

MARY ELIZABETH WEATHERFORD,
Individually and d/b/a Ellouise Abbott
Showroom,

Plaintiff,

VS.

DECORATIVE CENTER OF
HOUSTON, LP,

Defendant

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IN THE DISTRICT COURTS OF

HARRIS COUNTY, T E X A S

269TH JUDICIAL DISTRICT

**PLAINTIFF'S INITIAL BRIEF TO
SUPPORT TEMPORARY INJUNCTION**

I. Key Lease Provisions, Applied to Undisputed Facts, Require Decorative Center to Apply \$64,380.00 in Unexpended "Landlord's Contribution" to Ms. Weatherford's Rent

1. Sometimes a case that seems to be simple, is. This is such a case. The Court can readily determine the unambiguous intent of the parties by examining the language within the four corners of the Lease, by giving that language its ordinary meaning, and by applying a few hornbook rules of contract construction. All else is a tale full of sound and fury, signifying nothing.

2. [Article 41](#) of the Lease, entitled "Landlord's Contribution," permits Ms. Weatherford to propose and make Tenant Improvements, described as "the initial work and installations required to make the Demised Premises suitable for the conduct of Tenant's business." If she does, the Lease requires Decorative Center to "contribute up to the sum of \$64,380.00 ('Landlord's Contribution') toward the cost of such work." And the Lease requires

that if the amount the "Tenant expends for the cost" of such Tenant Improvements "is less than the amount of Landlord's Contribution, Landlord shall apply any unexpended portion to the Tenant's rent." Thus reads the plain language of the Lease.

3. What is *not* in the Lease is also very clear. Nowhere does the Lease *require* Ms. Weatherford to propose or make *any* Tenant Improvements. Nowhere does the Lease give Decorative Center the right to specify any particular Tenant Improvements she must make. Nowhere does the lease specify any percentage or dollar amount of the Landlord's Contribution that must be spent on Tenant Improvements, rather than applied to Ms. Weatherford's rent. And nowhere does the Lease abridge Ms. Weatherford's inherent right to determine for herself what makes the Demised Premises "suitable" for the conduct of her own business — Decorative Center is Ms. Weatherford's landlord, not her boss or even her business partner.

4. The facts to which these Lease provisions apply are also simple, undisputed, and indeed, indisputable: The Demised Premises are already "suitable" for the conduct of Ms. Weatherford's business — the conclusive proof being that she's indeed doing business there. Therefore, rather than spending money on unnecessary "improvements" that wouldn't actually improve anything, she has instead chosen — logically enough — to propose no Tenant Improvements. The cost of the work performed on Tenant Improvements she has proposed, accordingly, is zero. The unexpended portion of the Landlord's Contribution is precisely \$64,380.00.

5. Ms. Weatherford has asked Decorative Center to comply with the Lease they both signed — specifically, to "apply [the] unexpended portion" of the Landlord's Contribution "to [her] rent." But Decorative Center has not only refused to perform this obligation, it has also threatened her with "any and all remedies" that would be available to it if she had simply defaulted on her rent payments altogether. Those remedies could include non-judicial forms of self-help — including a lock-out that would immediately put Ms. Weatherford out of business altogether.

6. Accordingly, Ms. Weatherford filed this action, seeking a declaratory judgment that, in essence, the Lease means what it says, and that on these facts Decorative Center is obliged to "apply [the] unexpended portion" of the Landlord's Contribution "to [her] rent." To preserve the status quo long enough for the Court to rule on the merits, and to prevent immediate and irreparable injury to her in the meantime, Ms. Weatherford sought a Temporary Restraining Order, which was granted on Tuesday, June 12, 2002, after notice to Decorative Center and argument from counsel for both sides. Ms. Weatherford immediately paid two full months' rent — all that Decorative Center now claims to be due — in cash into the registry of the court in lieu of a TRO bond. She now seeks to extend the Court's equitable protection and maintenance of the status quo by means of a temporary injunction.

