

CAUSE NO. 2014-40964

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

CAUSE NO. 2015-49014

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

**DEFENDANTS/COUNTER-PLAINTIFFS’
MOTION TO COMPEL DEPOSITION OF PLAINTIFFS’ EXPERT**

Defendants/Counter-Plaintiffs Craig Taylor (“Taylor”) and Atlas Commodities, LLC (“Atlas”) and Defendant/Counter-Plaintiff James Marshall (“Marshall”) (collectively “Defendants”) file this Motion to Compel Deposition of Plaintiffs’ Expert as follows:

I. SUMMARY OF THE ARGUMENT

Plaintiffs Eric Torres (“Torres”), Adam Sinn, XS Capital Investments, LP, and Aspire Commodities, LP (Sinn and the two entities are referred to collectively herein as “Sinn”), in yet another attempt to obstruct the Defendants’ right to conduct discovery, refuse to produce their expert witness for deposition. Plaintiffs designated H. Max Lummis (“Lummis”) to rebut Rob Hancock (“Hancock”), the Defendants’ expert. Plaintiffs first requested Hancock’s deposition. Defendants offered dates. Plaintiffs repeatedly delayed scheduling it. Instead of actually taking

his deposition, Plaintiffs simply moved to strike his testimony altogether.

When they pretended to want to depose Hancock, the parties contemplated that Lummis' deposition would follow Hancock's. Defendants respectfully ask the Court to compel Plaintiffs to produce Lummis on a date certain within 30 days.

II. BACKGROUND

On December 15, 2015, Defendants produced Hancock's preliminary report pursuant to the Court's October 7, 2015 Order regarding disclosure of damages. Plaintiffs filed a Motion for Discovery Sanctions on January 25, 2016, claiming Hancock's report was insufficient. The Court denied the motion on February 5, 2016.

Later that day, counsel for Defendants stated that they intended to supplement Hancock's report and offered to postpone Plaintiffs' expert designation deadline so that they would have an opportunity to fully review the report prior to the designation. Exhibit A. Counsel for Plaintiffs replied that they would oppose any motion for leave to supplement Hancock's report. Exhibit B.

On February 8, 2016, Plaintiffs designated H. Max Lummis ("Lummis") as a rebuttal expert on lost profits/economic damages and served his report, a rebuttal to Hancock's preliminary report. Exhibit C.

During February and March, counsel for Defendants provided dates for Hancock's deposition when requested by Plaintiffs. Because Plaintiffs wanted to take Hancock's deposition after Taylor's deposition, however, scheduling the depositions on mutually agreeable dates was difficult. Counsel for Plaintiffs became concerned about missing the upcoming deadline to challenge expert witnesses, and so on March 18, 2016, the parties agreed to extend the discovery period and expert witness challenge deadline to May 27, 2016. Exhibit D.

By April 19, 2016, Hancock's deposition had still not been scheduled. But because it is not the Defendants who are interfering with discovery, the undersigned agreed to not object to Plaintiffs' taking Hancock's deposition outside of the discovery period. Exhibit E.

Plaintiffs never took Hancock's deposition. On May 27, 2016, Counsel for Plaintiffs filed their Motion to Exclude Hancock. Exhibit F. Having realized that Plaintiffs no longer intended to take Hancock's deposition, counsel for Defendants immediately emailed Plaintiff's to request dates for Lummis' deposition. Exhibit G. On June 2, 2016, counsel for Plaintiffs stated that they would not provide any potential deposition dates because the discovery period was over. Exhibit H.

III. ARGUMENT AND AUTHORITIES

Lummis was designated as Plaintiff's rebuttal expert. The parties understood that Hancock's deposition would be taken first, followed by Lummis' deposition. This is the order contemplated by the Texas Rules of Civil Procedure. *See* Rule 195.3(b) ("A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly *after* the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.") (emphasis added). Counsel for Plaintiffs repeatedly asked for Hancock's deposition, though they apparently never intended to take it. At Plaintiffs' request, Defendants agreed to Hancock's deposition taking place outside of the discovery period. It therefore necessarily follows that Lummis' deposition would also occur outside of the discovery period.

"In scheduling the designations and depositions of expert witnesses, the rule attempts to minimize unfair surprise and undue expense". Tex. R. Civ. P. 195, cmt.3. Plaintiffs' months-long feigning of interest in deposing Hancock as a means to run out the clock is not a justification for

preventing the Defendants from exercising their right to conduct discovery they have been diligent in seeking for two years.

IV. CONCLUSION

The Court should compel Plaintiffs to produce H. Max Lummis for deposition and for all other relief to which they may be entitled.

A proposed order is attached.

Respectfully submitted,
BERG FELDMAN JOHNSON, LLP

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MARSHALL

CERTIFICATE OF CONFERENCE

On July 12, 2016 I conferred with counsel for Plaintiffs, who advised that he is opposed to the relief sought in this motion.

/s/ Kathryn E. Nelson
Kathryn E. Nelson

