7/23/2015 3:07:15 PM
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Envelope No. 6199285
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Filed: 7/23/2015 3:07:15 PM

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

ERIC TORRES' REPLY TO TAYLOR PARTIES' RESPONSE TO TORRES' MOTION FOR TRADITIONAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff/Counter-Defendant Eric Torres ("Torres') files this Reply to the Response ("Response") of Craig Taylor and Atlas Commodities, LLC (collectively "the Taylor Parties") to Torres' Motion for Traditional Summary Judgment ("Motion") and would respectfully show this Court:

The Taylor Parties have been unable to point to any act taken by Torres that was a breach of the settlement agreement they entered into with him effective August 15, 2013 (the "Settlement") (Exh. A.1 to Motion), much less one that is material breach or a dependent obligation so as to the excuse the Taylor Parties' obligation to pay Torres. While this case began with accusations that Adam Sinn ("Sinn") took certain actions in violation of the Settlement, the Taylor Parties were permitted by the Court to search for something Torres actually did other than appear in the photograph at the Christmas party (the "Picture"). After taking the two depositions that the Court permitted, the best the Taylor Parties could come up with is: (a) a claim that Torres somehow violated a warranty provision or no assignment provision of the Settlement because Torres said Adam Sinn was to receive the money paid under the Settlement and the

Taylor Parties' new assertion that they would have never entered into the Settlement if that was the case; (b) a claim that Torres disparaged Taylor because he may have called him an "asshole" when talking to Adam Sinn; and (c) a claim that Torres spoliated evidence when he exchanged in his Iphone. The Taylor Parties have the burden on the affirmative defense that there is a material breach of a dependent obligation that excuses their performance under the Settlement and have failed to create a fact issue on each of the elements of that defense. These three legally unsound arguments are addressed briefly below.

Torres Did Not Violate the Settlement. From the outset of this case and indeed in the underlying lawsuit, the Taylor Parties have taken the position that Torres ***and Sinn*** purchased shares in Atlas and that the Taylor Parties settled with Torres ***and Sinn*** by agreeing to buy back "their shares," and the Taylor Parties did receive the "Sinn/Torres' shares" in return, and did in fact pay the first $250,000 and four of the twenty five $10,000 installment payments.. (*See* Defendants' Original Counterclaim filed 8/18/2014, ¶¶24, 25, 26; First Amended Counterclaim filed 10/28/2014, ¶¶24, 25, 26; Second Amended Counterclaim filed 5/6/2015, ¶¶24, 25, 26). While the Taylor Parties removed the paragraph numbers from their counterclaims, their Response nonetheless repeats these same factual assertions from their counterclaim in the "Undisputed Facts" section of their Response (*See* Response, p. 5); with one telling exception. The Taylor Parties' Response leaves out one paragraph from their Counterclaim, paragraph 27, which had remained unchanged for more than 10 months:

> "27. Taylor and Atlas' ***payment under the Settlement Agreement was to be made to Sinn, not Torres***. This would not have been the case had Torres and Sinn not defrauded Atlas and Taylor in the first place."

(original Counterclaim ¶27, First Amended Counterclaim ¶27, Second Amended Counterclaim ¶27, emphasis added). This was the Taylor Parties' interpretation of the Settlement right up until they realized that such an interpretation wholly contradicts their current, and newly-formed

unfounded righteous indignation over what they claim was a disguised "assignment" of the settlement proceeds from Torres to Sinn. In direct contradiction to their own counterclaim's paragraph 27 they now say that they have just recently "learned" that Torres was paying Sinn back the money Sinn provided him out of the Settlement payments. *See* Response, p. 19 ("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.") What the Taylor Parties fail to tell the Court is that ***the Settlement agreement signed by the Taylor Parties expressly set up this arrangement for payment*** and thus this is another ruse the Taylor Parties are using to avoid paying the Settlement payments**.**

