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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

TORRES AND THE SINN PARTIES' RESPONSE TO DEFENDANTS/COUNTER-PLAINTIFFS' TRADITIONAL MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Eric Torres ("Torres") as well as Aspire Commodities, L.P., XS Capital Investments, L.P., and Adam Sinn (the "Sinn Parties"), collectively "Plaintiffs," file this Response to the Defendants/Counter-Plaintiffs' Traditional Motion for Partial Summary Judgment ("Motion") and would respectfully show the Court the following:

I. INTRODUCTION AND SUMMARY OF RESPONSE

In an attempt to use clever pleadings in order to avoid having to prove damages on their breach of contract claim, yet still try to recover attorney's fees, Defendants/Counter-Plaintiffs Craig Taylor, Atlas Commodities, LLC and S. James Marshall (the "Atlas Parties") have moved for

summary judgment on their declaratory judgment action but not for breach of contract. The declaratory judgment claims, however, are mere declarations as to elements of their breach of contract claim, and for which they then ask for attorney's fees under the Uniform Declaratory Judgments Act. As will be shown below, the Atlas Parties are not the first to try this trick but Texas case law is abundantly clear that this is impermissible, and the Uniform Declaratory Judgments Act cannot be used as shortcut to obtain attorney's fees for a breach of contract otherwise the statute governing breach of contract attorney's fees would be rendered useless.

On the same day they filed their Motion, September 16, 2016, the Atlas Parties amended their counterclaims, changing the declaratory judgment requests that they had been seeking into five new requested pronouncements:

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(Defs.' 3rd Am. Answer, Affirm. Defenses, and Counterclaim ¶54). Notably the Atlas Parties did not file summary judgment on their breach of contract claim because that would require they actually show damages, and it has long been clear that they cannot do so.[1] Regardless of this maneuvering and the abrupt change in the declaratory judgments sought, the Atlas Parties' claims are still

[1] Just last week Plaintiffs took the deposition of the Atlas' Parties' damages expert who continued to adhere to the same methodology included in his original report which the Court already noted was highly suspect and not reliable (i.e. that but for the Torres departing Atlas in 2012 (an event that was released by the Settlement), Atlas would have maintained its revenues and costs at the same level as it had in the 12 months ending December 31, 2012 even though the alleged disparagement claimed by the Atlas Parties did not occur until almost a year later, and despite the fact that Atlas does not

nonetheless nothing more than elements of their breach of contract claim, or in one instance, a pronouncement of their affirmative defense to Torres' breach of contract claim.[2] Simply re-pleading elements of an existing claim or defense is not a permissible use of the Uniform Declaratory Judgments Act, nor can such a tactic lead to an award of attorney's fees.

The Atlas Parties' motion with regard to the "assignment" also shows distinct peculiarity in that the Atlas Parties appear to simply not believe in the linear progression of time. The Atlas Parties want a declaration that the document executed on June 30, 2014 by Eric Torres was a material breach of the Settlement Agreement that somehow excuses the Atlas Parties' repudiation and breach of that Settlement Agreement six months earlier on December 31, 2013 simply because the attempted "assignment" said it was effective as of August 15, 2013. In other words, a document that did not exist on December 31, 2013 (and likely would never have come to exist but for the Atlas Parties' decision on that day to stop paying) justifies the Atlas Parties' breach. This is yet another attempt by the Atlas Parties of having their cake and eat it too. They want to stop paying on the Settlement, keep the ownership units they received under it, and yet complain about the other side not living up to its end of the bargain. The Atlas Parties simply cannot use an alleged breach that did not exist at the time of their repudiation as a justification for such repudiation. Further, the undisputed evidence shows the assignment was something that was merely contemplated for litigation and then discarded, never having been accepted by the assignee. Moreover, case law shows that the failure to obtain a consent to an assignment required by a contract results in the assignment being a nullity – not a breach. In addition to this fact, there is no actual controversy as Plaintiffs agree that the June 30, 2014 "assignment," if somehow accepted, was a nullity as there was no consent. In addition the

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have contractual relationships with its customers requiring customers continue to use Atlas' brokerage).

[2] It should be noted that their fifth requested declaration is actually agreed upon by the parties and as such is not proper for declaratory judgment.

Atlas Parties continue to retain Torres shares thus waiving the alleged breach by the purported assignment. Finally, the "assignment" cannot constitute a breach of the Settlement Agreement because there are no damages associated with the "assignment."

Furthermore, the Atlas Parties are not entitled to a declaration that they were excused from performance because as a matter of law based on their later and continuing ratification of the Settlement Agreement by keeping the benefits of the Settlement Agreement (after having repudiated at least *their own obligations* under it by not paying) and treating it as continuing with regards to its benefits to themselves. As a result, Torres and the Sinn Parties are entitled to summary judgment on this issue, and on the Atlas Parties' declaratory judgment on their defense of excuse is not only an improper re-pleading of their affirmative defense, but is also substantively incorrect as a matter of law.

Finally, the Atlas Parties' entire case, as captioned by their motion for summary judgment, shows that the Atlas Parties' are desperately searching for a *post hoc* justification of their repudiation and excuse their performance of the Settlement. Their initial "justifications" (that Sinn sent the Picture to Taylor or that Sinn's lawyer mistakenly thought Sinn had sent the Picture to Atlas customers) have proven to be clearly wrong and unsustainable, and have now been abandoned. In their stead, the Atlas Parties have come to rely on newly discovered alleged "disparagement" that never could have served as an excuse for their not paying under the Settlement in December 2013 because:

> (a) it was not disparagement under contract;
>
> (b) there is no proof that the "disparagement" was "regarding any matter likely to be harmful to" the reputation of the Atlas Parties as required by the contract (ironically, the purportedly solicited comments from the third parties cited by the Atlas Parties show those persons already have low opinions of the Atlas Parties and thus there could be no proof that the statements of Sinn or Torres was likely to be harmful to the Atlas Parties' reputations);

(c) it was the kind of banter that even the Atlas Parties engage in with their friends when they called Sinn and Torres "tards," "pusses," and "dipshits";" and

(d) in any event, was not known at the time the Atlas Parties decided to repudiate the Settlement and therefore legally cannot serve as a basis for an excuse.

As a result, the Atlas Parties have drug this Court and this noble court system down, forcing it to play censor and moderator of the kind of things most grown-up people ignore in life and never think of bringing to a courtroom.

The Atlas Parties' motion for summary judgment is procedurally impermissible, substantively void, and must be denied.

II. OBJECTIONS TO SUMMARY JUDGMENT EVIDENCE

Torres and the Sinn Parties object to the summary judgment evidence referenced in and filed with the Motion as follows:

Torres and Sinn Parties object to paragraph 6 of Exhibit P to Defendants' Traditional Motion for Partial Summary Judgment- Declaration of Craig Taylor as a conclusory statement and a legal conclusion regarding the causation of harm to Atlas by Sinn and Torres' disparagement, which in the context of the Declaration is only the Picture being sent to Taylor.

Torres and Sinn Parties object to paragraph 6 of Exhibit P to Defendants' Traditional Motion for Partial Summary Judgment- Declaration of Craig Taylor as a conclusory statement and a legal conclusion regarding the classification of sending the Picture to Taylor as "disparagement."

Torres and Sinn Parties object to Craig Taylor's deposition responses on p.243:23-244:25 of Exhibit Z to Defendants' Traditional Motion for Partial Summary Judgment –Taylor deposition excerpts ([redacted]) because said responses are parol evidence, are speculative, and are controverted by the terms of the Settlement Agreement itself which directs the payments to Sinn's attorney not Torres', and is controverted by Defendants' own

pleadings, specifically paragraph 27 of Defendants' Third Amended Answer, Affirmative Defenses and Counterclaim filed the same day as the Motion which, as with all previous versions of that pleading, states "Taylor's and Atlas' payment under the Settlement Agreement was to be made to Sinn, not Torres."

Torres and Sinn Parties object to the use of statements/text messages by persons other than Adam Sinn or Eric Torres found in Exhibits AA and DD to Defendants' Traditional Motion for Partial Summary Judgment to the extent that the Atlas Parties use such statements to conclude that such commentary was prompted or solicited by Sinn because the evidence would be speculative.

Torres and Sinn Parties object to Defendants' request that "the Court take judicial notice of the years-long delays necessitated by the Plaintiffs withholding of discoverable evidence and filing baseless motions such as their various motions for sanctions." Defs.' Mot. Summ. Judgment p. 12. This request is improper, and Plaintiffs direct the Court's attention to Plaintiffs' July 20, 2016 response to Defendants' Motion to Compel Discovery Responses by Adam Sinn for the complete rundown of the various delay tactics and failures to act on information the Atlas Parties had possessed for months.

