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## District Courts Civil Litigant Inquiry

<b>Cause Number:</b>	2007CI09026
<b>Name:</b>	DAVID MONTELONGO
<b>Litigant Type:</b>	DEFENDANT
<b>Style:</b>	DAVID ESCALANTE ETAL VS MONTELONGO DEVELOPMENTS LLC ETAL
<b>Court:</b>	288
<b>Date Filed:</b>	06/15/2007
<b>Docket Type:</b>	BREACH OF CONTRACT
<b>Case Status:</b>	PENDING

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\* D O C K E T I N F O R M A T I O N \*

CAUSE NUM: 20070109026  
DATE FILED: 06/15/2007 COURT: 288 UNPAID BALANCE: 0.00  
TYPE OF DOCKET: BREACH OF CONTRACT

\* \* \* S T Y L E \* \* \*

DAVID ESCALANTE ETAI  
VS MONTELONGO DEVELOPMENTS LLC ETAI

ACCOUNT TYPE: ACCOUNT NO:  
ACCESS: 0 STATUS: PENDING  
LIST TYPE: C

\* L I T I G A N T I N F O R M A T I O N \*

SEQ	LAST /FIRST /MIDDLE NAME	LIT. TYPE/ATTORNEY	DATE
00001	ESCALANTE DAVID	FLAINTIFF 00001 PRINS, TODD A	06/15/2007
00002	PRES ESTATE LLC	FLAINTIFF 00001 PRINS, TODD A	06/15/2007
00003	MONTELONGO DEVELOPMENTS LLC	DEFENDANT 00002 SMAISIRLA, CLAYTON J	06/15/2007
00004	MONTELONGO DAVID	DEFENDANT 00002 SMAISIRLA, CLAYTON J	06/15/2007

\* S E R V I C E S I N F O R M A T I O N \*

SEQ	SERVICE TYPE / DATES	DISI	LITIGANT NAME
00001	CITATION ISS: 06/15/2007 REC: 06/18/2007	4	
00003	CITATION ISS: 06/15/2007 REC: 06/18/2007	4	MONTELONGO DAVID

\* A T T O R N E Y I N F O R M A T I O N \*

SEQ	DATE FILED	BAR NBR.	NAME	STATUS	DATE
00001	06/15/2007	16330400	FRINS, TODD A	SELECTED	06/15/2007
00002	06/28/2007	24041936	SMAISIRLA, CLAYTON J	SELECTED	06/29/2007

\* P R O C E E D I N G I N F O R M A T I O N \*

SEQ	DATE FILED	REEL	IMAGE	PAGE COUNT
00001	06/15/2007	0000	0000	0000
	DESC: PLAINTIFF'S ORIGINAL PETITION			
00002	06/15/2007	0000	0000	0000
	DESC: REQUEST FOR			

2 CITS/PFS

00003	06/15/2007	0000	0000	0000
	DESC: SERVICE ASSIGNED TO CLERK 2			
00004	06/28/2007	0000	0000	0000
	DESC: ORIGINAL ANSWER OF MONTELONGO DEVELOPMENTS LLC AND DAVID MONTELONGO			
00005	07/24/2007	0000	0000	0000
	DESC: FAX TRANSMITTAL FR: MINDY LARCOM			
00006	07/25/2007	0000	0000	0000
	DESC: COPY OF ALL PETITIONS, ANSWERS & ORDERS M/D TO MINDY LARCOM MAGA TV 1551 BRIARCLIFF RD ATLANTA GA 30306			

\* T R I A L I N F O R M A T I O N \*  
 SEQ      DATE FILED      COURT      SETT. DATE      TIME      ATTY

\* O R D E R I N F O R M A T I O N \*  
 SEQ      DATE FILED      JUDGE NAME      VOLUME      PAGE      PAGE CNT      AMOUNT      SDF

\* B O N D I N F O R M A T I O N \*  
 SEQ      DATE FILED      PRINCIPAL



Defendant, DAVID MONTELONGO, is an individual residing in Bexar County Texas and may be served with process at 8026 Vantage Dr. #215, San Antonio, TX 78230.

### C. Venue

Venue is appropriate in Bexar County, Texas because the Defendants' principal place of business and/or residence is in Bexar County, Texas.

### D. Facts

Plaintiffs and Defendants, entered into a contract whereby they would form a joint venture to acquire and develop approximately 4 acres of land in Schertz, Texas. The Plaintiffs would "invest \$5,000 as refundable Earnest Money to secure the contract. "Escalante" will also make a \$500 check to the "Seller", as the non-refundable Option Money to reserve the right to release "Montelongo" and "Escalante" from the contract at any time during the 90 day Option/Feasibility period." The Plaintiffs fully complied with this and submitted the funds

The Defendants agreed "to bring in a third Partner to secure financing for the construction of an approximate 14,000 sq. ft. retail condo strip center (6 units)."

