 704.
***
Q. You weren't going to get close [to Mr. Aranza's sale projections], were you?
A. I don't think we're going to get close, but we didn't have the buildings occupied when we thought they were going to be occupied. The buildings in front of the plaza were supposed to be occupied earlier than they actually were. We had other restaurants open in the area that were going to be a magnet. There were reasons why we were — why we could have been projecting 3 million that we didn't get. *See* Plaintiff MSJ App. 701.
***
Q. All right. The questions I was asking were just comparing net sales to your net sales projections. You weren't going to get close, were you?
A. We weren't going to hit the projections.
Q. Those projections turned out to be materially overstated?
A. I don't know if "overstated" is the correct word. I didn't do as good a job there as I did on almost every one of my other restaurant projections.
Q. And, again, you were solely responsible for making the projections, the actual numbers we looked at earlier; correct?
A. Yes. *See* Plaintiff MSJ App. 701.

In summary, there is no evidence in the record that the failure of the Restaurant had anything to do with a lack of parking. Rather various other factors, including the dismal economy and the disappointingly slow development of Victory Park,

were the obvious contributing factors. Tenant-Base is attempting to shift the loss of its entire investment in the Restaurant to Landlord-Center. The summary judgment evidence and law do not support this, particularly where the reasons that caused the Restaurant to ultimately fail were risks that Tenant-Base accepted knowingly and that occurred through no fault of Landlord-Center. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997). There are no facts or law presented that would allow Tenant-Base to transform Landlord-Center into an insurer of Tenant-Base's investment in the Restaurant. *Id*. In sum, there is no genuine issue of material fact suggesting that Tenant-Base may have suffered damages as a result of Landlord-Center's actions and Tenant-Base's fraud claims fail as a matter of law.

2. String Along Fraud

Tenant-Base has also asserted a separate string-along fraud claim. Landlord-Center has first argued that "string along fraud" does not exist under Texas law. This does not appear to be accurate. In fact, string-along fraud has been held to be an ongoing course of fraud that may begin before a contract is executed or can start after the contract is entered into and continues during the course of the contract's performance. For example, in *Southwell-Gray v. Jones*, No. Civ. 300CIV1539-H, 2001 WL 493165, at *3-5 (N.D. Tex. May 4, 2001), the district court

granted summary judgment for plaintiff on fraud claims based on defendants' continuing misrepresentations—both before and after the parties entered into a loan agreement—that defendants would repay a loan, even though they had no intent to do so. The court recognized that the fraud claim for inducing continued performance was distinct from other types of claims, explaining that "[t]his is not merely a case of failure to perform the contract, but one in which the evidence indicates Defendants had no intention of doing so" based on "pre-Agreement representations and . . . repeated representations made during and after the term of the Agreement, regarding the status of Plaintiff's loan principal and Defendants' intention to return it." *Southwell-Gray v. Jones*, No. Civ. 300CIV1539-H, 2001 WL 493165, at *5 (N.D. Tex. May 4, 2001).

Similarly, in *Kajima Int'l, Inc. v. Formosa Plastics Corp., USA*, 15 S.W.3d 289, 293 (Tex. App.—Corpus Christi 2000, pet. denied), a defendant plant owner was liable for fraudulently inducing a contractor's continued performance under a construction contract. In *Kajima*, the court rejected defendant's argument that "by allowing recovery for fraud after execution of the contracts, every case in which breach of contract is alleged and a contracting party has asked another party for continued performance will require a fraud submission." *Id.* Rather, the court expressly recognized fraud induced after a contract is

executed, stating, "[w]e can find no opinion precluding recovery for fraud because the fraud occurred after execution of a contract, and we decline to do so here." *Id.*

Other Texas federal and state courts, including the Fifth Circuit, have seemingly recognized string-along or ongoing fraud to induce continued contractual performance as a valid cause of action that is separate and distinct from a breach of contract claim.[25] All of the cases cited recognize that such fraud claims are separate and apart from other types of claims, including claims for breach of contract. That is because the legal duty not to fraudulently procure performance under a contract "is separate and independent from the duties established by the contract itself." *Formosa Plastics Corp. USA v. Presidio Eng'rs*