Attached hereto as Exhibit G is the affidavit of Kenneth M. Krock in support of Torres and Sinn Parties' objection to the Affidavit of Geoffrey Berg in Support of Defendants' Traditional Motion for Partial Summary Judgment. Torres and Sinn Parties specifically object to paragraphs 5, 7, 8, 9, 16 and 17 of Exhibit CC of Defendants' Traditional Motion for Partial Summary Judgment– Affidavit of Geoffrey Berg - on attorney's fees incurred as such paragraphs are in direct contention with both (a) the invoices provided which show that Berg, Feldman, Johnson, LLP's representation of Atlas Parties is on a flat fee basis, and (b) statements made by the deponent to Mr. Krock that Berg, Feldman, Johnson, LLP's representation of Atlas Parties was on an ongoing flat fee basis that

included representation of Atlas Parties in this matter as well as other matters in which Atlas Parties are involved and in which Torres and Sinn Parties are not involved. Torres and Sinn Parties further object to specific time entries on Berg, Feldman, Johnson, LLP's invoices as laid out in the affidavit of Kenneth M. Krock. Plaintiffs further object to the Berg Affidavit as failing to apply the proper legal standard for segregating attorneys' fees as it uses interrelated facts standard and case law prior to the Texas Supreme Court's teaching in *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).

III. FACTS

Plaintiffs will not undertake to recite the facts here. The facts are set forth in Torres and Sinn Parties' Motion for Traditional and No-Evidence Summary Judgment on file with the Court and those facts are incorporated herein. The "facts" in Defendants/Counter-Plaintiffs' Traditional Motion for Summary Judgment are argumentative rhetoric and thus are not actual facts that may support a motion for summary judgment.

In addition, some of the "undisputed facts" laid out by the Atlas Parties' motion are in fact disputed. For instance, the Atlas Parties claim that "[i]t is undisputed that the Defendants would not have agreed to the Settlement Agreement's terms if they had known about the Torres to Sinn assignment and they would not have consented to the assignment post-execution had they been asked." Torres and Sinn Parties absolutely dispute that Defendants would not have agreed to the Settlement Agreement's terms if they had known about the "assignment" first because the "assignment" didn't even exist at the time of the Settlement Agreement, but second because the terms of the Settlement Agreement itself show the money going to Sinn's lawyer not Torres' lawyer, and third, the Atlas Parties have no right whatsoever to tell Torres what he can and cannot do with money he has received under a settlement.

Torres and Sinn Parties also dispute the statement that "Taylor and Atlas were not interested in reinstituting litigation or seeing the settlement unravel…" which is in direct contention with Atlas' repudiation of the Settlement Agreement and refusal to continue paying under it as a result of a typo in an email from Mr. Langham that he quickly retracted.

Torres and Sinn Parties also dispute the statement that "Plaintiffs' withholding of relevant material has lasted years," as Plaintiffs have timely responded to all requests for production, whereas Defendants have had certain documents in their possession for nearly a year before deciding to actually ask questions about them or request follow-up discovery. Further, any references to the "assignment" as being withheld for any period of time, Defendants fail to recognize that they did not even request it in discovery until May 18, 2016, only nine days before the discovery period was set to expire.

Torres and Sinn Parties also dispute the entirety of Sections D and E of Defendants' Motion, especially the various conclusory statements contained therein. The Atlas Parties "undisputed facts" have strung together separate conversations as well as statements by different people (including by persons other than Sinn or Torres) to create purported "conversations" that did not occur. The Court should not rely on the Atlas Parties' summation of the evidence. It must look at the actual texts and instant messages in context, which destroys the Atlas Parties' assertions. Further, it is important to note that much of the alleged disparagement occurred after Sinn sent the Picture and Sinn and his friends were reacting to the reactions of Taylor and his attorney as well as the unfortunate initial miscommunication made by Sinn's attorney Chanler Langham on December 24, 2013.

Finally, much of the "undisputed facts" section of the Atlas Parties motion is their typical fallback position in this case that the Sinn Parties have not participated in discovery (which is not true) and that the Sinn Parties' guilt may be based on what the Atlas Parties perceive as the refusal to

participate in discovery. In fact, the Sinn Parties' objected to unfettered discovery that they knew (and now has been proven) was designed to merely find an *ex post facto* justification for not paying Torres the money owed under the Settlement when their original justification (the Picture and the retracted statement from Sinn's lawyer) ultimately had to be abandoned by the Atlas Parties. The Sinn Parties' view is supported by the facts – that while Taylor has testified he decided to stop payments on the Settlement because of the Picture and the statements by Chanler Langham that the Picture went to Atlas customers – that justification has been abandoned for alleged disparagement and an "assignment" dated June 30, 2014 that the Sinn Parties turned over in discovery. (*See* Plfs.' Mot. Summary Judgment Exh. F 153:17-163:18). In other words, the Atlas Parties filed a frivolous lawsuit to get discovery to justify their decision not to pay Torres after the fact and now want to be rewarded for their actions with avoiding $210,000 in debt plus attorneys' fees, keeping the ownership units, and getting $400,000+ on their attorneys' fees.

IV. RESPONSE TO MOTION FOR TRADITIONAL SUMMARY JUDGMENT

A. The Atlas Parties are not entitled to summary judgment on their affirmative defense of excuse.

The Atlas Parties' first assertion in their Motion is that the June 30, 2014 "assignment" and alleged "disparagement" excuses their performance under the Settlement Agreement. Summary judgment is not possible on this affirmative defense.

First, even if the "assignment" and "disparagement" were material breaches (which they were not as discussed below), the undisputed facts here show that the Atlas Parties are barred as matter of law from asserting excuse as an affirmative defense. The Atlas Parties rely on the very case law that defeats their affirmative defense as a matter of law. The Atlas Parties cite *Long Trusts v. Griffin*, 222 S.W.3d 412, 415–16 (Tex. 2006) asserting that "[w]hen a party breaches a contract, the other party is excused from any obligation to perform." (Motion, p.27). The actual language of *Long Trusts* is:

> Assuming petitioners' breach of their monthly billing obligation was **material**, as the trial court found, the Griffins were excused from any further obligation to perform. *Hernandez v. Gulf Group Lloyds,* 875 S.W.2d 691, 692 (Tex.1994) ("A fundamental principle of contract law is that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform."). They were entitled to terminate the agreement and sue for breach. ***But "[a] party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part."*** *Hanks v. GAB Bus. Servs., Inc.,*- 644 S.W.2d 707, 708 (Tex.1982). By claiming as damages their share of the *Tejas* lawsuit recovery, which was the benefit of the bargain, the Griffins treated the agreement not as terminated but as continuing. The Griffins could not cease to share in the expenses and still insist in sharing in the recovery. The court of appeals erred in affirming this part of the judgment for the Griffins.

Long Trusts v. Griffin, 222 S.W.3d 412, 415–16 (Tex. 2006) (emphasis added).

The Torres and Sinn Parties' Motion for Traditional and No-Evidence Summary Judgment filed September 16, 2016 and incorporated herein by reference ("Torres/Sinn's Motion"), cites the *Long Trusts* case as well as additional case law reflecting that Texas law is abundantly clear that, if, after the breach, the non-breaching party continues to insist on performance by the party in default, he is deprived of any excuse for terminating his own performance. *See* Torres/Sinn Motion at p. 29-30 *citing* Long *Trusts v. Griffin,* 222 S.W.3d 412, 415–16 (Tex.2007) (per curiam); *Hanks v. GAB Bus. Servs., Inc.*, 644 S.W.2d 707, 708 (Tex.1982); *Gupta,* 140 S.W.3d at 756; *Chilton,* 930 S.W.2d at 887; *W. Irrigation Co. v. Reeves Cnty. Land Co.,* 233 S.W.2d 599, 602 (Tex.Civ.App.-El Paso 1950, no writ); *see also Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 887 (Tex.App.-San Antonio 1996, writ denied) (quoting *Houston Belt & Terminal Ry. v. J. Weingarten Inc.*, 421 S.W.2d 431, 435 (Tex.Civ.App.-Houston [1st Dist.] 1967, writ ref'd n.r.e.)); *Gupta v. E. Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 756 (Tex.App.-Houston [14th Dist.] 2004, pet. denied).