II. The Lease Examined in More Detail, Through Sound and Fury

7. "When construing a contract, the court's primary concern is to give effect to the written expression of the parties' intent," [Forbau v. Aetna Life Insurance Co.](#), 876 S.W.2d 132, 133 (Tex. 1994), and Ms. Weatherford asks this Court to do exactly that — to give effect to

the written expression of the parties' intent, as evidenced by the Lease. "Language should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated." [*Reilly v. Rangers Management, Inc.*](#), 727 S.W.2d 527, 529 (Tex. 1987). There are no complex technical terms at issue here, and despite the stilted complexity of much of the rest of the Lease, it would be hard to come up with a phrase much more plain or straightforward than "Landlord shall apply any unexpended portion to the Tenant's rent."

8. But of course, courts are also "bound to read all parts of a contract together to ascertain the agreement of the parties"; every contract "must be considered as a whole," and "each part of the contract should be given effect." *Id.* Ms. Weatherford anticipates that Decorative Center's sound and fury will focus upon various other provisions of the Lease, in an attempt to confuse or to distract attention from the unequivocal language from Article 41 already quoted above. Careful examination reveals, however, that there is no internal conflict in the Lease, nor any other language that is directly relevant to the question of what to do with the unexpended portion of the Landlord's Contribution.

A. Other Provisions Relating to Tenant Improvements

9. First, Decorative Center will undoubtedly accuse Ms. Weatherford of taking a few sentences out of context. It will probably start by pointing to the balance of Article 41: The largest part of that article, after all, contains elaborate provisions regarding how Ms. Weatherford would go about getting Decorative Center to pay for Tenant Improvements that she proposes. Moreover, Article 41 begins with a cross-reference — "Subject to the provisions of Article 5 of this Lease" — and [Article 5](#) contains two and one-half pages of even more elaborate

provisions which govern improvements or alterations by Ms. Weatherford. Article 5 in turn cross-references another section of the Lease when it says "[t]he Improvements necessary to prepare the Demised Premises for Tenant's occupancy shall be performed by Tenant in accordance with Schedule B hereof," and [Schedule B](#) has still further specifications and requirements. Decorative Center will point to the sheer volume of rules and regulations that govern Tenant Improvements, and will argue, in effect, "Why would the parties have included all of this language if they didn't intend for Ms. Weatherford to make Tenant Improvements?"

10. The simple reply to this, however, is that of course the Lease plans for this contingency, as it plans for dozens and perhaps hundreds of others. The Lease plans, for instance, for what shall happen if the building is damaged by fire or other causes ([Article 10](#)), but that hardly requires anyone to set fire to the building. The same is true for the possibility that the building might be condemned ([Article 14](#)), or that there might be an excavation on adjacent land ([Article 20](#)), or that (heavens forbid!) the City of Houston or the State of Texas might institute compulsory rent control ([Article 39](#)). So of course the Lease includes specifications about how Tenant Improvements may be planned, performed, and paid for — but the most one can conclude from that fact is that the parties envisioned the making of Tenant Improvements as *a possibility* for which they needed to provide appropriately.

11. When the Lease does create a direct prohibition or a mandatory requirement that binds Ms. Weatherford, it does so in very clear terms — as, for instance, in [Section 4.01](#), which provides in part that "Tenant shall keep the [Demised Premises] open, fully lighted, and available for business activity during each and every day of the term, except

Saturdays, Sundays and holidays." The drafters of this Lease clearly knew how to use the word "shall" — the word appears over 600 times in the Lease! However, nowhere does Article 41 or any other provision of the Lease say that Ms. Weatherford "shall make" any Tenant Improvements. In fact, if Decorative Center casts about for language from which it can argue that the Lease affirmatively requires Ms. Weatherford to make Tenant Improvements, it is Decorative Center who is likely to take bits and pieces of the Lease out of context.

12. Thus, Decorative Center will likely quote selectively from the first sentence of [Article 41](#) — "Tenant agrees to perform the initial work and installations" — and say, "Aha! There's a commitment to do Tenant Improvements. Tenant *agrees!*" The problem for Decorative Center is the balance of the sentence — "the initial work and installations *required to make the Demised Premises suitable for the conduct of Tenant's business.*" (Emphasis added.) The absence of a superfluous "if any" after the phrase "initial work and installations" simply cannot be construed to mean, "There *must be some* initial work and installations!" Instead, by defining the work in terms of what is "suitable for the conduct of Tenant's business," the conclusion of the sentence qualifies and explains the beginning of the sentence, and this language further puts the decision as to what work is or is not "required" squarely in Ms. Weatherford's hands. Similarly, all of the later references to schedules or costs for the "work" are qualified by that initial definition.

