10/10/2016 9:13:45 AM
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Envelope No. 13141934
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Filed: 10/10/2016 9:13:45 AM

CAUSE NO. 2014-40964

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

CAUSE NO. 2015-49014

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

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO THEIR TRADITIONAL MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants file this reply ("Reply") to Plaintiffs' response ("Response") to their motion for summary judgment as follows:

Plaintiffs' Response is riddled with misrepresentations of fact and law. In the interest of brevity, Defendants in this Reply address only some of the most egregious.

I. TAYLOR'S NON-ACTIONABLE COMMENTS

Plaintiffs argue that their own derogatory statements notwithstanding, Taylor has said negative things about them too, in "the most ironic of circumstances." Resp. at 35. They quote an excerpt of an instant message exchange between Taylor and Chris Land—who Plaintiffs describe

as a "former" employee of Atlas—in which Taylor makes "impolite jibes" about them. *Id.* at 35–36. Plaintiffs argue that the Court should deny Defendants' motion for summary judgment because Taylor calls them names too, and "no one is suing him over it." *Id.* at 35.

The Plaintiffs are right about one thing: Chris Land is *now* a former Atlas employee. What they do not say, and the only thing that matters, is that at the time of the conversation, Land was an Atlas employee and manager. As Plaintiffs are aware, the Settlement Agreement prohibits the parties from making certain negative comments about each other to ***third parties***. Ex. M, Settlement Agreement, ¶ 9. The excerpted instant message is dated December 23, 2013 (Resp. Ex. D), when, as the Plaintiffs are aware and were aware when they tried to make the Court believe otherwise, Land was an Atlas employee and manager. Ps' MSJ Ex. F at 263:8–21. Counsel for Plaintiffs elicited this information from Taylor at his deposition – testimony that is part of the summary judgment record. *See id.* Taylor's comments are not actionable because they were not made to a third party. *See* Ex. M, Settlement Agreement, ¶ 9.

Defendants have also not sued Sinn and Torres for the multitude of derogatory comments they made to one another about Defendants—because they are not actionable under the Settlement Agreement. Plaintiffs now ask that the Court reward them for their attempt to mislead it, a request the Court should deny.

II. PLAINTIFFS' SELF-SERVING DEFINITIONS

Plaintiffs argue—for the first time in this years-old case—that, in order to violate the non-disparagement clause of the Settlement Agreement, any comments "should be construed as 'negative' ***and*** 'false' as the Parties intended." Resp. at 23 (emphasis added). Plaintiffs provide no evidence whatsoever in support of this reading of the Settlement Agreement. Doing so would violate the parol-evidence rule. *See In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 369 (Tex. App.—

Houston [14th Dist.] 2000, no pet.) ("The parol evidence rule precludes consideration of extrinsic evidence to contradict, vary or add to the terms of an unambiguous written agreement absent fraud, accident or mistake."). Instead, Plaintiffs use a carefully selected portion of the non-disparagement clause to support their assertion that, because the words surrounding "derogatory" "clearly imply not only a comment of negative connotation, but also of falsity," only comments that are *both* negative and false can violate the Settlement Agreement. Resp. at 22–23.

As Plaintiffs note, in construing a contract, courts give words their plain, common, or generally accepted meaning, unless the contract provides otherwise. *Plains Exploration & Prod. Co. v. Torch Energy Advisors, Inc.*, 473 S.W.3d 296, 305 (Tex. 2015). The Settlement Agreement provides that "the Parties shall not directly or indirectly, disparage, make or publish any 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." Ex. M, Settlement Agreement, ¶ 19. Plaintiffs' tortured interpretation of this clause both ignores the prohibition against disparagement and ignores the plain meaning of the word "derogatory."[1] *See* Resp. at 22–23. Had the parties intended the non-disparagement clause to mirror the common-law cause of action of defamation, they would have drafted the Settlement Agreement accordingly. They did not do so. Instead, they agreed on their own guidelines for prevention of disparagement. It did not include falsity.

Later in the Response, Plaintiffs insist that Sinn did not solicit any negative comments regarding Taylor or Atlas because he did not "specifically ask people for negative commentary." Resp. at 30. In support of this contention, Plaintiffs cite what they claim is the "specific common

[1] As noted in Defendants' Traditional Motion for Partial Summary Judgment, "derogatory" means "showing a critical or disrespectful attitude." *Derogatory*, OXFORD UNIVERSITY PRESS, http://www.oxforddictionaries.com/us/definition/american_english/derogatory (last visited Sept. 12, 2016).

meaning" of "solicit" from the online Merriam-Webster Dictionary: "to ask for (something, such as money or help) from people, companies, etc." *Id.* But the very definition cited by the Plaintiffs (included in the dictionary's "simple" category instead of the "full" in the same entry) include the following, purposefully omitted by the Plaintiffs: "to entice or lure especially into evil" and "to try to obtain by usually urgent requests or pleas." *See id.* One of the "legal" definitions listed is "to ask, *induce*, advise, or command (a person) to do something and especially to commit a crime." *Id.* (emphasis added). Sinn's conduct easily meets any of these plain definitions of "solicit." The Court is not limited to that which Plaintiffs prefer.

III. PLAINTIFFS' MISREPRESENTATION OF THE ASSIGNMENT

Finally, ignoring the actual language of the Assignment itself as well as their own testimony, Plaintiffs claim—again, for the first time—that "the alleged assignment . . . would assign nothing more than the cause of action for breach of the agreement." Resp. at 21–22. This is false. The Assignment provides: "Eric Torres ("Torres") does hereby assign, transfer and convey to XS Capital Management, L.P. ("XS") *all right, title, and interest in the Settlement Agreement . . . and any amounts receivable by Torres* pursuant to the Settlement Agreement." Ex. X, Assignment (emphasis added). Both Sinn and Torres have testified that all of the money paid to Torres under the Settlement Agreement went to Sinn because of an assignment by Torres in favor of Sinn. Ex. N, Torres Dep., at 27:25–29:9; Ex. O, Sinn Dep., at 35:16–36:20, 38:24–39:20. All money to be received in the future was similarly assigned. *Id*. Any allegation to the contrary is not only unsupported by any evidence, it is thoroughly contradicted by the summary judgment record.

Plaintiffs further contend that Defendants' citation of *Jetall Companies v. Four Seasons Food Distributors, Inc.*, 474 S.W.3d 780, 783 (Tex. App.—Houston [14th Dist.] 2014, no pet.), is "interesting" because the case "expressly states" that an assignment made in violation of an

agreement is a nullity. Resp. at 20. That is exactly what *Jetall* says, for one important reason—the contract at issue in that case contained this following language in the non-assignment clause: "*any such assignment shall be null and void ab initio*." *Jetall Cos.*, 474 S.W.3d at 782 (emphasis added). Though counsel for Plaintiffs represented to the Court at a prior hearing that such language was included in the Settlement Agreement, it is, in fact, not there.

Plaintiffs' continued attempts at obfuscation alter neither the facts nor the law. Defendants' Traditional Motion for Partial Summary Judgment should be granted.

IV. CONCLUSION AND PRAYER

Defendants/Counter-Plaintiffs Craig Taylor, Atlas Commodities, LLC, and S. James Marshall respectfully request that the Court grant their Traditional Motion for Summary Judgment in its entirety and any for any other and further relief to which they may be entitled.

Respectfully submitted,
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S. JAMES MARSHALL

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served by electronic filing, certified mail, return receipt requested, email, hand delivery, and/or facsimile on October 10, 2016 as follows:

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