It is undisputed that the Atlas Parties have not only kept the benefits of the Settlement Agreement—the ownership units, and continue to do so through today, but they unequivocally ratified the Settlement Agreement on March 6, 2014, when Taylor and Marshall executed an

Addendum Agreement to the Amended Company Agreement of Atlas Commodities, LLC acknowledging and memorializing that Torres was removed in all capacities, including returning his ownership shares to Atlas "Pursuant to the Settlement Agreement" -- ***two months after ceasing payments and repudiating the Settlement Agreement***. (Plfs.' Mot. Trad. And No-Ev. Summ. Judgment Exhs. D and F 261:1-263:25). The Atlas Parties continue to maintain in their Motion (p.6) that the "Sinn/Torres ownership units" were returned under the Settlement Agreement. Further, such ownership interest and the profits of Atlas associated with it remain with the Atlas Parties today. (Defs. Mot. Sum. Judgment p.6; Plfs.' Mot. Trad. And No-Ev. Summ. Judgment Exhs. D; F 261:1-263:25-Exhibit F hereto). The Atlas Parties not entitled to summary judgment on their affirmative defense as a matter of law.[3]

Second, as the case law cited by the Atlas Parties expressly states (but that the Atlas Parties' leave out of their Motion), for a breach of a contract to excuse performance, the breach must be **material**. *See Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994) ("A fundamental principle of contract law is that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform.) (emphasis added). "In determining the materiality of a breach, courts will consider, among other things, the extent to which the non-breaching party will be deprived of the benefit that it could have reasonably anticipated from full performance." *Id.* at 693. Because excuse is an affirmative defense, the Atlas Parties bear the burden to prove conclusively that the alleged breaches were material, which they have not and cannot do.

It should be noted at the outset that the reason Taylor gave for repudiating the Settlement was

[redacted]

[3] In fact, as a matter of law, this issue goes the other way – under the Torres/Sinn Motion, Torres and Sinn Parties

[redacted]. Realizing that these reasons could not offer a "just excuse" for not performing, the Atlas Parties have abandoned them and instead chose to rely on the June 30 2014 "assignment", statements Sinn made to his friends in texts, statements Sinn made to Torres in instant messages after the Atlas Parties' lawyer made a big deal of the Picture, and Torres' testimony that he may at some undefined point in time have called Taylor [redacted] Effectively, the Atlas Parties filed a frivolous case in order to fish for a justification for their improper actions. After two years of fishing, this is all they could come up with.

Torres and the Sinn Parties provide a detailed response below in Section (B)(4)(b) *infra* as to why the Atlas Parties' claims for declaratory judgment, which have the same basis as their purported excuse defense, and that discussion is incorporated herein by reference.

The June 30, 2014 assignment was not and could not have been a material breach of the Settlement Agreement. It was signed after the Atlas Parties' repudiation of the Settlement (and in fact because of it). It was signed only by the assignor, and the assignee never even knew about it, much less accepted. It was not considered valid by anyone because two weeks later Torres, as a Plaintiff, sued for breach of the Settlement Agreement. There was no damage as a result of the "assignment" as all of the payments were made before the alleged "assignment" and have been accounted for. This is not a situation where the Atlas Parties paid the assignor and then had the assignee sue and claim it did not receive the payments. Even under that scenario the courts would simply find the assignment was invalid and void, and the assignee could not maintain suit. The Atlas Parties have made no showing and indeed cannot make a showing that they lost the benefit of their bargain because of the June 30, 2014 "assignment". Case law shows that the remedy for an assignment made without consent required by a contract is that it is treated as void at the option of

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are entitled to summary judgment on the Atlas Parties' affirmative defense of excuse as a matter of law.

the party whose consent was required. *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n*, 710 S.W.2d 551, 556 (Tex. 1986).

Regarding the "disparagement" excuse, the Atlas Parties have made no showing that Torres made any statement that was disparaging under the Settlement Agreement much less made before the repudiation by the Atlas Parties. That Torres may have called Taylor an "asshole" at some point of time to somebody (of course there is no proof that the epithet was one that was "regarding a matter likely to be harmful" to the Atlas Parties' reputation as required by the Settlement Agreement), is not disparaging and even if it was, it would have to have been after the Settlement Agreement but before the Atlas Parties' repudiation which itself excused all further performance from Torres and the Sinn Parties. No proof was offered when this alleged statement was made. Further, there is no proof of any statements at all about Marshall so no summary judgment could ever be granted for Marshall. The Atlas Parties have no excuse for not paying Torres.

The Atlas Parties also try to excuse their payments to Torres performance based on texts and instant messages by Sinn to his friends. The Atlas Parties ignore the fact that they communicated with their friends calling Torres and Sinn "tards" and "pusses." Instead, the Atlas Parties want to hold Sinn to a higher standard under the Settlement Agreement. The reality is that the alleged statements by Sinn do not as a matter of law violate the non-disparagement clause as they are not defamatory and certainly would not likely have an effect of the Atlas Parties' reputation.

Moreover, Atlas Parties have relied on statements made before and after the dispute developed with the Picture and the Atlas Parties repudiated the Settlement. The statements after the Atlas Parties' suggested the Picture was a violation of the Settlement and then flatly repudiated the contract can never be actionable.

The Atlas Parties have no excuse for not paying Torres. Even if they did, the Atlas Parties

waived that excuse as a matter of law by expressly ratifying the Settlement and continuing to retaining the benefits of the Settlement.

B. The Atlas Parties are not entitled to summary judgment on their Declaratory Judgment action.

1. Atlas Parties are not entitled to summary judgment requesting an "excuse" proclamation because it is a mere repleading of their affirmative defense.

As shown above, the Atlas Parties are not entitled to summary judgment on their affirmative defense of excuse (indeed Torres and Sinn Parties are entitled to summary judgment, thus even if Atlas Parties' request for declaratory judgment declaring that "Defendants' performance under the Settlement Agreement is excused" was a proper declaratory judgment request, which it is not, Atlas Parties would still not be entitled to prevail on it. However, this declaratory judgment request is not a proper declaratory judgment request at all.

"A counterclaim for declaratory judgment is improper if it is nothing more than a mere denial of the plaintiff's claims and the counterclaim fails to have greater ramifications than the original suit." *BHP Petroleum Co. v. Millard,* 800 S.W.2d 838, 842 (Tex.1990) (orig. proceeding). To have "greater ramifications" than the original suit, the counterclaim should seek some sort of affirmative relief. *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638–39 (Tex.App.-Austin 1992, writ denied); *see also* Tex. R. Civ. P. 96; *Heritage Life v. Heritage Group Holding,* 751 S.W.2d 229, 235 (Tex.App.-Dallas 1988, writ denied) (declaratory judgment act not available to settle disputes already pending before court). "To qualify as a claim for affirmative relief, a defensive pleading must allege that the defendant has a cause of action, independent of the plaintiff's claim, on which he could recover benefits, compensation or relief, even though the plaintiff may abandon his cause of action or fail to establish it." *Gen. Land Office of Tex. v. OXY U.S.A., Inc.,* 789 S.W.2d 569, 570 (Tex.1990) (quoting *Weaver v. Jock,* 717 S.W.2d 654, 657 (Tex.App.-Waco 1986, writ ref'd n.r.e.)). .

In *Sanchez v. AmeriCredit Fin. Servs., Inc.* the Dallas Court of Appeals analyzed the concept in depth, finding that:

> Sanchez's assertion of a counterclaim in the form of a request for declaratory judgment did not relieve him of his burden to comply with the requirement to assert a claim for affirmative relief. **The matters on which Sanchez sought a declaratory judgment were nothing more than affirmative defenses to claims on which the parties had already joined issue and had no greater ramification than the defenses that were presented when Sanchez's counterclaim for declaratory action was filed. In none of Sanchez's requested declarations did he seek affirmative relief; he sought only to avoid liability. In fact, Sanchez's requested declarations were identical to affirmative defenses set forth earlier in the same pleading.** Thus, the declaratory-judgment counterclaim duplicated other parts of the pleading in every respect. The allegations pled in Sanchez's counterclaim are not averments of fact upon which affirmative relief could be granted. They are denials of AmeriCredit's cause of action. Sanchez could not recover any relief once AmeriCredit abandoned its causes of action. We therefore conclude that Sanchez asked for no greater relief in his declaratory-judgment counterclaim than he asked for without that counterclaim.

Sanchez v. AmeriCredit Fin. Servs., Inc., 308 S.W.3d 521, 524–25 (Tex. App. 2010, no pet.). (citations omitted) (emphasis added).

Here, Atlas Parties' declaratory judgment action for the pronouncement that they are "excused" from performance is nothing more than a re-pleading of their affirmative defense of excused performance, which they plead in the very same Third Amended Answer, Affirmative Defenses, and Counterclaim, and as such is not a proper request for declaratory relief. "[A] request for declaratory relief that amounts to only denial of plaintiff's cause of action is not a counterclaim that seeks affirmative relief that survives a nonsuit. *Stern v. Marshall*, 471 S.W.3d 498, 514 (Tex. App.-Houston [1st] 2015, no pet.). Because it is not an independent claim that has any greater ramifications to the case than their defense of excuse, Atlas Parties' declaratory judgment action for a proclamation of "excuse" is not a proper declaratory judgment action.

2. Atlas Parties are not entitled to summary judgment requesting "breach" proclamations because they are mere repleadings of elements of their breach of contract claim.

The Atlas parties also seek three declarations from the court that Torres and/or Sinn Parties (i) breached the. . .non-disparagement clause by making derogatory comments…(ii) breached the. . .non-disparagement clause by soliciting form third parties comments and/or statements that may be considered negative…and (iii) breached the non-assignment clause by assigning Torres' rights under the Settlement Agreement." (Defs' Motion Section VI ; Defs.' 3rd Am. Answer, Aff. Defenses, and Counterclaim ¶54). Here, the Atlas Parties don't even try to disguise that this is simply an element of their breach of contract claim, and ask specifically to have the court pronounce three "breaches" of the contract.