The evidence already in the record shows that Torres was entitled to receive the payments (Exh. A.1, ¶3) but that the payments were being made to Sinn's attorney (Exh. A.1, ¶3). Specifically, the parties agreed in the Settlement Agreement itself that the payments to Torres were to be made by paying the trust account of Susman Godfrey. (Exh. A.1 ¶3). If there was any doubt in the Taylor Parties' mind at the time, the Settlement Agreement itself identified the attorney for Mr. Torres (Melissa Moore) and the attorney for Sinn as Susman Godfrey. *Id.* at ¶ 20. While the underlying case is sealed, the Court may take judicial notice of its court records in that case that these attorney relationships existed at the time the case was settled in August 2013. Thus, the Taylor Parties' assertion that this "assignment" violated the Settlement agreement and excused performance (much less gives rise as the Taylor Parties now contend, to a breach of contract claim and a fraudulent inducement claim[1]) is contrary to their own judicial admissions

[1] The claims for breach of the agreement and fraudulent inducement fail as a matter of law. The contract permits the very thing being called a breach. And it is well settled that one cannot be defrauded into entering a contract when itself contradicts the alleged fraud (Exh. A.1, ¶3), includes a merger or entire agreement clause (¶25), and disclaims reliance on any other promises (¶28). *See DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858–59 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("[A] party who enters into a written contract while relying on a contrary oral agreement does so at its peril and is not rewarded with a claim for fraudulent inducement when the other party seeks to invoke its rights under the contract. In this case, therefore, even assuming [plaintiff's]

in this case in each version of their Counterclaims, the language of Settlement, their arguments in this case and the underlying case as to whose money it was, who acquired the shares, and who had to return the shares, and is contrary to simple logic.[2]

Finally, the Taylor Parties' assertion that Torres breached the warranty he gave in the Settlement that there was no assignment is equally flawed.[3] A simple reading of the warranty (¶11) shows it is a warranty that Torres has not assigned an interest in the claims released. The full text (not quoted by the Taylor Parties) states

> 11. **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, and hereby agrees to indemnify and hold harmless all persons or entities hereby released from any and all injuries, harm, damages, penalties, costs, losses, expenses and/or liability or other detriment, including, without limitation, all reasonable attorneys' fees incurred as a result of any and all claims, actions, demands, and/or causes of action of whatever nature or character which may hereafter be asserted against any such released persons or entities by any person or entity claiming by, through or under Torres by virtue of such an assignment or other transfer. Torres further represents and warrants that he is not aware of any actual or potential disputes, claims, or causes of action they do or may have against any of the Atlas Releasors that are not waived and released under the terms of this Agreement.

(Exh. A.1). There has been no allegation much less proof that some third party has asserted against the Taylor Parties any of the claims Torres released. The combination of (a) the fact that there is an expressed remedy (indemnification), and (b) the representations in the last sentence of

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evidence to be admissible and sufficient to show its actual reliance on a contrary oral agreement, that reliance could not, as a matter of law, have been justified."); *see Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179-80 (Tex. 1997) (enforcing disclaimer of reliance in a settlement to prevent as a matter of law a fraudulent inducement claim); *McLernon v. Dynegy, Inc.*, 347 S.W.3d 315, 330 (Tex. App. –Hous. [14th Dist.] 2011, no pet) (affirming grant of summary judgment on fraudulent inducement claim); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Ctr. E., Inc.*, 290 S.W.3d 554, 569 (Tex. App. – Dallas 2009, no pet) (concluding "the trial court did not err when it granted Rent–A–Center's motion for summary judgment as to the Worldwide Purchasers' claims for fraud and fraudulent inducement" because of a no reliance clause similar to this case).

[2] The Court should note the complete absence of any allegation much less proof that the Taylor Parties have been harmed by this arrangement. Torres has given credit to the Taylor Parties for all of the prior payments made by them and there is no dispute about that. Nor has any third party asserted a claim that Torres released.

[3] The Taylor Parties' assertion that the warranty was made "under oath" is unclear. The Settlement was acknowledged by the parties but not sworn to. It is presumed that the Taylor Parties make this mischaracterization to try to argue some fact issue by conflicting evidence. As discussed above there is no conflicting evidence as there has been no testimony by Torres or other evidence that that the statements in this warranty are not accurate.

the paragraph leaves this as the only reasonable interpretation of this paragraph. The Taylor Parties have received the effect of that release, as there is no allegation or proof that any third party is making a claim that he owns the claims in the underlying suit that have been released. All Torres wants is to receive the consideration he was promised for that release, and for the shares of the company he has already returned.