[25] *See, e.g., GWTP Inv., L.P. v. SES Americom, Inc.*, 497 F.3d 478, 483 (5th Cir. 2007) (reversing district court's judgment that plaintiff's fraud claim "was just a repackaged contract claim," holding that defendant's misrepresentations made after the parties entered into an unenforceable oral agreement were actionable in fraud); *Nat'l Ctr. for Policy Analysis v. Fiscal Assocs., Inc.*, No. CIV. A. 3:97CV2660L, 2002 WL 433038, at *5-6 (N.D. Tex. Mar. 15, 2002) (recognizing fraud claim based on defendants' post-contract promises of performance); *Bray Int'l, Inc. v. Computer Assocs. Int'l, Inc.*, No. CIV H-02-0098, 2005 WL 3371875, at *6 (S.D. Tex. Dec. 12, 2005) (recognizing validity under Texas law of string-along fraud where defendant failed to disclose defective condition of software to induce plaintiff to install and use the newest software version and thus to remain defendant's customer); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 586-87 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (affirming fraud verdict where plaintiff supplier was induced to manufacture and deliver wallboard to nonpaying defendant distributor based on defendant's non-disclosure of its true financial condition and organizational structure); *Dimon v. Trendmaker, Inc.*, No. 14-96-01081-CV, 1998 WL 19861, at *8-9 (Tex. App.—Houston [14th Dist.] Jan. 22, 1998, no writ) (not designated for publication) (reversing summary judgment on fraud claim based on years of post-contract misrepresentations that induced continued performance).

& Contractors, Inc., 960 S.W.2d 41, 46-47 (Tex. 1998).

Despite the foregoing, here, the court does not find, based on the summary judgment evidence, that there is any genuine issue of material fact suggesting Landlord-Center perpetrated any type of string along fraud against Tenant-Base. In addition to the same misrepresentations that Tenant-Base argues for its other fraud claims, Tenant-Base also cites to statements that Landlord-Center made after the Lease was signed in which Landlord-Center (through either Courson or Skenderian) assured and promised Tenant-Base that the Parking Agreement would be signed. As stated above, the summary judgment evidence was utterly lacking of any hint that Landlord-Center ***fraudulently*** misrepresented or ***fraudulently*** failed to disclose, either before or after the Lease, the status of the Parking Agreement. Moreover, the court cannot find that there is a genuine issue of fact regarding whether Tenant-Base has suffered any direct or consequential damages as a result of Landlord-Center's alleged string along fraud. Accordingly, Tenant-Base's claim for string along fraud fails as a matter of law.

B. Negligent Misrepresentation Claim

The elements of the tort of negligent misrepresentation under Texas law are: (1) a defendant provided information in the course of his business, or in a transaction in which defendant

had a pecuniary interest; (2) the information supplied was false; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; (4) the plaintiff justifiably relied on the information; and (5) the plaintiff suffered damages proximately caused by the reliance. *Larsen v. Carlene Langford & Assocs., Inc.*, 41 S.W.3d 245, 249-50 (Tex. App.—Waco 2001, pet. denied).[26] Tenant-Base must show justifiable and reasonable reliance on the representations Landlord-Center made regarding the Parking Agreement. *See Ortiz v. Collins,* 203 at 423 (justifiable and reasonable reliance is a necessary element of a claim for fraudulent misrepresentation); *Larsen*, 41 S.W.3d at 249-50 (justifiable reliance is a necessary element of a claim for negligent misrepresentation); *Solano v. Landamerica Commonwealth Title of Fort Worth, Inc.*, No. 2-07-152-CV, 2008 WL 5115294, at *9-10 (Tex. App.—Fort Worth Dec. 4, 2008, no pet.) (affirming summary judgment where no evidence of detrimental reliance). In the case of negligent misrepresentation: (a) the difference between the value of what the plaintiff received in the transaction and its purchase price or other value given for it; and (b) the pecuniary loss suffered

[26] The second prong of negligent misrepresentation has sometimes been differently phrased as "the defendant supplie[d] false information for the guidance of others in their business," and the fourth and fifth prongs have sometimes been differently phrased as "the plaintiff suffer[ed] pecuniary loss by justifiably relying on the representation." *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

by a plaintiff, in reliance on the defendant's actions, are sufficient to sustain a claim. *Sloane*, 825 S.W.2d at 442-43 (Tex. 1991); RESTATEMENT (SECOND) OF TORTS § 552B (2011).