13. Likewise, Decorative Center may seek to take out of context part of the first sentence in paragraph 2 of [Schedule B](#), which says that "Tenant shall provide to Landlord for its approval complete architectural and mechanical plans and specifications" for Tenant

Improvements. "Aha!" — Decorative Center may say — "There's your 'shall' clause!"

Unfortunately, though, if one reads the entire sentence in context, it actually further buttresses the conclusion that the Lease commits to Ms. Weatherford the exclusive ability to decide whether any Tenant Improvements are undertaken:

On or before April ____, 2002, Tenant shall provide to Landlord for its approval complete architectural and mechanical plans and specifications in form for filing with and acceptance by the applicable governmental authority, prepared by an architect that has been approved by Landlord, showing all improvements *that Tenant proposes to install in the Demised Premises.*

(Date blank in original; emphasis added.) Again, the conclusion of the sentence qualifies everything that precedes it — both the "plans and specifications" and the "improvements" are to be as "Tenant proposes to install." Clearly, "proposing" is the most Ms. Weatherford can do initially, since she cannot actually arrange for the completion of any Tenant Improvements without Decorative Center's prior consent and approval. But the decision whether and what to "propose" is explicitly committed, logically enough, to her as Tenant — not to Decorative Center.

14. The unfilled date blank for "April ____, 2002" in Schedule B also flags an important, if inferential, indication of the parties' intentions. Note that signatures on the Lease are made "as of the day and year first above written." This is a reference to the "Date of Lease" definition in the Lease's introductory pages — "May 3, 2002" — and indeed the Landlord's signature was affixed and notarized on that same date. The Court may, of course, take judicial notice that no day in April 2002 occurs after May 3, 2002, and that the parties therefore could not have filled in this blank with any meaningful date in April 2002. From the very first day of the

Lease's legal existence, then, if the Lease is strictly construed — and Section 33.15 reminds us that "time is of the essence" — Ms. Weatherford could not possibly have proposed Tenant Improvements on a timely basis! And further confirmation of this impossibility appears in Article 41: "Tenant agrees to deliver to Landlord, for Landlord's approval, the plans and specifications for Tenant's initial work on or before April 1, 2001 [*sic*]." If we take this sentence at face value, even a submission of plans and specifications on the effective date of the Lease would have been untimely by more than one year. If Decorative Center's interpretation of the Lease were correct — if the Lease were construed to somehow *require* Ms. Weatherford to propose and ultimately to make Tenant Improvements — then she would already have been in default at the instant the Lease was signed.

B. Provisions Regarding Abatement and Set-Off

15. Decorative Center is likely to point to other provisions in the Lease — more sound and fury, signifying nothing. Decorative Center will point to the statement on the [initial summary page](#) which reads: "Rent Abatement: None." But that does not conflict with Ms. Weatherford's interpretation of Article 41, for her rent is not being "abated." Rather, if Decorative Center will only comply with its obligations under Article 41, then her rent will be paid — paid in full and indeed prepaid in excess! — out of the \$64,380.00 in unexpended Landlord's Contribution until that fund is exhausted. Note that this is not the Landlord "paying itself" in a circular transaction that could arguably be disregarded, because under the mechanism created by Article 41, the Landlord is effectively obliged to hold the unexpended portion of the

Landlord's Contribution *in trust*, for the sole benefit of Ms. Weatherford, until sufficient rental obligations have accrued that it has been exhausted by being "appl[ied] to Tenant's rent."

16. Likewise, Decorative Center is likely to point to [Section 3.04](#), which provides that "[t]he Base Rent and additional rent shall be payable by Tenant without any set-off, abatement or deduction whatsoever and without notice or demand, except as otherwise expressly provided herein." But again Decorative Center is tripped up by a pesky sentence ending: the phrase "*except as otherwise expressly provided herein*" of course includes the express provision in Article 41 that if the amount Tenant expends for the cost of Tenant Improvements "is less than the amount of Landlord's Contribution, Landlord shall apply any unexpended portion to the Tenant's rent." Moreover, as discussed above, the Base Rent actually will be paid — "without any set-off, abatement or deduction" — as soon as Decorative Center complies with its obligations under Article 41.

