

IN THE CIRCUIT COURT OF COUNTY, MISSISSIPPI

, PLAINTIFF

V.

NO.

, DEFENDANTS

FIRST AMENDED COMPLAINT

Plaintiff, , a Mississippi corporation with its principal place of business in , County, Mississippi, files this its suit against Defendants, and and in support thereof states the following:

Parties and Venue

1. Plaintiff is a Mississippi corporation with its principal office in , County, Mississippi.

2. is a Mississippi corporation having its principal place of business in , Mississippi, and may be served with process by serving its agent for process, . is an adult resident citizen of , Mississippi, who may be served with process at .

3. This cause of action arises out of a contract to be performed in County, Mississippi, and a tort which occurred in said county.

FACTS

4. In , was the general contractor for the construction of between and in , Mississippi. , a real estate developer, owned acres located on in County, Mississippi, which required filling to a certain elevation to be commercially developed. contacted and requested that allow it to use the property to dump construction debris, but declined, stating that the property was to be developed as a retail center, which would preclude the use of such fill materials as construction debris.

5. and executed a Letter Agreement under date of , , Exhibit attached, which provided that , in consideration of an ownership interest, would fill the property to, the agreed elevation by , with soil materials which would contain no construction debris or refuse. Subsequently, the parties

entered into a Limited Partnership Agreement dated \_\_\_\_\_, \_\_\_\_\_, a copy of which is attached as Exhibit \_\_\_\_\_.

6. Said Limited Partnership Agreement specified that the Partnership was organized to "own, improve, and hold for investment or development certain real property to be contributed to the partnership by the General Partner"( \_\_\_\_\_ ) and that the fill material would "consist solely of native soil materials and not include any type of construction debris or refuse."

7. Shortly after the execution of said letter, \_\_\_\_\_ commenced filling the property, but, unknown to \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ caused \_\_\_\_\_ land to be filled with construction debris, broken concrete pavement, broken asphalt pavement, steel reinforcing bars, bridge members, timbers, bricks, tree stumps, and other unsuitable material, which made the land completely unfit for economical commercial development of any kind. Said Defendants fraudulently caused said improper construction debris to be covered with soil material, thus concealing said gross, wanton, and intentional breach of contract in order fraudulently to induce \_\_\_\_\_ to accept said performance.

8. \_\_\_\_\_ deliberately used \_\_\_\_\_ land as a dump for a large amount of the construction debris generated as a result of \_\_\_\_\_ performance of its contract for the construction of the new \_\_\_\_\_ Project from \_\_\_\_\_ to \_\_\_\_\_. Said illegal, unauthorized and fraudulent misuse of \_\_\_\_\_ property not only destroyed the ability of \_\_\_\_\_ to develop the property in an economically feasible manner, but, on information and belief, it also resulted in huge savings for \_\_\_\_\_ in its cost of completing said highway construction project by eliminating the need to purchase dumping privileges for unwanted construction debris and avoiding potentially expensive longer hauls to sites where the debris from said construction project could be legally dumped.

9. \_\_\_\_\_ and \_\_\_\_\_ falsely represented to \_\_\_\_\_ that \_\_\_\_\_ had properly completed its duties under the Limited Partnership Agreement; and, relying on said representation, paid \$ \_\_\_\_\_ to \_\_\_\_\_ in consideration of \_\_\_\_\_ release of its rights in the Partnership property.

10. Further relying on \_\_\_\_\_ assurances of performance, and believing that \_\_\_\_\_ had completed the performance, \_\_\_\_\_ sold to \_\_\_\_\_ acres on the \_\_\_\_\_ corner of said property from \_\_\_\_\_. \_\_\_\_\_ entered a lease with \_\_\_\_\_, required \_\_\_\_\_ build a building and parking lot to the specifications of said tenant on said \_\_\_\_\_ acre tract.

11. As a result of tests conducted by soil engineers employed by said tenant, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ first became aware of the concealed construction debris buried on the site and, accordingly, were required to completely excavate the building site at its own expense and, to date, has expended approximately \$ \_\_\_\_\_ to do so. Additionally, said tenant has made demand on \_\_\_\_\_ for liquidated damages and substantial unspecified expenses incurred by said tenant rectifying the problems in the fill caused by the construction debris in the tenant's parking lot area. Also, as a direct and proximate result of the actions of Defendants, the value of remaining property has been reduced by approximately \_\_\_\_\_ (\$ \_\_\_\_\_). On information and belief, it would cost in excess of \$ \_\_\_\_\_ to remove the fill placed on Plaintiff's property by Defendants and replace it with soil that met the specifications of the contract between Plaintiff

and . The curative work required to be done resulted in a delay of months in opening the store which resulted in a loss of rent and liability for liquidated damages. Said fill condition also caused substantial questions to be raised as to the suitability of the remaining site for development, thus resulting in further damages to .

