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CAUSE NO. 2014-40964

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

CAUSE NO. 2015-49014

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

DEFENDANTS/COUNTER-PLAINTIFFS' RESPONSE TO
TORRES AND THE SINN PARTIES'
MOTION FOR TRADITIONAL AND NO EVIDENCE SUMMARY JUDGMENT

Defendants/Counter-Plaintiffs Craig Taylor ("Taylor"), Atlas Commodities, LLC ("Atlas"), and S. James Marshall ("Marshall") (collectively "Defendants") file this Response to Plaintiffs/Counter-Defendants Eric Torres, Aspire Commodities, LP, XS Capital Investments, LP, and Adam Sinn's (collectively "Plaintiffs") Motion for Traditional and No Evidence Summary Judgment as follows:

I. PRELIMINARY STATEMENT

It is undisputed that Eric Torres ("Torres") assigned his interest in the parties' Settlement Agreement to XS Capital Investments, LP ("XS Capital"), that Torres and Adam Sinn ("Sinn")

used derogatory language about the Defendants to third parties in their industry, and that they invited others to do so. These violations of the Settlement Agreement notwithstanding, the Plaintiffs nevertheless continue to argue that the parties' dispute is about nothing more than Sinn's sending of "the Picture" to Taylor on December 22, 2013. Had Plaintiffs provided evidence of their compliance with the Settlement Agreement when asked nearly three years ago, it might have been. That is not the course they chose. Instead, they obfuscated, obstructed discovery, and destroyed evidence.

Plaintiffs' Motion for Traditional and No Evidence Summary Judgment ("Motion") is itself an act of obfuscation. It distorts facts. It contains pages of irrelevant argument and inapplicable law. The Motion is without merit and should be denied.

II. ADOPTION

On July 17, 2015, Atlas and Taylor filed their (i) Response to Plaintiff/Counter-Defendants Adam Sinn, XS Capital Investments, L.P., and Aspire Commodities, L.P.'s Motion for Summary Judgment and (ii) Response to Plaintiff/Counter-Defendant Eric Torres' Motion for Summary Judgment. (These two documents are collectively referred to herein as "MSJ Responses.") On September 16, 2016, Defendants filed their Traditional Motion for Partial Summary Judgment ("MSJ"). Defendants adopt, as if fully set out below, the entire MSJ Responses and MSJ, including all attachments, exhibits, and supplements to them.

III. OBJECTIONS TO SUMMARY JUDGMENT EVIDENCE

Defendants object to Plaintiffs' Summary Judgment Evidence as follows:

Exhibit A. Conclusory statements in affidavits are not competent summary judgment proof without facts to support the conclusions. *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App—Houston [1st Dist.] 1997, no writ). Conclusions without factual support are not credible and are

not susceptible of being easily controverted. *Id.* Statements of legal conclusions are no more than a witness choosing sides on the outcome of a case. *Id.* Paragraphs 16 and 17 in the Affidavit of Eric Torres, attached as Plaintiffs' Exhibit A, are rife with conclusory statements:

> 16. Just prior to filing the above styled cause on July 17, 2014, I executed a document called "Assignment of Interest in Settlement Agreement and Amount" on June 30, 2014. I received this document from my counsel Chanler Langham. I did not discuss this document with Mr. Sinn and did not provide a copy to him. *My understanding is the assignment was not treated as effective or agreed to by Mr. Sinn as I am a Plaintiff in this litigation seeking to enforce the Settlement Agreement.* Adam Sinn did not ask me to execute this assignment. The assignment was executed six months after Atlas Commodities, Craig Taylor and James Marshall stopped paying under the Settlement Agreement. This June 30, 2014 document is the "assignment" I had testified about in my first deposition but was confused at that time as to the timing of the document's creation and execution.
>
> 17. I have not discussed the Settlement Agreement, *nor have I made any comments about Craig Taylor, Atlas Commodities, LLC, or S. James Marshall that would qualify as "disparagement" under the Settlement Agreement, and I do not believe that anything said between Adam Sinn and myself relating to Taylor, Marshall, and Atlas' failure to pay the remainder of the Settlement Agreement can qualify as "disparaging."* Nothing Mr. Sinn could say to be would affect the reputation of the Atlas Parties in my mind. I have had numerous experiences with the Atlas Parties including being sued by them for fraud in the underlying lawsuit which form my opinions concerning the Atlas Parties.