Much the same as requests for declaratory judgment that do nothing besides replead a defense, requests for declaratory judgment that are nothing more than a repleading of an already existing cause of action or element of such a cause of action are also impermissible requests for declaratory judgment. The Declaratory Judgment Act is "not available to settle disputes already pending before a court." *BHP Petroleum Co. Inc. v. Millard,* 800 S.W.2d 838, 841(Tex.1990) (citing *Heritage Life v. Heritage Group Holding,* 751 S.W.2d 229, 235 (Tex.App.-Dallas 1988, writ denied)). Ordinarily declaratory relief will not be granted where the cause of action has fully matured and invokes a present remedy at law. *See Tucker v. Graham,* 878 S.W.2d 681, 683 (Tex.App.-Eastland 1994, no writ); *Sylvester v. Watkins,* 538 S.W.2d 827, 831 (Tex.Civ.App.-Amarillo 1976, writ ref'd n.r.e.). A declaratory judgment action is improper if declaratory relief is requested for the first time in an amended petition and merely raises the same issues. *Adams v. First Nat. Bank of Bells/Savoy,* 154 S.W.3d 859, 873 (Tex. App.-Dallas 2005, no pet.) *citing Hartford Cas. Ins. Co. v. Budget Rent–A–Car Systems, Inc.,* 796 S.W.2d 763, 772 (Tex.App.-Dallas 1990, writ denied);

Kenneth Leventhal & Co. v. Reeves, 978 S.W.2d 253, 258–59 (Tex.App.-Houston [14th Dist.] 1998, no pet.); *Tucker*, 878 S.W.2d at 683.

The same is true if the declaratory judgment action is simply overlapping elements of live claims, as the Austin Court of Appeals explained in case where the Court found that the requested declarations sought declarations only as to issues that were already presented by the wrongful-termination claims:

> "The district court properly dismissed these claims because the requested declarations **overlap elements of their wrongful-termination/due-process claims** and "[a]n action for declaratory judgment will not be entertained if there is pending, at the time it is filed, another action or proceeding between the same parties and in which may be adjudicated the issues involved in the declaratory judgment action." *Texas Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex.1970); *see BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex.1990) ("The Declaratory Judgments Act is 'not available to settle disputes already pending before a court.' " (citations omitted)). Although Plaintiffs appear to question this rule in their seventh and eighth issues, those contentions are without merit, and we overrule them."

Brantley v. Texas Youth Comm'n, 365 S.W.3d 89, 107 (Tex. App.-Austin 2011, no pet.). Here, Atlas Parties' three requested declarations that seek to have the Court declare that Sinn and/or Torres "breached" the Settlement Agreement by doing some behavior are nothing more than recitations of elements of their breach of contract claim which they tellingly do not bring summary judgment on. As such, these declarations are not proper declaratory judgment requests. Further still, as will be show below, because these are merely duplicative requests of elements in a claim they already have pending before the court, Defendants cannot obtain attorney's fees under the Uniform Declaratory Judgments Act based on them.

3. Atlas Parties are not entitled to summary judgment requesting the "assignment" be declared void.

a. There is no justiciable controversy because the Parties agree that the "Assignment" is void.

Even if the Court considers the "defensive" declaratory judgment claims, summary judgment cannot be granted on those claims.

Finally, the Atlas Parties requests as a declaratory judgment the declaration that "the assignment is null and void." (Defs. Motion Requested Declaration (iii)). There is no basis for declaratory judgment as there is no actual, justiciable controversy as is required. Torres and the Sinn Parties agree that the unaccepted June 30, 2014 "assignment" is void and of no effect. (Plfs.' Mot. Trad. And No-Evid. Summ. Judgment pg. 22-23). In fact, that is why it is not a breach of the settlement agreement

A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought. *Bonham State Bank v. Beadle,* 907 S.W.2d 465, 467 (Tex. 1995). With regards to the Atlas Parties' declaratory judgment request for a declaration that "the assignment is null and void," there is no controversy. Both sides agree the assignment is null and void. What the Atlas Parties really want is for the assignment to support an actionable claim for breach of contract. Texas law simply does not treat an alleged violation of an anti-assignment clause as an actionable breach.

b. There is no cause of action for breach of contract based on a violation of an anti-assignment provision because any attempted assignment is simply void and of no force and effect.

As Torres and the Sinn Parties show in their motion for summary judgment, the precedent from Texas case law is clear that an attempted assignment in violation of an assignment clause requiring the other parties' consent is "of no force and effect." *Island Recreational Dev. Corp. v.*

Republic of Texas Sav. Ass'n, 710 S.W.2d 551, 556 (Tex. 1986) ("Further, by the terms of the paragraph in question the letter of commitment was not assignable without Republic's consent. Thus, any attempted assignment, whether absolute or collateral, would be of no force and effect."); *see also Reef v. Mills Novelty Co.*, 126 Tex. 380, 382, 89 S.W.2d 210, 211 (Comm'n App. 1936) ("When the debtor has the contract right to ignore a voluntary transfer of the claim, as in the instant case, no effective transfer can be made without his consent. His contract right must be respected by third persons."). It is logically consistent that an assignment inconsistent with an anti-assignment clause in a contract, which is treated as void and of no force or effect would not be considered an actionable breach because the assignment is treated as if it did not exist. It does not confer any rights or benefits, it simply fails to obtain, and therefore does not violate an anti-assignment provision *because nothing is actually assigned by an unauthorized assignment*. The case law is nearly unanimous on this point.[4] Summary judgment on this ground must be denied.

[4] The only other case to even hold that an assignment in violation of an anti-assignment clause is effective but may give rise to damages has been rejected as contrary holdings by the Texas Supreme Court and in fact the potential damages claim was dicta as it was not at issue in the case. In *Reuben H. Donnelley Corporation v. McKinnon*, the Corpus Christi Court of Appeals relied on RESTATEMENT OF CONTRACTS § 322(2) (2d ed. 1981) in holding that the anti-assignment clause did not render the assignment ineffective. 688 S.W.2d 612 (Tex.App.-Corpus Christi 1985, writ ref'd n r.e.). The Court reasoned that "Section 322(2) [of the Restatement] provides in part: A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective." *Id.* However, other Texas courts have rejected *McKinnion* on this ground stating that Texas Courts are bound by the holdings of the Texas Supreme Court in *Island Recreational* and *Reef*. *See Texas Dev. Co. v. Exxon Mobil Corp.*, 119 S.W.3d 875, 881 (Tex. App.-Eastland 2003, no writ). Further a review of *McKinnon* shows that the potential damages claim under the Restatement was not even at issue or addressed by the court. In McKinnon, McKinnon purchased a Thrifty Rent A Car franchise from Connell. *McKinnon*, 688 S.W.2d. at 614. Connell had previously placed an advertisement in the yellow pages with RHD. *Id.* Connell then cancelled the advertisement and RHD did not run the ad. *Id.* McKinnon sued both Connell and RHD for negligence and DTPA (interestingly not on breach of contract). *Id.* The issue became whether RHD had any duty to McKinnon under the advertisement contract because it had an anti-assignment clause. *Id.* at 614-615. The Corpus Christi Court of Appeals found that even if the sale was an assignment in violation of the anti-assignment clause, the violation did not render the assignment ineffective but would give RHD a claim for damages. *Id.* at 615. This allowed McKinnon to enforce the contractual duty against RHD even without its consent. *Id.* While the *McKinnon* decision seems legally absurd, it is irrelevant here as no one is trying to enforce the assignment. The quoted part from the Restatement about damages is *dicta* and the whole Restatement contradicts Texas Supreme court precedent. *See id.; but see Texas Dev. Co. v. Exxon Mobil Corp.*, 119 S.W.3d at 881.

c. None of Defendants' cited cases treat an assignment in light of an anti-assignment clause as an actionable breach.

The Atlas Parties themselves do not cite to any authorities that stand for the proposition that an assignment in light of an anti-assignment clause is an actionable breach of contract, but instead rely on their case authority to support the proposition that the assignment is void, which is agreed on.

