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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' MOTION FOR TRADITIONAL AND NO EVIDENCE 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 Motion for Traditional and No Evidence Summary Judgment would respectfully show the Court the following:

I. INTRODUCTION AND SUMMARY OF MOTION

This motion seeks traditional summary judgment on all claims by Plaintiffs (i.e. Torres' breach of contract claim against Craig Taylor, S. James Marshall and Atlas Commodities, L.L.C. (the "Atlas Parties"), jointly and severally, for failure to pay under the settlement), traditional and no evidence summary judgment on each and every affirmative defense of the Atlas Parties (unclean

hands, estoppel, laches, waiver, failure to mitigate and excused performance); and traditional and no evidence summary judgment on each and every counterclaim of the Atlas Parties (declaratory judgment, breach of contract, fraud in the inducement, demand for indemnity, and spoliation). This motion seeks summary judgment on all claims in this case.

It is undisputed that, under a Settlement Agreement of a prior lawsuit in this Court, Torres tendered his shares in Atlas Commodities, L.L.C. ("Atlas") to the "Atlas Parties in exchange for the Atlas Parties' joint and several obligation to pay Torres the total sum of $500,000. The Atlas Parties paid the initial $250,000 and the subsequent $10,000 monthly payments for a total of four months when, on December 31, 2013, the Atlas Parties' attorney affirmatively stated the Atlas Parties' position was that they were excused from further performance. Thereafter, the Atlas Parties did not make the monthly payment due January 15, 2014, as well as the subsequent monthly payments due under the Settlement Agreement through October 2015, a total of $210,000.

Taylor has testified that the excuse for stopping payments was that Taylor *believed* that <u>Sinn</u> (not Torres) had sent the now infamous middle-finger Picture ("Picture") to Atlas' customers with the statement "Happy Holidays Atlas." Taylor based his belief on an email from Sinn's attorney at the time, Chanler Langham, that incorrectly and accidentally stated that the Picture was sent to customers of Atlas stating "Happy Holidays Atlas" on it. Mr. Langham quickly retracted the statement and explained he was mistaken, but Taylor refused to believe the retraction because of Taylor's utter refusal to believe anything at all coming from Adam Sinn or his attorney. As discussed below, despite refusing to pay Torres, filing the counterclaim in this case, and over two years of discovery, the Atlas Parties have yet to provide any evidence that the Picture was sent to anyone with the statement "Happy Holidays Atlas" (other than as a joke to Sinn's attorney Mr. Langham which led to the unfortunate email and subsequent retraction) and indeed there is no evidence of any

material breach by any of the Sinn Parties that would excuse the Atlas Parties' payments under the Settlement Agreement.

Regardless, it is undisputed that Taylor did not base his decision to stop paying on any action of Torres so summary judgment is appropriate for Torres on Torres' breach of contract claim for all of the remaining payments, the $210,000 that should have been paid by October 2015. In addition, Torres is also now owed his reasonable and necessary attorneys' fees as a plaintiff in this breach of contract case.

In addition to the fact that nothing Torres did served as a basis of the Atlas Parties' excuse for not paying, the Atlas Parties cannot use the defense of excuse as a matter of law because they kept benefit of the contract – the shares Torres tendered to Atlas. Because the Atlas Parties have unequivocally chosen to treat the contract as continuing, the Atlas Parties cannot be excused from performance as a matter of law. As such, the Atlas Parties' obligation to pay the remaining $210,000 under the Settlement Agreement for the buyback of the ownership units in Atlas is not excused and is immediately due and owing because the Atlas Parties anticipatorily repudiated the Settlement Agreement on December 31, 2013.

Finally, the Atlas Parties have no evidence of any breach by Torres of the Settlement Agreement, much less one that occurred before Taylor decided to stop paying Torres. Marshall as a joint and several obligor has no defense as none of the actions alleged or to which Taylor testified as the basis for ceasing payments was directed at Marshall. Judgment may and should be entered on the claims against Marshall.

In addition, most of the Atlas Parties' other claims are based on alleged actions occurring <u>after</u> Taylor made his decision not to pay the settlement and to repudiate the contract (and items that could not have formed the basis of that decision as they were discovered in this lawsuit) and thus are

legally irrelevant to the Atlas Parties' excuse defense.

Furthermore, as shown herein the evidence conclusively negates at least one element of all other affirmative defenses plead thus summary judgment is appropriate on each and all of the Atlas Parties' affirmative defenses.

In addition, there are no viable counterclaims against Torres or the Sinn Parties. There is no claim under law for spoliation even if the Atlas Parties could meet the elements to show Torres spoliated any evidence. There is no claim for fraud in the inducement because as a matter of law the Atlas Parties cannot prove justifiable reliance as the Settlement Agreement contains a no reliance clause. Further, the alleged fraud – that Torres was turning over the money to Sinn – was a fact that the Atlas Parties knew, and have repeatedly alleged in their thrice amended counterclaims in this case, that he knew Sinn was getting the money from the settlement. The Settlement Agreement itself shows the payment being made to Sinn's lawyer's account, not Torres' lawyer's account. Further, by retaining the shares, the Atlas Parties have ratified the Settlement Agreement.

There is no claim for breach of the contract based on the June 30, 2014 "assignment" because the "assignment" document was executed approximately ten months after the Settlement Agreement (and six months after the Atlas Parties repudiated and stopped paying on the Settlement Agreement), was provided only to Sinn and Torres' attorney, and the effect of which was obviously something that was considered by Torres and Sinn's prior counsel regarding the mechanics of filing this lawsuit a mere 17 days later and included Torres as a party. The evidence shows Sinn and Torres did not discuss the "assignment" or that it was ever accepted by the Sinn Parties. Regardless, under Texas law, if an assignment requires consent and consent is not obtained, the "assignment" becomes a legal nullity and is of no force and effect. Here Torres is a party to the case, no payments were made after the "assignment" and all payments are accounted for. The Atlas Parties as a matter of law have no

damages to support a breach of contract case. There is no claim for breach of warranty under the settlement agreement or a right to indemnification because of the "assignment" for the foregoing reason and the fact that the warranty in the Settlement Agreement applies only to the claims Torres was releasing in the Settlement Agreement and not the claim for breach of the Settlement Agreement that arose four months later when the Atlas Parties suspended payments. Thus, there is no claim for indemnity. Further, the Settlement Agreement specifically states that claims to enforce the Settlement Agreement are not being released by the Settlement Agreement. Finally the Atlas Parties' declaratory judgment claims are merely defensive theories -- such as excused performance -- restated as a declaration and thus summary judgment is appropriate of those claims as well.

Accordingly, summary judgment against Marshall, Taylor and Atlas is appropriate on Torres' claim for breach of contract and each of the Atlas Parties' claims. Torres also seeks his attorneys' fees incurred in this cause and in this Motion.

Finally, no evidence and traditional summary judgment is also appropriate on all counterclaims against Torres and the Sinn Parties. The undisputed facts show conclusively negate the elements of the Atlas Parties' counterclaims. Nonetheless, there is no evidence to support these counterclaims and they should dismissed

II. SUMMARY JUDGMENT EVIDENCE

In support of this Motion, Torres and the Sinn Parties offer the competent summary judgment evidence included in the Appendix hereto, which is incorporated fully herein by reference:

Exhibit A	Affidavit of Eric Torres
A.1	Settlement Agreement dated August 15, 2013 (also Exhibit 13 to Deposition of Craig Taylor)
A.2	Assignment of Interest in Settlement Agreement and Amount (bates labelled SINN000266, also Exhibit 1 to 09/13/2016 Deposition of Eric Torres and Exhibit 5 to 09/02/2016 Deposition of Adam Sinn)
Exhibit B	Craig Taylor and Atlas' Amended Answers and Objections to Plaintiffs Eric Torres, Adam Sinn, XS Capital management, LP, and Aspire Commodities,

	LP's First Set of Interrogatories.
Exhibit C	Email string from Geoff Berg to Chanler Langham, with verifying affidavit (as reflected in Exhibit L and Exhibit U to Defendants' Response to Eric Torres' Motion for Summary Judgment in Cause No. 2014-40964; *Eric Torres et al. v. Craig Taylor and Atlas Commodities, LLC;* in the 157th Judicial District Court of Harris County, Texas)
Exhibit D	Addendum Agreement dated March 6, 2014 produced by the Atlas Parties bates labeled ACL-TAYLOR000074-78 (Also Exhibit 26 to Craig Taylor Deposition)
Exhibit E	Atlas' Responses to Second Interrogatories
Exhibit F	Deposition of Craig Taylor Excerpts and selected exhibits –*Submitted In Camera*
Exhibit G	09/02/2016 Deposition of Adam Sinn Excerpts and selected exhibits *Submitted In Camera*
Exhibit H	09/13/2016 Deposition of Eric Torres Excerpts and selected exhibits
Exhibit I	08/22/2016 Deposition of Evan Caron Excerpts and selected exhibits
Exhibit J	Email from Geoff Berg to Chanler Langham and Melissa Moore dated December 23, 2013 at 9:27 P.M.
Exhibit K	04/21/2015 Deposition of Adam Sinn Excerpts and selected exhibits
Exhibit L	Picture message sent to Chanler Langham from Adam Sinn Bates Labeled Confidential SINN 000224 [also Exhibit 6 to 09/02/2016 Deposition of Adam Sinn].
Exhibit M	03/06/2015 Deposition of Eric Torres Excerpts and selected exhibits

III. UNDISPUTED OF FACTS

The following facts are conclusively established by the record in this case as well as the evidence referenced above. Plaintiffs further request this Court take judicial notice of the Atlas Parties' Third Amended Answer, Affirmative Defenses, and Counterclaim on file in this case, which constitute judicial admissions of certain positions by the Atlas Parties.[1]

The Underlying Suit[2]

On August 15, 2012, Torres filed a lawsuit in the 157th Judicial District Court of Harris County, Texas, Cause No. 2012-46745, against Craig Taylor ("Taylor") and Atlas Commodities, LLC ("Atlas") alleging causes of action for shareholder oppression, violation of the right of

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[1] Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. Any fact admitted is conclusively established in the case without the introduction of the pleadings or presentation of other evidence. *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983).