The italicized statements above are legal conclusions and therefore cannot be considered as support for Plaintiffs' Motion for Traditional and No Evidence Summary Judgment. *Rizkallah*, 952 S.W.2d at 587–88.

IV. SUMMARY JUDGMENT EVIDENCE

In addition to the evidence attached to the MSJ Responses and the MSJ, Defendants rely upon the following:

Exhibit GG: Eric Torres' Responses to Defendants' Second Requests for Production of Documents; and

Exhibit HH: Excerpts from Deposition of Robert Anthony Hancock.

V. SUMMARY JUDGMENT STANDARDS

A. Traditional Motion for Summary Judgment Standard

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

B. No-Evidence Motion for Summary Judgment Standard

After adequate time for discovery, a party may move for summary judgment on the grounds that there is no evidence of one or more essential elements of the adverse party's claim or defense. Tex. R. Civ. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

> In reviewing a no-evidence summary judgment motion, we examine the record in the light most favorable to the nonmovant; if the nonmovant presents more than a scintilla of evidence supporting the disputed issue, summary judgment is improper. A no-evidence summary judgment is improper if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. "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." More than a scintilla of evidence exists if it would allow reasonable and fair-minded people to differ in their conclusions.

Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 172 (Tex. 2003) (internal citations omitted).

VI. ARGUMENT AND AUTHORITIES

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

Defendants incorporate by reference the preceding paragraphs for all purposes.

Torres moves for summary judgment on his claim for breach of contract, claiming actual damages in the amount of $210,000 under the Settlement Agreement. Mot. at 11.

A party who is in breach cannot maintain a suit for breach of contract. *D.E.W., Inc. v. Depco Forms, Inc.*, 827 S.W.2d 379, 382 (Tex. App.—San Antonio 1992, no writ), *see also Hooker v. Nguyen*, No. 14-04-00238-CV, 2005 WL 2675018, at *8 (Tex. App.—-Houston [14th Dist.] Oct. 20, 2005, pet. denied) (mem. op.) ("It is a well-settled principle in Texas law that when a party to a bilateral contract commits a material breach of that contract, the other party is discharged or excused from further performance") (citing *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex.2004) (citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex.1994))). Torres is not entitled to summary judgment on his claim for breach of the Settlement Agreement because—as described in detail in Defendants' MSJ[1]—he assigned to Sinn or and/or XS Capital[2] "all right, title and interest" in the Settlement Agreement in violation of its anti-assignment clause. *See* Ex. M, Settlement Agreement, ¶ 27; Ex. X, SINN000266. Both Sinn and Torres testified in 2015 that all of the money Torres received went to Sinn because of the assignment. *See* Ex. N, Torres Dep., at 27:25–29:9; Ex. O, Sinn Dep., at 35:16–36:20, 38:24–

[1] MSJ at 16–23, 27–28.

[2] XS Capital is a Texas-based limited partnership owned and controlled entirely by Sinn. Ex. V, Sinn Dep., at 70:17–71:13.

39:20. Within the last month, however, Sinn testified that no assignment exists. Ex. V, Sinn Dep., at 104:2–105:8, 101:19–102:2,103:7–20. For his part, Torres recently testified that an assignment existed but is no longer applicable. Ex. Y, Torres Dep., at 12:16–13:1, 18:18–19:4.

In their Motion, Torres and Sinn claim that, if an assignment existed, it was not effective. Mot. at 22–23. They then allege that, if the allegedly non-existent assignment was effective, it was void because it violated the Settlement Agreement's anti-assignment clause. Mot. at 22–23. As a result, Torres and Sinn claim (without authority), any breach of the anti-assignment clause is therefore "not . . . legally recognizable [*sic*]." Mot. at 23.

Under well-established and uncontroverted Texas law, anti-assignment clauses are enforceable. *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 721 (Tex. App.—Dallas 2004, no pet.). Defendants are entitled to have this Court enforce the Settlement Agreement's anti-assignment clause. *See id.* Accordingly, Defendants have asked the Court to declare that Plaintiffs breached the anti-assignment clause and that the assignment is null and void. MSJ at 32.