17. Even if there were some conflict between these two provisions and the express language of Section 41, the language in Section 41 must be deemed to control, for two good and sufficient reasons. First, "general terms appearing in a contract are overcome and controlled by specific language dealing with the same subject." [Hinojosa v. Housing Authority of the City of Laredo](#), 940 S.W.2d 763, 766 (Tex. App.—San Antonio 1997, no pet'n). The sentence upon which Ms. Weatherford relies in Article 41 is the most specific statement anywhere in the Lease as to what shall be done with any unexpended portion of the Landlord's Contribution, and therefore must overcome and control over more general terms regarding rent abatements or set-offs.

18. Second, at best for Decorative Center, these terms might create an internal conflict or ambiguity in the Lease. But if so, that conflict or ambiguity must be resolved against Decorative Center: "In Texas, a writing is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of the parties." [*Temple-Eastex Inc. v. Addison Bank*](#), 672 S.W.2d 793, 798 (Tex. 1984). "[I]f there is any doubt on the question under the language of the instrument, that doubt must be resolved against [the party] who prepared the instrument." [*Bethel v. Butler Drilling Co.*](#), 635 S.W.2d 834, 838 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). One need not be a sophisticated real estate attorney to deduce that this Lease, like most, was in fact prepared by the Landlord and its attorneys.

III. Decorative Center's Likely Attempts to Avoid the Parol Evidence Rule by Alleging Ambiguity or Fraud Must Fail

19. "In determining the intention of the parties, [courts] look only within the four corners of the agreement to see what is actually stated, and not at what was allegedly meant." [*Mobil Exploration & Producing U.S., Inc. v. Dover Energy Exploration, L.L.C.*](#), 56 S.W.3d 772, 776 (Tex. App.—Houston [14th Dist] 2001, no pet'n). The greatest amount of sound and fury in this case is likely to be generated by Decorative Center's probable attempts to go outside the four corners of the Lease by offering parol evidence regarding the early-stage negotiations of the Lease.

20. To do so, Decorative Center must first avoid the parol evidence rule. "The parol evidence rule is not a rule of evidence, but one of substantive law." [*In re H.E. Butt Grocery*](#)

[Co.](#), 17 S.W.3d 360, 369 (Tex. App.—Houston [14th Dist.] 2000, no pet'n). It provides that in general, "[a] party may not introduce parol evidence to vary the terms of an unambiguous contract. When a writing is intended as a completed legal transaction, the parol evidence rule excludes other evidence of any prior or contemporaneous expressions of the parties relating to that transaction." [Markert v. Williams](#), 874 S.W.2d 353, 355 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

21. Decorative Center will likely attempt to avoid the parol evidence rule in two different ways. First, it will set aside its argument that the Lease creates some unambiguous obligation for Ms. Weatherford to make Tenant Improvements, and argue in the alternative that the Lease is ambiguous. Second, it might argue that Ms. Weatherford induced Decorative Center to enter into the Lease through fraud. But neither of these cynical strategies can succeed.

A. The Lease Cannot be Deemed Ambiguous

22. With respect to the first strategy, "[p]arol evidence is not admissible for the purpose of *creating* an ambiguity." [National Union Fire Insurance Co. v. CBI Industries, Inc.](#), 907 S.W.2d 517, 520 (Tex. 1995) (emphasis added). And Decorative Center cannot succeed in demonstrating an ambiguity within the Lease its own attorneys drafted:

Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered. A contract is not ambiguous if it can be given a definite or certain meaning as a matter of law. On the other hand, if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, which creates a fact issue on the parties' intent.

An ambiguity does not arise simply because the parties advance conflicting interpretations of the contract. For an ambiguity to exist, both interpretations must be *reasonable*.

[*Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*](#), 940 S.W.2d 587, 589 (Tex. 1996) (citations omitted; emphasis in original); *accord*, [*DeWitt County Electric Cooperative, Inc. v. Parks*](#), 1 S.W.3d 96, 100 (Tex. 1999); [*Friendswood Development Co. v. McDade & Co.*](#), 926 S.W.2d 280, 282-83 (Tex. 1996); [*Appleton v. Appleton*](#), __ S.W.3d __, 2002 WL 369964 (Tex. App.—Houston [14th Dist.] Mar. 7, 2002, no pet'n history). As demonstrated in the first portion of this brief, the Lease can indeed be given "a definite or certain meaning as a matter of law." Moreover, as also noted above, "applying the pertinent rules of construction" cures any possible ambiguity or conflict in the Lease. Specific provisions control over general ones, and ambiguities or conflicts are resolved against the party who drafted the contract.