[2] Many of these facts are supported by the Court's record in that cause of which this Court can take judicial notice.

inspection, breach of contract, breach of fiduciary duty, fraud in the inducement, negligent misrepresentation, intentional misrepresentation, conversion, statutory theft, and declaratory relief. (Exh. A ¶4).

On September 19, 2012, Taylor and Atlas filed a counterclaim against Eric Torres ("Torres") alleging causes of action for fraud, fraudulent inducement, negligent misrepresentation, and conspiracy to commit fraud. (Exh. A ¶5).

On February 25, 2013, Taylor and Atlas filed a third-party petition against the Sinn Parties alleging causes of action for conspiracy to commit fraud and aiding and abetting fraud. (Exh. A ¶6).

On March 7, 2013, the Adam Sinn, Aspire Commodities, LLC, and XS Capital Management filed a third-party counterclaim against Taylor and Atlas alleging causes of action for groundless pleading. (Exh. A ¶7).

The Settlement Agreement

On July 11, 2013, all Parties to the lawsuit attended mediation before Paul D. Clote. (Exh. A ¶8).

On August 15, 2013, without admitting or allocating fault or liability, all Parties to the lawsuit entered an agreement to permanently resolve and settle any and all claims, issues, matters, or disputes that they had or may have had among them (the "Settlement Agreement"). (Exh. A ¶9, Exh. A.1)

Pursuant to the Settlement Agreement, Torres agreed to assign, transfer, and convey all right, title, and interest in Torres' ownership interest in Atlas. (Exh. A ¶10, Exh. A.1 at ¶1). In exchange, the Atlas Parties, jointly and severally, agreed to pay Torres $500,000 in settlement of all claims. The payment was to be made through the account of Susman Godfrey, Sinn's lawyer, not Torres' lawyer, in the underlying case. (Exh. A ¶10, Exh. A.1 at ¶¶3, 20).

In addition under the Settlement Torres, Adam Sinn, Aspire Commodities, LLC and XS Capital Management, Craig Taylor, and Atlas Commodities, LLC also agreed to mutual dismissal of their various claims against each other. (Exh. A ¶10, Exh. A.1 at ¶4).

On August 15, 2013, Atlas paid $250,000 of the $500,000 settlement amount according to the terms of the Settlement Agreement. (Exh. A ¶11).

According to the terms of the Settlement Agreement, the Atlas Parties jointly and severally agreed that "[t]he remainder of the Settlement Amount shall be paid at a rate of Ten Thousand Dollars ($10,000) per month for 25 months beginning 30 days after the Effective Date." (Exh. A ¶12, Exh. A.1).

On August 19, 2013, pursuant to the mutual promises, covenants and releases contained in the Settlement Agreement, the parties filed a joint motion to dismiss with prejudice and reported to this Court that "The Parties have settled" and "move for dismissal of all claims with prejudice." (Exh. A ¶13).

On September 9, 2013, this Court granted the joint motion to dismiss and "Ordered, Adjudged, and Decreed that all claims of each party are dismissed in their entirety with prejudice to all parties' right to re-file any part or aspect of the same, and with each Party to bear his/its own court costs and legal fees." (Exh. A ¶14).

<u>Atlas Parties Cease Payments but Keep Torres' Shares</u>

The Atlas Parties only made four (4) of the required monthly payments of $10,000. The Atlas Parties failed to pay Torres 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). (Exh. A ¶15).

The Atlas Parties made clear on December 31, 2013 and January 7, 2014, through their counsel, that they have anticipatorily repudiated the Settlement Agreement and would no longer

perform under the contract. (Exh. C). Originally, the Atlas Parties' counsel stated that the reason for the repudiation was the receipt by Taylor from Sinn of the now infamous Picture with several people holding up their middle fingers. (Exh. J).[3] All of the testimony in this case (by people at the actual holiday party) was that the Atlas Parties were not discussed at the time of the taking of the Picture nor were they the reason the Picture was taken. (Exh. H 32:8-33:7; Exh. G 77:12-78:10; Exh. K 42:22-43:10; Exh. I 55:11-59:17) Nonetheless, it is clear that the Atlas Parties have not paid and do not intend to pay their past, present, and future obligations under the Settlement Agreement. (Exh. C).

After the parties did not settle at the pre-suit mediation mandated by the Settlement Agreement, Torres and the Sinn Parties began preparations to file suit. In connection therewith counsel for Torres and the Sinn Parties prepared an "Assignment of Interest In Settlement Agreement and Amount" which Torres signed on June 30, 2014 and returned to his counsel ("June 30, 2014 Document"). Sinn did not know of the June 30, 2014 Document, is not a signatory to it, and did not accept it, and ultimately when this case was filed a few days later, Torres was actually made party to the suit and asserted his claims for the remainder of proceeds that the Atlas Parties stopped paying under the Settlement Agreement several months earlier in January 2014. (Exh. A, ¶16; Exh. G 82:4-84:18).[4]

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[3] At his deposition on May 17, 2016, Craig Taylor testified that the excuse for stopping payments under the Settlement Agreement (and thus repudiate the contract) in January 2014 wasn't receiving the Picture itself; it was the emails with Sinn's counsel leading to Taylor to believe that the Picture was sent to people with "Happy Holidays Atlas" as accompanying text. (Exh. F 153:17-163:18). This is significant because this is the only basis Taylor could rely to support his defense of excused performance and this is mere suspicion contradicted by the facts – Sinn has testified he did not send the Picture with a tag line Happy Holiday Atlas to anyone other than his attorney Mr. Langham (Exh. G 79:14-82:3; Exh L). Taylor cannot as a matter of law and fact rely on any "information" discovered after the repudiation in January 2014.

[4] In his first deposition over a year ago in April 2015, Torres testified that he recalled signing an assignment of his right to the money under the Settlement but thought the document was done at the time of the Settlement Agreement. Over a year later in May 2016, the Atlas Parties untimely requested *Sinn* produce the "assignment" Torres was referencing in his deposition. Sinn objected to the untimely discovery but this Court allowed the untimely discovery and ordered responses. Because Sinn had no idea what Torres was testifying about (Exh. K 37:16-38:7) but because the Court ordered a

Despite having unilaterally decided to stop paying their obligations under the Settlement Agreement, the Atlas Parties nonetheless treated the Settlement Agreement as continuing by retaining the consideration paid by the Plaintiffs under the Settlement Agreement, i.e. Eric Torres' ownership units in Atlas. In essence, the Atlas Parties want to treat their half of the contract as repudiated, but Plaintiffs' half as continuing, all the while keeping the ownership units. As will be shown below, the law does not allow this to happen.

IV. MOTION FOR TRADITIONAL SUMMARY JUDGMENT

A. Standard of Review

Summary judgment procedure allows a trial court to dispose of unmeritorious claims or untenable defenses. *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 876 n.5 (Tex. 1979). A motion for summary judgment and its supporting evidence must show that: a) there is no genuine issue as to any material fact; and b) the movant is entitled to judgment as a matter of law. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). A party may move for summary judgment against another party's claims alleged against the movant. Tex. R. Civ. P. 166(a). The movant is entitled to summary judgment if "ordinary minds cannot differ as to the conclusion to be drawn from the evidence." *Zep Mfg. Co. v. Hancock*, 824 S.W.2d 654, 657 (Tex. App.—Dallas 1992, no writ).

B. Traditional Summary Judgment on Torres' Breach of Contract Claim

1. Breach of Contract

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response, the undersigned counsel's office sought the document from Torres. It was at that time they learned that the "assignment" Torres was remembering was not at the time the Settlement, but at the time of this lawsuit was filed and was prepared by prior counsel Mr. Langham and returned solely to Mr. Langham. The document may arguably be work product but given the testimony and the Court's order to respond, the "assignment" was produced in hopes that it would eliminate this red herring. It did not and the Atlas Parties have now morphed their cause of action again to assert that this June 30, 2014 Document was somehow a breach of the Settlement Agreement upon which they could base a counterclaim. As shown below, no such claim exists as a matter of law.

Because there are no undisputed facts concerning the elements of Torres breach of contract claim seeking to force the Atlas Parties to pay the remaining $210,000.00 under the contract, summary judgment must be granted as a matter of law.

To recover on a claim for breach of contract the plaintiff must prove (1) the existence of a contract; (2) performance tendered by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the defendant's breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1977, no writ).

The Atlas Parties do not dispute the existence of a valid, enforceable contract: the Settlement Agreement. In fact, the Atlas Parties seek to enforce the contract themselves in this lawsuit and by retaining the shares obtained under the agreement. (Exh. D; Exh. F 261:1-263:25). The Atlas Parties do not dispute that the total amount due under the Settlement Agreement in exchange for the ownership shares in Atlas is $500,000.00 (Def.'s 3rd Am. Answer, Aff. Defenses, and Counterclaim ¶24; Exh. A ¶¶14-15). The Atlas Parties do not dispute that they have only paid $290,000 of the $500,000 due under the contract. (*See* Def.'s 3rd Am. Answer, Aff. Defenses, and Counterclaim ¶26; Exh. A ¶¶14-15).