Torres and Sinn also claim that Defendants have not incurred any damages as the result of any breach of the Settlement Agreement's anti-assignment clause. Mot. at 23. This is false. Taylor testified that, had Defendants known that the entire Settlement Agreement had been assigned to Sinn, they never would have agreed to it. *See* Ex. Z, Taylor Dep., at 243:16–244:23. It was not, as Plaintiffs incredibly claim on summary judgment, "exactly what the Atlas Parties wanted to happen." *See* Mot. at 27.

Torres breached the Settlement Agreement. He is not entitled to summary judgment.

B. Plaintiffs Are Not Entitled to Summary Judgment on Defendants' Claims

Defendants incorporate by reference the preceding paragraphs for all purposes.

1. Claims Related to Plaintiffs' Breaches of the Non-Disparagement Clause

Defendants move for summary judgment on the first two declarations sought by Defendants and on Defendants' claim for breach of contract, all of which are related, at least in part, to Plaintiffs' multiple breaches of the Settlement Agreement's non-disparagement clause. Mot. at 27–30.

Two of Plaintiffs' arguments are irrelevant and are not addressed in detail here. First, Plaintiffs make various statements and allegations regarding "the Picture" in relation to Defendants' claims for breach of the non-disparagement clause. Mot. at 27–28. These contentions have no bearing on Defendants' claims concerning the non-disparagement clause. Second, Plaintiffs claim that any comments made from Sinn to Torres or from Torres to Sinn cannot be "disparaging" under the Settlement Agreement. Mot. at 28–29. Defendants make no such contention.

Plaintiffs allege that any comments made by Sinn or Torres to third-parties are not "disparaging" for several reasons. Mot. at 29–30. First, Plaintiffs contend that any comments made by Sinn to Evan Caron were not breaches of the non-disparagement clause because they did not change Caron's opinion of Defendants or cause him to cease doing business with Defendants. Mot. at 29. This is only one of the Plaintiffs' repeated mischaracterizations of the Settlement Agreement's non-disparagement clause. The provision prohibits comments "likely to be harmful to the Party's business, business reputation, or personal reputation" and those "that may be considered negative, false, derogatory or detrimental to the business reputation of any other Party." Ex. M, Settlement Agreement, ¶ 19. Plaintiffs make no effort to describe what a "derogatory" comment is or how Sinn or Torres' statements were or were not "likely" to harm Defendants' business or personal reputation. They similarly make no effort to acquit themselves of violating

the Settlement Agreement's prohibition against inviting third parties to make negative comments about the Defendants. The harm these statements caused is described in detail in both Taylor's declaration (Ex. P ¶ 6) and in the deposition of Rob Hancock (Ex. HH at 8:11–9:1, 26:3–14, 57:12–15).

Second, Sinn's testimony that he did not disparage Taylor or Atlas is not evidence of anything. *See* Mot. at 29. It is a legal conclusion—one which is factually completely at odds with his deposition testimony—which is not competent summary judgment proof. *Rizkallah*, 952 S.W.2d at 587.

Finally, Plaintiffs engage in a lengthy discussion regarding the standards for common-law defamation and business disparagement. Mot. at 29–30. Plaintiffs cite cases from North Dakota, Illinois, and Ohio in addition to two Texas cases in support of their contention that name-calling is not "actionable." *Id.* None of these cases have anything to do with this case. The Texas Supreme Court case cited by Plaintiffs concerns the application of the *New York Times Co. v. Sullivan*[3] standard to a satirical article about a public official. *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 152 (Tex. 2004).

Plaintiffs' entire argument is irrelevant. Defendants have not asserted claims for defamation or business disparagement. This is instead a breach of contract case; Defendants' claims center entirely on the Settlement Agreement's non-disparagement clause. MSJ at 28–30. As detailed in Defendants' MSJ, Plaintiffs violated the non-disparagement clause by making negative or derogatory comments about Taylor and Atlas and inviting others to do the same. MSJ at 28–30.

Plaintiffs have briefed claims the Defendants have not made. Plaintiffs are not entitled to summary judgment on Defendants' claims concerning the non-disparagement clause.

[3] 376 U.S. 254 (1964).