In its negligent misrepresentation claim, Tenant-Base asserts damages based upon two representations: (1) Landlord-Center stating that the Parking Agreement was signed; and (2) Landlord-Center stating that the PD would not need to be amended. Specifically, Tenant-Base refers to an email dated June 3, 2008 that Skenderian sent to Allen, as a representative of Tenant-Base, that "[o]nce I receive the signed lease, I will obtain the signatures on the various attachments, compile the exhibits and send out a complete lease package." Tenant-Base equates this to Landlord-Center saying that the Parking Agreement was, in fact, executed by Hillwood.

First, as to Skenderian's statement, Craver specifically testified that:

> Q. From the time period of April 14th, 2008 that we see in Exhibit 145, to June 2nd or 3rd, 2008, do you recall having any additional communications or negotiations with Mr. Courson regarding the parking agreement for the Chili's restaurant?
> A. I do not.
> Q. As of approximately June 2nd or 3rd 2008, did you continue to believe that you had reached agreement on all material terms of the parking agreement for the Chili's restaurant with Mr. Courson that's reflected in Exhibit 145 that we looked at previously?
> A. Yes. *See* Defendant Resp. App. 174.
> ***
> Q. And during that time, is it correct that you

> really didn't have any additional negotiations regarding the Chili's parking agreement because, as you said previously, that had—those material terms had previously agreed upon?
> A. Yes.
> Q. That was—that agreement was kind of just sitting to the side, already agreed upon, but it just hadn't been executed?
> A. That's correct. *See* Plaintiff Resp. App. 47.

Thus, the unrefuted summary judgment evidence shows that Landlord-Center had, at least, a reasonable and justifiable belief that it had finalized the Parking Agreement with Hillwood at the time the Lease was executed. Skenderian's statement to Tenant-Base indicated that he would ***obtain*** the signatures on the various attachments, but this is not the same thing as saying the Parking Agreement was signed. A reasonable fact finder cannot interpret there to have been a false fact communicated to Tenant-Base as to whether Hillwood had signed the Parking Agreement. Moreover, there is unrefuted summary judgment evidence reflecting that Landlord-Center had a reasonable belief that the material terms of the Parking Agreement had been agreed to and finalized with Hillwood. There is no summary judgment evidence from which a reasonable fact finder could infer a lack of reasonable care in suggesting a Parking Agreement would be forthcoming.

As to the PD being amended, there is no dispute that the PD ultimately had to be amended, so in fact, Landlord-Center's statement to Tenant-Base was false in this regard. Thus, the court must determine whether or not there is a genuine issue of

material fact as to whether Landlord-Center was reasonable in its belief that the PD did not need to be amended. First, Craver testified that the determination of whether the planned development would need to be amended for the Restaurant was "very complicated" and that he did not think that the "average person would know that" or even that the "average zoning consultant" would know because "it's not apparent from our zoning." *See* Plaintiff Resp. App. 60-61.

Second, as to the initial analysis that Landlord-Center took with regard to the PD amendment, Skenderian testified that "based on past practices and our understanding of the planned development, we believed no amendment to the planned development was required at that time." *See* Defendant Resp. App. 157. Although Landlord-Center was ultimately wrong, and the PD had to be amended, Skenderian testified that "ceratin parts of our analysis were generally accepted" but that the "city had a different interpretation" with regard to whether an amendment ultimately needed to be made. *Id.* Putting together Skenderian's and Craver's testimony, the court concludes that no genuine dispute has been shown as to whether Landlord-Center exercised reasonable care with regard to its communications to Tenant-Base on whether the PD needed to be amended. Landlord-Center clearly took the initial step of analyzing whether the PD needed to be amended, but, undoubtedly, because such process is complicated

and ultimately depends on the decision making of a third party (*i.e.*, the city), the court does not think there is any fact issue created as to whether Landlord-Center was negligent in representing to Tenant-Base that an amendment to the PD was unnecessary.

