

CAUSE NO. 2014-40964

ERIC TORRES, ADAM SINN,
XS CAPITAL MANAGEMENT, L.P.,
AND ASPIRE COMMODITIES, L.P.,

Plaintiffs,

v.

CRAIG TAYLOR AND
ATLAS COMMODITIES, L.L.C.,

Defendants.

§
§
§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

157TH JUDICIAL DISTRICT

**PLAINTIFFS’ RESPONSE IN OPPOSITION
TO DEFENDANTS’ MOTION TO COMPEL**

TO THE HONORABLE JUDGE OF SAID COURT

Plaintiffs Eric Torres, Adam Sinn, XS Capital Management, L.P., and Aspire Commodities, L.P. (“Plaintiffs”) file this Response in Opposition to Defendants’ Motion to Compel¹, and would respectfully show this Court the following:

I. INTRODUCTION

This case is about Defendants’ obligation to pay Eric Torres over \$200,000 in settlement funds from the last time these parties litigated. Defendants have refused to pay Torres, asserting as some kind of defense that Adam Sinn sent to Craig Taylor early in the morning on December 22, 2013, after a Christmas party, a picture of several individuals around a Christmas tree

¹ The undersigned was substituted in as counsel last week for Plaintiffs’ counsel. The Motion to Compel, along with several other requests for relief, was set for hearing on October 24, 2014 and is now set for October 29, 2014. Plaintiffs have previously filed a Motion to Quash and for Protective Order (September 8, 2014) concerning third party discovery and a Motion to Quash and For Protective Order Against Abusive and Harassing Discovery (September 22, 2014) concerning the discovery to Plaintiffs. Those motions are set for hearing at the same time, provide a fairly thorough discussion of the issues with Defendants’ discovery, and are incorporated herein by reference. Finally, Plaintiffs also filed special exceptions to Defendants’ counterclaim, demonstrating that Defendants have failed to plead an actionable counterclaim (much less entitlement to discovery on such a non-existent counterclaim). These special exceptions are set for hearing on October 29th as well, and are incorporated herein by reference.

holding up their middle fingers at the camera. Craig Taylor admits that the picture message had no text or tag line.² Nonetheless, despite the fact that nothing about this communication is disparaging to Defendants or discusses any confidential information, Taylor and Atlas Commodities, L.L.C. have used this incident to try to avoid their legal obligation to pay Torres the settlement funds. Furthermore, Defendants have used this incident to launch a massive fishing expedition seeking documents and information concerning *all* of Adam Sinn's private communications dating back to *August 15, 2013*, instead of just messages where this picture was sent to others. Not stopping there, Defendants have served third party discovery requests to various cell phone carriers to obtain all manner of unrelated records of communications, as well as communication records of persons not even party to this litigation. Further, Torres and Taylor are competitors in the same industry. Defendants' discovery is designed to do more than just obtain discovery as to the picture Taylor received. In total, Defendants have served 11 sets of discovery requests seeking broad information and refused requests to limit the discovery. The Motion to Compel should be denied.

II. ARGUMENTS AND AUTHORITIES

Defendants have asserted that their broad discovery is not a fishing expedition and is within the scope of discovery. Interestingly, they quote and cite *In re Sears, Roebuck & Co.*, 123 S.W.3d 573, 578 (Tex. App.—Houston [14th Dist.] 2003, no pet.). *See Motion* fn.3. However, Defendants only quote part of the paragraph of the court's opinion and not the complete paragraph:

Aside from the problems in the timing and format of this order, its substance was also improper. A "fishing expedition" is one aimed not at supporting existing claims but at finding new ones. *See Dillard Dept. Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex.1995). As noted above, the only Sears products that Joel

² As stated in the Motion to Compel, Taylor asked for an apology and to be left alone, which was given and was done and should have been the end of this.

Fuerstenau or any of his designated co-workers identified as potential sources of asbestos exposure were Homart water heaters and boilers. Yet the order required production of far more.

Id. Like that case, Defendants Taylor and Atlas seek discovery not about the incident in question on December 22, 2013, but other possible incidents that may or may not have occurred in the months since the parties reached a settlement on August 15, 2013. Yet, Defendants reference no breach, no incident, and no dispute prior to or after December 22, 2013. Knowing that the December 22, 2013 picture message to Taylor does not justify Defendants' failure to pay, Defendants are searching for some other unknown justification that they do not have. Like the *Sears* case, Defendants are seeking to lead this Court into error by permitting them to search for some unknown breach unrelated to the incident that allegedly gave rise to this dispute.

Defendants further attempt to justify their over broad discovery citing *Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 800 (Tex. App.—Dallas 2002, pet. denied), and asserting that discovery is permitted in actions to enforce settlements. However, the *Avary* case did not involve a claim to enforce a settlement agreement, but instead involved claims against the executor of an estate in connection with that executor's representation of the decedent's estate at mediation. The reality is that there is nothing special about discovery in this case. Defendants claim that they refused to pay Torres because Sinn sent a picture to Taylor at about 2:06 a.m.³ on December 22, 2013. The picture was sent. The Court can decide if the picture sent to Mr. Taylor was a breach of the non-disparagement or confidentiality clauses of the settlement and, if so, whether that justified Defendants' refusal to pay Torres. There is no need for discovery on such issues, much less the abusive and harassing discovery proposed by Defendants.

³ The phone records already provided to Defendants' counsel are apparently in Pacific time and show the message transmitted at 12:06 a.m.

WHEREFORE, Plaintiffs request that the Court deny Defendants Motion to Compel and grant Plaintiffs all further relief to which they are entitled.

Respectfully submitted,

RAPP & KROCK, PC

s/ Kenneth M. Krock

Kenneth M. Krock
State Bar No. 00796908
Terri S. Morgan
State Bar No. 08286500
Megan N. Brown
State Bar No. 24078269
3050 Post Oak Boulevard, Suite 1425
Houston, Texas 77056
(713) 759-9977 telephone
(713) 759-9967 facsimile
kkrock@rk-lawfirm.com
tmorgan@rk-lawfirm.com
mbrown@rk-lawfirm.com
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of October 2014, a true and correct copy of this document was served on counsel of record in accordance with the Texas Rules of Civil Procedure.

Geoffrey A. Berg
gberg@bfjblaw.com
Kathryn E. Nelson
knelson@bfjblaw.com
Berg Feldman Johnson Bell, LLP
4203 Montrose Boulevard, Suite 150
Houston, Texas 77006

Via Eserve

s/ Kenneth M. Krock

Kenneth M. Krock