The Atlas Parties paid the down payment and four (4) monthly payments, but then refused to pay any more sums beginning with the payment due January 15, 2014, while retaining the consideration provided to them under the agreement. (Exh. A ¶11, 15). Counsel for Marshall, Taylor and Atlas unequivocally advised Torres that they would not make any further payments and would not perform their obligations under the agreement on December 31, 2013 and January 7, 2014. (Exh. C). The Atlas Parties have also refused to make any other payments, and they have in fact made no further payments. (Exh. C). Thus, the Atlas Parties anticipatorily repudiated their obligations under Settlement Agreement, which allows Torres to sue for the entirety of the amount due under the

Settlement Agreement. *See Murray v. Crest Const., Inc.,* 900 S.W.2d 342, 344 (Tex. 1995) ("We have long recognized the rule of anticipatory breach: the repudiation of a contract before the time of performance has arrived amounts to a tender of breach of the entire contact and allows the injured party to immediately pursue an action for damages."); *See also Taylor Pub. Co. v. Sys. Mktg. Inc.*, 686 S.W.2d 213, 217 (Tex. App.-1984, writ ref'd n.r.e.) ("When a party who is obligated to make future payments of money to another absolutely repudiates the obligation *without just excuse*, the obligee is entitled to maintain his action for damages at once for the entire breach, and is entitled in one suit to receive in damages the present value of the future payments payable to him by virtue of the contract.") (emphasis added). Further the undisputed fact is all of the payments under the Settlement Agreement were due by October 2015, which has already passed, and have not been paid.

Plaintiff Torres respectfully requests that the Court enter summary judgment against the Atlas Parties for the damages in the amount of all remaining payments under the Settlement Agreement (i.e. $210,000), plus prejudgment interest, attorneys' fees discussed below, post-judgment interest, and costs.

2. Attorneys' Fees

Pursuant to Tex. Civ. Prac. & Rem. Code §38.001, Plaintiff Torres is entitled to the reasonable and necessary attorney's fees for his suit on a written contract and a suit for debt on a contract. Plaintiff has presented its claims to the Atlas Parties, and the Atlas Parties have refused to pay the claims. Plaintiff has retained the undersigned counsel to prosecute his claims which included overcoming numerous affirmative defenses and the Atlas Parties' counterclaims all of which are merely defensive theories and tied to the affirmative defenses. Given that there are several issues in this matter, and the Atlas Parties have filed their own motion for summary judgment to be heard at the same time as this one, Plaintiffs seek here a judgment that they are entitled to their equitable and

just attorneys' fees and requests that the Court set a hearing or trial on the issue of the amount of such fees at a later time.

C. Traditional Summary Judgment On The Atlas Parties' Affirmative Defenses

1. Summary Judgment on Affirmative Defense of Excuse.

a. The alleged breach by Sinn relied on by Taylor in order to repudiate the contract was not a breach, and can therefore not be a basis for excused performance.

Taylor testified that the excuse for stopping payments was that he believed that Sinn had sent a Picture to his customers stating "Happy Holidays Atlas." (Exh. F 153:17-163:18). His entire basis for that is Mr. Langham's email and his utter refusal to believe anything Plaintiffs say, including Mr. Langham's retraction of that statement. (Exh. F 153:17-163:18).

Taylor did not base his decision to stop paying on anything Torres did. Accordingly, there is no excuse to stop paying Torres and summary judgment must be granted.

Further, the evidence in this case conclusively establishes that Sinn did not send the Picture to customers of Atlas at all, let alone with a text saying "Happy Holidays Atlas." (Exh. G 79:14-82:3) Nor did Torres. (Exh. H: 33:8-15). In fact, the records show that the only person to whom Sinn sent the Picture consecutively with a text saying "Happy Holidays Atlas," is when he sent the picture to his attorney. (Exh. G 79:14-82:3; Exh L). Mr. Sinn added, for his attorney, "Happy Holidays Atlas". *Id.*[5] Regardless, Taylor has testified that he stopped payments because he thought Sinn and his attorney (not Torres) was lying about whether a communication was sent, even though Taylor

[5] In any normal situation such information would not be necessary as the Atlas Parties would come forward at some point with some proof or at least a complaint that a customer of Atlas received the Picture. The Atlas Parties have never even alleged that to have occurred. Thus, unfortunately, the Sinn Parties have been forced to prove a negative – that they did not send the Picture with the tag line to any of Atlas' customers and to try to overcome Taylor's general distrust for anything Sinn says. It is axiomatic that suspicion alone has never been allowed to support a claim in a court of law. *See King Ranch Inc. v. Chapman*, 118 S.W.3d 742, 755 (Tex. 2003) ("While anything more than a scintilla of evidence is legally sufficient to survive a no-evidence summary judgment motion, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence").

finally admitted in his deposition that he has never received a communication from a customer reporting they had received the Picture with or without the tag line "Happy holidays, Atlas." (Exh. F 164:9 – 165:2).

First, Taylor did not say Torres sent anything, nor did they plead as such. Summary judgment is therefore mandated on Torres' claim.

Second, Sinn's sending of the Picture to Taylor in and of itself cannot be "disparaging" as defined by the Settlement Agreement as: "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) The Picture itself, with no text attached, is not a comment, nor can it be construed as derogatory, slanderous or libelous because it does not depict anything other than people giving the middle finger to the camera, and cannot thus be making any "comments about any party." (Exh. A.1; Exh. 16 to Exh. F).

Further, the statement which Taylor believed was made accompanying the Picture ("Happy Holidays Atlas") was not actually sent to anyone other than Sinn's attorney (which ordinarily would be a privileged communication). (Exh.G 79:14-82:3; Exh.L). Atlas and Taylor have admitted that they have received no notification from any clients that they received the Picture and/or a "Happy Holidays, Atlas" text message from Sinn. (Exh. B Nos. 3-4; Ex. F 164:17-165:2). And finally, Taylor testified that it was his <u>belief</u> that the Picture was sent to people or customers of Atlas stating "Happy Holidays Atlas" that caused the Atlas Parties to repudiate the contract. (Exh. F 153:17-163:18). ***Taylor admitted he had no proof customers received such a communication*** (even if it would have been disparaging had it existed). (Exh. B Nos. 3-4; Ex. F 164:17-165:2).[6] There is no breach of the Settlement Agreement by Torres or the Sinn Parties, and Taylor's "excuse" for repudiating the

[6] In fact, Taylor testified he did not even ask the Atlas customers whether they received the Picture or a text from Sinn.

contract due to the Picture cannot stand because Sinn's alleged "breach" is not a breach of the Settlement Agreement.

b. The Atlas Parties have treated the Settlement Agreement as continuing by retaining the benefit of the Settlement Agreement, therefore they have obligated themselves to fully perform as a matter of law.

Regardless of whether there was a communication to Atlas' customers or not, and despite Taylor's admission that no customer identified such a communication, the Atlas Parties' excuse defense fails as a matter of law because the law follows the proverbial rule "you cannot have your cake and to eat it too." The Atlas Parties want to keep the ownership units in Atlas that Torres provided under the Settlement Agreement, yet at the same time, they want their own performance forgiven, and to treat the contract as not continuing with regard to only their obligations to pay. In fact, as shown below, the Atlas Parties signed a corporate agreement in March 2014, <u>after</u> the alleged breach that they claim justified them to stop paying, ratifying the Settlement Agreement and expressly accepting and recognizing that Torres returned his ownership units in Atlas under the Settlement Agreement. In other words, the Atlas Parties divide the contract so Sinn and Torres' obligations remain alive while the Atlas Parties' obligations are terminated. The law simply does not allow parties to take such a position.

"It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *BFI Waste Sys. of N. Am. v. N. Alamo Water Supply Corp.,* 251 S.W.3d 30, 30–31 (Tex.2008) (per curiam) (quoting *Mustang Pipeline Co.,* 134 S.W.3d at 196). However, if, after the breach, the non-breaching party continues to insist on performance by the party in default, "the previous breach constitutes no excuse for nonperformance on the part of the party not in default and the contract

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(Ex. F 164:17-165:2).

continues in force for the benefit of both parties." *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.)); *see also Gupta v. E. Idaho Tumor Inst., Inc.,* 140 S.W.3d 747, 756 (Tex.App.-Houston [14th Dist.] 2004, pet. denied).

If the non-breaching party treats the contract as continuing after the breach, he is deprived of any excuse for terminating his own performance. *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). Seeking to benefit from the contract after the breach operates as a conclusive choice depriving the non-breaching party of an excuse for his own non-performance. *Hanks,* 644 S.W.2d at 708; *Chilton,* 930 S.W.2d at 888; *Cox, Colton, Stoner, Starr & Co., P.C. v. Deloitte, Haskins, & Sells,* 672 S.W.2d 282, 286–87 (Tex.App.-El Paso 1984, no writ). If the non-breaching party elects to treat the contract as continuing after a breach and continues to demand performance, it obligates itself to perform fully. *Henry v. Masson*, 333 S.W.3d 825, 840-41 (Tex. App. 2010) citing *Long Trusts,* 222 S.W.3d at 415–16 (holding that by claiming as damages share of lawsuit recovery, which was benefit of bargain, non-breaching party treated oil and gas operating agreement not as terminated but as continuing and thus "could not cease to share in the expenses and still insist in sharing in the recovery."); *Hanks,* 644 S.W.2d at 708 (holding that by choosing to treat contract for sale of business as continuing after other party's breach of covenant not to compete and by retaining all assets of business and continuing its operation, non-breaching party waived any right it had to partially rescind contract); *Gupta,* 140 S.W.3d at 757–58 (holding that when non-breaching party elected to treat joint venture agreement in full force and effect after

alleged breaches at beginning of agreement and continued to demand performance of opposing party, party's failure to comply with agreement was not excused).