The Atlas Parties rely on *Pagosa Oil and Gas, LLC v. Marrs and Smith Partnership,* 323 S.W.3d 203, Tex. App.—El Paso 2010, reh'g denied). However, in *Pagosa Oil* the Court found that the assignment at issue there was not void and that the party asking that it be declared void did not have standing to do so. *Id.* at 212-213. *Pagosa Oil* does not recognize a cause of action for breach of contract based on an assignment in light of an anti-assignment clause in a contract. *See generally id.*

The Atlas Parties also interestingly rely on *Jetall Companies v. Four Seasons Food Distributors, Inc.*, 474 S.W.3d 780 (Tex. App.-Houston [14th] 2014, no pet.). *Jetall* does in fact stand for the proposition that an assignment contrary to an anti-assignment provision of the contract is void, it also expressly states that:

> "[i]t follows that Jetall errs when it characterizes Four Seasons a***s having "wrongfully assigned the contract*** to Jetall without PMCF's consent." ***This characterization is erroneous because the assignment was not wrongful; rather, the assignment was a nullity*** without PMCF Properties's written consent**,** which PMCF Properties had absolute discretion to withhold and did in fact withhold."

Id. at 783-84 (emphasis added). Thus, the very case Atlas Parties cite stands for the proposition that there is no such thing as a breach of contract action based on a "wrongful assignment" because the assignment is a nullity.

The Atlas Parties further rely on *Rancho La Valencia, Inc. v. Aquaplex, Inc.*, which just interprets the substance of an assignment and is not presented with the question of whether an assignment is or is not void, nor whether there is a cause of action for breach of contract based on an assignment *Rancho La Valencia, Inc. v. Aquaplex, Inc.*, 297 S.W.3d 781 (Tex.App.-Amarillo 2008).

They also rely on *Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154 (Tex. 1994), which does not involve an assignment at all.

There simply is not a cognizable cause of action for "breach" of a contract by way of an assignment that is contrary to an anti-assignment clause in a contract under Texas jurisprudence. Texas simply treats such an assignment as a nullity. Furthermore, even it was actionable, the June 30, 2016 assignment, which Plaintiffs maintain was not treated as effective but was only a "just in case" document for purposes of instituting this lawsuit, could not form the basis of a breach excusing Atlas Parties' performance because they had already repudiated the Settlement Agreement and stopped paying six months prior to the execution of the assignment.

Even further, Texas law distinguishes between a contracting party's ability to assign rights under a contract containing an anti-assignment clause and that same party's ability to assign causes of action arising from the breach of that contract. *See Pagosa Oil & Gas, L.L.C. v. Marrs and Smith P'ship*, 323 S.W.3d 203, 211–12 (Tex.App.-El Paso 2010, pet. denied). Absent specific circumstances . . . . causes of action in Texas are freely assignable. *Id.* at 212. Texas courts look to the plain wording of the anti-assignment clause to determine whether it prohibits assigning causes of action to the City. *See id.; see also City of Brownsville ex rel. Pub. Utilities Bd. v. AEP Texas Cent. Co.*, 348 S.W.3d 348, 358 (Tex. App. 2011). Merely preventing the assignment of the "rights and duties" under the agreement is not sufficient language to prevent assignment of causes of action arising from breaches of that agreement. *See id.* Here, the anti-assignment provision of the Settlement Agreement simply states that "[n]o Party may assign any of its rights or delegate any of its duties hereunder without the written consent of the other Parties." (Defs. Mot. Sum. Judgment Ex. M). Because the alleged assignment here was executed on June 30, 2014, after the Atlas Parties had repudiated and breached the agreement by no longer paying, the alleged assignment, if it were treated

as effective by Sinn and Torres, which it was not, then would assign nothing more than the cause of action for breach of the agreement. Assignment of a cause of action is not prevented by the anti-assignment clause in the Settlement Agreement and therefore could not be a breach.

4. *The Atlas Parties' Are Not Entitled to Summary Judgment on Their Declarations of Disparagement Because They Fail to Prove that Any Alleged "Disparaging" Comments or "Solicitations" are Disparaging Under the Settlement Agreement.*

The Atlas Parties have the burden to prove that any statements they allege are disparaging under the definition of disparagement as defined under the Settlement Agreement.

a. Defining "Disparagement" under the Settlement Agreement.

The Settlement Agreement prohibits "false, derogatory, slanderous or libelous comments about any other Party regarding any matter likely to be harmful to the Party's business, business reputation, or personal reputation." (Exh. A.1 ¶19). There are no definitions of these terms offered by the Settlement Agreement, as such, courts give words their plain, common, or generally accepted meaning unless the contract shows that the parties used words in a technical or different sense. *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015), *reh'g denied* (Oct. 23, 2015). Thus, the prohibition consists of three conjuncts necessary to fall under the prohibited conduct: (a) false, derogatory, slanderous or libelous comments; and (b) about any other Party; and (c) regarding any matter likely to be harmful to the Party's business, business reputation, or personal reputation. A comment cannot fall under this provision of the contract unless it meets all three conjuncts.

i. False, derogatory, slanderous or libelous comments

In analyzing the first conjunct, false, derogatory, slanderous or libelous comments, it is clear that the Parties here intended to prevent statements that would be of a similar type to those subject to claims of defamation. In essence, the Settlement Agreement seeks to prevent false statements made

about the other Parties. Indeed, the common meaning of "false," "slanderous[5]" and "libelous[6]" all include a necessary element of falsity. Under the rules of contract construction, courts apply the canon of *ejusdem generis*, meaning "if general words follow an enumeration of specific persons or things, the general words apply only to persons or things of the same kind or class as those specifically mentioned." In this contract, "derogatory" is the only general term that does not in and of itself require falsity, with a meaning of "expressing a low opinion of someone or something : showing a lack of respect for someone or something." Derogatory. (n.d.). MERRIAM-WEBSTER.COM, retrieved September 28, 2016, from http://www.merriam-webster.com/dictionary/derogatory (last visited Oct. 3, 2016). Because the surrounding words clearly imply not only a comment of negative connotation, but also of falsity, the standard for any comment to be in violation of the first conjunct of the Settlement Agreement should be construed as "negative" and "false" as the Parties intended. Otherwise, almost any statement could be construed in some way to be critical of another.

ii. Matter likely to be harmful

The third conjunct necessary (there is no dispute over the second prong) to qualify as a violation under the Settlement Agreement is that the comment must be "regarding any matter likely to be harmful to the Party's business, business reputation, or personal reputation." (Exh. A.1 ¶19). Thus, harm to business, business reputation or personal reputation must be the highly probable[7] result of the comment. Because the likelihood of harm resulting from the comment must be assessed to determine if a violation of the provision has occurred, the context in which the comment was made,

[5] **Slander:** to make a false spoken statement that causes people to have a bad opinion of someone. Slander. (n.d.). MERRIAM-WEBSTER.COM, retrieved September 28, 2016, from http://www.merriam-webster.com/dictionary/slander (last visited Oct. 3, 2016).

[6] **Libel:** the act of publishing a false statement that causes people to have a bad opinion of someone. Libel. (n.d.). MERRIAM-WEBSTER.COM, retrieved September 28, 2016, from http://www.merriam-webster.com/dictionary/libel (last visited Oct. 3, 2016).

[7] **Likely:** having a high probability of occurring or being true **:** very probable. Likely. (n.d.). MERRIAM-WEBSTER.COM, retrieved September 28, 2016, from http://www.merriam-webster.com/dictionary/likely (last visited

including the audience to which the comment was made, is of critical importance. For instance, if one says Person X is "not intelligent" to someone considering Person X for a job who does not know Person X versus saying it to someone who already dislikes Person X, the likelihood that the comment would be harmful to Person X is vastly different in each scenario. Likewise, the comments complained about by the Atlas Parties must be analyzed in context, and when so done, it is clear that the comments would be highly improbable to cause harm. Furthermore, it would be Atlas Parties' burden to prove that harm was "likely" to first qualify under the Settlement Agreement, then would second have the burden to prove that damages did in fact result in order to prevail on a breach of contract claim based on such a comment.

The Atlas Parties do not even bother to try to assert damages in their motion and in fact palpably try to plead around having to show actual resulting damages. Further still, for purposes of whether or not the comments are "likely" to be harmful, the Atlas Parties simply ask the Court to find the comments to be inherently likely to cause damages rather than bother stating why such obviously juvenile comments would be likely to cause harm to their reputation – without any proof. The reason for Atlas Parties' failure to show any comment is likely harmful to their reputation is that each of the comments were said to Sinn's social friends. In fact, when Atlas Parties took the deposition of one of the recipients, [redacted] (the only recipient of the allegedly "disparaging" statements they deposed), he clearly and unequivocally testified that nothing Sinn said to him caused any negative change in his opinion of Craig Taylor, Atlas, or Marshall and did not cause him to cease doing any business with Atlas. (Plfs.' Mot. Summ. Judgment Exh. I 101:15-104:4).

b. None of the statements meet the definition of disparagement under the Settlement Agreement.

