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CAUSE NO. 2014-40964

ERIC TORRES, ADAM SINN, XS CAPITAL MANAGEMENT, L.P., AND ASPIRE COMMODITIES, L.P.,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	HARRIS COUNTY, TEXAS
CRAIG TAYLOR AND ATLAS COMMODITIES, L.L.C.,	§	
Defendants.	§	157TH JUDICIAL DISTRICT

Consolidated with
CAUSE NO. 2015-49014

ERIC TORRES,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
v.	§	HARRIS COUNTY, TEXAS
S. JAMES MARSHALL,	§	
Defendant.	§	157TH JUDICIAL DISTRICT

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL DEPOSITION OF ADAM SINN

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs/Counter-Defendants Eric Torres, Aspire Commodities, L.P., XS Capital Investments, L.P., and Adam Sinn ("Plaintiffs") file this Response to Defendants' Motion to Compel Deposition of Adam Sinn and would respectfully show this Court:

I. INTRODUCTION

Defendants Craig Taylor and Atlas Commodities, LLC ("Taylor Parties") and S. James Marshall ("Marshall") have moved this Court to compel the deposition of Adam Sinn which, by their

own motion, admits that Plaintiffs had previously agreed to give outside of the applicable discovery period due to difficulty in scheduling Mr. Sinn's deposition. Regardless, Defendants seek Court intervention to apparently schedule the deposition[1]. As such, Plaintiffs respond in opposition.

It is not without some irony that Defendants use the motion to compel to make accusations that Plaintiff has "obstructed discovery" by the difficulties in scheduling his deposition. First of all, Plaintiff Sinn has already been deposed in this case on April 8, 2015. However, upon request, Plaintiffs had agreed to allow the second deposition of Mr. Sinn and Mr. Torres. Plaintiffs have attempted to work with Defendants for the efficient progression of this case. Unfortunately, efficiency is not the tactic so far employed by Defendants, who instead prefer using delay to keep this case on life support.

II. BACKGROUND

The original discovery deadline in this case was August 21, 2015 when the case was set for trial September 21, 2015. The Court continued the case to April 18, 2016 with a March 18, 2016 discovery deadline. Defendants then moved for another continuance because they had another case set for the same time. Plaintiffs consented to the continuance but not to reopening deadlines. The Court then continued the case to October 2016 and expressly denied re-setting deadlines in the Order. (Exh. A). Nonetheless Plaintiffs agreed to extend the discovery period to end May 27, 2016 and Defendants filed a Rule 11 agreement on March 8, 2016. (Exh. B). Defendants have not acted to meet this extended discovery period.

On July 24, 2015 the Court removed the previous discovery restrictions in place and re-set the trial of this matter. (Exh. C). After about three months, on October 29, 2015, Plaintiff Eric Torres

[1]It should also be noted that Plaintiffs set their motion to strike for this date per the request of Defendants to accommodate counsel for Defendants' vacation schedule despite it being a date for which lead counsel Kenneth Krock has a vacation letter on file, and did so not expecting that Defendants would set four additional motions on the

filed his traditional motion for summary judgment against S. James Marshall, in a separate lawsuit that has since been consolidated into this action. Torres' motion for summary judgment was set to be heard on November 20, 2015. (Exh. D). In response, Defendant Marshall filed both a motion to consolidate the cases, and a motion for continuance of the summary Defendant set the motion to continue the summary judgment hearing on submission for November 9, 2105 (Exh. E), and set the motion for consolidation for oral hearing on November 13, 2015. (Exh. F). On November 13, 2015, the Court held the hearing on the motion for continuance and consolidation of the cases. At the hearing, Defendants argued that they needed time to conduct discovery. On November 13, 2014, the Court consolidated the cases and gave the Defendants a 90 day continuance of the summary judgment motion in which to conduct further discovery. (Exh. G). From November 13, 2015 until May 18, 2016 (only 9 days before the discovery deadline set by agreement), Defendants sent **zero** written discovery requests. On May 18, 2016, Defendants served late discovery requests related to responses to interrogatories served on December 31, 2014 and documents produced to them on September 4, 2015, ***a year and five months*** and ***eight months*** respectively before they requested the information. (*See Plfs.' Resp. to Defts.' Mot. Compel Discov. Responses from Sinn).* It wasn't until February 4, 2016, as Defendants point out in their motion, that Defendants even asked for a second deposition of Sinn, ***five months*** after Plaintiffs had produced the documents they claim justifies a second deposition, a mere nine (9) days before the end of the 90 day extension for discovery the Court gave them, and just a little more than one month before the then discovery cutoff date of March 18, 2016, which was subsequently extended by agreement to May 27, 2016. This is hardly obstruction of discovery by Plaintiffs because there was almost no discovery attempted by Defendants. During that same time period, Plaintiffs have filed and had heard a motion to compel,

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same day.

mainly revolving around Defendants' lack of a damage model, a motion for discovery sanctions, an expert designation with an expert report containing actual substance, a motion to strike Defendants' expert (within the time period for such motions per the DCO), and conducted the deposition of Craig Taylor. It is obvious from this history which party is partaking in delay tactics.

