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CAUSE NO. 2014-40964

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

DEFENDANTS/COUNTER-PLAINTIFFS' RESPONSE TO PLAINTIFF/COUNTER-DEFENDANT ERIC TORRES' MOTION FOR TRADITIONAL SUMMARY JUDGMENT

Defendants/Counter-Plaintiffs Craig Taylor ("Taylor") and Atlas Commodities, LLC ("Atlas") (collectively "Defendants") file this Response to Plaintiff/Counter-Defendant Eric Torres' Motion for Summary Judgment as follows:

I. INTRODUCTION

Eric Torres ("Torres") now admits that he dislikes Craig Taylor and Atlas so much and has disparaged them so many times and to so many people that he cannot remember all of the things he said or who he said them to. Torres also admits that he destroyed the central piece of evidence in this case while discovery to him requesting it was pending.

Torres and Adam Sinn ("Sinn") both now admit that though they warranted and represented under oath that rights under the settlement agreement had not been assigned, Torres had in fact assigned his interest in the settlement agreement. Notwithstanding that admission, Torres has filed an affidavit in support of his motion for summary judgment claiming that the opposite is true. The same affidavit—filed before Torres was deposed—makes the conclusory claim that he did not send

the photograph at issue to anyone, a fact that cannot be confirmed because he admits that he destroyed any evidence of it.

Torres and Sinn will make any statements or allegations that support their version of events—including under oath—in order to gain an advantage in this litigation, even if that means misleading the Court. Their motions for summary judgment must be denied. Atlas and Taylor will move for summary judgment at the appropriate time and will show through the expert testimony of Rob Hancock that they have been harmed by Torres and Sinn's violations of the Settlement Agreement.

II. OBJECTIONS TO TORRES' SUMMARY JUDGMENT EVIDENCE

Defendants object to Torres' Summary Judgment Evidence as follows:

Exhibit 1. One of the two pieces of evidence attached to Torres' motion for summary judgment is an affidavit that contains conclusory statements that cannot be controverted because Torres destroyed any evidence supporting his assertion. For example, in paragraph 15 of his affidavit, Torres states:

> I never sent the Picture to anyone (not Taylor, not Atlas, nor any clients or affiliates of Taylor or Atlas) and indeed Defendants acknowledge that fact in their pleadings.

(Torres Ex. A. ¶ 15.) After executing this affidavit, Torres admitted he destroyed his phone and any evidence it contained. (Ex. N, Torres Dep., at 56:13–58:6.)

Torres' testimony therefore rests entirely on his credibility. "If the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate." *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989).

III. SUMMARY JUDGMENT EVIDENCE

Defendants rely on the following:

Exhibit A: Photograph

Exhibit B: December 23, 2013 Email from Berg to Moore and Langham

Exhibit C: December 24, 2013 Email from Langham to Berg, copy to Moore

Exhibit D: December 24, 2013 Email form Berg to Langham, copy to Moore

Exhibit E: December 24, 2013 Email from Langham to Berg and Moore

Exhibit F: December 25, 2013 Email from Berg to Langham and Moore

Exhibit G: December 31, 2013 Email form Berg to Langham and Moore

Exhibit H: January 1, 2014 Email from Langham to Berg and Moore

Exhibit I: January 2, 2014 Email from Berg to Langham and Moore

Exhibit J: January 7, 2014 Email from Berg to Langham and Moore

Exhibit K: January 7, 2014 Email from Langham to Berg and Moore

Exhibit L: January 7, 2014 Email from Berg to Langham and Moore

Exhibit M: August 15, 2013 Settlement Agreement

Exhibit N: Excerpts from March 6, 2015 Deposition of Eric Torres

Exhibit O: Excerpts from April 8, 2015 Deposition of Adam Sinn

Exhibit P: Declaration of Craig Taylor

Exhibit Q: Defendants' First Set of Interrogatories and Requests for Production to Plaintiff Eric Torres

Exhibit R: Eric Torres' Response to Defendants' First Set of Interrogatories and Requests for Production

Exhibit S: Defendants' First Set of Interrogatories and Requests for Production to Plaintiff Adam Sinn

Exhibit T: Adam Sinn's Response to Defendants' First Set of Interrogatories and Requests for Production

Exhibit U: Affidavit of Kathryn E. Nelson

IV. UNDISPUTED FACTS

Atlas is a commodities brokerage. For the most part, it brokers energy products, facilitating the transfer, storage, and purchase of gas, electricity, physical crude and related commodities. Taylor is Atlas' majority shareholder.

In or about September 2010, Torres and Taylor entered into negotiations for Torres to purchase an equity interest in Atlas. The idea was that Torres would buy into Atlas, establish and run Atlas' electricity/power transactions (known as ERCOT). Taylor agreed to sell a 25% ownership interest in Atlas to Torres for $750,000. An additional 10% interest in Atlas was conveyed subject to reversion if Torres failed to meet certain revenue goals.