While the Atlas Parties cobble together statements from Sinn and others to try to create some

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Oct. 3, 2016).

type of disparaging statement, the Court should require the Atlas Parties to specifically identify the statements upon which they base their claim. Because the Atlas Parties reference numerous statements without actually conducting the required analysis under the clause in the Settlement Agreement their Motion should be denied. However, out of an abundance of caution Plaintiffs will analyze each comment stated in the Atlas Parties' Motion.

i. Cock Blast

The first specified comment in Atlas Parties' Motion section entitled "Plaintiffs have Repeatedly Breached the Non-Disparagement Clause" that Atlas Parties complain about is that Sinn called Taylor a "cock blast." (Defs. Mot. Sum. Judgment p.23). The comment was made to [redacted]." (Exh. A is attached hereto and submitted in camera as Defendants' Ex. DD is apparently missing this crucial page). First, this is not a statement capable of truth or falsity, and is a mere epithet (which as show below is universally treated by Courts as not, thus it cannot fall within the first conjunct of the definition under the Settlement Agreement.

Second, this statement is not "regarding any matter likely to be harmful" the Atlas Parties' reputations. The Atlas Parties offered no evidence that the comment was likely to cause harm, but instead request that the Court infer from the statement itself it was likely to cause harm by their misplaced mentioning in passing of the inapplicable defamation per se law *See Section 4(d) infra.* Thus the Court cannot presume damages even if "cock blast" could ever be defamatory.

Finally, [redacted] testified that nothing Sinn said to him changed his opinion of Taylor or Atlas

at all (Plfs.' Mot. Summ. Judgment Exh. I 101:15-104:4), and [redacted] response shows [redacted] already had an opinion of dislike toward Taylor at the time. Thus the actual evidence shows that the comment was not likely to cause harm to Taylor, Atlas, or Marshall.

ii. Hope he chokes on his breakfast

The second specified comment that Atlas Parties complain about is in the text message sending the Picture to a group of his friends the next day (all of whom were in the picture except Joon Park) explaining that he had sent the picture to Taylor, Sinn said in response to [redacted] that it was "Funny shit. I hope he chokes on his breakfast." (Defs. Mot. Sum. Judgment p.24; Exh. B hereto submitted in camera). Again, this is not a comment capable of truth or falsity about Craig Taylor. This statement expresses nothing of substance, but only that Sinn does not like Taylor. Again, this statement was said to a group of Sinn's friends, not disinterested industry third parties, and thus is highly unlikely to cause harm to the Atlas Parties and certainly is not "regarding any matter likely to be harmful" to the Atlas Parties' reputations since Taylor's breakfast or his choking thereon has nothing to do with his business or reputation.

Again, Atlas Parties offered no evidence that the comment was likely to cause harm, but instead request that the Court infer from the statement itself it was likely to cause harm by their misplaced mentioning in passing of the in applicable defamation per se concept.

iii. Christmas miracle if Taylor has a heart attack

The third specified comment that Atlas Parties complain about is Sinn's text to [redacted] where Sinn explains [redacted] Sinn responds with "CMAS miracle Craig

has heart attack." (Defs. Mot. Sum. Judgment p.24; Defs. Mot. Sum. Judgment Ex. DD). Much like the "chokes on his breakfast" comment, this comment has no substance and is not capable of truth or falsity as to Taylor. The context is clear that this was a joke speaking in hyperbole about how strongly Taylor was taking Mr. Langham's mistake and is not a serious wish. Sinn even testified he said it jokingly. (Defs. Mot. Sum. Judgment p.24; Defs. Mot. Sum. Judgment Ex. O). Further still, the text is to [redacted], and it is clear that [redacted] did not have a high opinion of Taylor at the time because in a text one day prior, when Sinn tells [redacted] that Taylor is angry about the photo, and says apparently Taylor is going to sue Sinn again, [redacted]" (Defs. Mot. Sum. Judgment Ex. DD). Thus, [redacted] opinion of Taylor seems clear, and thus the comment about having a CMAS miracle heart attack was highly unlikely to cause harm. In any event, the statement is certainly not "regarding any matter likely to be harmful" to the Atlas Parties' reputations and the Atlas Parties offered no evidence that it was.

iv. That fuck

The fourth specified comment that Atlas Parties complain about is Sinn saying "[b]ut like with Atlas that fuck almost totally tried to ruin me here…" (Defs. Mot. Sum. Judgment p.25). This statement was said [redacted]. As previously shown, [redacted] testified nothing Sinn said effected his opinion of Taylor, Atlas or Marshall, and did not stop [redacted] from doing business with Atlas. (Plfs.' Mot. Summ. Judgment Exh. I 101:15-104:4). [redacted] even further testified that Atlas actually told him no when he tried to continue doing business with Atlas. (Plfs.' Mot. Summ. Judgment Exh. I 60:4-61:20). Thus it clearly caused no harm. Further, as shown above, [redacted] did not have a positive opinion of Taylor at the time, making any comments to [redacted] unlikely to cause harm. Further still, calling someone a "fuck" is nothing more than an epithet that is not a statement that is capable of being true or false.

Furthermore, the comment is not "regarding any matter likely to be harmful" to the Atlas Parties' reputations and the Atlas Parties offered no evidence that it was.

v. Treats everyone who works there like a slave.

The fifth specified comment that Atlas Parties complain about is Sinn saying to [redacted] who is now an employee of Sinn's company, in an text on November 10, 2013: "so Craig over at Atlas bites again and fired [redacted] for hanging out with someone that Craig said not to…This guy infuriates me as much as I think [redacted] is an idiot he treats everyone that works there like a slave." (Defs. Mot. Sum. Judgment p.25; Defs. Mot. Sum. Judgment Ex. AA). Once again, this comment is nothing more than rhetorical hyperbole, and as shown below is universally accepted by Courts throughout the nation and in Texas as incapable of a defamatory meaning. The comment is certainly not "regarding any matter likely to be harmful" to the Atlas Parties' reputations and the Atlas Parties offered no evidence that the comment was. In Fact, [redacted] response that "Didn't [redacted] ditch half of his friends for them" shows that [redacted] is aware that [redacted] had been prohibited by Taylor from hanging out with Sinn, Torres, and other individuals Taylor was not fond of, which interestingly corresponds with [redacted] comment to Sinn a few days earlier stating "I heard that Craig suspended him for hanging out with [redacted] at the TTU game. Nazi atlas. So then [redacted] resigned." (Defs. Mot. Summ. Judgment Ex. AA).

vi. [redacted]

The sixth specified comment that Atlas Parties complain about is Sinn saying, on December 20, 2013 to Evan Caron that "[[redacted]] tells me tha[redacted] buddy interviewing at Atlas so I mention he should do a background check on then and no response lol." (Defs. Mot. Sum. Judgment p.25; Defs. Mot. Sum. Judgment Ex. DD). This comment is nothing more than common sense advice about anyone going to work for any company. Sinn testified at his first deposition that this is advice

he would give to anyone interviewing anywhere, even if they were interviewing with him, in order to get to know the company and situation. (Exh. C hereto). Furthermore, the comment itself says nothing negative whatsoever and is not a statement capable of truth or falsity. Further still, the Atlas Parties offered no evidence that the comment was "regarding any matter likely to be harmful" to the Atlas Parties' reputations or likely to cause harm, but instead request that the Court infer from the statement itself it was likely to cause harm by their misplaced mentioning in passing of the defamation per se concept.

vii. [redacted]

Finally, the seventh specified comment that Atlas Parties complain about is Sinn saying, [redacted]." (Defs. Mot. Sum. Judgment p.26; Exh. A hereto; Defs. Mot. Sum. Judgment Ex. DD). This comment, again, is nothing but hyperbole and isn't even arguably name calling. It is simply a comment on Craig Taylor's reaction to the miscommunication by Mr. Langham. The comment is actually arguably true as the evidence shows that, at least in the communications from Mr. Berg, Taylor was getting upset about a Picture. In reality, the instant messages from Taylor show he thought the Picture was funny. (Exh. D hereto).