12. , and personally, fraudulently and, with intent to deceive , deliberately placed, or caused to be placed, the organic material, rubble, broken concrete pavement, broken asphalt pavement, steel reinforcing bars, bridge members, timbers, bricks and other unacceptable materials on property and concealed their actions from . Said fraudulent concealment was done with the intent to defraud into believing that was properly performing its duties under the Letter Agreement and the Limited Partnership Agreement, so that would not require Defendants to cease said flagrant destruction of property values, and to believe that it had completed its contract with and thus to obtain the compensation it claimed was due under its agreement with . , acting in reliance on said fraudulent concealment, failed to stop Defendants from the continued dumping on its land and also executed a release under the terms of which paid \$ in exchange for its interest in the land. If had been aware of the condition of said soil, it would not have executed said release and paid said \$ .

13. Defendants knew full well that their actions in using valuable commercial property on as a dumpsite for their construction debris would substantially destroy the commercial value of said property. Not only is the soil rendered too unstable for construction, but the presence of large chunks of concrete and other debris prevent the economical construction of foundations, utility lines, streets, parking areas and other excavation required by a commercial development. Said wanton and deliberate destruction of the value of property, along with the intentional and fraudulent concealment thereof, constitutes a separate tort for which Defendants are liable in actual and punitive damages.

## COUNT I

### Breach of Contract

14. , under the Letter Agreement attached as Exhibit A and the Limited Partnership Agreement attached as Exhibit B, had a duty to fill land with native soil materials only and not with construction debris or refuse. deliberately and intentionally breached its agreement and did, in fact, place a substantial amount of construction debris on the said land. As a direct and proximate result of said breach of contract, has been damaged in the amount of not less than \$ .

Wherefore, demands judgment against for all damages suffered as a result of said breach of contract in the sum of at least \$ , plus prejudgment interest and costs.

## COUNT II

### Intentional Tort

15. , and fraudulently, deliberately, intentionally, and with actual malice destroyed the value of land by burying and concealing large amounts of construction debris and refuse on said land which rendered it unsuitable for commercial development without the expenditure of large sums of money for rectification. Said , and , fraudulently and with the intent to deceive Plaintiff then caused said construction debris to be concealed from and its agents. Said unauthorized and concealed placing of construction debris on said property without their consent constitutes a trespass and was accompanied by such flagrant, malicious and outrageous conduct as to constitute a separate and independent tort for which said Defendants are liable for actual damages in the amount of (\$ ) and punitive damages in the same amount, (\$ ).

### ACCOUNT III

#### Breach of Fiduciary Duty

16. As a result of the execution of Exhibits A and B, and the trust and confidence placed in in the joint development of the property as partners, owed a fiduciary duty to in this matter. concealed, deliberate, and malicious destruction of value of property for its own gain constitutes a breach of said fiduciary duty, for which is liable for actual and punitive damages.

### COUNT IV

#### Damages and Indemnity for Curative Work

17. As a direct and proximate result of their wrongful actions herein, Defendants jointly and severally are liable to indemnify for its expenses to date for the curative work on said acre tract in the amount of (\$ ) and for any further payments it may be required to make to for curative work on said soil, which is estimated to be (\$ ). In the alternative, Defendants are liable to for indemnity to for all expenses which incurred in said curative work.

Wherefore, and demand judgment against , and , jointly and severally for all damages proximately caused by their said wrongful acts in an amount of not less than (\$ ) plus prejudgment interest, costs and such punitive damages of not less than (\$ ) for a total judgment of not less than (\$ ).

Plaintiff also demands that the Defendants be ordered to repay to the Plaintiff the sum of \$ for said Release, plus interest, and that the parties be restored to the status quo ante.

### COUNT V

#### DECLARATORY RELIEF

Plaintiff would show the Release referred to in Defendants' Fourth Affirmative Defense was obtained by the fraud of the Defendant, \_\_\_\_\_, in that it deliberately misrepresented to the Plaintiff, \_\_\_\_\_, that Defendant had complied with the letter agreement attached to the Complaint as Exhibit "A" and the Limited Partnership Agreement attached thereto as Exhibit MBM. Specifically, Defendant \_\_\_\_\_ intentionally misled Plaintiff into believing that there was no construction debris or any materials other than native soils in the said fill when in fact said Defendant had caused to be placed in said fill huge amounts of said construction debris, as all has been set forth in more detail above. Because of said intentional fraud of Defendant \_\_\_\_\_, this Court should declare that the said Release is void and of no effect and that the Defendant, \_\_\_\_\_, has failed to fulfill its contract with Plaintiff and that it be ordered to return to Plaintiff, \_\_\_\_\_, the \$ \_\_\_\_\_ paid as a result of said fraud and the parties be restored to the status quo ante.

Wherefore, Plaintiff demands:

Judgment against Defendants jointly and severally for all damages proximately caused by Defendants' conduct and punitive damages in the sum of \$ \_\_\_\_\_; and

Judgment declaring that (1) the Release executed by Plaintiff and \_\_\_\_\_ be declared void; that (2) \_\_\_\_\_ must return the \$ \_\_\_\_\_ paid for said Release with interest to Plaintiff; that (3) \_\_\_\_\_ has failed to fulfill its duties under the Limited Partnership Agreement with Plaintiff; and that (4) the parties are returned to the position in which they were prior to the execution of the Release.

Respectfully submitted,

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Attorney for

Of counsel:

Telephone:  
MSB #  
Attorney for

CERTIFICATE OF SERVICE

I, \_\_\_\_\_, hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to \_\_\_\_\_, and to \_\_\_\_\_.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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