In this case, there is no question that the Atlas Parties have treated the contract as continuing because they have retained Torres' ownership shares (and continue to do so) after the event which they claim excused their performance, and even after the Atlas Parties notified Plaintiffs they were not going to perform further. (Exh. A ¶10 & 15, Exh. C, Exh. D; Exh. F 261:1-263:25; Exh. E). In fact, on March 6, 2014, (months after the purported breach they claim excused performance) 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. (Exh. D; Exh. F 261:1-263:25). Keeping the shares is retention of the benefits to Atlas and Taylor under the Settlement Agreement. Therefore any excuse of performance on the part of the Atlas Parties has been waived as a matter of law. *See Hanks,* 644 S.W.2d at 708; *See also Gupta,* 140 S.W.3d at 757–58. The Texas Supreme Court's ruling in *Hanks v. GAB Business Services* is particularly applicable here:

> A party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part. . . . At all times during the dispute and subsequent litigation, GAB chose to treat the contract as continuing. GAB retained all the assets of the business and continued its operation. Moreover, GAB did not pursue its excuse remedy until it had already instituted action to enforce the contract, well over a year after Hanks' breach of the covenant not to compete.
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> * * *
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> In holding that GAB had not elected its remedy prior to judgment, the court of appeals relied on this Court's decision in *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848 (Tex. 1980). The court reasoned that neither GAB's filing of the lawsuit nor its retention of the business operated as a "conclusive choice" that would create a "manifest injustice" within the meaning of the *Bocanegra* test. Similarly, the court held that GAB's actions did not waive its excuse remedy, reasoning that GAB's actions were only consistent with the closing of the contract and did not constitute

> "intentional inconsistent conduct." We disagree. At the time of Hanks' breach, GAB could have elected to partially rescind the contract. Because GAB retained the assets of the business and chose to treat the contract as continuing, it could not elect the excuse remedy prior to judgment.

Hanks, 644 S.W.2d at 708. Accordingly, summary judgment is appropriate.[7]

2. *Summary Judgment on Affirmative Defenses of Laches, Estoppel, and Waiver*

The Atlas Parties have asserted the affirmative defenses of laches, estoppel, and waiver "to the extent that Plaintiffs seeks equitable relief." (Def.'s 3rd Am. Answer, Aff. Defenses, and Counterclaim ¶3(b)). However, as is clear in Plaintiffs' petition, Plaintiffs do not seek equitable relief of any kind, and as such, these defenses are inapplicable to the suit at hand based on the condition that these defenses have been asserted against equitable relief that is simply not sought by the Plaintiff. In essence, by their own terms, these defenses are inapplicable to this suit and must be dismissed on summary judgment.

a. Laches

Again, the evidence conclusively establishes that on December 31, 2013, the Atlas Parties unequivocally repudiated the Settlement Agreement by stating that they would no longer make any payments pursuant to the Settlement Agreement. (Exh. C pg. 4-5). On July 17, 2014, Torres filed suit for breach of contract. (*Plfs.' Orig. Petition*). Thus, within six months of the breach, Torres brought a claim to enforce the Settlement Agreement. Torres has not slept on his rights.

b. Estoppel

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[7] Comparatively, Torres has not treated the contract as continuing. The only action by Torres in response to the Atlas Parties' anticipatory repudiation of the Settlement Agreement being to bring this suit for damages. "No notice need be given by plaintiff that he treats defendant's repudiation as a breach.... Nothing more is necessary than bringing the action, and this should be allowed at any time before the repudiation is withdrawn." *Cont'l Cas. Co. v. Boerger*, 389 S.W.2d 566, 569 (Tex. Civ. App.—Waco 1965, *writ dismissed*). "That the damages alleged by plaintiff are related directly to what the contract would have provided is not, as appellant argues, inconsistent with the latter course.... His measure of damages is 'the present value at the time of trial of all that he would have received if the contract had been performed." *Id.* at 569-570. This is precisely what Torres did, filed suit shortly after the repudiation for the amount of the liquidated damages due to him under the Settlement Agreement equivalent to the value he would have received if the contract had been fully

The Atlas Parties do not explain the basis of their "estoppel" defense. However, all estoppel theories require the Atlas Parties to show that Torres is taking a position contrary to a prior position or making a representation contrary to a prior representation relied on by the Atlas Parties. *See Concord Oil Co. v. Alco Oil & Gas Corp.*, 387 S.W.2d 635, 639 (Tex. 1965) ("An essential element of estoppel is that the party relying on an estoppel must have acted on it to his prejudice" and "'In order for an estoppel to exist, it devolves upon the party seeking the advantage thereof to establish that he has been misled to his injury.").

It is hard to fathom such a defense even being arguably applicable under these facts. Indeed there is no allegation Torres ever represented anything other than the statements made in the Settlement Agreement. And, as set forth below, there is both a merger clause and a clause specifically negating reliance on any other statement by Torres. Further, since Torres' breach of contract claim arose after the Settlement, and indeed after the Atlas Parties stopped paying on that settlement, for estoppel to provide a defense, the Atlas Parties would have to show a statement or position taken by Torres that is contrary to one made or taken previously. None exists. Torres prosecuted his claims for breach of contract within a few months of the breach. Summary judgment is appropriate on this defense.

c. Waiver

The evidence conclusively establishes that on December 31, 2013, the Atlas Parties unequivocally repudiated the Settlement Agreement by stating that they would no longer make any payments pursuant to the Settlement Agreement. (Exh. C pg. 4-5). On July 17, 2014, Torres filed suit for breach of contract. (*Plfs.' Orig. Petition*). Thus, within six months of the breach, Torres brought a claim to enforce the Settlement Agreement. There has been no waiver of Torres' rights to enforce the

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performed.

Settlement Agreement.

3. *Summary Judgment on Affirmative Defenses of Unclean Hands*

Under the doctrine of unclean hands, a court may refuse to grant equitable relief to a plaintiff who has been guilty of unlawful or inequitable conduct regarding the issue in dispute. *Lazy M Ranch, Ltd. v. TXI Operations, LP*, 978 S.W.2d 678, 683 (Tex. App.—Austin 1998, pet. denied). The "clean hands" maxim is strictly an equitable doctrine not applicable outside equitable proceedings. *Furr v. Hall,* 553 S.W.2d 666, 672 (Tex. Civ. App. 1977), *writ refused NRE* (Dec. 21, 1977) citing *Greever v. Persky*, 156 S.W.2d 566, 569 (Tex.Civ.App. Fort Worth 1941), aff'd 140 Tex. 64, 165 S.W.2d 709 (1942). Because Plaintiff does not seek equitable relief of any kind in this proceeding, the doctrine of unclean hands is wholly inapplicable and must be dismissed on summary judgment

4. Summary Judgment on Affirmative Defenses of Failure to mitigate

The burden of proving a failure to mitigate is upon the party who caused the loss and the standard is that of ordinary care, i.e., what an ordinary prudent person would have done under the same or similar circumstances. *Moulton v. Alamo Ambulance Service,* 414 S.W.2d 444, 447 (Tex.1967). "A defendant cannot get a mitigation instruction merely by asserting that a plaintiff failed to mitigate damages. Evidence must be developed which clearly shows a plaintiff's failure to mitigate caused further damages, and the evidence must be sufficient to guide the jury in determining which damages were attributable to a plaintiff's failure to mitigate." *Hygeia Dairy Co. v. Gonzalez,* 994 S.W.2d 220, 225 (Tex. App. 1999). There must be some evidence in the record from which the jury can make a reasoned calculation about losses from failure to mitigate. *Id.* This language is usually deployed to discard specious or near-specious assertions of a duty to mitigate. *Id.*

In this action, Plaintiffs simply bring suit on a settlement agreement in which a particular

price is set for the purchase of Torres' ownership interest in Atlas. Torres' damage claim in this breach of contract action against the Atlas Parties is for liquidated damages in the amount of the remaining outstanding balance owed to him for the ownership interest that Marshall, Atlas, and Taylor (each of whom are jointly and severally liable for the payment for that ownership interest) have retained but ceased paying for. There is simply nothing that could have been done to mitigate this amount. The evidence conclusively shows that within six months of the breach, Plaintiff filed suit for his liquidated damages, and caused no unnecessary delay. As such, the Atlas Parties' affirmative defense of failure to mitigate must be dismissed on summary judgment.

D. Traditional Summary Judgment on Defendants/Counter-Plaintiffs' Counterclaims

1. Traditional Summary Judgment of Defendants' Breach of Contract Claims

The Atlas Parties have brought breaches of contract claims on apparently two different theories: (a) violation of the non-disparagement clause of the Settlement Agreement, and (b) violation of the warranty/non-assignment provisions of the Settlement Agreement.

In their desperate search for some *ex post facto* justification for failing to pay Torres under the Settlement, the Atlas Parties initially counterclaimed to assert that Adam Sinn sent the infamous Picture to Taylor and disparaged him. Then they claimed Sinn sent the Picture to Atlas' customers but never came forward with any proof that actually occurred after Sinn denied it (this is the iteration that Taylor testified gave him excuse to repudiate the Agreement). Then the Atlas Parties' claim morphed again, when they took the deposition of Torres and Torres testified he thought he had assigned his claims to Sinn but could not remember the exact timeframe (Exh. M 28:22-30:3). The Atlas Parties then seized on this vague testimony to assert that (a) Torres and Sinn had committed fraud in the inducement because the Atlas Parties never would have signed the Settlement if they knew the money was going to Sinn; and (b) that the vaguely recalled assignment violated Torres'

warranty that he had not assigned any claims released under the settlement as well as the no assignment clause of Settlement.

A year later in response to an untimely document request to Sinn by Defendants to produce the purported assignment. Sinn had truthfully testified he was unaware of any assignment. (Exh. K 37:16-38:7). Because the Court's order compelling Sinn to respond to the untimely discovery, the undersigned counsel for Sinn and Torres went to Torres to obtain the assignment Torres remembered. Torres located the June 30, 2014 "assignment" he provided to his and Sinn's counsel Chanler Langham on June 30, 2014, just prior to this lawsuit being filed (Exhibit A.2 - the "June 30, 2014 Document"). This June 30, 2014 Document is the "assignment" Torres had vaguely testified about in his first deposition. (Exh. A ¶16, Exh. M 28:22-30:3; Exh. H 22:25-20). Concurrently with the assignment theory, Defendants have asserted that a few text messages between Sinn and his friends violated the non-disparagement clause of the Agreement.

a. The ineffective Assignment is not a breach as a matter of law.