Soon after Torres "purchased" the shares in Atlas, Taylor questioned whether Plaintiff/Counter-Defendant Adam Sinn ("Sinn") was the source of Torres' investment funds. Torres prevaricated and stalled in order to protect himself and refused to admit that Sinn was indeed the source of the funds with which he "purchased" the shares in Atlas. (*See* Ex. N, Torres Dep. at 11:24–13:8; 14:8–17:5.)

When it became clear that Sinn had financed Torres' investment and was the true owner of Atlas' shares, Atlas offered to simply return all of Sinn's money in exchange for return of Atlas' shares and Torres' departure. (*See* Ex. N, Torres Dep., at 22:16–25.) Atlas was prepared to absorb the damage that had been done to the company and its reputation in order to be rid of Sinn and Torres. Sinn and Torres refused. (*See id.*)

Ultimately, as he did here, Torres preemptively filed suit against Atlas, Taylor and Marshall. Atlas and Taylor counterclaimed and joined Sinn, XS, and Aspire for, among other things, rescission of the sale to Torres/Sinn of Atlas shares. A settlement was reached and, on August 15, 2013, a settlement agreement was signed ("Settlement Agreement"). (Ex. M at 1.) Though

Sinn/Torres had paid $750,000 for shares of Atlas and the company had grown since the sale, Atlas/Taylor agreed to buy back their shares for $500,000 paid out without interest over two years as follows: $250,000 up front, and then $10,000 per month for twenty-five months. (*See id.* ¶ 3.)

Return of Sinn/Torres' shares of Atlas was to, and did, take place immediately. (*See* Ex. M, Settlement Agreement, ¶ 1; Ex. N, Torres Dep., at 26:12–17.) Taylor and Atlas made the $250,000 payment, and four subsequent payments of $10,000 each. (*See* Ex. N, Torres Dep. at 26:24–27:28:3.) The case was dismissed with prejudice and, at Sinn's request, the records were sealed.

The Settlement Agreement contains the following non-disparagement provision:

> **Non-Disparagement.** The Parties agree that in exchange for the consideration provided under this agreement, 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. Further, the Parties agree that they shall not solicit from any third party any comments, statements, or the like that may be considered negative, false, derogatory or detrimental to the business reputation of any other Party. Further, the Parties agree that they will not restrict, limit, or prohibit any third party or employee form socializing, fraternizing, or doing business with any other Party.

(Ex. M, Settlement Agreement, ¶ 19.)

On December 22, 2013 at 12:06 a.m., four months after execution of the Settlement Agreement, Taylor received a text message from Sinn. (Ex. P, Taylor Aff., ¶ 3.) The message contained no text, just a photograph of Sinn, Torres, Barry Hammond (another of Sinn's lawyers), and a few other energy traders, Evan Caron, Paul Sarver, and Sean Kelly. (*Id.*) They are standing in front of a Christmas tree—and all but Caron are extending their middle fingers at the camera. (Ex. A.) At the time the picture was taken, Caron and Kelly were traders at companies that do business with Atlas. (Ex. P, Taylor Aff., ¶ 4.) Sarver is a former Atlas employee who worked for a competitor. (Ex. P, Taylor Aff., ¶ 5.)

Taylor and Atlas were not interested in reinstituting litigation or seeing the settlement unravel because Sinn and a few apparently intoxicated friends were not imaginative enough to do anything more amusing than say "f-you" with their fingers. So on Monday, December 23, 2013, counsel for Taylor and Atlas sent the following email to counsel for Torres and Sinn:

> As you know, the settlement agreement between our clients contains confidentiality and non-disparagement clauses. I can't say I've ever seen a violation of those provisions quite like this one, but Mr. Sinn texted the attached picture to Craig Taylor this past weekend. As you can see, the photo features Mr. Sinn and Mr. Torres. Also making an appearance is Chanler's co-counsel, not exactly living up to the highest standards of professionalism by upholding his middle finger instead of the dignity of the profession, as the rules require.
>
> Whether they thought they were being funny or trying to accomplish something else isn't clear. I'm going to guess, though, that this picture was not taken right after your clients and co-counsel either refused to discuss Atlas, Taylor, Marshall or the settlement or used "words to the effect that all disputes among [the Parties] have been fully settled and resolved" and nothing else, as the agreement requires.
>
> It looks to me like they were just drunk. Whatever the case, Mr. Taylor isn't amused, and I don't blame him.
>
> This case took a lot of effort from all of us to get settled and I don't want to undo it over this. Without waiving Atlas' right to act in response to any future violation(s), and without asking that either of your clients admit to having violated it, request is made that Mr. Sinn, Mr. Torres and Chanler's co-counsel (whose name escapes me at the moment) each apologize to Mr. Taylor before Christmas and then leave him alone.
>
> If you would like to discuss, please let me know.