23. Additionally, however, while Decorative Center is indeed advancing a conflicting interpretation of the Lease, its interpretation cannot be deemed "reasonable." Decorative Center's interpretation not only permits Ms. Weatherford to make Tenant Improvements (on certain rather complicated conditions), it would require her to do so. If that interpretation is correct, however, then Ms. Weatherford could satisfy her obligation by, say, installing a new doorstep — for the Lease certainly contains no specification of how much the Tenant Improvements must cost. Indeed, we know that the parties anticipated that the cost of Tenant Improvements would vary, for they provided for their respective financial responsibilities if the cost turned out to be above the Landlord's Contribution, and for what would be done with the unexpended portion of the Landlord's Contribution if it were less than that figure. Decorative

Center's construction, viewed in its most favorable light, is that Ms. Weatherford may spend any amount of money for Tenant Improvements to make the Demised Premises "suitable for the conduct of Tenant's business" — *except zero*.

24. That is simply not a reasonable interpretation, especially when one need look no farther than the beginning of the contract for compelling evidence of the alternate interpretation — that both parties well knew that the premises were *already* "suitable for the conduct of Tenant's business" at the moment the Lease was signed. [Section 2.01](#) acknowledges that "Tenant is presently in possession of the Demised Premises under a lease expiring on April 30, 2002." [Section 2.02](#) next provides as follows:

Tenant has fully inspected the Demised Premises, is familiar with the condition thereof and agrees to accept the same on the Commencement Date in its then "As Is" condition. Tenant's possession of all or any part of the Demised Premises shall be conclusive evidence as against Tenant that all or such part of the Demised Premises was in *good order and satisfactory condition* when Tenant took possession.

(Emphasis added.)

B. Decorative Center Could Not Have Reasonably Relied Upon Any "Fraudulent Representations" by Ms. Weatherford

25. It would be especially ironic should Decorative Center — a limited partnership whose business is being a landlord, whose attorneys drafted the Lease, and whose signatory, its corporate general partner's president, is also an attorney — claims to have been fraudulently induced by its tenant, a sole proprietor who operates a furniture showroom. The irony stems in no small part from the fact that Decorative Center inserted not one, but two "merger" clauses into the Lease. [Section 33.04](#) provides, "This Lease and the Schedules annexed

hereto constitute the entire agreement between Landlord and Tenant referable to the Demised Premises, and all prior negotiations and agreements are merged herein." And a page later,

[Section 33.12](#) provides:

Tenant agrees that this Lease supersedes and cancels any and all previous statements, negotiations, arrangements, brochures, agreements and understandings, if any, between Landlord and Tenant or displayed by Landlord to Tenant with respect of the subject matter of this Lease, the Demised Premises, the Building or the Building Project, and that *there are no representations, agreements or warranties (express or implied, oral or written) between Landlord and Tenant* with respect to the subject matter of this Lease, the Demised Premises, the Building or the Building Project other than those contained in this Lease.

(Emphasis added.) Having drafted and insisted upon this language, can Decorative Center now plausibly contend that its alleged reliance upon pre-execution representations by Ms.

Weatherford was "reasonable"? It cannot, for the obvious intent of the italicized language is to preclude — as a matter of law — any later claims by either party that it reasonably relied to its detriment on any representations extrinsic to the Lease.

26. These clauses are of course redundant — not only of each other, but also of what the common law of Texas would provide in their absence:

The parol evidence rule provides that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements with regard to the same subject matter are excluded from consideration whether they were oral or written. Additionally, a written instrument presumes that all prior agreements relating to the transaction have been merged into it and it will be enforced as written and cannot be added to, varied, or contradicted by parol testimony. The rule is particularly applicable where the written contract contains a recital that it contains the entire agreement between the parties or a similarly worded merger provision.

[*Smith v. Smith*](#), 794 S.W.2d 823, 827 (Tex. App.—Dallas 1990, no writ). Presumably, the parol evidence rule is doubly "particularly applicable" when the written contract contains two merger clauses.