Finally, the court also concludes that there is not a genuine issue of material fact as to whether Tenant-Base's alleged damages could have been proximately caused by Landlord-Center's statements about both the Parking Agreement and the PD amendment. Specifically, Tenant-Base has asserted damages against Landlord-Center for its construction costs of approximately $3,000,000, as well as the lost profits it expected to receive. *See* Counterclaims, paragraph 131. First, lost profits are not available to Tenant-Base as damages for a negligent misrepresentation claim. *See Sloane*, 825 at 442-43; *see also Sterling Chemicals, Inc. v. Texaco, Inc.*, 259 S.W.3d 793, 797 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (finding that loss profits are not recoverable for a negligent misrepresentation claim). Moreover, any "benefit of the bargain" or "expectancy" damages, which are the amounts necessary to put the plaintiff in as good of position as it would have been had the contract been performed, are also not recoverable under a negligent misrepresentation claim. *See Reed v. Carecentric National, LLC, et al. (In re Soporex, Inc.)*, 446 B.R. 750, 763-

764 (Bankr. N.D. Tex. Mar. 7, 2011). This is known as the "economic loss rule," which provides that a plaintiff may not bring a negligent mispresentation claim unless the plaintiff establishes an injury that is distinct, separate, and independent from the economic losses recoverable on a breach of contract claim. *See Sterling Chemicals*, 259 S.W.3d at 797. Here, all of the damages that Tenant-Base asserts under its negligent misrepresentation claim are for an economic loss or for benefit of the bargain damages to the subject matter of the Lease, and Aranza admitted as much in his deposition. Specifically, Aranza testified that:

> Q: Well, we can break it down. Negligent misrepresentation, as you see in the Counterclaim, involves the provision of false information. What false information is Base contending or does it believe supports its claims for negligent misrepresentation?
> A. Well, certainly the issues having to deal with the parking agreement, and the whole issue dealing with obtaining building permits and planned development and parking issues that surrounded the issuance of those building permits.
> Q. Can you give us facts, Mr. Aranza? Who said what and when?
> A. As I told you earlier, it is all the minutes, the weekly progress minutes who said what, when.
> Q. What specifically are you claiming is false information that gives rise to this claim for which you are seeking damages?
> A. The false information was repeatedly parking will be dealt with tomorrow. Tomorrow, tomorrow, or next week, next week.
> Q. Is there anything else you can tell us?
> A. No, sir.
> Q. How did providing such false information cause Base injury?

A. I think I've answered that in conjunction with 1 and 2 also.
Q. And as it relates to damages for negligent mispresentation claim, are those damages the same dealing with the subject matter of the lease that we've talked about?
A. Yes, sir.
Q. And what amount of damages are those? Are those the same amounts, for example the $3.3 million that you're claiming for breach of contract action?
A. It's all the amount of damages. We're claiming both the amount I expended and the amount for lost profits.
Q. So that's the 3.3 million that you're claiming for breach of the lease, plus this unspecified amount of lost profits you believe may be up to 10 million.
A. Correct.
Q. And those are damages arising out of the subject matter of the lease. Correct?
A. Correct. *See* Plaintiff MSJ App. 689-90.

Thus, having admitted that the remainder of Tenant-Base's damages asserted under its negligent misrepresentation claim arise under the Lease itself and are "benefit of the bargain" damages, the court concludes that Tenant-Base has not shown any basis for recoverable damages, as a matter of law, and, thus, summary judgment should be granted in favor of Landlord-Center on the negligent misrepresentation claim.