(Ex. B.)

The next day, on December 23, 2015, counsel for Sinn responded by saying that the picture was not intended for Taylor, but was in fact sent to people associated with ***Atlas*** with the tag line "Happy Holidays from ***Atlas***." (Ex. C (emphasis added).) This of course would be a far more serious breach of the Settlement Agreement than originally believed, so counsel for Atlas and Taylor wrote back just over an hour later requesting (i) that Sinn provide "the picture with the tag

line, a list of senders, and a full list of recipients, including all names, phone numbers, and email addresses," and (ii) that ***no related material be deleted or destroyed***. (Ex. D.)

Later that night (at 8:30 on Christmas Eve), counsel for Sinn emailed again, explaining that in his response to counsel for Atlas, he typed "***Atlas***" when what he meant was "***Aspire***," Sinn's company. In other words, Sinn was now claiming that the photograph was sent to people associated with ***Aspire*** with the tag line "Happy Holidays from ***Aspire***." Along with this explanation, counsel for Sinn forwarded to counsel for Taylor and Atlas an email from Sinn in which he explained:

> I thought I was sending the photo to someone else, I know multiple Craig's [*sic*] and even two Craig Taylor's [*sic*] believe it or not. This is the first I've learned of Craig Taylor getting sent this photo errantly. Everyone needs to lighten up a bit, and yes I sent it to a bunch of folks as a joke. If Craig has [*sic*] issue I can surely apologize, but in now [*sic*] way are the others in the photo apologizing for something I did by accident.

(Ex. E.)

The next day, Wednesday, December 25, counsel for Taylor and Atlas again emailed counsel for Sinn, pointing out that the message received by Taylor contained no text—no "tag line"—at all, just a picture, and requesting that he forward what Sinn now claimed were "holiday cards" to ***Aspire*** associates by Friday, December 27. (Ex. F.)

By the following Tuesday, December 31, Sinn had not responded at all, so counsel for Taylor and Atlas again emailed counsel for Sinn and said:

> I didn't receive any of these, so I will assume your client does not intend to provide them.
>
> Contacting people associated with Atlas with an obscene message purporting to be "from Atlas" is a violation of the settlement agreement. This breach by Mr. Sinn and Mr. Torres excuses further performance by Atlas, which will now consider what action it should take to protect itself.

(Ex. G.)

The following day, January 1, 2014, counsel for Sinn emailed the following *non sequitur* to counsel for Taylor and Atlas:

> I assume from your response that you did not understand that I wrote a typo in my previous email. The places where I referenced "***Atlas***" should have referenced "***Aspire***." It is my understanding that Mr. Taylor received the message and photo in error. It was not meant for him to receive it and it was not directed at him either. Indeed, the message had nothing to do with Mr. Taylor or the lawsuit that we amicably resolved.
>
> We did not send any messages to people associated with your client's company, we also did not purport to send any messages "from" your client's company. This apparently is all a big misunderstanding. I don't think it would be appropriate to claim that the mistaken message or my typo is some breach of the settlement agreement. I also don't think it would be appropriate to unilaterally cease your clients [*sic*] performance under the settlement agreement based on a mistaken text message.
>
> With that said, we sincerely apologize for any inconvenience this may have caused you and your client.

(Ex. H (emphasis added).)

The next day, January 2, 2014, counsel for Taylor and Atlas responded to counsel for Sinn:

> Thanks for the clarification, but I do understand that you claim your previous email's reference to Atlas was a typo. I hope that is the case and look forward to receiving the original texts with the original tag lines and a list of recipients so that it can be confirmed.

(Ex. I.) Again, Sinn did not respond.

On January 7, still having had no response from Sinn, counsel for Taylor and Atlas emailed again, this time pointing out that Sinn had to that point simply ignored repeated requests that he produce whatever it was that he sent out, so:

> Request is made—again—that you provide the original texts in full, with a list of senders and recipients. If you do not provide it by the close of business on Friday, January 10, 2014, Atlas will assume that it is because to do so would confirm Mr. Sinn and Mr. Torres' breach of the settlement agreement.

> Breach by Mr. Sinn and Mr. Torres excuses further performance by Atlas. If Mr. Sinn or Mr. Torres have breached the settlement agreement, Atlas will have no obligation to make further payment, and such payments will not be made.

(Ex. J.)

That same day, instead of simply producing the texts which Sinn claimed would vindicate him, thus avoiding this entire dispute, he invoked the mediation clause of the Settlement agreement, requesting that the parties make themselves available for a teleconference with the parties' agreed mediator, Paul Clote. (Ex. K.)