The parties were then to form:

"LLC along with the third Partner in which "Escalante" will have 17% ownership interest in the overall LLC. "Escalante" will form its own LLC. In which will ultimately be the 17% shareholder of the "New" LLC formation. "Escalante" agrees to close on the purchase of a portion of the land determined by Survey (approximately 2 Acres) with a Cash Closing. The Land will be titled to the New LLC. at closing in order to Leverage the "Free and Clear Land' against the

Construction Loan. The second portion of the land (approximately 2 Acres) will either be Sold to a Third Party in which “Montelongo” and “Escalante” will share the profits 50/50 or “Montelongo” will bring in another Partner to close on the second portion of the land. Both “Montelongo” and “Escalante” reserve the right to bring in additional Capitol to close on the 2<sup>nd</sup> portion of land, in order to secure 17% interest in phase 2 of construction. Phase 2 of construction will consist of a similar 14,000 sq ft. structure”

The parties, therefore, created a continuing joint venture/partnership relationship by and between the Plaintiff and Defendant.

While payments were made by the Plaintiffs as agreed upon, the Defendants took advantage of those funds, yet have refused to move forward on the project.

#### **Count 1 – Breach of Contract**

All of the above aforementioned acts constitute breach of contract on behalf of the Defendants.

#### **Count 2 – Quantum Meruit**

Plaintiff is entitled to restitution in that Defendants have obtained a valuable benefit due to the work of the plaintiff by taking undue advantage of plaintiff and by not fully performing their part of the agreement.<sup>1</sup>

#### **Count 3 – Fraud**

All of the above aforementioned acts constitute fraud on behalf of the Defendants. The Defendants knowingly made a false, material representation to Plaintiffs that they would share in the revenues of the venture entered into by the parties.

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<sup>1</sup> *Burlington N. R.R. v. Southwestern Elec. Power Co.*, 925 S.W.2d 92, 97 (Tex App —Texarkana 1996), *aff'd on other grounds*, 966 S.W.2d 467 (Tex. 1998).

The Defendants made these representations with the intent that Plaintiffs act on them by entering into a partnership and invest in the partnership. Plaintiffs relied on the representation which caused it injury in the form of expenses and lost profits.<sup>2</sup>

This is the kind of fraud that allows for exemplary damages in that the Defendants made material misrepresentations that were false, knowing that they were false or with reckless disregard as to their truth and as a positive assertion, with the intent that the representation be acted upon by the Plaintiffs. The Plaintiffs relied upon the representations and suffered injury as a result of this reliance. The Plaintiffs, therefore, seek exemplary damages in an amount within the jurisdictional limits of the court.

#### **Count 4 – Breach of Fiduciary Duty**

As partners, the Defendants owed to the Plaintiffs a duty of loyalty to the joint concern;<sup>3</sup> a duty of utmost good faith, fairness, and honesty in dealing with plaintiff on matters relating to the purchase and development of the property;<sup>4</sup> a duty of full disclosure of matters relating to the partnership;<sup>5</sup> as well as a duty to account for all partnership profits and property.<sup>6</sup> All of the above aforementioned acts constitute breach of fiduciary duty on behalf of the Defendants.

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<sup>2</sup> *Insurance Co of N. Am V. Morris*, 981 S.W 2d 667, 674 (Tex 1998)

<sup>3</sup> *Bohatch v Butler & Binion*, 977 S W 2d 543, 545 (Tex. 1998).

<sup>4</sup> *Id.*

<sup>5</sup> Tex. Rev. Civ. Stat. art 6132b-4.03; *Hughes v St. David's Support Corp* , 944 S.W 2d 423, 426 (Tex. App.—Austin 1997, writ denied).

<sup>6</sup> Tex. Rev Civ. Stat. art 6132b-4.04.

### **Count 5 – Accounting under Partnership and Contract**

The Defendants owe a duty to account for all partnership profits and property and to refrain from self-dealing.<sup>7</sup> Plaintiffs request that the court would order the Defendants to make an accounting to the Plaintiffs.

### **Count 6 – Negligent Misrepresentation**

The elements of a cause of action for negligent misrepresentation include: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.<sup>8</sup>

In this case, Defendants made the representation that the parties would move forward on the development of the property together. The same Defendants supplied "false information" for the guidance of Plaintiffs in their business. The same Defendants did not exercise reasonable care or competence in obtaining or communicating the information. The Plaintiffs suffered pecuniary loss by justifiably relying on the representation.

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<sup>7</sup> Tex. Rev. Civ. Stat. art. 6132b-4 04; *Cheek v Humphreys*, 800 S.W.2d 596, 597-99 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1990, writ denied).