The Parties do not dispute that there is an anti-assignment clause in the Settlement Agreement that reads as follows: "No Party may assign any of its rights or delegate any of its duties hereunder without the written consent of the other Parties." (Exh. A.1 ¶27). However, 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.")[8] Thus, as a matter of law, even if it were effective, the Assignment is void and of no force and effect.[9] The Assignment is simply treated as if it does not exist, and is not a legally recognizable breach.[10] However, even if it was not treated as null and void as a matter of law, as shown below, the Assignment still would not violate the Warranty by Torres in the Settlement Agreement because it does not assign any claims that were released by the warranty provision.

Further, the Sinn Parties did not sign the June 30, 2014 Document, did not know of it, and did not accept it. (Exh.82:4-85:8). An assignee "[can] not be bound by the contract of assignment without his assent." *Mitchell v. Scott*, 14 S.W.2d 916, 918 (Tex. Civ. App. 1928).

Regardless, as a matter of law, the Atlas Parties cannot prove the element of damages for a breach of contract under their "assignment" theory. The Atlas Parties admit that they have not received any other claims for settlement funds previously paid to Torres under the Settlement Agreement, nor for claims that were released by the Settlement Agreement. (Exh. F 137:13-138:12). Further, all of the Atlas Parties' payments under the Settlement Agreement occurred before the June 30, 2014 Document was signed. Accordingly, as a matter of law there could be no damages.

In addition, this June 30, 2014 Document occurred ***more than six months after the Atlas***

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[8] Torres and the Sinn Parties acknowledge that in *Reuben H. Donnelley Corporation v. McKinnon,* 688 S.W.2d 612 (Tex.App.-Corpus Christi 1985, writ ref'd n.r.e.), the court relied on RESTATEMENT OF CONTRACTS § 322(2) (2d ed. 1981) in holding that the anti-assignment clause did not render the assignment ineffective. Section 322(2) 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 *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, the legal issue is really legally irrelevant as there are no damages resulting from the alleged June 30, 2014 Document.

[9] The Atlas Parties apparently agree with this proposition as in their Third Amended Counterclaim they now seek to declare this claimed "assignment is null and void." (Def. 3rd Am. Answer ¶54(iv)).

[10] This argument also applies to Defendants' claim for a Declaratory Judgment (iii) which requests a declaration that "Sinn, Torres, and Aspire violated the non-assignment provision of the Agreement."

Parties repudiated and refused to pay sums due under the Settlement. Such a material breach prevents the Atlas Parties from complaining about a June 30, 2014 Document that would never have been necessary if they had not repudiated, causing Plaintiffs to institute litigation to enforce the Settlement Agreement in the first place. As such, any breach of contract claim based on an alleged breach of the non-assignment clause of the Settlement Agreement must fail as a matter of law.

b. There is no breach of the Warranty by Torres as a matter of law.

A simple review of the Warranty of non-assignment provision at issue shows that there has been no breach of this provision. The Warranty provision Atlas and Taylor say Torres breached reads as follows:

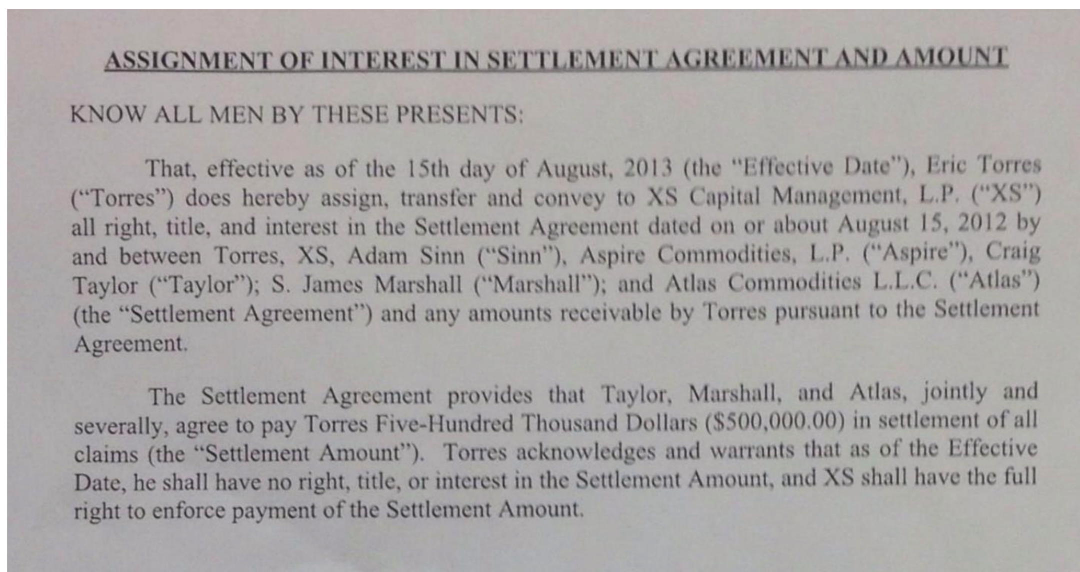
> 11. **Warranty by Torres.** Torres hereby represents and warrants that he has not assigned or otherwise transferred to any other person or entity any interest in any claims, actions, demands and/or causes of action he has, or may have, or may claim to have in connection with the matters released hereby 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).

This warranty clearly states that Torres warrants that he has n**ot assigned any interest in any claims… in connection with the matters released hereby…**” the Atlas Parties' only assertion that Torres has violated this provision is that he has “assigned” or directed the payments under the Settlement Agreement to Adam Sinn. However, the *payment of the funds under the Settlement Agreement are not in connection with the matters that were released by the Settlement Agreement*. In fact, the payment under the Settlement Agreement could not possibly be connected with the matters

released by the Settlement Agreement, or else the ability to enforce the payments under the Agreement would have been released by the very instrument causing the obligation to pay. This argument is foreclosed when in the Agreement each paragraph where a party gives a release and explicitly ends with "Notwithstanding anything contained in the foregoing release, the [Party] do not release any of the [Party] from any claim related to their rights under this Agreement of for any claims that arise after the Closing Date." (Exh. A.1 ¶6, 9, 14). This warranty deals only with the claims being released by the Settlement Agreement, not with the right to enforce the Settlement Agreement.

The language of the June 30, 2014 Document is important here because it clearly does not assign any claims that were released by the Settlement Agreement, which is the sole subject matter of the warranty:



ASSIGNMENT OF INTEREST IN SETTLEMENT AGREEMENT AND AMOUNT

KNOW ALL MEN BY THESE PRESENTS:

That, effective as of the 15th day of August, 2013 (the "Effective Date"), 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 dated on or about August 15, 2012 by and between Torres, XS, Adam Sinn ("Sinn"), Aspire Commodities, L.P. ("Aspire"), Craig Taylor ("Taylor"); S. James Marshall ("Marshall"); and Atlas Commodities L.L.C. ("Atlas") (the "Settlement Agreement") and any amounts receivable by Torres pursuant to the Settlement Agreement.

The Settlement Agreement provides that Taylor, Marshall, and Atlas, jointly and severally, agree to pay Torres Five-Hundred Thousand Dollars ($500,000.00) in settlement of all claims (the "Settlement Amount"). Torres acknowledges and warrants that as of the Effective Date, he shall have no right, title, or interest in the Settlement Amount, and XS shall have the full right to enforce payment of the Settlement Amount.

(Exh. A.2) The language shows an assignment of the right to receive the funds owed under the Settlement Agreement, ***it does not assign any claims being released by the Settlement Agreement***, which is the only subject matter of the Warranty provision. Torres did not, and has not assigned any of the claims he released under the Settlement Agreement; and the "Assignment" Defendants point to

as the "smoking gun" does not assign any claims released by the Settlement Agreement. (Exh. H 26:-30:11; Exh. A.2). Further still, the evidence conclusively establishes that neither Torres, nor Sinn assigned any of the claims that were released by the Settlement Agreement neither at that time, nor any time after the Settlement Agreement. Taylor admits there are no lawsuits by third persons or by any party to this litigation bringing causes of action against Taylor, Atlas, or Marshall on the basis of claims released by the Settlement Agreement. (Exh. F 137:13-138:12).

It is also important that the Sinn Parties did not sign the June 30, 2014 Document, did not know of it, and did not accept it. (Exh.82:4-85:8). An assignee "[can] not be bound by the contract of assignment without his assent." *Mitchell v. Scott*, 14 S.W.2d 916, 918 (Tex. Civ. App. 1928)

In addition, the proximity to the filing of this lawsuit on July 17, 2014, mere days after the June 30, 2014 Document was signed, is also important, as it shows that this document was created and executed as a "just in case" document in anticipation of litigation. However, that Torres is in fact a Plaintiff in this litigation shows that neither Torres nor the Sinn Parties took the June 30, 2014 Document to be an effective assignment.

c. There is no breach of the Settlement Agreement if Torres agrees to pay Sinn the funds Torres is owed under the Settlement Agreement.

Finally, to the extent that the Atlas Parties assert that Torres paid or agreed that proceeds from the Settlement Agreement would ultimately go to Sinn, there is no prohibition in the Settlement Agreement as to what use Torres makes of the settlement proceeds. Indeed, the Atlas Parties have consistently asserted in their pleadings since the beginning of this case, including their recent filing on September 16, 2016, that

> 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.

(Defs.' 3rd Am. Answer, Aff. Defenses and Counterclaim). Accordingly, the Atlas Parties' claim Torres agreed to pay Sinn money he was to receive under the Settlement Agreement is not only not prohibited, it is exactly what the Atlas Parties wanted to happen. As such, this claim must fail as a matter of law.