Taylor and Atlas agreed about an hour later, but pointed out that none of this would be necessary if Sinn would simply produce the documents he claimed would exonerate him: Taylor and Atlas would not invoke their right to cease performance, no attorneys' fees would be incurred, and no costs of any kind would be necessary. If litigation followed, Taylor and Atlas would be entitled to production of those messages in discovery anyway—all at much greater expense than simply producing them ahead of time. All Sinn had to do was show Taylor and Atlas—even Taylor and Atlas' counsel for his eyes only—what Sinn claimed were messages unrelated in any way to Atlas or Taylor. Counsel for Taylor and Atlas therefore responded:

> I agree that Mr. Sinn and Mr. Torres' breach of the settlement agreement requires that the parties to confer with Paul Clote before initiating any action. I am available tomorrow afternoon anytime, Thursday from 1:30–2:45, Friday morning until 11:00, and Tuesday the 14th from 1:30–3:00.
>
> As you know, if Mr. Clote is not able to assist us in resolving this matter and litigation follows, your clients will be required to produce in discovery what we're requesting now. If the texts didn't mention Atlas or go to anyone associated with Atlas, as you now claim, there will be nothing to drag third parties into. If that isn't the case, however, we will find out about it during discovery and those third parties will, at a minimum, be witnesses anyway. It is curious that Mr. Sinn and Mr. Torres would prefer to spend time and money jumping through all of these hoops instead of just forwarding what they claim would exonerate them and dispose of this issue completely.

> Neither Mr. Sinn nor Mr. Torres have any reason to believe that Atlas wants to litigate further, as you now claim. It doesn't. Craig Taylor, James Marshall, and Atlas want nothing more to do with your clients. It wasn't Atlas that contacted them and it isn't Atlas which is refusing to prove something so simple.
>
> If this was all a mistake, proving it is easy (which I guess you don't deny since you promise to provide some of the evidence to Mr. Clote). What makes absolutely no sense at all is to insist on spending thousands of dollars going through a mediator instead of just forwarding the requested information. It does make sense if Mr. Sinn and Mr. Torres have something to hide, though.
>
> If your clients were actually concerned that Atlas was looking for an excuse to initiate litigation, you could have asked at any time over the last two-plus-weeks for an assurance that if you provided the material, Atlas would consider the issue resolved. Atlas would have said yes because litigation isn't what it wants. Instead, Mr. Sinn and Mr. Torres have done everything they can not to have to turn over what they sent out.
>
> Mr. Sinn, XS, Aspire, and Mr. Torres are in breach of the settlement agreement. Because of their breach, further performance by Mr. Taylor, Mr. Marshall, and Atlas is excused. This email will be printed and sent by certified mail and facsimile to you and Melissa pursuant to paragraph 20 of the Settlement Agreement.

(Ex. L.) Payment from Atlas and Taylor to Sinn was accordingly halted.

The parties mediated, first by phone and then in person on April 1, 2014. Sinn steadfastly refused to produce what he actually sent.

On July 17, 2014, Torres filed this lawsuit against Atlas and Taylor for breach of the Settlement Agreement, complaining of their failure to pay them monies he claimed were due. Atlas and Taylor answered on August 18, 2014 and asserted a claim for breach of the non-disparagement provision of the Settlement Agreement.

Also on August 18, 2014, Defendants served their First Set of Interrogatories and Requests for Production on Torres. (*See* Ex. Q at 2.) Defendants specifically requested information regarding the photograph attached as Exhibit A:

> **REQUEST FOR PRODUCTION NO. 1:** Produce all documents or communications sent to, received from, or created by you mentioning, relating, or

referring to the photograph attached as Exhibit A to Defendants' Original Counterclaim.

…

REQUEST FOR PRODUCTION NO. 3: Produce all communications between you and Adam Sinn between August 15, 2013 and the present.

…

REQUEST FOR PRODUCTION NO. 9: Produce all communications in your possession, custody or control between August 15, 2013 and the present that, directly or indirectly, mention, relate, or refer to Craig Taylor. This request includes but is not limited to communications sent by you and those received by you.

…

REQUEST FOR PRODUCTION NO. 11: Produce all communications in your possession, custody or control between August 15, 2013 and the present that, directly or indirectly, mention, relate, or refer to Atlas. This request includes but is not limited to communications sent by you and those received by you.

REQUEST FOR PRODUCTION NO. 12: Produce all communications in your possession, custody or control which say "Happy Holidays from Atlas" sent by you between December 21, 2013 and the present.

…

REQUEST FOR PRODUCTION NO. 14: Produce all communications in your possession, custody or control which say "Happy Holidays from Atlas" sent to you between December 21, 2013 and the present.

…

REQUEST FOR PRODUCTION NO. 16: Produce all communications in your possession, custody or control which contain or refer to the photograph attached to Defendants' Original Counterclaim as Exhibit A.