<sup>8</sup> *Federal Land Bank Association Of Tyler v. William C. Sloane, Lettie Sloane, and Robert C. Sloane*, 825 S.W.2d 439, 442; 1991 Tex. LEXIS 147, 8-9; 35 Tex. Sup. J. 184 (citing RESTATEMENT (SECOND) OF TORTS § 552 (1977)) (See, e.g., *Cook Consultants, Inc v Larson*, 677 S.W.2d 718 (Tex. App.--Dallas 1984), rev'd on other grounds, 690 S.W.2d 567 (Tex. 1985), on remand, 700 S.W.2d 231, 234 (Tex. App.--Dallas 1985, writ ref'd n.r.e.); *Traylor v. Gray*, 547 S.W.2d 644, 656 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.); *Rosenthal v. Blum*, 529 S.W.2d 102, 104-05 (Tex. Civ. App.--Waco 1975, writ ref'd n.r.e.) (citing an earlier draft of the Restatement).



### **E. Damages**

Defendants' conduct was a producing and/or proximate cause of the economic damages incurred by the Plaintiff. The Plaintiff seeks damages in an amount that are within the jurisdictional limits of the court.

### **F. Attorney Fees**

Plaintiff is entitled to recover reasonable and necessary attorney fees under the Texas Civil Practice and Remedies Code.

### **G. Prayer**

For these reasons, Plaintiff asks that Defendant be cited to appear and answer and that Plaintiff have judgment against Defendant for the following:

- a. Loss of benefit-of-the-bargain.
- b. Costs of mitigation.
- c. Any other actual damages incurred.
- d. Punitive or Exemplary damages.
- e. Lost profit.
- f. Prejudgment and postjudgment interest.
- g. Costs of suit.
- h. Attorney fees.
- i. All other relief, in law and in equity, to which Plaintiffs may be entitled.

### **H. Request for Disclosure**

Under Texas Rule of Civil Procedure 194, Plaintiff requests that each Defendant disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

Respectfully Submitted,



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Todd A. Prins  
SBN 16330400  
Angela M. Arnwine  
SBN 90001467

Prins ♦ Arnwine  
4940 Broadway, Suite 108  
San Antonio, Texas 78209  
Telephone: (210) 820-0833  
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ATTORNEYS FOR PLAINTIFF

COURT  
PROCESS DEPT

DAVID ESCALANTE AND PRES  
ESTATE, LLC,  
Plaintiffs



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IN THE DISTRICT COURT

VS.

288<sup>th</sup> JUDICIAL DISTRICT

MONTELONGO DEVELOPMENTS,  
LLC AND DAVID MONTELONGO,  
Defendants

BEXAR COUNTY, TEXAS

**DEFENDANT'S ORIGINAL ANSWER**

TO THE HONORABLE JUDGE:

NOW COME Defendants, MONTELONGO DEVELOPMENTS, LLC AND DAVID MONTELONGO ("Defendants"), and without waiving any of their defenses, files this, their Original Answer to Plaintiff, DAVID ESCALANTE AND PRES ESTATE, LLC's ("Plaintiffs") Petition, and would show the Court as follows:

I

Defendants hereby exercises their right to require Plaintiffs to prove its allegations by a preponderance of the credible evidence.

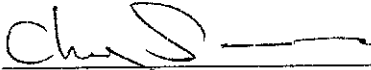
II.

Defendants generally deny the matters pled by Plaintiffs, as provided by Rule 92 of the Texas Rules of Civil Procedure, and asks that these matters be properly decided by this Honorable Court and Jury.

WHEREFORE, PREMISES CONSIDERED, Defendants pray Judgment of the Court and for such other and further relief, both general and special, at law and in equity, to which it may be justly entitled.

Respectfully submitted,

NORMAN & OLIVER, P.C  
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Telephone: (210) 822-8972  
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By:   
CLAYTON J. SMAISTRLE  
State Bar No 24041936

ATTORNEY FOR DEFENDANTS,  
MONTELONGO DEVELOPMENTS, LLC  
AND DAVID MONTELONGO

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been forwarded to the following counsel of record in compliance with the Texas Rules of Civil Procedure on this 27<sup>th</sup> day of June, 2007:

Mr. Todd A. Prins  
State Bar No. 16330400  
Ms Angela M Arwine  
State Bar No 90001467  
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CLAYTON J. SMAISTRLE

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June 27, 2007

Margaret G. Montemayor  
District Clerk  
100 Dolorosa  
San Antonio, Texas 78205

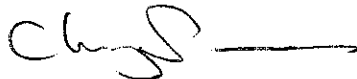
RE: *Cause No 2007CI09026; David Escalante and Pres Estate, LLC v Montelongo Developments, LLC and David Montelongo*

Dear Ms. Montemayor:

Enclosed please find an original and one copy of Defendant Original Answer. Please file the document with the Court and return a file-stamped copy to our office in the enclosed, self-addressed and stamped envelope.

Should you have any questions, please do not hesitate to contact me. Thank you for your courteous attention to this matter

Sincerely,



Clayton J. Smaistrla

CJS  
Enclosures

Cc: Mr. Todd A. Prins  
Ms. Angela M. Arnwine  
Prins Arwine  
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San Antonio, Texas 78209