2. Fraud in the Inducement

Plaintiffs also move for summary judgment on Defendants' claim that Plaintiffs fraudulently induced Defendants to enter into the Settlement Agreement by representing that they had not assigned any of their rights thereunder and promising not to do so in the future without Defendants' consent. Mot. at 31–35.

First, Plaintiffs' insistence that Defendants' "intent and plan" was for Sinn to receive all of the payments under the Settlement Agreement is unsupported by anything in the record and is in fact disputed by Taylor's testimony. Mot. at 31. Defendants understood that the money belonged to Torres and was being returned to him. Ex. Z, Taylor Dep., at 126:20–127:21. Had they known that the payments were going to Sinn, they would not have executed the Settlement Agreement. *See* Ex. Z, Taylor Dep., at 243:16–244:23.

Plaintiffs then spend several pages discussing the Settlement Agreement's non-reliance clause, which is irrelevant to Defendants' claims. Mot. at 32–34. Defendants' claim for fraudulent inducement concerns Defendants' statements and promises made *within* the Settlement Agreement, namely the Warranty by Torres and the non-assignment clause. *See* Ex. M, Settlement Agreement, at ¶¶ 11, 27.

The parties agreed not to assign their rights under the Settlement Agreement without the other parties' consent. *Id.* ¶ 27. "A promise of future performance constitutes an actionable misrepresentation if the promise was made with no intention of performing at the time it was made." *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009). A party's breach of a promise combined with "'slight circumstantial evidence' of fraud" is sufficient evidence of fraud. *Id.* at 775. The party's fraudulent intent may be inferred from subsequent acts after the promise is made. *Id.*

Torres assigned all of his rights under the Settlement Agreement to XS Capital and/or Sinn. *See* Ex. N, Torres Dep., at 27:25–29:9; Ex. O, Sinn Dep., at 35:16–36:20, 38:24–39:20; Ex. X, SINN000266. Both Torres and Sinn have admitted that Torres *never* received any of the monies paid under the Settlement Agreement. *See* Ex. N, Torres Dep., at 27:25–29:9; Ex. O, Sinn Dep., at 35:16–36:20. Sinn's receipt of all of the payments under the Settlement Agreement, coupled with their recently-asserted denial of the assignment's existence along with their summary judgment argument that the Defendants knew the money was all going to Sinn are itself admissions that the Plaintiffs never intended to comply with the non-assignment clause. *See Aquaplex*, 297 S.W.3d at 775.

Plaintiffs are not entitled to summary judgment on Defendants' claim for fraudulent inducement, the Defendants are.

3. Indemnity

Torres moves for summary judgment on Defendants' claim for indemnity. Mot. at 35–36.

Notwithstanding their recent testimony to the contrary, Sinn is the beneficiary of an assignment made by Torres in violation of the Settlement Agreement. *See* Ex. N, Torres Dep., at 27:25–29:9; Ex. O, Sinn Dep., at 35:16–36:20, 38:24–39:20; Ex. X, SINN000266. Sinn has brought suit to recover money he claims to be owed "by, through or under Torres by virtue of" the assignment from Torres to Sinn. *See* Ex. M, Settlement Agreement, ¶ 11. Torres agreed to indemnify Defendants "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" by virtue of the assignment. *See id.*

Plaintiffs are not entitled to summary judgment on Defendants' claim for indemnity.

4. Spoliation

Plaintiffs move for summary judgment on Defendants' request for a spoliation instruction against Torres. Mot. at 36–39.

Plaintiffs claim that Torres had no duty to preserve evidence. Mot. at 38. A party has a duty to preserve evidence when he "knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim." *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 20 (Tex. 2014). On December 24, 2013—two days after Sinn sent "the Picture" to Taylor—counsel for Defendants asked counsel for Plaintiffs to direct their clients not to delete or dispose of any related "documents, phones, or computers." Ex. D at 1. At that point Torres knew that that litigation was likely and that he had a duty to preserve evidence. *See Brookshire Bros.*, 438 S.W.3d at 20.