On February 23, 2016 the parties filed a joint motion for trial continuance, with the Defendants requesting new deadlines in the DCO, but with the Plaintiffs agreed to the continuance but opposed to new deadlines. (Exh. H). The Court granted the continuance but rightfully refused to set new deadlines expressly in the order. (Exh. A).

III. ARGUMENT

The justification Defendants give for wanting to re-take Sinn's deposition is that since his initial deposition in this case (a deposition that Defendants insisted on taking so early on) Sinn has "produced 265 pages of documents." *Defts.' Mot. Compel Deposition of A. Sinn p.2*. However, what Defendants fail to mention is that those 265 pages of production *occurred on September 4, 2015.* Defendants admit that they did not even begin to ask for Sinn's second deposition until February 4, 2016, a half a year later, and just a little more than one month before the then discovery cutoff date of March 18, 2016, which was subsequently extended by agreement to May 27, 2016 due to a number of re-schedulings of Defendant Taylor's deposition. However, Plaintiff had agreed to produce Sinn for a second deposition (as well as Torres, which was previously scheduled but Defendants cancelled), and had agreed to do so outside of the discovery period which ended on May 27, 2016. Plaintiffs have been more than accommodating despite Defendants' general failure to act on anything until right before the deadline, and as Defendants state in their motion, Plaintiffs have given a number of dates for Mr. Sinn's deposition, some in Houston, and some in Puerto Rico.

Defendants claim that Houston is a reasonable place to take the deposition pursuant to Rule

199.2, but that San Juan, Puerto Rico is not. However, Rule 199.2 includes a non-exhaustive list of a variety of "reasonable place[s]" where the deposition may occur, including "the county where the witness is employed or regularly transacts business in person." Tex. R. Civ. P. 199.2(b)(2)(C). San Juan, Puerto Rico is

Mr. Sinn is a resident of Puerto Rico, which includes residency requirements that he be in Puerto Rico for 200 days out of the year, thus, scheduling trips outside of Puerto Rico for Mr. Sinn is often difficult, and usually must serve a dual purpose. Furthermore, as Defendants are well aware, Mr. Sinn is an energy trader, and has an enormous amount of risk on during the summer months. Thus, a five-hour flight with no access to the internet exposes Mr. Sinn to the inability to conduct trades and exposes Mr. Sinn to potential loss in the millions. In fact, Mr. Sinn has gone as far as offered to pay for Defendants' counsel's airfare and hotel room in order to conduct the deposition in Puerto Rico, however Defendants have refused the offer. (Exh. I). Thus, not only is San Juan, Puerto Rico a reasonable place under Rule 199.2, it is even more reasonable because Mr. Sinn has offered to shoulder the Defendants' costs of having the deposition there.

Astonishingly, on the date of the filing of this response, Sinn offered August 5, 2015 as a date to be deposed in Houston, or, alternatively August 1-4 in Puerto Rico, again with Sinn paying the costs of travel and lodging. In response, Mr. Berg stated that he was unavailable on October 5, 2016 and simply noticed up the deposition for October 10, 2016, a date for which Mr. Sinn is not available. (Exh. J). Plaintiffs object to the deposition notice.

IV. Conclusion

Defendants' justification for wanting to re-depose Sinn was unreasonably delayed by their own actions and as such should be denied. However, despite Mr. Sinn already having been deposed in this matter, Plaintiffs had agreed to allow Mr. Sinn to be deposed outside of the discovery period,

the only issue was scheduling. Plaintiffs request that the deposition be allowed to take place in San Juan, Puerto Rico at a time available to both parties. Further, due to Mr. Sinn's schedule and heightened risk during the summer months, Plaintiffs request that Mr. Sinn's deposition be scheduled for September in the event this Court is inclined to order the deposition in Houston, which Plaintiffs believe would be unnecessary.

WHEREFORE, the Sinn Parties respectfully requests that the Court deny Defendants' unnecessary motion to compel the deposition of Adam Sinn.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of July, 2016, a true and correct copy of this document was served on counsel of record in accordance with the Texas Rules of Civil Procedure.

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