(Ex. Q.) On September 22, 2014, Torres served general, boilerplate objections to the requests, but produced no documents whatsoever. (*See* Ex. R.)

On September 29, 2014, one week later, Defendants moved to compel responses to the requests. Faced with having to produce the evidence, Torres destroyed it:

Q. (By Mr. Berg) I'm going to hand you what I've marked as Exhibit 4 to your deposition and ask if you recognize that document.

A. These are the interrogatories and requests for production. Yes, I do recognize this.

Q. Okay. Those are the responses to the requests for production and interrogatories that were served on you; correct?

A. Correct.

Q. These are your answers to that.

A. Correct.

Q. And you'll see that there are a number of requests for production—

A. Uh-huh.

Q. —correct?

A. (Nods head affirmatively.)

Q. And in response, you didn't produce a single document; did you?

A. I provided IM conversations.

Q. To your counsel?

A. Correct.

Q. How many pages of IM conversations?

A. It was only, I think, maybe two.

…

Q. Didn't you just testify that you received a group e-mail with that picture marked as Exhibit 3 which mentions Craig Taylor?

A. Correct.

Q. But you didn't find that on your phone?

A. (Shakes head negatively.) It was no longer in my messages, no.

Q. Why not?

A. I don't necessarily keep my messages for very long. I delete them on a regular basis.

Q. So you had deleted that conversation?

A. Probably not long after I got the actual message, it was probably deleted.

Q When you say "not long after," how long?

A. I don't remember exact time frame. It could have been days, it could have been a week. Who knows?

Q. What type of phone did you have at the time that you received that picture?

A. Brand?

Q. Yes.

A. IPhone.

Q. IPhone? Which model?

A. I think it was—The newest one is 6, so it was probably an iPhone 5.

Q. Do you know whether your text messages were backed up?

A. Naturally the iCloud does a sync. It syncs to whatever your most recent format of your phone is and everything; so there is a—a back-up. I don't know how often it does it. Whenever I get on wi-fi, whatever the case may be.

Q. Did you search, for example, iTunes for messages that might have been responsive?

A. Search iTunes? No. I don't…

Q. ***Did you get rid of that phone?***

A. ***That phone was sold back to T-Mobile, if I recall correctly, as part of a new contract with them.***

Q. ***When?***

A. October, possibly.

Q. Of 2—

A. —of 2014. ***October of 2014.***

Q. Do you remember the exact date?

A. I don't remember the exact date off the top of my head, no.

(Ex. N, Torres Dep. at 55:7–56:4, 56:13–58:6 (emphasis added).) After hearing Defendants' motion, on November 11, 2014, the Court compelled Torres to produce documents responsive to the requests, but Torres had already destroyed the phone containing those documents. (*See* Ex. N, Torres Dep., at 56:13–58:6.)

Sinn and Torres both have now admitted that Sinn was the source of the funds Torres used to purchase a share of Atlas. (Ex. N, Torres Dep., at 11:21–12:8; Ex. O, Sinn Dep., at 23:12–24:6.) In addition, Torres has admitted and Sinn has confirmed that they committed fraud in executing the Settlement Agreement. In the Settlement Agreement, Torres represented—under oath—that he had not assigned any of his rights or interests under the agreement:

> **Warranty by Torres.** Torres hereby represents and warrants that he has not assigned or otherwise transferred to any other person or entity any interest in any claims, actions, demands and/or causes of action he has, or may have, or may claim to have in connection with the matters released hereby and/or the persons and entities released herein. . .

(Ex. M, Settlement Agreement, ¶ 11, at 10.) In Torres' affidavit attached to his motion for summary judgment, he falsely represents to the Court that he is entitled to payment under the Agreement:

> Taylor and Atlas only made four (4) of the required monthly payments of $10,000. ***Taylor and Atlas failed to pay me the payment due January 15, 2014 and have failed to pay and continue to owe twenty-one (21) monthly payments of $10,000 (i.e., $210,000).***

(Torres Ex. A ¶ 13 (emphasis added).)

These representations are flatly contradicted by both Torres' and Sinn's deposition testimony. First of all, Torres and Sinn both acknowledged at deposition that all moneys paid under the Agreement ($290,000 to date) went to Sinn:

Q. So that lawsuit between you and Atlas Commodities, James Marshall and Craig Taylor was ultimately settled after a mediation; correct?

A. That's correct.

Q. And under the terms of that settlement, Atlas and Taylor basically were going to pay $500,000 to you; right?

A. Correct

…

Q. And under the terms of the settlement agreement—Well, strike that.

$250,000 was paid under the terms of the settlement agreement. Where did that money go?

A. That was paid, if I recall, directly to Chandler's [*sic*] law firm. That's—I'm sure that's how we set it up. Yeah.

Q. Okay. $250,000 went to Chanler's law firm Chanler Langham at Susman, Godfrey who represented Adam Sinn and XS Capital.