Plaintiffs also allege—for the first time—that "the communications (if they existed) **might not actually be gone**" because Torres' iPhone was synched to iCloud. Mot. at 37–38 (emphasis added). On September 4, 2015, Torres stated, in a request for production of his iCloud backups from August 15, 2013 to the present:

> Plaintiff objects to this Request to the extent that it is overbroad in time and scope, is harassing, is an impermissible fishing expedition, and calls for information that is not relevant to the claims or defenses of the parties and is not reasonably likely to lead to the discovery of admissible evidence. Plaintiff further objects to this Request as seeking confidential information. Subject to and without waiving the General Objections above and specific objections herein, Plaintiff responds as follows: **After diligent search, Plaintiff has discovered that only backups from August 2015 are available, as Apple apparently deletes iCloud backups without warning on a regular basis.** See Documents produced with concurrent with this response labeled SINN 000235 – SINN 000242.

Ex. GG, Torres Resp. to 2d RFP, at 3 (emphasis added). Torres' wrongful and intentional withholding of his iCloud backups provide an additional basis for a spoliation instruction.

Plaintiffs are not entitled to summary judgment on Defendants' request for a spoliation instruction.

5. Plaintiffs' Prior Material Breaches

Plaintiffs move for summary judgment on Defendants' request for a declaration and their affirmative defense that Defendants' performance under the Settlement Agreement is excused because of Defendants' prior breaches. Mot. at 41–42.

Plaintiffs acknowledge that "when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004). Torres breached the Settlement Agreement's anti-assignment clause from its inception when he assigned his rights to Sinn. *See* Ex. N, Torres Dep., at 27:25–29:9; Ex. O, Sinn Dep., at 35:16–36:20, 38:24–39:20; Ex. X, SINN000266. Plaintiffs further breached the agreement when they made comments and solicited comments from third parties in violation of the non-disparagement clause beginning at least in October 2013, long before Sinn sent Taylor "the Picture." *See* Ex. AA at SINN 000244–245; Ex. DD at SINN 000225–226.

The cases Plaintiffs cite in support of their claim that Defendants' performance under the Settlement Agreement is not excused by Plaintiffs' prior breach are distinguishable for several reasons. Mot. at 15–18. Defendants have made no demands upon Plaintiffs after ceasing performance because of Plaintiffs' breach. *See, e.g.*, *Long Trusts v. Griffin*, 222 S.W.3d 412, 415–16 (Tex. 2006) (per curiam); *see also Gupta v. E. Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 757 (Tex. App.—Houston [14th Dist] 2004, pet denied) (physician continued to demand that company provide equipment, office space, and machinery for radiation oncology clinic). The *Griffin* plaintiffs stopped paying their share of expenses under a litigation cost-sharing agreement, later

claiming that the defendants breached the agreement first by failing to send out bills. *Id.* at 415. When the suit settled two years later, however, they demanded their share of the $11.1 million settlement. *Id.* By seeking the benefit of their contract with the defendants, the *Griffin* plaintiffs treated the agreement as continuing were therefore not excused from performing. *Id.* at 415–16. Nor have Defendants retained the benefit of their bargain with Plaintiffs. *See Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 884 (Tex. App.—San Antonio 1996, writ denied). The general contractor in *Pate & Pate* withheld payments to its subcontractor because of alleged delays and other problems. *Id.* At the same time, however, the subcontractor continued to perform and the general contractor continued to receive progress payments for subcontractor's work. *Id.* Here, Defendants have been deprived of the full benefit of the Settlement Agreement because of Defendants' material breaches of the non-assignment and non-disparagement clauses.

Plaintiffs are not entitled to summary judgment on Defendants' request for a declaration and their affirmative defense concerning Plaintiffs' prior material breach of the Settlement Agreement.

6. Plaintiffs' Failure to Mitigate

Plaintiffs seek summary judgment on Defendants' affirmative defense that Plaintiffs' failed to mitigate their damages. Mot. at 20–21.

A party has a duty to exercise reasonable care to mitigate its damages. *Great Am. Ins. Co. v. N. Austin Mun. Utility Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995). If a party fails to exercise such reasonable care, it cannot recover damages that could have been avoided. *Pinson v. Red Arrow Freight Lines, Inc.*, 801 S.W.2d 14, 15 (Tex. App.—Austin 1990, no writ).