Finally, the comment is not "regarding any matter likely to be harmful" to the Atlas Parties' reputations and the Atlas Parties offered no evidence that the comment was likely to cause harm to their reputations.

c. None of the "solicitations" mentioned by Atlas Parties meet the definition of prohibited solicitations under the Settlement Agreement

The Settlement Agreement also prohibits parties to "solicit from any third party any comments, statements…that may be considered negative, false, derogatory or detrimental to the

business reputation of other Party" (Ex. A.1 ¶19). Solicit has a specific common meaning of "to ask for (something, such as money or help) from people, companies, etc." Solicit. (n.d.). MERRIAM-WEBSTER.COM, retrieved September 28, 2016, from http://www.merriam-webster.com/dictionary/solicit (last visited Oct. 3, 2016). Thus, to meet this section of the Settlement Agreement, Sinn must specifically ask people for negative commentary about Taylor, Atlas, or Marshall. There are simply no instances of this occurring, the Atlas Parties want to blame Sinn for other people's low opinions of Taylor and Atlas simply being voluntarily offered. The complained about "solicitations" laid out in the Atlas Parties Motion are wholly absurd.

i. Nazi Atlas

The Atlas Parties complain that in a text message to [redacted], where all Sinn says is "oh I heard from Johnny PR [redacted] resigned," which in fact did occur, [redacted] responds by saying "Thanks bro, I heard that Craig suspended him for hanging out with [redacted] at the TTU game. Nazi atlas. So then [redacted] resigned." (Defs. Mot. Summ. Judgment Ex. AA). Somehow to Atlas, this is Sinn "soliciting" negative comments. However, this cannot be a solicitation as Sinn not only does not ask [redacted] for negative commentary, Sinn is merely reporting something of fact, that [redacted] resigned from Atlas-which is undisputed, and the negative value judgment of stating "Nazi Atlas" was wholly the statement of [redacted], not Sinn. Yet, the Atlas Parties want to manufacture a claim against Sinn for [redacted]' own low opinion about Atlas. There is simply nothing about this text conversation that amounts to "solicitation of negative comments or statements." There is also no proof this could have negatively affected the business reputation of the Atlas Parties.

ii. [redacted]

The Atlas Parties also complain that in a text message string between Sinn [redacted], Sinn explains that "[redacted] and that "[redacted] ice,"

both of which are true statements about the factual situation at the time (as according to Mr. Berg although again privately Taylor was telling his friends the Picture was funny), [redacted] responds by asking "[redacted]" to which Sinn replies [redacted]," and in response [redacted]i makes a value judgment, stating "[redacted]." Again, Sinn does nothing in this text string besides relay factual information and his belief that he will probably be sued over the Picture. [redacted]s response - that Taylor was a "[redacted]" – was not solicited by Sinn, asked for by Sinn, nor was it an opinion formed by Sinn. Once again, the Atlas Parties want to hold Sinn accountable for the opinions of others even though it is likely the Atlas Parties' actions formed the basis of these people's thoughts and opinions about them. There is, again, nothing about this text conversation that amounts to "solicitation of negative comments or statements." There is also no proof this could have negatively affected the business reputation of the Atlas Parties.

iii. [redacted]

The Atlas Parties mention earlier on in their motion (though they do not include it in the section asking for summary judgment on their declaratory judgment action seeking a proclamation that Sinn "breached" the Settlement Agreement) a comment that Sinn makes to [redacted]n Park where he states: "[redacted]," to which either [redacted] responds "[redacted]" (Defs. Mot. Summ. Judgment p.2; Defs. Mot. Summ. Judgment Ex. AA). The initial comment by Sinn is merely an expression of his emotional feeling towards Atlas, and it is likely true, thus it cannot fall within the first prong of the "disparagement" definition of the Settlement Agreement. Further still, it is not on a matter likely to cause harm as Sinn's emotional feelings do not regard any business or personal matters of Taylor. The response, by either [redacted] that "[redacted]" was not solicited by Sinn. Sinn did

not ask for negative statements from [redacted], but instead one of them stated their own opinion of Atlas, which they are entitled to have. Sinn's response of [redacted] is also simply yet another non-actionable epithet unlikely to cause harm given the audience who expressed a belief that they "[redacted]" and one of which (the only one deposed by Atlas Parties) who testified that Sinn's comments made no impact on his opinion or business dealings with Taylor or Atlas. There is no proof this could have negatively affected the business reputation of the Atlas Parties.

d. Atlas Parties reliance on defamation per se is misplaced.

As part of their obvious attempt to eschew the necessity of proving actual damages resulting from any of the comments or "solicitations" that they complain about, the Atlas Parties casually reference the concept of defamation per se in hopes of justifying their requested attorney's fees award without proving breach of contract. (Defs.' Mot. Summ. Judgment p. 29-30). The Atlas Parties' reliance on this doctrine is misplaced. First of all, Atlas Parties do not bring a claim for defamation in this suit, but instead bring a breach of contract action based on the "non-disparagement" clause of the Settlement Agreement. The likely reason they did not bring a defamation claim is because they would actually have to show the statements were false, and would also face a slew of nationwide case law that refuses to find ridiculous, juvenile epithets actionable.[8] Defendants have made this point clear previously:

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(Defs.' Resp. to Torres' Mot. Sum Judgement dated 7/17/2015 pg. 22).

[8] Whether the plaintiff is a public figure or not, falsity is always an element of the cause of action, and truth is an absolute defense to defamation. *Pardo v. Simons*, 148 S.W.3d 181, 186 (Tex. App.—Waco 2004, no pet.) *citing Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964) (public figure); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69, 106 S.Ct. 1558, 1559, 89 L.Ed.2d 783 (1986) (private figure); *Bentley v. Bunton*, 94 S.W.3d 561, 580 (Tex.2002) (public figure); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116 (Tex.2000) (public

Furthermore, besides the fact that defamation is not even a claim, the statements complained about in this case are simply not the type of statements that would remotely qualify as defamation per se. Defamation per se is a statement that injures one in her profession as a statement that "ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit...."*Hancock v. Variyam*, 400 S.W.3d 59, 66 (Tex. 2013). "Disparagement of a general character, equally discreditable to all persons, is not enough unless the particular quality disparaged is of such a character that it is peculiarly valuable in the plaintiff's business or profession.... Thus, a statement that a physician consorts with harlots is not actionable per se, although a charge that he makes improper advances to his patients is actionable; the one statement does not affect his reputation as a physician whereas the other does so affect it." *Id.* at 67. Here, Sinn's comments amount to nothing but juvenile name calling, none of which are tailored to Atlas Parties' particular profession of brokering energy trades. Further, it is axiomatic that comments made by someone other than Sinn or Torres could never form the basis of a cause of action against Sinn or Torres for defamation.

Not only are the comments complained about here not even close to defamation per se, as Torres and Sinn Parties argued in their prior motion for summary judgment (to which the Atlas Parties asserted then that this is not a common law defamation case), they are not even the kind of comments that courts are willing to entertain as defamatory. Numerous cases have found that name calling akin to "cock blast" or "that fuck" is not capable of a defamatory meaning. *See Meier v. Novak*, 338 N.W.2d 631, 635 (N.D. 1983) (refusing to find calling a person an "asshole" was defamatory); *McGuire v. Jankiewicz*, 8 Ill.App.3d 319, 290 N.E.2d 675, (1972) (holding that calling

figure); *McIlvain v. Jacobs*, 794 S.W.2d 14, 15–16 (Tex.1990) (private figure).

the attorney an "ass hole" was not slander because: "Where the words amount to mere epithets or 'name-calling' and do not impute a want of integrity or capacity in the legal profession they are not actionable as being defamatory….and are "merely an example of objectionable but unactionable 'name-calling'." (*citation omitted*); *see also Bartow v. Smith*, 149 Ohio 301, 78 N.E.2d 735, 737 (1948) (analyzing a similar epithet and stating ""[i]t is axiomatic that opprobrious epithets, even if malicious, profane, and in public, are ordinarily not actionable. There is no right to recover for bad manners.") *overturned on other grounds Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983) *abrogated by Welling v. Weinfeld*, 2007-Ohio-2451, 113 Ohio St. 3d 464, 866 N.E.2d 1051 (2007). Specifically, Texas courts have found that the use of epithets and hyperbole to describe another, including using such words as "blackmail" to describe their negotiating style, is not actionable. *See A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 80 (Tex. App. – Ft Worth 1982, writ refused n.r.e.) (quoting other case law approvingly that stated "the word blackmail "was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable."). The Texas Supreme Court has also approved of other courts' holding that "[i]ncidental jibes and barbs may be humorous forms of epithets or "mere name-calling" and are not actionable under settled law governing such communications." *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 152 (Tex. 2004). As the North Dakota Court held, "[w]hile such language is no doubt ill-mannered, rude, and objectionable in the extreme, especially when used in public, it does not constitute a basis for a cause of action for slander in this setting. To hold otherwise would open our courts to a flood of litigation of a similar nature." *Meier v. Novak*, 338 N.W.2d 631, 635 (N.D. 1983). Thus, not only are the jibes complained about by Atlas Parties not defamation per se, they are not even run of the mill defamation or capable of a defamatory meaning at all.

e. The Atlas Parties Do Not Consider These Types of Comments Disparaging - Craig Taylor calls Sinn, Torres, and even the "Industry Third Parties" names too.

Finally, in perhaps the most ironic of circumstances, Craig Taylor is guilty of saying the very same kinds of incidental jibes and barbs that Atlas Parties want to use to justify stopping payments for the ownership units they received under the Settlement Agreement and to sue Sinn and Torres.