In addition, it is "a fundamental principle of contract law" that to excuse performance by the other side, a breach must be material. *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 692-93 (Tex. 1994). "In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance." *Id.* at 693.[4] "The less the non-breaching party is deprived of the expected benefit, the less material the breach." *Id.* In this case, the alleged breach is in no way material as the Taylor Parties have not and indeed cannot show any prejudice whatsoever. Torres has not asserted that he did not receive the first payments or that those are not to be credited to the obligation. The Taylor Parties' stopped paying because of the Picture, not because anyone else asserted a claim to the Sinn/Torres' shares or asserted a claim against the Taylor Parties that Torres released.

Finally, "[i]t is generally said that breach of a "dependent" covenant of the contract may give the non-breaching party an election to terminate the contract while breach of an "independent" covenant will not; in the latter case, the non-breaching party may only recover for

[4] The Texas Supreme Court also listed the other factors:

> The other factors courts consider in determining the materiality of a breach are: (i) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (ii) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (iii) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (iv) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. at 693 n.2

the breach in a separate cause of action." *Lazy M Ranch, Ltd. v. TXI Operations, LP*, 978 S.W.2d 678, 681 (Tex. App. – San Antonio 1998, pet denied). Assuming the alleged "assignment" was a breach, and assuming that the breach was material, the non-assignment clause is independent of the payment clause. True the Taylor Parties should not have to pay the same sums twice, but that is not what is occurring here – here, the Taylor Parties are not paying at all, and are now searching for any *new* rationale for not doing so.[5]

Torres' Name Calling, If True, Is Not Actionable. The Taylor Defendants now assert that Torres violated the Settlement's non-disparagement clause when he allegedly called Taylor an "asshole" when communicating with Sinn. Assuming, for purposes of this Motion, that this is true (and further assuming as the Taylor Defendants' suggest that Torres used this or a similar term to describe Taylor to others), as a matter of law such terms are not disparagement under the definition in the Settlement which is similar to common law defamation or business disparagement. Numerous cases have found such terms are 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 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. [Citation omitted.]) and are "merely an example of objectionable but unactionable 'name-calling'."); *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*

[5] Likewise the non-disparagement clause is not a dependent covenant the breach of which would give rise to excused performance.

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).

While the undersigned has not found any Texas courts addressed these words specifically the courts have held that 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 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).

There Is No Claim for Spoliation In Texas and No Spoliation Exists Here In Any Event. It is well settled in Texas that here is no cause of action in Texas for spoliation. *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998). The Taylor Parties suggest that the Court should deny Torres' motion for summary judgment asserting that he spoliated evidence because he turned in his Iphone and got a new one in October 2014. Effectively, the Taylor Parties want this Court to give itself a spoliation instruction that Torres destroyed evidence and that the evidence would have been harmful to Torres. This is improper and unnecessary, and yet another ruse by

the Taylor Parties who are desperately trying to avoid paying their obligations under the Settlement.

"[A] spoliation analysis involves a two-step judicial process: (1) the trial court must determine, as a question of law, whether a party spoliated evidence, and (2) if spoliation occurred, the court must assess an appropriate remedy." *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 14 (Tex. 2014) "To conclude that a party spoliated evidence, the court must find that (1) the spoliating party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to do so." *Id.* The "party alleging spoliation bears the burden of establishing that the nonproducing party had a duty to preserve the evidence." *Id.* at 20. "The standard governing the duty to preserve resolves two related inquiries: when the duty is triggered, and the scope of that duty." *Id.*

Torres turned in his Iphone to get another one. The Iphone is gone, but the Iphone is not evidence. There is no dispute about the Iphone. The Iphone itself is not relevant.

There is no proof that evidence was destroyed at all, much less by Torres under a duty to preserve it. Similar to their unsupported assertions that Sinn sent texts to Atlas's customers or employees, the Taylor Parties' spoliation argument depends on assuming without any proof that there were communications on the Iphone that were forever lost when the phone was turned in.[6] However, there is absolutely no evidence such communications existed – the Taylor Parties presume they do, but without any basis whatsoever. Interestingly, Torres was asked (in the testimony quoted by the Taylor Parties in their Response) if he received Sinn's text with the Picture sent December 21, 2013 that mentions that he had sent the Picture to Craig Taylor (Sinn has produced this text message and it was marked as an exhibit and shown to Torres in the

[6] It should be noted that this Court permitted and Defendants obtained (several months ago) the records from Torres' carrier concerning the communications that occurred during the relevant time period set by the Court so if Defendants actually knew of a relevant communication that was made, they could have brought that to the Court.

deposition as quoted in the Response). Torres stated that he received the text from Sinn and deleted it within a few days from its receipt, well before this suit was filed or any discovery was propounded.[7] This is the only communication that there is evidence of, but was destroyed. However, the Taylor Parties already have that communication. .