A. Correct.

Q. So $250,000 to Susman, Godfrey which then did what with it?

A. I'm—I don't know exactly what they did with it. I'm sure they gave—gave it to Adam Sinn or they used part of it to pay for legal fees, gave it to Adam Sinn, I don't know; but I know some of it got to Adam Sinn.

Q. None of it came to you.

A. Correct.

Q. Right. Then there were two payments made following that payment under the settlement agreement; correct?

A. Was it only two? I thought it was four.

…

Q. Those payments went, under the terms of the settlement agreement, to Chanler Langham's law firm; correct?

A. Correct.

Q. Okay. Ultimately Chanler's firm represented you, but it didn't at that point; correct?

A. I was represented by Melissa Moore.

Q. Right. Okay. So that money went to Susman, Godfrey—

A. Uh-huh.

Q. —which did what with it?

A. I imagine they gave it to Adam Sinn, but I don't know for sure.

Q. ***Okay. That money was going directly to Adam Sinn, or at least to his representative.***

A. ***Sure.***

Q. ***None of it was going to you.***

A. ***No.***

Q. ***And none of the remainder was going to you.***

A. ***Correct.***

Q. ***It all goes to Adam Sinn, ultimately.***

A. ***Ultimately, yes.***

(*See* Ex. N, Torres Dep., at 26:3–10, 26:22–27:20, 27:25–28:21 (emphasis added).)

Q. All right. So, Atlas made that first·250,000-dollar payment. Where did that go?

A. To Susman Godfrey.

Q. And what did Susman Godfrey do with it?

A. They then distributed it out.

Q. To whom?

A. To myself.

Q. Did Mr. Torres get any of it?

A. No.

Q. Okay. And then Atlas made payments of $10,000 per month for four months, correct?

A. Correct.

Q. And those payments also went to Susman Godfrey, right?

A. They did.

Q. Susman Godfrey was the law firm which represented you before you hired Rapp & Krock, correct?

A. Yes.

Q. All right. And Susman Godfrey represented you in the lawsuit that was settled by this Settlement Agreement, right?

A. Correct.

Q. Okay. So, $10,000 a month for four months went to Susman Godfrey, right?

A. Correct.

Q. And what happened to each of those payments of $10,000?

A. They were distributed out to me.

Q. ***Did Mr. Torres get any of those funds?***

A. ***No.***

(Ex. O, Sinn Dep., at 35:16–36:20 (emphasis added).)

More importantly, Torres and Sinn have further admitted that the entire $500,000 settlement was assigned to Sinn by Torres and that Torres has no right to any of that money. The assignment from Torres to Sinn was, according to Torres' testimony in this case, executed between the time the parties settled the underlying matter at mediation and the time they entered into the Settlement Agreement:

Q. Okay. Did you sign some agreement with Adam Sinn saying: All the money under this settlement agreement is going to you?

A. If I recall correctly, I did. I don't remember the exact document; but I think ***after the settlement day, between that until the actual final agreement, there was a document that I signed where the $500,000 was to be paid to Adam Sinn***, essentially—

Q. Okay.

A. —to cut out the middleman, basically.

Q. Do you know if that document was produced in this litigation?

A. I don't think so, no. [1]

(*See* Ex. N, Torres Dep., at 28:22–29:9 (emphasis added).)

Q. But you do have a written agreement on the total of 500,000 under the Settlement Agreement?

A. I don't recall, but potentially we do.

Q. Okay. Well, if it's not written, it's certainly oral, correct?

A. Like, I literally don't recall. I mean, I know he said that, but I don't recall.

Q. Okay.

A. I don't recall what the specific structure—

Q. Then let me—let me put it this way. He says to you in one way or another, oral, written, whatever you leave open the possibility.

A. Okay.

Q. ***You just don't recall. He says: Hey, I owe you this money. Under the Settlement Agreement, it's $500,000. It's yours. I assign it to you.***

A. ***Uh-huh.***

Q. ***Is that right?***

A. ***Basically correct.***

[1] Defendants have produced no documentation of this assignment. (Ex. U, Nelson Aff., ¶3.) As otherwise set forth in this response, discovery is woefully incomplete. Defendants therefore request, in the alternative, a continuance of the motions for summary judgment set for July 24, 2015.

Q. ***Right. Whether it's written or oral, you don't remember, but that's how it happened?***

A. ***Correct.***

(Ex. O, Sinn Dep., at 38:24–39:20 (emphasis added).) In addition to being completely at odds with the affidavit Torres filed in support of his motion for summary judgment, the Torres/Sinn assignment is itself a violation of the Agreement. (*See* Ex. M, Settlement Agreement, ¶ 11.)