C. Breach of Contract

The elements of a breach of contract claim are: (a) the existence of a valid, enforceable contract; (b) the plaintiff is a proper party to sue for the breach; (c) the non-breaching party performed or tendered performance; (d) the defendant breached the

contract; and (e) the defendant's breach caused the damages sought. *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 739 (Tex. App.—Fort Worth 2008, pet. dism'd). Tenant-Base alleges six separate breaches on the part of Landlord-Center in its Counterclaims: (1) failing to provide quiet enjoyment of the premises; (2) failing to fully resolve the parking issues; (3) failing to provide the Hillwood Parking Agreement (4) refusing to allow Tenant-Base to advertise and pass out handbills and coupons inside the Arena, even though the Lease allows the same; (5) impeding the access of customers to the Chili's Restaurant by barricading the entry way located immediately next to the Restaurant during the Circus; and (6) charging rent before the rental commenced on December 6, 2008. The first alleged breach has already been addressed in the MD Order, which specifically dismissed any claims for breaches based upon Landlord-Center's failure to provide quiet enjoyment of the premises. The remaining breaches are discussed in detail below.

1. The Closing of the South Entrance and Preventing Disbursement of Marketing Materials

As to the next two alleged breaches by Landlord-Center (*i.e.*, refusing to allow Tenant-Base to hand out flyers and coupons inside the Arena and impending access of customers to the Restaurant by closing the south entrance of the Arena during the Circus), the court observes that such actions were actually

permitted under the terms of the Lease. The Rules and Regulations regarding the Lease are contained in Exhibit "B" to the Lease. Section 6 of Rules and Regulations, entitled "Marketing and Advertising" provides that "Tenant is strictly prohibited from any type of marketing or advertising on property owned by Landlord without Landlord's written approval, which approval may be withheld in Landlord's sole discretion. *See* MSJ App. 51. It is undisputed that Tenant-Base had no such written approval and Landlord-Center only instructed Tenant-Base to refrain from marketing inside the Arena after it received a complaint from someone at the Circus. *See* Defendant Resp. App. 162. Thus, Landlord-Center could not have breached the Lease when it requested Tenant-Base to refrain from passing out marketing materials at the Circus.

Section 4 of the Rules and Regulations entitled "Common Areas," provided in part that "Landlord reserves the right to control and operate the public portions of the Center and the public facilities, as well as facilities furnished for the common use of the tenants, in such manner as Landlord, in its reasonable judgment, deems best for the benefit of the tenants generally." *See* MSJ App. 50. The Arena has multiple entrances on all sides and since the Arena opened, Landlord-Center from time to time has closed some entrances during particular events held at the Arena. *See* MSJ App. 1105-1106. These decisions are apparently made, on

a case-by-case basis, for logistical reasons that include, among other things, whether such events are anticipated to have lower attendance and/or whether an event requires access to the interior space adjacent to an entrance for the staging of equipment. *Id.* at 1106. For example, during the one-year period from September 1, 2008 through August 31, 2009, the main South entrances to the Arena were closed on approximately 27 dates for events. *Id.* These closures, however, did not include the separate outside entrance to the Restaurant, which entrance was located near the southwest corner of the Arena. *Id.* The Circus has been held at the Arena every summer since 2001, and the south entrances have been closed at various times over the years. *Id.* It was within Landlord-Center's decision making authority to decide whether or not it chose to keep the South entrance open and, since there is clear evidence that this is not the first time such a closure has happened, the court cannot discern any genuine issue of material fact as to whether a breach occurred due to such closures.[27]

2. Lack of Parking Agreement

Next, the court will turn to whether Landlord-Center's failure to provide the Parking Agreement constituted a breach of the Lease. First, it is not disputed that the Landlord-Center

[27] Moreover, Tenant-Base did not present any summary judgment evidence showing that such closures were prompted by any type of ill motive towards Tenant-Base.

had an obligation to provide for parking for Chili's customers in Parking Lot E, pursuant to a referenced agreement that would be between Landlord-Center and Hillwood (the latter being the owner of Lot E). But, as a matter of contract interpretation, the court does believe that Landlord-Center's failure to promptly provide the Parking Agreement (for several months; the Parking Agreement was eventually signed September 1, 2009) was a ***material*** breach of the Lease. However, assuming it was not a material breach, Tenant-Base's recovery on such breach would be contingent upon whether ***it,*** in fact, performed its obligations under the Lease, which included paying rent.