On December 23, 2013, the day after receiving the Picture from Sinn, Taylor has an instant messenger conversation with [redacted] who is a former Atlas employee, where he discusses the Picture. Taylor's comments about the people in the picture show that he does the same type of name calling that he complains about, by saying "what a bunch of tards. . . .so ridic" (Exh. D hereto). Of course the comment is offensive and insensitive, but no one is suing him over it. Taylor goes on to comment that he actually thinks the photo is funny in response to [redacted]'s apparent attempt to diffuse the situation:

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(Exh. D hereto). Not only does Taylor call Sinn, Torres, and everyone else in the photo "tards," he also calls them "pusses in public," and "meek little dudes." (Exh. D hereto). He makes a particular

point to call [redacted] (who was a recipient of most of the text messages from Sinn that Atlas Parties complain about and an employee at Mercuria at the time) "too big a puss to look even the camera in the eye." (Exh. D hereto). Worse yet, Taylor makes comments that are precisely aimed at the specific professions of Sinn, stating that "Sinn is all done in the mkt [sic.]" and Torres stating that "I cant [sic.]imagine he gets much ercot biz." *Id.* It seems that both Taylor and Sinn call each other names when talking to their friends. The Court should deny the Atlas Parties' Motion.

Further still, even the institution of this lawsuit did not Taylor from making impolite jibes about Sinn and Torres, where on August 13, 2014, Taylor says that "either way, they are dipshits" in an e-mail discussing a story being written about this very lawsuit. (Exh. E).

C. The Atlas Parties Are Not Entitled to Their "Reasonable and Necessary" Attorney's Fees on their Declaratory Judgment Action.

1. *The Claim For Attorneys' Fees is Legally Improper*

As stated previously, the Atlas Parties' motion is nothing more than an attempt to get attorney's fees on a breach of contract claim without actually proving damages by rehashing that claim as a series of declaratory judgment requests. Not only are these requests not proper declaratory judgment requests, but Texas law is abundantly clear that it has seen this trick before, and in no way can this route be used to get to such attorney's fees.

The Texas Supreme Court has already dealt with this sort of end-run attempt at breach of contract attorney's fees using the Uniform Fraudulent Transfers Act:

> "The Act was originally "intended as a speedy and effective remedy" for settling disputes before substantial damages were incurred. It is "intended to provide a remedy that is simpler and less harsh than coercive relief, if it appears that a declaration might terminate the potential controversy." ***But when a claim for declaratory relief is merely tacked onto a standard suit based on a matured breach of contract, allowing fees under Chapter 37 would frustrate the limits Chapter 38 imposes on such fee recoveries***. And granting fees under Chapter 37 when they are not permitted under the specific common-law or statutory claims involved would violate the rule that specific provisions should prevail over general ones. While the

> Legislature intended the Act to be remedial, it did not intend to supplant all other statutes and remedies. At trial, the Woodlands ***recovered no damages on its breach of contract claim, so it cannot recover fees under Chapter 38. Allowing it to recover the same fees under Chapter 37 would frustrate the provisions and limitations of the neighboring chapter in the same Code.*** Accordingly, we hold the Woodlands cannot recover attorney's fees under the Declaratory Judgments Act."

MBM Fin. Corp. v. Woodlands Operating Co., L.P., 292 S.W.3d 660, 670 (Tex. 2009). Indeed, the Supreme Court found that "[i]f repleading a claim as a declaratory judgment could justify a fee award, attorney's fees would be available for all parties in all cases." *Id.* at 669. "Accordingly, the rule is that a party cannot use the Act as a vehicle to obtain otherwise impermissible attorney's fees." *Id.* The Texas Supreme Court expanded its reasoning in guidance on the issue two years later, stating that:

> "When a claim for declaratory relief is merely "tacked onto" statutory or common-law claims that do not permit fees, allowing the UDJA to serve as a basis for fees "would violate the rule that specific provisions should prevail over general ones. The declaratory judgment claim must do more 'than merely duplicate the issues litigated' via the contract or tort claims."

Etan Indus., Inc. v. Lehmann, 359 S.W.3d 620, 624–25 (Tex. 2011).

That the Atlas Parties' declaratory judgment requests in this case are nothing more than a repleading of their breach of contract claim and affirmative defense of excuse is radically obvious. So obvious in fact, they don't even try to disguise the language, and just blatantly ask for proclamations that Torres and Sinn Parties "breached" the Settlement Agreement, and that Atlas Parties' performance is "excused." They then assert they are entitled to $432,308.50, an unreasonable and unnecessary amount, of fees. All, of course, without moving for summary judgment on the breach of contract claim because that would require actual proof of damages and that's just something the Atlas Parties have never been able to come up with.

2. ***The Claim For Attorneys' Fees is Unsupported by The Evidence (or at a Minimum There Are Fact Issues Preventing Summary Judgment)***

In addition, the Affidavit of Geoffrey Berg (Defs. Mot. Sum. Judgment Ex. CC) does not provide evidence of the requested attorney's fees as just and equitable attorney's fees as is required by Tex. Civ. Prac. & Rem. Code 37.009. He merely testifies that the $400,000+ fees he is seeking is reasonable and necessary. As demonstrated by the affidavit of Kenneth Krock and in fact the very invoices attached to Mr. Berg's affidavit, the Atlas Parties did not incur these fees. The Atlas Parties have a flat fee arrangement with Mr. Berg under which they pay him a set sum each month for all legal work for the Atlas Parties, including work on other cases and matters. Thus even that flat fee must be divided up among the work that Mr. Berg did for Atlas in this litigation. However, Mr. Berg did not do that in his affidavit and thus it may not be used to support an award of fees. Moreover, the fees sought are not reasonable and were not necessary. Much of those fees were the result of the Atlas Parties' own actions in the case. In any event, such fees need to be presented to the trier of fact for determination and cannot be awarded here.

3. ***The Claim for Reasonable and Necessary Attorneys' Fees Is Improper and The Fees Requested Are Not Equitable or Just***

The Atlas Parties request that the Court order them "reasonable and necessary" attorneys' fees under the Declaratory Judgments Act. The Declaratory Judgments Act provides: "In any proceeding under this chapter, the Court may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West). The Atlas Parties request reasonable and necessary attorneys' fees but do not request "equitable and just" fees and thus their request is improper and must be denied. In fact, the Atlas Parties make no showing that the fees requested are equitable and just. The Atlas Parties repudiated the Settlement Agreement because of the Picture and because they did not believe Sinn's lawyer when he said he mistakenly referred to

Atlas in his email rather than Aspire. In the first hearing in this case, on Plaintiffs' special exceptions, the undersigned asked the Court to require the Atlas Parties to identify an Atlas customer or even alleged that an Atlas customer actually received the Picture which was the whole basis of the refusal to pay and the defense and counterclaim. The Atlas Parties did not and could not. Two years later and the Atlas Parties have yet to ever answer that question and indeed have abandoned that defense and have amended their counterclaim to rely on alleged "breaches" of the Agreement they discovered only during this case. Further, they want those alleged "breaches," for which they have shown no damages, and which amount to nothing more than inactionable name calling and an ineffective assignment that would never have been necessary if they had paid, to give the Atlas Parties a windfall – obtaining Torres' ownership interests that Torres paid the Atlas Parties $750,000, for a net total of $290,000, retain those interests and all of the profits associated with them, avoid the $210,000 in payments the Atlas Parties agreed to pay, and recover more than twice the amount in dispute in attorneys' fees - $432,608.50 (albeit the evidence is that the Atlas Parties actually paid far less). It is undisputed that this case went to pre-suit mediation before Torres filed his claims for breach of contract before any significant attorneys' fees were incurred. The deposition testimony shows that Taylor does not like Adam Sinn and he apparently chose to spend more than twice the amount in dispute simply to try to avoid this obligation. There is nothing equitable or just about that. The Atlas Parties' request for attorneys' fees should be denied.

V. CONCLUSION

The Atlas Parties have repeatedly tried to play the innocent victim throughout this case, but it is nothing more than a show designed to feign injury in hopes to avoid their clear liability under the Settlement Agreement. Taylor clearly participates in the same types of juvenile name calling about which they now complain. There is no excuse for their nonperformance under the Settlement

Agreement, and because they chose to keep the benefits of the contract they legally cannot assert they are excused from performing. The Atlas Parties' motion for summary judgment is nothing more than an attempt at clever pleadings to get to breach of contract attorney's fees without having to prove the elements of breach of contract, especially damages. Indeed the claim of [redacted]s in alleged lost profits that their expert testified was the result of Eric Torres leaving Atlas (an event that was released by the Settlement) has only served to unnecessarily extend this litigation. This case should have one single issue, do the Atlas Parties have to pay for the ownership units? The answer is unquestionably yes. All of the other claims for breach of the Settlement Agreement because of a middle finger photo, or the Parties all calling each other absurd names, or an "assignment" that did not exist until after the Atlas Parties stopped paying are piddling noise to distract from the one true issue in this case: the Atlas Parties want to keep the ownership units they obtained under the Settlement Agreement without having to pay for them. The Atlas Parties' Motion should be denied in its entirety.

PRAYER

WHEREFORE, Torres and the Sinn Parties request that the Court deny Defendants/Counter-Plaintiffs Traditional Motion for Partial Summary Judgment; and grant Torres and the Sinn Parties all further relief in law and equity to which they are entitled.

Respectfully submitted,

RAPP & KROCK, PC

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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of October 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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Via Eserve
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