Any assignment of rights under the Settlement Agreement required consent of the Atlas parties:

> **Successors and Assigns.** The rights of the Parties hereto, and any of their subsidiaries and affiliates, shall inure to the benefit of any and all of their successors and assigns. **No Party may assign any of its rights or delegate any of its duties hereunder without the written consent of the other Parties**.

(Ex. M, Settlement Agreement, ¶ 27 (emphasis added).) None of the Atlas parties consented to the Torres-Sinn assignment, nor were they ever asked. Atlas and Taylor would not have agreed to payment to Sinn, which is precisely why Plaintiffs did not ask. (See Ex. P, Taylor Aff., ¶ 7.)

V. TRADITIONAL SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). A party moving for summary judgment on its own cause of action must conclusively establish each element of its claim as a matter of law. *See Winchek v. Am. Exp. Travel Related Servs. Co.*, 232 S.W.3d 197, 201 (Tex. 2007); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). All summary judgment evidence must be admissible. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam). When reviewing a motion for summary judgment, the court must take the

nonmovant's evidence as true, indulge every inference in favor of the nonmovant, and resolve every doubt in the nonmovant's favor. *M.D. Anderson,* 28 S.W.3d at 23.

VI. ARGUMENT AND AUTHORITIES

A. Torres Is Not Entitled to Summary Judgment on His Breach of Contract Claim

Defendants incorporate by reference the preceding paragraphs for all purposes.

Torres moves for summary judgment on his claim for breach of contract, claiming actual damages in the amount of $210,000 under the Settlement Agreement. (Mot. at 6.) The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *Winchek v. Am. Exp. Travel-Related Servs. Co., Inc.*, 232 S.W.3d 197, 201 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Torres, however, has admitted that he assigned his rights to payment and/or collection under the Settlement Agreement to Sinn. (Ex. N, Torres Dep., at 28:20–29:6.) Sinn has confirmed this. (Ex. O, Sinn Dep., at 39:12–20.) The assignment has not been produced, so it is unclear which rights have been transferred. An assignment is a transfer from the owner of a right or property to another. *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 113 (Tex. App.—Houston [14th Dist.] 1996, no pet.). Unless it is qualified in some way, it is a transfer of one's whole interest. *Id.* Because he assigned his rights to payment and/or collection under the Settlement Agreement to Sinn, Torres no longer has a right any monies he now claims he is owed. *See id.*

Torres is not entitled to summary judgment on his claim for breach of the Settlement Agreement because—as he admits—he is not owed anything and therefore has sustained no

damages. *See Winchek*, 232 S.W.3d at 201; *Twelve Oaks Tower I*, 938 S.W.2d at 113. Summary judgment on Torres' breach of contract claim should be denied.

B. Torres Is Not Entitled to Summary Judgment on Defendants' Claims

Defendants incorporate by reference the preceding paragraphs for all purposes.

As an initial matter, Torres is not entitled to summary judgment on *all* of Defendants' claims because he has not moved for summary judgment on all of Defendants' claims. *See* Tex. R. Civ. P. 166a(a), (c) (summary judgment may only be granted on claims regarding which a party moves).Torres has not moved for summary judgment on Defendants' claim for fraud in the inducement and their request for indemnity. (*See* 2d Am. Pet. ¶¶ 28–62.) Torres also has not moved for summary judgment on Defendants' request for a declaration that he violated the non-assignment provision of the Settlement Agreement. (*See* 2d Am. Pet. ¶ 51.) Summary judgment therefore cannot be granted on those claims. *See* Tex. R. Civ. P. 166a(a), (c).

Torres moves for summary judgment on the first three declarations sought by Defendants and on Defendants' claim for breach of contract, all of which are related to the creation and transmission of the photograph attached as Exhibit A, along with any message that may have accompanied it. (Mot. at 6–7.) Torres asserts that Defendants have no claims against him because he did not send the photograph or any accompanying message. (Mot. at 7; Torres Ex. A ¶ 15.) This assertion is conclusory and cannot be confirmed because Torres destroyed any evidence thereof. (Ex. N, Torres Dep., at 56:13–58:6.) Torres has made his credibility a dispositive factor in the resolution of the case; therefore, summary judgment is inappropriate. *Casso*, 776 S.W.2d at 558.

Moreover, Torres misstates Defendants' claims. Defendants allege that Torres breached the Settlement Agreement when he "sent the obscene text message described herein to persons associated with Atlas under Atlas's name ***and/or participated in its creation***." (2d Am. Pet. ¶ 51

(emphasis added).) Even if Torres did not transmit the photograph to anyone, that alone would not entitle him to summary judgment on Defendants' claims for declaratory relief and breach of contract related to the photograph, because that is not what Defendants allege. (*See* 2d Am. Pet. ¶ 51.) Torres therefore is not entitled to summary judgment on that basis.