Further the testimony quoted by the Taylor Parties shows that the communications, assuming they ever existed or were not deleted well before this litigation, were not destroyed at all. Torres testified that the Iphone synced to his iCloud. Realizing that the testimony may completely destroy the spoliation theory he was trying to create, counsel for the Taylor Parties quickly changed the line of questioning. Accordingly, not only have the Taylor Parties offered no proof that evidence existed and was destroyed when the Iphone was turned in, the evidence in the record shows that the communications (if they existed) might not actually be gone.

Additionally there was no duty to preserve the evidence. Unlike their unsupported assertions that Sinn sent texts to Atlas's customers or employees, the Taylor Parties never asserted Torres sent the Picture or sent any messages to Atlas or Aspire; they have always only complained that Sinn did those things. Accordingly, Torres is not accused of any actual wrongdoing. In fact, until the assignment argument referenced in the Response and addressed above, the Taylor Parties had not alleged Torres had breached the Settlement. The Taylor Parties are trying to prove Sinn took actions in sending the Picture; not Torres. Furthermore, the Court severely limited the discovery requests by ruling in October 2014 and thus drastically reduced the scope of the inquiry. That communications existed on that Iphone during the relevant timeframe established by the Court remains mere supposition by the Taylor Parties.

In a case even more compelling on all points than this one the court of appeals rejected

[7] Torres actually testified (as quoted in the Response) that he does not keep text messages very long and deletes them on a regular basis. Again, the Taylor Parties have failed to carry their burden that Torres deliberately destroyed evidence when he was under duty to preserve it.

that there was spoliation. *See Muhs v. Whataburger, Inc.*, No. 13-09-00434-CV, 2010 WL 4657955, at *12 (Tex. App. – Corpus Christi Nov. 18, 2010, pet denied) (not designated for publication) (finding no spoliation instruction warranted where court assumed there was a duty to preserve, and a witness took pictures of an accident scene but exchanged the cell phone and lost the ability to obtain the pictures).

Furthermore, the Taylor Parties offer no evidence that they were harmed or prejudice by the fact that the Iphone was turned in. This is yet another basis to deny the spoliation instruction. *See Backes v. Misko*, No. 05-14-00566-CV, 2015 WL 1138258, at *16 (Tex. App. Dallas, Mar. 13, 2015, no pet.) (finding that deletion of online posts (something that actually existed) was not spoliation because "Misko has provided no evidence from which the trial court could conclude she was prejudiced in her ability to present her case such that she may be entitled to a spoliation presumption").

The Taylor Parties have spent over a year and a half (since they stopped paying the payments under the Settlement in January 2014) looking for a reason to justify their refusal to continue to pay Torres for the transfer of the stock and release he gave them in the Settlement. They used the Picture Sinn sent to Taylor to justify the refusal to pay in January 2014 (which according to the Taylor Parties' response to Sinn's motion for summary judgment (page 20), they have now abandoned).[8] Instead they now bring a meritless "assignment" argument and an argument that Torres spoliated evidence of their non-existent reason to stop paying Torres in January 2014. Torres is entitled to summary judgment. Further, the Taylor Parties' unclear assertion that Torres somehow failed to mitigate his attorneys' fees fails to meet their burden of proof of an affirmative defense, and in reality sounds like more of an argument to be made at the

[8] Interestingly, on page 21-22 of the Response, the Taylor Parties assert that Torres' mere appearance in the photograph giving the middle finger to whoever is taking the photograph justifies the Taylor Parties' refusal to pay Torres the remaining sums under the Settlement.

trial on the attorneys' fees owed Torres, than a reason to deny that he is entitled to his attorneys' fees. Torres' motion for summary judgment should be granted, and judgment entered that the Taylor Parties owe Torres the total amount of the remaining payments at this time for their anticipatory repudiation and breach of the Settlement as well as an order that Torres is entitled to his attorneys' fees and setting a trial on the amount of such attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of July 2015, 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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