2. There is no disparagement under the Agreement as a matter of law.

i. <u>The Picture itself is not disparaging</u>

Sinn's sending of the Picture to Taylor in and of itself cannot be "disparaging" as defined by the Settlement Agreement as: "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) The Picture itself is not a comment, nor can it be construed as derogatory, slanderous or libelous because it does not depict anything other than people giving the middle finger to the camera, and cannot thus be making any "comments about any party." (Exh. A.1; Exh. 16 to Exh. F). Further, every person deposed in this matter that was present during the taking of the photo has testified that the photo was not taken for the purpose of sending any type of message to Craig Taylor, nor were any of the Atlas Parties a subject of discussion surrounding the Picture. (Exh. H 32:8-33:7; Exh. G 77:12-78:10; Exh. K 42:22-43:10; Exh. I 55:11-59:17).

ii. <u>The Picture was never sent to customers of Atlas</u>

The evidence in this case conclusively establishes that the only person to whom Sinn sent the Picture consecutively with a text saying "Happy Holidays Atlas," is when he sent the picture to his attorney. (Exh.G 79:14-82:3; Exh. L/Exh. 6 to Exh. G). Torres did not send the photo to anyone, and there is no allegation that he did so. (Exh. H: 33:8-15). Further, the Atlas Parties admit that there have been no customers that have advised them of receiving the photo from Sinn with or without the tagline "Happy Holidays Atlas", (Exh. F 164:9 – 165:2; Exh. B Nos. 3-4) and the Atlas Parties have

not even asked their clients if any of the customers ever received the Picture, or such a text, or any other communications of such a nature. (Exh. F 164:9 – 165:2). The only indication that there has ever been in this case to make Taylor "believe" that the Picture was sent to Atlas customers with or without the tagline was the mistaken e-mail by Sinn's counsel to Taylor's counsel, which Sinn's counsel immediately retracted and explained was a mistake and a misunderstanding by him. (Exh. F 153:17-163:18; Exh. C). Sinn simply did not send the Picture to any customers of Atlas, let alone with the tagline "Happy Holidays Atlas," and he has consistently testified as such. (Exh. K 63:18-24; Exh. G 81:14-82:3). As such, this claim must be dismissed as a matter of law.

iii. None of Sinn's text messages to his friends are disparaging or solicit disparaging comments from third parties in violation of the Settlement Agreement.

The Atlas Parties maintain that certain name-calling that they have discovered in a few text messages between Sinn and his friends after the Atlas Parties repudiated the Settlement Agreement, and after the institution of this litigation to enforce the Settlement Agreement, are "disparagement" under the Settlement Agreement and appear to bring a breach of contract claim based on these texts, ***though they have yet to identify in particular which texts or phrases they claim are the actual breaches***. Included in what the Atlas Parties maintain are violations of the non-disparagement clause of the Settlement Agreement is a series of instant messages between Sinn and Torres reacting to Taylor's repudiating the Settlement Agreement in response to receiving the Picture from Sinn. "Disparaging" is defined by the Settlement Agreement as: "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). None of Sinn or Torres statements meet this definition.

First of all, any comments between Sinn and Torres, who are both signatories to the

Settlement Agreement are not "disparaging" under this agreement, as discussion between the two cannot possibly be "likely to be harmful to [Atlas, Taylor or Marshall's] business, business reputation or personal reputation" because Torres and Sinn's opinions were already set and cannot be swayed to the negative by each others' comments. Further, Torres never said (nor is there even an allegation he did) anything that would qualify as "disparagement" under the Settlement Agreement about Craig Taylor, Atlas Commodities, LLC, or S. James Marshall and nothing Sinn said or could say could harm the Atlas Parties reputations in Torres' mind. (Exh. A ¶17).

Second, the only evidence from a third party about Sinn and Torres' statements comes from Evan Caron, who has 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. (Exh. I 101:15-104:4). As such, nothing said to Evan Caron by Adam Sinn can be "disparaging" under the Settlement Agreement.

Third, the evidence shows that Sinn unequivocally testified that he did not disparage Taylor or Atlas. (Exh. K 63:1-16).

Further still, as a matter of law such terms as the Atlas Parties complain about such as "cock blast" or "a fuck" are not disparagement under the definition in the Settlement which is similar to common law defamation or business disparagement. How case law treats the concept of "disparagement" should guide the interpretation of "disparagement" under this Settlement Agreement. 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….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).

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). Similarly here, there is evidence that both sides called each other names to their friends and to allow such name calling to form the basis of a violation of a non-disparagement clause would open this Court up to a landslide of unnecessary litigation.

3. Traditional Summary Judgment on Fraud In the Inducement Claim

The Atlas Parties have asserted that Torres and the Sinn Parties represented and warranted that they had not assigned any of their rights under the Settlement Agreement, that this was material to their decision to pay the $290,000 under the Agreement, that the representation was somehow false and that the Atlas Parties were harmed because they never would have paid the $290,000 thinking it would go to Torres instead of Sinn under the "undisclosed assignment."

This claim is a farce and is contrived. There was no representation and warranty concerning assignment of the rights under the Settlement Agreement. As shown above, the Warranty provisions of the Agreement deal only with assignment of the claims being released by the Settlement Agreement, and the Settlement Agreement itself specifically states that the rights to enforce the Settlement Agreement are not being released by the Parties. (Exh. A.1 ¶9, 11, 14, 15). In fact the Settlement Agreement had all the payments going to Susman Godfrey, Sinn's lawyer, not through Torres' lawyer. (Exh. A.1 ¶3). Further in each of their Counterclaims filed in this case, the Atlas Parties have themselves alleged that Sinn actually got the money as was the intent and plan:

> 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.

(Defs.' 3rd Am. Answer, Aff. Defenses and Counterclaim). Moreover, the evidence shows that the only "assignment" that was signed was signed June 30, 2014, several months after the Settlement Agreement, months after the Atlas Parties stopped paying on that settlement, and a few days before this suit was filed. More importantly the June 30, 2014 Document was executed after the Atlas Parties made the $290,000 in payments they claimed they would not have made if they had known of the assignment.

Even assuming there was a representation that no assignment had occurred, and that such a representation was false (even though it is not the case at all), in order to prove their claims for fraudulent inducement, the Atlas Parties must prove that they actually and justifiably relied on the misrepresentation and thereby suffered injury. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001).

The Settlement Agreement states unequivocally:

> 28. **No Reliance on Undocumented Promises of Any Kind.** The Parties represent and declare that, in executing this Agreement and the Redemption Agreements, they are relying solely on their own judgment, belief and knowledge, and on the advice and recommendations of their own independently selected counsel, concerning the nature, extent, and duration of their rights and obligations in this Agreement. The Parties acknowledge that no Party or any of its representatives has made any promise, representation, or warranty whatsoever, written or oral, as any inducement to enter into this Agreement except as expressly set forth in this Agreement. Therefore, in entering into this Agreement, the Parties represent and warrant that they have not relied on or been influenced to any extent by any statements, promises, consideration, representations, or inducements of any kind made by any of the Parties, or by any person representing them, which are not fully set forth in this Agreement.

(Exhibit A.1).

The Texas Supreme Court reviewed an almost identical clause in a settlement in *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179–80 (Tex. 1997). The Supreme Court concluded as a matter of law on a similar record that the fraudulent inducement claim was barred.[11] *See also Cmty. Mgmt., LLC v. Cutten Dev., L.P.*, No. 14-14-00854-CV, 2016 WL 3554704, at *11 (Tex. App. June 28, 2016). The Supreme Court has provided for an analysis of whether the provision will negate a fraud in the inducement claim. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011). The first inquiry is whether this is "a clear and

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[11] Moreover, like *Schlumberger,* the Agreement included a merger clause in Section 25. (Exhibit A.1) The language of that clause further negates, any reliance under the circumstances presented by this case. *See Springs Window Fashions Div., Inc. v. Blind Maker, Inc.,* 184 S.W.3d 840 (Tex.App.-Austin 2006) (review granted but remanded by agreement); *Playboy Enterprises, Inc. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250 (Tex.App.-Corpus Christi May 25, 2006, pet. filed); *Yzaguirre v. KCS Res., Inc.,* 47 S.W.3d 532, 542-43 (Tex.App.-Dallas 2000), *aff'd,* 53 S.W.3d 368 (Tex.2001) (finding merger clause in settlement agreement containing "entire agreement" provision and statement that "[n]o oral understandings, statements, promises or inducements contrary to this Settlement Agreement exist" characterized as "disclaimer" and applying *Schlumberger* to preclude fraudulent-inducement claim).

unequivocal disclaimer-of-reliance clause." *Id.*at 336.

> If the contract contains a clear and unequivocal disclaimer of reliance clause, we then look to the circumstances surrounding the contract's formation to determine whether the provision is binding on the parties. *Id.* at 337 n.8 (citing *Schlnmberger,* 959 S.W.2d at 179). The analysis includes whether (1) the terms of the contract were negotiated, rather than boilerplate; (2) during negotiations, the parties specifically discussed the issue that became the topic of the subsequent dispute; (3) the complaining party was represented by counsel; (4) the parties dealt with each other in an arm's length transaction; and (5) the parties were knowledgeable in business matters. *Id.* (citing *Forest Oil,* 268 S.W.3d at 60). This analysis is necessary because a mere disclaimer, standing alone, will not forgive intentional lies regardless of context. *Forest Oil,* 268 S.W.3d at 61 (refusing to adopt a per se rule that a disclaimer automatically precludes a fraudulent inducement claim).

Cmty. Mgmt., LLC v. Cutten Dev., L.P., No. 14-14-00854-CV, 2016 WL 3554704, at *5 (Tex. App. June 28, 2016).

Even under the *Italian Cowboy* factors, however, the Atlas Parties cannot prove justifiable reliance in this case because (1) the Agreement covers where the payments are going, what representations were made concerning the claims being released and the parties' agreement on no assignments without consent; (2) this was a settlement of a contentions dispute concerning allegations of fraud by the Atlas Parties; (3) the Atlas Parties were represented by counsel (indeed, Mr. Taylor is a lawyer); and (4) the Atlas Parties negotiated settlement at arm's length (in fact not only at arms-length, but at a prior mediation). (Exh. A ¶4-12; Exh. A.1).