Torres also asserts that, even if he had sent the photograph to Taylor, he would not have violated the non-disparagement clause of the Settlement Agreement. (*See* Mot. at 7–8.) Again, Torres misstates Defendants' claims. Defendants do not allege that the transmission of the photograph to Taylor violated the Settlement Agreement. (*See* 2d Am. Pet. ¶ 51.) Torres therefore is not entitled to summary judgment on that basis.

Torres baldly asserts that the transmission of the photograph and any accompanying message could not have damaged Taylor's or Atlas' reputation, citing the elements for a cause of action for business disparagement. (Mot. at 8.) But Defendants do not allege business disparagement. Defendants have sued for breach of the non-disparagement clause of the contract at issue. For that reason alone, Torres' motion for summary judgment may not be granted.

Finally, Torres claims – in this motion filed before he was deposed – that he never made "any 'false, derogatory, slanderous or libelous comments' about Taylor or Atlas 'regarding any matter likely to be harmful' to Taylor's or Atlas' 'business, business reputation, or personal reputation." (Mot. at 8.) This is demonstrably false. At his deposition, Torres admitted that he made so many disparaging statements about Taylor and Atlas that he just could not remember them all:

> Q. You don't like Craig Taylor very much; do you?
>
> A. Someone I have had a—had legal issues with, you don't tend to have high opinions of that person.
>
> Q. Okay. And you've had conversations about him— Let me put that a different way. You had conversations about him between August 15th and December 20th, 2013.

A. Uh-huh.

Q. Correct?

A. Conversations about him?

Q. Yes.

A. I remember a few.

Q. Which at least referred to him.

A. I remember a few.

Q. Which at least referred to him.

A. I remember a few.

Q. Yes.

A. Uh-huh.

Q. And conversations which referred to Atlas.

A. I don't recall if it was referred to Atlas, but…I mean if you have the document that shows that, then sure. I don't recall if I referred to Atlas. I know I had conversations about Craig Taylor.

Q. Right. Who did you talk to—to about Craig Taylor?

A. Adam Sinn.

Q. Who else?

A. Adam Sinn is who I recall.

Q. Dave Schmidli?

A. Dave Schmidli? I don't recall if I did or didn't? I know I had conversations with Adam Sinn. I don't recall if I had with Dave Schmidli or not.

Q. Joon Park?

A. Joon Park, possibly, yeah.

Q. Barry Hammond?

A. Possibly, yeah.

Q. Okay. ***And you called Craig Taylor an asshole; didn't you?***

A. ***I don't recall who I said that to.*** I know I definitely said that to Adam Sinn.

(Ex. N, Torres Dep., at Torres Dep., at 34:7–35:21.) Torres therefore is not entitled to summary judgment on the basis that he never disparaged Taylor or Atlas in violation of the Settlement Agreement. Moreover, he should not be allowed to benefit from his destruction of evidence despite pending discovery requests.

C. Torres Is Not Entitled to Attorney's Fees

Defendants incorporate by reference the preceding paragraphs for all purposes.

A party has a duty to exercise reasonable care to mitigate its damages. *Great Am. Ins. Co. v. N. Austin Mun. Utility Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995). If a party fails to exercise such reasonable care, it cannot recover damages that could have been avoided. *Pinson v. Red Arrow Freight Lines, Inc.*, 801 S.W.2d 14, 15 (Tex. App.—Austin 1990, no writ). The doctrine of mitigation applies to claims for attorney's fees. *See Glenn v. Nortex Foundation Designs, Inc.*, No. 2-07-172-CV, 2008 WL 2078510, at *4 (Tex. App.—Fort Worth 2008, no pet.) (mem. op.) (upholding reduction of recoverable attorney's fees because of party's failure to mitigate after rejecting reasonable settlement offer); *A.D. Willis Co., Inc./Metal Bldg. Components, Inc. v. Metal Bldg. Components, Inc.*, No. 03-09-00574-CV, 2000 WL 1508500, at *5 (Tex. App.—Austin 2000, pet. denied) (upholding reduction of recoverable attorney's fees because of party's failure to make reasonable efforts to negotiate a compromise) Torres has failed to mitigate his attorney's fees in this case by resisting discovery, including by the destruction of evidence—his phone—and breaching the Settlement Agreement himself, including by assigning his rights to payment and/or collection to Sinn. (*See* Ex. N, Torres Dep., at 28:20–29:6; 57:22–59:5.) Torres therefore is not

entitled to an award of the attorney's fees incurred because of his multiple failures to mitigate his damages. *See Glenn*, 2008 WL 2078510, at *4; *A.D. Willis Co.*, 2000 WL 1508500, at *5.

VII. CONCLUSION AND PRAYER

For these reasons, Defendants/Counter-Plaintiffs Craig Taylor and Atlas Commodities, LLC respectfully request that the Court deny Plaintiff/Counter-Defendant Eric Torres' 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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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, and/or facsimile on July 17, 2015 as follows:

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