Plaintiffs failed to mitigate their damages by (i) providing conflicting, dishonest explanations for sending "the Picture" then refusing to provide material supporting their claims of

compliance, (ii) withholding and destroying relevant evidence and otherwise obstructing discovery, and (iii) filing baseless motions for protection and for sanctions. Had the Plaintiffs not misled the Defendants about "the Picture," had they provided reasonable assurance of compliance in 2013 when asked, had they not withheld requested documents in December 2013, the Defendants would have resumed payments under the Settlement Agreement, rendering this litigation unnecessary. *See* Exs. A–L. Had Plaintiffs complied with their discovery obligations under the Texas Rules of Civil Procedure, both parties would have likely saved thousands in attorney's fees.[4]

Plaintiffs are not entitled to summary judgment on Defendants' affirmative defense of failure to mitigate.

C. Plaintiffs Attorney's Fees Should Be Reduced

Defendants incorporate by reference the preceding paragraphs for all purposes.

Plaintiffs are not entitled to attorneys' fees because they are not entitled to prevail. Even if they were, however, a trial court has discretion in the amount of such an award. *Hassell Const. Co. v. Stature Commercial Co.*, 162 S.W.3d 664, 668 (Tex. App. 2005). The doctrine of mitigation applies to claims for attorney's fees. *See Glenn v. Nortex Foundation Designs, Inc.*, No. 2-07-172-CV, 2008 WL 2078510, at *4 (Tex. App.—Fort Worth 2008, no pet.) (mem. op.) (upholding

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[4] *See, e.g.*, Plaintiffs' Motion to Quash and for Protective Order (9/8/2014); Plaintiffs' Motion to Quash and for Protective Order Against Discovery Served on Non-Party Paul Sarver (9/17/2014); Plaintiffs' Motion to Quash and for Protective Order Against Abusive and Harassing Discovery (9/22/2014); Defendants' Motion to Compel and Response to Plaintiffs' Motion to Quash (9/29/2014); Order on Discovery Motions and Special Exceptions (11/11/2014); Plaintiffs/Counter-Defendants' Motion to Quash and for Protective Order Against Discovery Served on Non-Parties Paul Sarver, David Schmidli and Evan Caron (1/5/2015); Defendants' (1) Response to Plaintiffs' Motion to Quash and for Protective Order and (2) Motion to Compel (1/6/2015); Defendants' Supplemental Motion to Compel (1/8/2015); Defendants/Counter-Plaintiffs' Motion to Compel Deposition of Adam Sinn (5/27/2016); Defendants/Counter-Plaintiffs' Motion to Compel Discovery Responses from Plaintiff Adam Sinn (7/12/2016); Order [Compelling Deposition Appearance] (7/22/2016); Adam Sinn's Motion to Quash Deposition Notice for Adam Sinn, Motion for Protection and Motion for Costs (8/9/2016); Plaintiff's Motion to Quash and for Protective Order Against Hearing Subpoena Served on Adam Sinn (8/23/2016); Order [Compelling Hearing Appearance] (9/2/2016).

reduction of recoverable attorney's fees because of party's failure to mitigate after rejecting reasonable settlement offer); *A.D. Willis Co., Inc./Metal Bldg. Components, Inc. v. Metal Bldg. Components, Inc.*, No. 03-09-00574-CV, 2000 WL 1508500, at *5 (Tex. App.—Austin 2000, pet. denied) (upholding reduction of recoverable attorney's fees because of party's failure to make reasonable efforts to negotiate a compromise). As described above, Defendants have failed to mitigate their damages in this lawsuit.

Despite years of Defendants' requests, the Plaintiffs only produced the assignment in August of 2016; after this Court ordered additional discovery, it took at least six months for them to agree to produce Sinn for deposition. The Plaintiffs have failed to mitigate through at least September 2 of this year. Any award of fees should therefore be limited to less than one month as a result of their multiple failures to mitigate. *See Glenn*, 2008 WL 2078510, at *4; *A.D. Willis Co.*, 2000 WL 1508500, at *5.

[continued on following page]

VII. CONCLUSION AND PRAYER

Defendants/Counter-Plaintiffs Craig Taylor, Atlas Commodities, LLC, and S. James Marshall respectfully request that the Court deny Plaintiffs/Counter-Defendants Eric Torres, Aspire Commodities, LP, XS Capital Investments, LP, and Adam Sinn's Motion for Traditional and No Evidence Summary Judgment in its entirety and any for any other and further relief to which they may be entitled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served by electronic filing, certified mail, return receipt requested, email, and/or facsimile on October 3, 2016 as follows:

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