Further, reliance on representations made in a business or commercial transaction is generally not justified when the representation takes place in an adversarial context. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999). For example, a party to a contract is not justified in relying on oral representations that precede execution of a written contract that expressly contradicts those representations. *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] 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."); *Fisher Controls Int'l v. Gibbons*, 911 S.W.2d 135, 141–42 (Tex. App.—Houston [1st Dist.] 1995, no writ). Stated another way, a party does not justifiably rely on a prior representation when the contract would disclose that the representation was not correct. Here the Settlement Agreement itself states that the money is being paid to Sinn's attorney, not Torres' attorney. (Exh. A.1 ¶3). The warranties are specific in warranting claims being released are not assigned. Accordingly, the contract itself negates the Atlas Parties' argument that they wanted to prohibit Sinn from receiving any of the money paid Torres under the agreement.

Even assuming that the Atlas Parties' allegations regarding fraudulent misrepresentations or omission are true (which they are not), Torres and the Sinn Parties are still entitled to summary judgment on those claims because the Atlas Parties ratified any alleged fraud. Ratification occurs when a person induced by fraud to enter into an agreement continues to accept benefits under that agreement after he becomes aware of the fraud, or if he conducts himself so as to recognize the agreement as binding. *Johnson v. Smith*, 697 S.W.2d 625, 630 (Tex. App.—Houston [14th Dist.] 1985, no writ). Despite the alleged fraud, the Atlas Parties continued to accept benefits under the Settlement after they became aware of the alleged fraud – i.e. they retained the shares and the profits of the company attributed thereto, and even executed corporate documents affirming that Torres was removed in all respects and that his shares were returned to the company per the Settlement Agreement after they had repudiated the Agreement themselves. *See Johnson v. Smith*, 697 S.W.2d at 630.

It is well settled that "if a party who has been induced by fraud to enter into a voidable agreement engages in conduct which recognizes the agreement as subsisting and binding after the party has become aware of the fraud, the party thereby ratifies the agreement and waives any right to assert the fraud as basis to avoid the agreement. *See Rosenbaum v. Texas Bldg. & Mortg. Co.,* 167 S.W.2d 506, 508, 140 Tex. 325 (1943); *see also Harris v. Archer*, 134 S.W.3d 411, 427 (Tex. App.—Amarillo 2004, pet. denied). An express ratification is not necessary; any act based upon a recognition of the agreement as subsisting or conduct inconsistent with an intention to avoid it has the effect of waiving the right of rescission. *Id.*

Accordingly, assuming the Atlas Parties could prove their fraud in the inducement claim, which they cannot, Torres and the Sinn Parties are still entitled to summary judgment on those claims because the Atlas Parties ratified the alleged fraud.[12]

4. Traditional Summary Judgment on Demand for Indemnity

The Atlas Parties have asserted a claim for indemnity under the Settlement Agreement which is based on the warranty Torres executed stating that he has not assigned any of the claims he was releasing. The Atlas Parties have mischaracterized the warranties of the Settlement Agreement to be warranties that the rights under the Settlement Agreement have not been assigned, which is simply incorrect. The warranties only warrant that there has been no assignment of any claims, actions, demands and/or causes of action he has, or may have, or may claim, to have in connection with the matters being released by the Settlement Agreement. (Exh. A.1 ¶¶8, 11, 15). Again, the Settlement

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[12] The Atlas Parties tellingly *do not* seek rescission of the contract. This is because the Atlas Parties seek to continue to enforce this contract by retaining the ownership units re-purchased under the contract. Instead, the Atlas Parties absurdly seek to keep the ownership units for free. Clearly, by not seeking to avoid the contract (but only seeking to avoid their own obligations under it) and by keeping the consideration exchanged by the Plaintiffs (Torres' ownership units) under the contract, the Atlas Parties have unequivocally ratified the contract, and may not seek to avoid it, nor avoid only its own obligations thereunder. Once a party ratifies an agreement, that party may not later withdraw the ratification and seek to avoid the contract. *Id.,* citing *Missouri Pac. R. Co. v. Lely Dev. Corp.,* 86 S.W.3d 787, 792 (Tex.App.-Austin 2002, pet. dism'd).

Agreement says in no uncertain terms in the releases both by Torres and the Sinn parties that "Notwithstanding anything contained in the foregoing release, Torres/Sinn Releasors ***do not release any of the Atlas Releasors from any claim related to their rights under this Agreement.*** (Exh. A.1 ¶9, 14).The warranty by Torres only agrees to indemnify for damages incurred as a result of any and all claims being asserted against the released parties (Taylor, Atlas, Marshall) being brought by virtue of an assignment assigning "any claims, actions, demands, and/or causes of action…in connection with the matters released hereby." Taylor admits there are no lawsuits by third persons or by any party to this litigation bringing causes of action against Taylor, Atlas, or Marshall on the basis of claims released by the Settlement Agreement. (Exh. F 137:13-138:12). Just as the breach of warranty claim must be denied, this derivative indemnity claim must be dismissed as a matter of law.

5. Traditional Summary Judgment on Spoliation "Claim"

The Atlas Parties have asserted a claim for "spoliation." 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). Accordingly, summary judgment must be granted on this claim.

Moreover the Atlas Parties' "claim" that Torres spoliated evidence because he turned in his iPhone and got a new one in October 2014, would not amount to spoliation anyway. "[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 was Torres under a duty to preserve it. Similar to their unsupported assertions that Sinn sent texts to Atlas's customers or employees, the Atlas 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.[13] However, there is absolutely no evidence such communications existed – the Atlas Parties presume they do, but without any basis whatsoever. Interestingly, Torres was asked (in the testimony quoted by the Atlas 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 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.[14] This is the only communication that there is evidence of, but was destroyed. However, the Atlas Parties already have that communication. Further still, Torres testified that before turning in the iPhone, he had checked it more than once for relevant and responsive documents, texts, etc., but that there were none on the iPhone when he turned it in. (Exh. H 30:12-32:3).

Further the testimony quoted by the Atlas Parties shows that the communications, assuming they ever existed or were not deleted well before this litigation, were not destroyed at all. Torres

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[13] 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.

[14] Torres actually testified that he does not keep text messages very long and deletes them on a regular basis. (Exh. M 56:13-57:3) Again, the Taylor Parties have failed to carry their burden that Torres deliberately destroyed evidence when he was under duty to preserve it.

testified that the iPhone synced to his iCloud. (Exh. M 57:12-18). Accordingly, not only have the Atlas 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 Atlas 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 as a basis for their repudiation. Accordingly, Torres is not accused of any actual wrongdoing. In fact, until the assignment argument that arose many months after this case was on file, the Atlas Parties had not alleged Torres had breached the Settlement. The Atlas 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 Atlas Parties.

In a case even more compelling on all points than this one the court of appeals rejected 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 Atlas 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 Atlas Parties have repeatedly asked this Court to allow them to take discovery of third parties, well after the discovery deadline, because they needed the discovery because Torres "destroyed" his iPhone. The Court granted the Atlas Parties' discovery requests thereby remedying any alleged spoliation. Given their opportunity by this Court, Defendants took only one deposition of a third party, and cancelled another scheduled deposition of a third party at the last moment shortly following the deposition of the first. Regardless, the Court has provided the Atlas Parties the remedy they requested.

6. Traditional Summary Judgment on Defendants' Declaratory Judgment Action

On the day this Motion was filed, the Atlas Parties morphed again their claim seek a declaratory judgment. (Defs.' 3rd Am. Answer, Aff. Defenses and Counterclaim ¶54). However, even as revised, the declarations sought are merely attempts to challenge elements of Torres' claim, establish a defense to that claim, or mirror an element of one of the Atlas Parties' counterclaim. "The Declaratory Judgment Act is not available, however, to settle disputes already pending before a court." *Warrantech Corp. v. Steadfast Ins. Co.*, 210 S.W.3d 760, 770 (Tex. App.-Ft. Worth 2006, pet. denied). "A party bringing a counterclaim under the Declaratory Judgment Act may recover its attorney's fees 'if its counterclaim is more than a mere denial of the plaintiff's cause of action.'" *Id.* Each of these requested declarations are merely duplicative of elements of their claims or affirmative defenses for the purposes of attempting to obtain attorney's fees. The declaratory judgment claim must do more that merely duplicate the issues litigated. *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624 (Tex. 2011). Simply repleading a claim as one for a declaratory judgment cannot serve as a basis for

attorney's fees. *Id.* Because they are merely duplicative, the arguments within this Motion related to the claims or affirmative defenses each requests mirrors are equally applicable to these requests for declaratory judgment.

Further, as demonstrated above, each of these "declarations" is contrary to the undisputed facts and/or legally improper. Thus, for the reasons cited above, summary judgment must be granted on each of these requests for declaratory relief.

a. **Attorney's fees under Chapter 37**

Plaintiffs should be awarded their equitable and just attorneys' fees under Texas Civil Practice & Remedies Code Chapter 37 regarding the defenses of the counterclaim for declaratory judgment. Torres and the Sinn Parties have retained the undersigned counsel to defend the counterclaims for declaratory judgment and should be awarded their equitable and just attorneys' fees through judgment and on appeal. The declaratory judgment claims were mere mirror counterclaims or concerned the elements of other claims and this and the Sinn Parties seek here a judgment that they are entitled to their full equitable and just attorneys' fees. Given that there are several issues in this matter, and the Atlas Parties have filed their own motion for summary judgment to be heard at the same time as this one, Plaintiffs seeks here a judgment that they are entitled to his equitable and just attorneys' fees and requests that the Court set a hearing or trial on the issue of the amount of such fees at a later time.

