

No. 2014-40964

ERIC TORRES, ADAM SINN,	§	IN THE DISTRICT COURT
XS CAPITAL INVESTMENTS, L.P.,	§	
AND ASPIRE COMMODITIES, L.P.	§	
	§	OF HARRIS COUNTY, TEXAS
VS.	§	
	§	
CRAIG TAYLOR, AND ATLAS	§	
COMMODITIES, L.L.C.	§	157 TH JUDICIAL DISTRICT

Adam Sinn, XS Capital, and Aspire Special Exceptions to
Defendants’ Plea in Abatement and Counterclaim

Plaintiffs Adam Sinn (“Sinn”), XS Capital Investments, LP, (“XS Capital”) and Aspire Commodities, LP (“Aspire”) file the following special exceptions to Defendants’ Plea in Abatement and Counterclaim, and would respectfully show as follows:

1. Plea in Abatement: Sinn, XS Capital, and Aspire specially except to ¶¶ 4-5 of Defendants’ Plea in Abatement and Counterclaim, which assert that “XS Capital Management, LP is not a limited partnership registered to do business in the State of Texas.” Plaintiffs’ First Amended Petition to Enforce Settlement Agreement properly names XS Capital Investments, LP as a plaintiff in this action. Accordingly, Defendants’ Plea in Abatement is moot.

2. Counterclaim for Breach of Contract – No Breach: Sinn, XS Capital, and Aspire specially except to ¶¶ 45-49 of Defendants’ Counterclaim. To prove an action for breach of contract, Defendants must establish that Sinn, XS Capital, or Aspire breached the contract. *Southwell v. University of the Incarnate Word*, 974 S.W.2d 351, 354-55 (Tex. App.—San Antonio 1998, pet. denied). In this case, Defendants assert in ¶ 30 that an “unsolicited contact by Sinn was a breach of the Settlement Agreement.” However, Defendants fail to allege that XS Capital or Aspire ever sent a text message, sent a photograph, or made any unsolicited contact to Defendants. Nor have plaintiffs alleged that Sinn, XS Capital, or Aspire made any “false, derogatory, slanderous or libelous comments” about Taylor or Atlas “regarding any matter likely

to be harmful” to Taylor’s or Atlas’s “business, business reputation or personal reputation,” as is required by the non-disparagement clause of the Settlement Agreement. Moreover, Defendants have failed to allege that Sinn, XS Capital, or Aspire “solicit[ed] from any third party any comments, statements, or the like that may be considered negative, false, derogatory or detrimental to the business reputation” of Taylor or Atlas, as is required by the non-disparagement clause of the Settlement Agreement. Because Defendants have failed to allege that Sinn, XS Capital, or Aspire took any action in violation of the non-disparagement clause, Defendants cannot establish breach. Defendants should therefore be required to replead; if they fail to do so, Defendants’ breach of contract claim should be stricken. *See Cruz v. Morris*, 877 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.] 1994, no writ) (if party refuses to amend, court can strike).

3. Counterclaim for Breach of Contract – No Injury: Sinn, XS Capital, and Aspire specially except to ¶¶ 45-49 of Defendants’ Counterclaim. To prove an action for breach of contract, Defendants must establish that the alleged breach caused injury. *Prudential Sec. Inc. v. Haugland*, 973 S.W.2d 394, 397 (Tex. App.—El Paso 1998, pet. denied). Defendants say in ¶ 48 that “Defendants have suffered damages as a result of the breaches of contract alleged herein.” However, Defendants fail to allege any facts to support this conclusory statement. Namely, Defendants have failed to allege that Defendant Craig Taylor or Atlas Commodities, LLC have suffered any damage to their business, business reputation, or personal reputation as a result of Taylor’s receipt of the text message. Defendants have failed to allege that a single employee, associate, or affiliate of Atlas, other than Craig Taylor and those pictured in the photo, received the disputed text message. Defendants have further failed to allege that they have lost any business or suffered some monetary loss as a result of the disputed text message. Defendants have not even alleged that any customer, employee or affiliate of Craig Taylor or Atlas has

contacted Defendants to suggest that they received the text message. Because Defendants have failed to allege that they suffered any injury or damages as a result of the alleged text message, Defendants cannot establish their breach of contract claim. Defendants should therefore be required to replead; if they fail to do so, Defendants' breach of contract claim should be stricken. *See Cruz v. Morris*, 877 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.] 1994, no writ) (if party refuses to amend, court can strike).

4. Failure to Specify Maximum Amount Claimed: Sinn, XS Capital, and Aspire specially except to Defendants' Counterclaim because Defendants do not state the maximum amount of their alleged damages. Texas Rule of Civil Procedure 47 provides that "upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed." Tex. R. Civ. P. 47. Sinn, XS Capital, and Aspire invoke this provision to trigger Defendants' obligation for such specificity.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: Chanler A. Langham

Chanler A. Langham

State Bar No. 24053314

clangham@susmangodfrey.com

Alexander L. Kaplan

State Bar No. 24046185

akaplan@susmangodfrey.com

1000 Louisiana Street, Suite 5100

Houston, TX 77002-5096

Telephone: (713) 651-9366

Facsimile: (713) 654-6666

*Attorneys for Eric Torres, Adam Sinn,
XS Capital Management, L.P. and
Aspire Commodities, L.P.*

CERTIFICATE OF SERVICE

This is to certify that on this the 24th day of September, 2014, a true and correct copy of the above and foregoing instrument was properly forwarded to the following counsel of record in accordance with Rule 21 of the Texas Rules of Civil Procedure as indicated below:

Geoffrey A. Berg
gberg@bfjblaw.com
Kathryn E. Nelson
knelson@bfjblaw.com
BERG FELDMAN JOHNSON BELL, LLP
4203 Montrose Boulevard, Suite 150
Houston, Texas 77006

Attorneys for Craig Taylor and Atlas Commodities, LLC

Chanler A. Langham

Chanler A. Langham