27. Fraud in the inducement, like mutual mistake, can be an exception to the parol evidence rule. But it is not an unlimited exception, and Decorative Center cannot twist the facts of this case into a fraud claim that would require parol evidence as its proof:

Negotiations preceding a written contract should not displace the terms of the written contract. When experienced executives represented by counsel voluntarily sign a contract whose terms they know, *they should not be allowed to claim fraud in any earlier oral statement inconsistent with a specific contract provision.* Otherwise, contracts would be "nothing more than a scrap of paper."

[*Fisher Controls International, Inc. v. Gibbons*](#), 911 S.W.2d 135, 141-42 (Tex. App.—Houston [1st Dist.] 1995, no writ) (emphasis added; citations omitted).

28. In summary, the various arguments made by Decorative Center, and the parol evidence it seeks to rely upon, all ultimately boil down to excuses as to why Decorative Center ought not be held to the unambiguous requirements of the Lease it drafted and signed. Perhaps its representatives should have paid closer attention to the explicit language of the Lease, but that avails them nothing:

[P]arties to an arms-length transaction are charged with a duty to read what they sign, and the failure to do so constitutes negligence. Further, the law presumes that a written agreement correctly embodies the parties' intentions, and is an accurate expression of the agreement the parties reached in prior oral negotiations.

[*Salinas v. Beaudrie*](#), 960 S.W.2d 314, 320 (Tex. App.—Corpus Christi 1997, no pet'n). Perhaps those representatives now wish they had made a different contract, but Texas law forbids that indulgence:

[I]n applying the [settled rules of contract construction, courts] may not rewrite the agreement to mean something it did not. Simply put, [courts] cannot change the contract merely because we or one of the parties comes to dislike its provisions or thinks that something else is needed in it. This is so because parties to the contract are considered masters of their own choices. They are entitled to select what terms and provisions to include in a contract before executing it. And in so choosing, each is entitled to rely upon the words selected to demarcate their respective obligations and rights.

[*Cross Timbers Oil Co. v. Exxon Corp.*](#), 22 S.W.3d 24, 26 (Tex. App.—Amarillo 2000, no pet'n)

(citations omitted); accord, [*ASI Technologies, Inc. v. Johnson Equipment Co.*](#), ___ S.W.3d ___,

2002 WL 340589 (Tex. App.—San Antonio Mar. 6, 2002, no pet'n history).

IV. Ms. Weatherford Meets the Procedural Requirements for a Temporary Injunction

29. The Court is no doubt already well acquainted with the procedural standards within which its examination of the Lease and of this dispute must take place, but they have been recently re-summarized by the First Court of Appeals:

The sole issue before a trial court in a temporary injunction hearing is whether the applicant may preserve the status quo, pending trial on the merits. To be entitled to a temporary injunction, an applicant must plead a cause of action, show a probable right to recover on that cause of action, and show a probable injury in the interim. A probable right of success on the merits is shown by alleging a cause of action and presenting evidence that tends to sustain it. Probable injury includes elements of imminent harm, irreparable injury, and no adequate remedy at law for damages.

[*Telephone Equipment Network, Inc. v. TA/Westchase Place, Ltd.*](#), ___ S.W.3d ___, 2002 WL 437288 (Tex. App.—Houston [1st Dist.] May 21, 2002, no pet'n history). These traditional equitable principles have been expressly incorporated into Tex. Civ. Prac. & Rem. Code Ann. §§ [65.001](#) & [65.011\(3\)](#).

30. "Clear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury." [*Ebony Lake Healthcare Center v. Texas Department of Human Services*](#), 62 S.W.3d 867, 874 (Tex. App.—Austin 2001, no pet'n) (quoting [*Southwestern Bell Telephone Co. v. Public Utility Commission*](#), 72 S.W.3d 23, 30 (Tex. App.—Austin 2001, pet'n dismiss'd w.o.j.)). Ms. Weatherford has clear evidence of both.

31. Regarding the first requirement, Ms. Weatherford "is not required to establish that she will prevail on final trial," [*Walling v. Metcalfe*](#), 863 S.W.2d 56, 58 (Tex. 1993). But this brief has already demonstrated that there is an ample basis — indeed, a compelling basis — for the declaratory judgment cause of action Ms. Weatherford has pleaded.