V. MOTION FOR NO EVIDENCE SUMMARY JUDGMENT

A. <u>Standard of Review</u>

A party may move for summary judgment alleging that, after adequate time for discovery, there is no evidence of one or more elements of a claim or defense upon which a respondent would have the burden of proof at trial. Tex. R. Civ. P. 166(i). A no-evidence point will be sustained when

(a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or evidence from giving weight to the only evidence offered; (c) the evidence offered to prove a vital fact is no more than a scintilla; or (d) the evidence conclusively establishes the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion of a fact.'" *Id.*

B. <u>No-Evidence Summary Judgment on Affirmative Defenses</u>

While a plaintiff need not challenge affirmative defenses to recover on his claims under a motion for summary judgment, a plaintiff may move for traditional or no evidence summary judgment on such affirmative defenses to eliminate some or all of those defenses for trial. Because the Atlas Parties cannot support any of their affirmative defenses and as such those defenses should be eliminated from this case, Plaintiffs move for no evidence summary judgment on those defenses here.

1. No Excuse

"[T]he contention that a party to a contract is excused from performance because of a prior material breach by the other contracting party is an affirmative defense." *Triton 88, L.P. v. Star Elec., L.L.C.*, 411 S.W.3d 42, 58 (Tex. App. 2013). To raise a material fact issue on every element of an affirmative defense, the party claiming excused performance must raise a fact question as to every element of the other party's prior breach of contract. *See Id.* The elements for breach of contract are (1) the existence of a contract; (2) performance tendered by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the defendant's breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1977, no writ). In this instance, Taylor testified that the alleged material breach relied upon to justify the excused

performance was his belief that Sinn sent the Picture to customers of Atlas with the tagline "Happy Holidays, Atlas." (Exh. F 153:17-163:18).

There is no evidence that Sinn sent the Picture to customers of Atlas. There is no evidence that Sinn sent the Picture to customers of Atlas with the tagline "Happy Holidays Atlas." There is no evidence that Defendants/Counter-Plaintiffs suffered damages as a result of Sinn sending the Picture to customers of Atlas with the tagline "Happy Holidays Atlas" (because it did not happen). Furthermore, there is no evidence that Defendants/Counter-Plaintiffs did not waive the affirmative defense of excused performance by retaining the benefits (Torres' ownership units) of the Agreement and treating the Agreement as continuing.

Regardless of the excuse claimed then or whatever they may claim now, the Atlas Parties have no evidence to support each of the elements above for such an excuse including that the Atlas Parties have no evidence to support an obligation by Torres (or the Sinn Parties), tendered performance by the Atlas Parties, a material breach by Torres (or the Sinn Parties), or damages.

2. *No Unclean Hands*

The affirmative defense of "unclean hands" requires that a party seeking equity must come with clean hands. *Adams v. First Nat. Bank of Bells/Savoy*, 154 S.W.3d 859, 876 (Tex. App.--Dallas 2005, no pet.). Because no Plaintiff seeks equitable relief, this defense is inapplicable. Further, there is no evidence of unclean hands by Torres or the Sinn Parties, and no evidence that Torres or the Sinn Parties seek equitable relief.

3. *Estoppel*

To prove the affirmative defense of equitable estoppel, the party asserting the defense must prove: (1) a false representation or concealment of material facts, (2) made with actual or constructive knowledge of those facts, (3) with the intention that it should be acted on, (4) to a party

without knowledge, or the means of knowledge of those facts, (5) who detrimentally relied upon the misrepresentation. *Enchilada's Nw., Inc. v. L & S Rental Properties*, 320 S.W.3d 359, 365 (Tex. App.—El Paso 2010, no pet.) citing *Schroeder v. Texas Iron Works, Inc.,* 813 S.W.2d 483, 489 (Tex. 1991). The party relying upon estoppel has the burden of proof, and the failure to prove any element is fatal. *Enchilada's Nw., Inc.,* 320 S.W.3d at 365.

There is no evidence of a false misrepresentation made by a Plaintiff, there is no evidence that said false misrepresentation was made with actual knowledge or constructive knowledge of the facts allegedly concealed, there is no evidence that there was false misrepresentation made with the intention that it be acted on, there is no evidence that the Atlas Parties were without knowledge of alleged concealed or misrepresented facts, and there is no evidence that the Atlas Parties relied on such a misrepresentation to their detriment.

4. *No Laches defense*

Again laches is an equitable defense and thus not applicable here. In addition two of the essential elements of laches are (1) unreasonable delay by one having legal or equitable rights in asserting them, and (2) a good faith change of position by another to his detriment because of the delay. *City of Fort Worth v. Johnson*, 388 S.W.2d 400, 403 (Tex. 1964). There is no evidence of unreasonable delay in asserting a legal right by Plaintiff Eric Torres (or the Sinn Parties), and there is no evidence of a good faith change of position by any Atlas Party as a result of that delay.

5. *No Waiver*

The affirmative defense of waiver can be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. *Tenneco Inc. v. Enter. Products Co.*, 925 S.W.2d 640, 643 (Tex. 1996). There is no evidence that Plaintiff Eric Torres (or the Sinn Parties) intentionally relinquished a known right. There is no

evidence that Eric Torres (or the Sinn Parties) engaged in intentional conduct inconsistent with claiming that known right, in this instance particularly, the right to receive the payments owed under the settlement agreement

6. *There Was No Failure to Mitigate*

The burden of proving a failure to mitigate is upon the party who caused the loss and the standard is that of ordinary care, i.e., what an ordinary prudent person would have done under the same or similar circumstances. *Moulton v. Alamo Ambulance Service,* 414 S.W.2d 444, 447 (Tex.1967). A defendant cannot get a mitigation instruction merely by asserting that a plaintiff failed to mitigate damages. Evidence must be developed which clearly shows a plaintiff's failure to mitigate caused further damages, and the evidence must be sufficient to guide the jury in determining which damages were attributable to a plaintiff's failure to mitigate. *Hygeia Dairy Co. v. Gonzalez,* 994 S.W.2d 220, 225 (Tex. App. 1999). There must be some evidence in the record from which the jury can make a reasoned calculation about losses from failure to mitigate. *Id.* This language is usually deployed to discard specious or near-specious assertions of a duty to mitigate. *Id.*

There is no evidence that Torres (or the Sinn Parties) failed to mitigate or acted outside of the standard of ordinary care with respect to the Atlas Parties' breach and repudiation of the Settlement Agreement, nor is there any evidence of any "further" losses stemming from a failure to mitigate. As such, the Atlas Parties affirmative defense of failure to mitigate must be dismissed on summary judgment.

C. <u>No-Evidence Summary Judgment on the Atlas Parties' Counterclaims</u>

1. *There is No Evidence For The Atlas Parties' Breach of Contract Counterclaim*

The elements for breach of contract are (1) the existence of a contract; (2) performance tendered by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff

as a result of the defendant's breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.–
–Houston [1st Dist.] 1977, no writ).

There is no evidence that Torres or the Sinn Parties breached the Settlement Agreement. There is no evidence that Torres breached the Settlement Agreement. There is no evidence that the Atlas Parties suffered damages as a result of a breach by Torres or the Sinn Parties.

Specifically, without limiting the foregoing, in their Third Amended Counterclaim filed September 16, 2016, the Atlas Parties do not clearly define their alleged breaches but they revise their declaratory judgment claim to seek a declaration that the Settlement Agreement was also breached by "soliciting from third parties comments and/or statements that may be considered negative, false, derogatory, and/or detrimental to the business reputations of" the Atlas Parties. (3rd Amended Counterclaim, ¶54). There is no evidence of this claim.

2. *Fraud in Inducement*

To prevail on a fraud claim, a plaintiff must prove that (1) the defendant made a material representation that was false; (2) it knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) it intended to induce the plaintiff to act upon the representation; and (4) the plaintiff actually and justifiably relied upon the representation and thereby suffered injury. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.,* 51 S.W.3d 573, 577 (Tex.2001). Fraudulent inducement is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof. *Haase v. Glazner,* 62 S.W.3d 795, 798–99 (Tex.2001). In a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties. *Coastal Bank ssb v. Chase Bank of Texas, N.A.*, 135 S.W.3d 840, 843 (Tex. App. 2004).

There is no evidence that Torres or Sinn Parties made a false material representation. There is

no evidence that Torres or the Sinn Parties knew the representation was false when made or that Torres or the Sinn Parties made the representation recklessly as a positive assertion without any knowledge of its truth. There is no evidence that Torres or the Sinn Parties intended to induce the Atlas Parties into entering the Settlement Agreement based upon the representation. There is no evidence that the Atlas Parties justifiably relied on any alleged false material representation by Torres or the Sinn Parties. There is no evidence that the Atlas Parties suffered any damages as a result of the alleged fraud by Torres or the Sinn Parties.

3. Demand for Indemnity

The demand for indemnification by the Atlas Parties as to Torres is based on the "Warranty" provision of the Settlement Agreement. The provision provides for indemnification for costs "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 [of 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] or other transfer. (Exh. A.1 ¶11).

There is no evidence of a right to indemnity outside the Settlement Agreement. There is no evidence of any assignment or other transfer of any claims, actions, demands and/or causes of action of Torres (or the Sinn Parties) that were released by the Settlement Agreement. There is no evidence of any assertion of any claims, actions, demands and/or causes of action of Torres (or the Sinn Parties) that were released by the Settlement Agreement by any person or entity asserting such claims, actions, demands and/or causes of action by virtue of any assignment or other transfer of any claims, actions, demands and/or causes of action of Torres (or the Sinn Parties) that were released by the Settlement Agreement. There is no evidence of any damages of this claim.

4. Declaratory Judgment

There is no evidence to support the counterclaim for declaratory judgment. The "declarations" sought are advisory and defensive theories only, and are simply duplicative of elements of their counterclaims and/or defenses only. As such, summary judgment is appropriate on these counterclaims as well.

PRAYER

WHEREFORE, Torres and the Sinn Parties request that the Court grant this Motion; grant summary judgment on Torres' claim for breach of contract and award him damages, prejudgment and post judgment interest, and attorney's fees; grant summary judgment on each and every of the Atlas Parties' affirmative defenses and counterclaims, and grant Torres and the Sinn Parties all further relief in law and equity to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of September 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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