It is undisputed that Tenant-Base never paid a month of rent under the Lease. Tenant-Base, alleges, however, that it was excused from performing due to Landlord-Center's failure to provide the Parking Agreement. It is a "fundamental principle of contract law that a material breach by one contracting party excuses performance by the other party, and an immaterial breach does not." *Coastal Ref. & Mktg., Inc. v. U.S. Fid. & Guar. Co.*, 218 S.W.3d 279, 294 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). In *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994), the Texas Supreme Court stated that "[i]n determining the materiality of a breach, courts will consider, among other things, the extent to which the non-breaching party

will be deprived of the benefit that it could have reasonably anticipated from full performance."[28] In assessing materiality "the less the non-breaching is deprived of the expected benefit, the less the material breach." *Id.*

Again, as set above, the court cannot conclude that Landlord-Center's failure to provide the Parking Agreement was a ***material*** breach of the Lease. And this, likewise, means that Tenant-Base's failure to pay rent is not excused. The court will not repeat itself in citing the significant, lengthy and unequivocal testimony from Craver, Courson, Aranza, and Mr. Thompson regarding how parking was not a problem for patrons visiting the Restaurant. Rather, their testimony was consistent and unequivocal that the lack of patrons (having nothing to do with parking) caused the Restaurant's problems. Without a doubt, at the time Landlord-Center and Tenant-Base signed the Lease, it was certainly agreed that parking was necessary for the Restaurant (thereby necessitating the need for a Parking

[28] *Hernandez* also provided that the court should consider other factors when determining materiality of a breach including: (1) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (2) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (3) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (4) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Id.* at 693, n.2.

Agreement with Hillwood). Was there a breach by Landlord-Center to the extent it did not provide Parking Lot E to Tenant-Base? Yes. But, with regard to the issue of materiality, the undisputed summary judgment evidence shows that, subsequent to the Restaurant opening, patrons (including Aranza himself), ***always had a place to park***. In fact, by all accounts, patrons almost always parked in the much-closer Lot A. Lot A was free to the public for two hours during Non-Event Days. In fact, Lot E (for which Tenant-Base bargained) was hundreds of feet away from the Restaurant. Tenant-Base never once relayed to Landlord-Center, within the roughly 10 month period the Restaurant was open, that it had any parking concerns.

A similar situation occurred in the case of *Earl Hayes Rents Cars & Trucks v. City of Houston*, 557 S.W.2d 316 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). In *Earl Hayes*, a parking facilities operator entered into a contract with the City of Houston whereby the operator had the right to operate parking facilities at the Houston Intercontinental Airport. *Id.* at 318. As compensation to the City, the operator agreed to pay the City a percentage of gross revenues or, alternatively, minimum annual guaranteed payments. *Id.* After the airport and parking facilities opened, the City was unable to make available to the operator the specified number of parking spaces and to

furnish the operator with directional signs and office space as required by the contract. The operator expended its own funds to construct the office space and provide signs. *Id.* When the City failed to reimburse the operator for such expense, the operator withheld payments that it owed under the contract. *Id.* at 319-320. The City then evicted the operator and operated the parking facilities for the balance of the term of the contract. *Id.* at 320. The operator sued the City for breach of contract and the City counterclaimed for breach of contract, with each party claiming that the other owed amounts under the contract. *Id.* The Court of Appeals held that the City did not materially breach the contract, stating as follows:

> There is evidence in the record from which the trial court could have concluded that the City's failure to furnish the required number of parking spaces, office facilities and signs was not of such a nature, under the circumstances, as to excuse Hayes' [plaintiff's] obligation to pay the required compensation. Not every breach of performance will excuse the other party from performance. Where the obligations imposed upon one party are independent of or subsidiary to the obligations imposed upon the other, a breach by one party may not constitute such a repudiation of the contract as will excuse the other party from continued performance. *Id.* at 320.
> ***
> The City's failure to perform its obligations under the contract did not render performance by HAYES [plaintiff] impossible, and HAYES [plaintiff] continued to operate the facilities under the contract. The trial court was justified in concluding that HAYES [plaintiff] had elected to continue the contract in effect and that the City's breach did not excuse HAYES' [plaintiff's] failure to perform.

Id. at 321.