32. And there can be no serious doubt as to the second requirement, either, given the likelihood that without a preliminary injunction to preserve the status quo, she will abruptly be put out of business. "An existing remedy is adequate if it is as complete and as practical and efficient to the ends of justice and its prompt administration as is equitable relief." [*Blackthorne v. Bellush*](#), 61 S.W.3d 439, 444 (Tex. App.—San Antonio 2001, no pet'n). The traditional alternate remedy available to Ms. Weatherford — a suit for money damages for the destruction of her business and the resulting damage to her reputation — might indeed give her money, but money cannot adequately redress the loss of a life's work and reputation. Neither would a later suit for money damages — a long and expensive trial, one full of disputed facts, value judgments, opinion testimony, and credibility determinations — be "as practical and efficient to the ends of justice and its prompt administration" as would be simply continuing the

existing TRO as a temporary injunction pending an expedited trial on the merits. "A legal remedy is inadequate if damages are difficult to calculate or their award may come too late." [T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.](#), 965 S.W.2d 18, 24 (Tex. App.—Houston [1st Dist.] 1998, pet'n dismissed) (temporary injunction proper because a money-damages remedy for anticipated lost profits and damage to a business' good will would be inadequate). Such is the case here.

33. "The status quo to be preserved by a temporary injunction is the last, actual, peaceable, noncontested status that preceded the controversy." [Simon Property Group \(Texas\) L.P. v. May Department Stores Co.](#), 943 S.W.2d 64, 70 (Tex. App.—Corpus Christi 1997, no pet'n). In a case such as this one, preserving that status quo may be especially compelling because it implicates the public interest in the peaceful and orderly resolution of disputes through judicial processes, rather than through brute force and self-help.

34. For example, in a commercial lease dispute in which the parties offered conflicting constructions of the lease, [Houck v. Kroger Co.](#), 555 S.W.2d 803, 806 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.), the appellate court held that "[a]part from these questions of 'probable right' and 'probable injury,' we affirm the order of the court below on the ground that it was justified by the finding that appellees were in the last peaceable possession of the real estate so as to entitle appellees to a temporary injunction restraining appellants from interference with appellees' possession by force or violence." The court noted that both parties before it had "resorted to self-help and ignored the relief available through the courts," and that the appellants in particular had "elected to abandon the suit they had filed to resolve the issues

and to undertake to reenter the premises by forcefully drilling out and changing the locks." *Id.*
"Reliance on self-help to settle such disputes evidences a disrespect for the legal processes and affords the trial court an adequate basis for the issuance of its writ of injunction." *Id.*

35. Similarly, the public interest is obviously served by the continuation in place of a tenant who has a ten-year history as a solvent, law-abiding, tax-paying, and *rent-paying* business. And the balancing of hardships and equities between the parties likewise weighs heavily in Ms. Weatherford's favor: She risks the destruction of a business and a career. By contrast, Decorative Center risks, at the most, a trivial delay in its claimed right to repay Ms. Weatherford for up to \$64,280.00 in unwanted and unneeded Tenant Improvements to her own premises; its interests are purely financial, simple to calculate, and easily protected in full by a temporary injunction bond.

36. For these reasons — and on the further basis of the evidence and argument that Ms. Weatherford will offer at the upcoming hearing — Ms. Weatherford respectfully prays that the Court will grant her application for a temporary injunction.

Dated: June 26, 2002

Respectfully submitted,
WEISBLATT & ASSOCIATES, INC.

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ELIZABETH WEATHERFORD

Certificate of Service

I certify that on June 26th, 2002, I have served a true copy of this instrument to counsel for Decorative Center, Beth Edler, Esq., and Mary A. Van Kerrebrook, Esq., Wilson, Cribbs, Goren & Flaum, P.C., 2200 Lyric Centre, 440 Louisiana, Houston, Texas 77002, by fax to 713-229-8824, and by Certified Mail/Return Receipt Requested No. 7001 0320 0001 5763 8711, and to counsel for Matthew P. Minnis, Andrew M. Caplan, Esq., Weycer, Kaplan, Pulaski & Zuber, P.C., 1400 Summit Tower, Eleven Greenway Plaza, Houston, Texas 77046, by fax to 713-961-5341, and Certified Mail/Return Receipt Requested No. 7001 0320 0001 5763 8728.

/s/ William J. Dyer
William J. Dyer