Similar to the court in *Hernandez*, the court interprets the Lease such that Tenant-Base was not excused from performing its obligations under the Lease, when it was clearly possible to continue operating despite the absence of the Parking Agreement. In sum, this court cannot conclude that the alleged breach of which Tenant-Base complains was material, and that, thus, Tenant-Base's performance under the Lease was excused.

3. Rent

Finally, the bankruptcy court was confronted with the issue of whether Landlord-Center's decision to charge rent before the Restaurant actually opened was a breach of the Lease (Tenant-Base argues the "Chili's Opening Date" should be deemed to have been no sooner than December 6, 2008 and Landlord-Center argues that the "Chili's Opening Date" should be deemed to have occurred early in October 2008). The bankruptcy court initially concluded that there existed genuine issues of material fact as to when the Lease term actually commenced, and accordingly, the court did not grant summary judgment on this alleged breach. Specifically, Tenant-Base alleged that delays in opening the Restaurant were beyond its reasonable control. There seemed to be disputed evidence regarding whether this was, in fact, the case (it appears that there may have been permitting issues, construction issues, financing issues, and even other issues at play). The

bankruptcy court believed it was necessary to hear full evidence on this at a trial.[29]

Subsequently, the parties entered into a Recital and Stipulation dated February 19, 2013, on the one disputed fact as to the "Chili's Opening Date" under the Lease Agreement (that such date was December 6, 2008), so that no trial on the merits is needed on the one otherwise-remaining breach of contract counterclaim of Tenant-Base, which was an assertion that Landlord-Center improperly charged rent before December 6, 2008—no rent shall then be deemed to have accrued before such date.

D. Attorney's Fees

The parties also agreed in their Recital and Stipulation dated February 19, 2013 that parties would bear their own costs and attorneys fees. Thus, Tenant-Base's attorney's fees claim is moot.

[29] The court should note that Tenant-Base, at one time, alleged that Landlord-Center's failure to provide the Parking Agreement delayed the opening of the Restaurant, specifically, because it impacted Landlord-Center's ability to procure the PD amendment. The court observes that there now seems to be no summary judgment evidence suggesting that the absence the Parking Agreement impacted/delayed the procurement of the PD amendment. Not only is there no summary judgment suggesting this, but it appears that Tenant-Base no longer alleges this and it will be undisputed for purposes of the upcoming Trial. *See* MSJ App. 650-51, 690, 878; *See also* Plaintiff Resp. App. 51.

CONCLUSION

Based on the foregoing:

A. The bankruptcy court proposes that Defendant's Partial MSJ be denied, in full.

B. The bankruptcy court proposes that Plaintiff's MSJ be granted on all of Tenant-Base's live tort counterclaims (*i.e.*, all of Tenant-Base's fraud claims and its negligence misrepresentation claim).

C. The bankruptcy court proposes that Plaintiff's MSJ be granted, in part, as to Tenant-Base's breach of contract claims. Specifically, Landlord-Center is entitled to summary judgment on the alleged breaches asserted by Tenant-Base that Landlord-Center: (i) failed to provide the Hillwood Parking Agreement and/or to fully resolve parking issues (such breach(es) not being material and, thus, precluding any recovery by Tenant-Base due to its nonperformance of Tenant-Base's obligation to pay rent), (ii) refused to allow Tenant-Base to advertise and pass out handbills and coupons inside the Arena, and (iii) impeded the access of customers to the Restaurant by barricade.

D. The bankruptcy court proposes that Plaintiff's MSJ be denied, in part, as to Tenant-Base's breach of contract claim alleging that Landlord-Center improperly charged rent before December 6, 2008. Rather, the bankruptcy court proposes that the District Court accept the Recital and Stipulation of the

parties dated February 19, 2013, agreeing that the "Chili's Opening Date" should be deemed to have occurred on December 6, 2008, thus resolving in full Tenant-Base's breach of contract claim alleging that Landlord-Center improperly charged rent before December 6, 2008.

E. The bankruptcy court proposes that the District Court enter Final Judgment that Tenant-Base take nothing on all counts on its counterclaim, denying all other relief, and ordering that each party shall bear its own costs and attorney's fees.

END OF PROPOSED MEMORANDUM OPINION AND ORDER