

No. 2012-46745

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

Plaintiffs' Original Petition to Enforce Settlement Agreement

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs Eric Torres, Aspire Commodities, L.P., XS Capital Management, L.P., and Adam Sinn file this Original Petition to Enforce Settlement Agreement complaining of Defendants Craig Taylor and Atlas Commodities, LLC, and for causes of action show:

Discovery Level

1. Discovery is intended to be conducted at Level 2 pursuant to Rule 190.3.

Jurisdiction and Venue

2. Plaintiff Eric Torres ("Torres") is a natural person residing in Harris County, Texas.
3. Plaintiff Aspire Commodities, L.P. ("Aspire") is a Texas limited partnership that regularly conducts business in Harris County, Texas.
4. Plaintiff XS Capital Management, L.P. ("XS Capital") is a Texas limited partnership that regularly conducts business in Harris County, Texas.
5. Plaintiff Adam Sinn ("Sinn") is a natural person residing in Harris County, Texas.
6. Defendant Craig Taylor ("Taylor") is a natural person residing in Harris County and may be served at his place of employment, 24 East Greenway Plaza, Suite 445, Houston, Texas 77046.

7. Defendant Atlas Commodities, LLC (“Atlas”) is a Texas Limited Liability Corporation with its principal place of business in Houston, Texas, and may be served with process through its registered agent, Craig Taylor, at 24 East Greenway Plaza, Suite 445, Houston, Texas 77046.

8. This Court has jurisdiction over the parties and subject matter of this suit. This Court may exercise personal jurisdiction over Taylor and Atlas because this suit arises in substantial part from their systematic and continuous contacts and business in Harris County, and because the Settlement Agreement at issue in this suit provides that “Each Party hereby submits to the jurisdiction of any state or federal court in Harris County, Texas for any action, suit or proceeding arising out of or related to this Agreement.”

9. Venue is proper in Harris County, Texas under Section 15.002(a)(1) of the Tex. Civ. Prac. & Rem. Code because all or a substantial part of the events or omissions giving rise to this suit occurred in Harris County, and because the Settlement Agreement at issue in this suit provides that “The Parties fully intend that venue in Harris County shall be mandatory.”

#### Summary of Action

10. This is a suit to enforce a Settlement Agreement entered into among the Parties on August 15, 2013 in Cause No. 2012-46745, *Eric Torres v. Craig Taylor, et al., v. Adam Sinn, et al.*, previously pending before the Honorable Judge Randy Wilson in the 157<sup>th</sup> Judicial District Court of Harris County, Texas. Defendants Taylor and Atlas unilaterally ceased making monthly settlement payments pursuant to the Settlement Agreement and still owe over \$200,000 in unpaid settlement funds.

#### The Underlying Suit

11. On August 15, 2012, Torres filed a lawsuit in the 157th Judicial District Court of Harris County, Texas, Cause No. 2012-46745, against Taylor and Atlas alleging causes of action

for shareholder oppression, violation of the right of inspection, breach of contract, breach of fiduciary duty, fraud in the inducement, negligent misrepresentation, intentional misrepresentation, conversion, statutory theft, and declaratory relief.

12. On September 19, 2012, Taylor and Atlas filed a counterclaim against Torres alleging causes of action for fraud, fraudulent inducement, negligent misrepresentation, and conspiracy to commit fraud.

13. On February 25, 2013, Taylor and Atlas filed a third-party petition against Sinn, XS, and Aspire alleging causes of action for conspiracy to commit fraud and aiding and abetting fraud.

14. On March 7, 2013, Sinn, XS, and Aspire filed a third-party counterclaim against Taylor and Atlas alleging causes of action for groundless pleading.

15. On July 11, 2012, the Parties attended mediation before Paul D. Clote.

#### The Settlement Agreement

16. On August 15, 2012, without admitting or allocating fault or liability, the Parties 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").

17. Pursuant to the Settlement Agreement, Torres agreed to assign, transfer, and convey all right, title, and interest in Torres' ownership interest in Atlas. In exchange, Atlas agreed to pay Torres \$500,000 in settlement of all claims.

18. On August 15, 2012, Atlas paid \$250,000 of the \$500,000 settlement amount according to the terms of the Settlement Agreement.

19. According to the terms of the Settlement Agreement, Atlas agreed that "The 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." Atlas has only made four

(4) of the required monthly payments of \$10,000. Atlas has failed to pay and continues to owe twenty-one (21) monthly payments of \$10,000.

20. Pertinent to this action, the Settlement Agreement contains a non-disparagement clause that provides as follows:

**Non-Disparagement.** The Parties agree that in exchange for the consideration provided under this agreement, the Parties shall not directly or indirectly, disparage, make or publish any false, derogatory, slanderous or libelous comments about any other Party regarding any matter likely to be harmful to the Party's business, business reputation or personal reputation. Further, the Parties agree that they shall not solicit from any third party any comments, statements, or the like that may be considered negative, false, derogatory or detrimental to the business reputation of any other Party. Further, the Parties agree that they will not restrict, limit, or prohibit any third party or employee from socializing, fraternizing, or doing business with any other Party.

21. The Settlement Agreement also contains a dispute resolution clause that provides:

**Mediation Obligations.** If any dispute arises with regard to the interpretation and / or performance of this Agreement, the Parties agree to resolve that dispute by phone conference with Paul Clote (the "Mediator"). If the Parties cannot resolve their dispute by phone conference, then each agrees to schedule one day of mediation with the Mediator within 30 days of the above phone conference to attempt to resolve the dispute before filing any law suit. The costs of the mediation prescribed by this paragraph shall be borne equally by the Parties participating in the mediation.

22. 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."

23. 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."

24. The Confidentiality provision of the Settlement Agreement provides in pertinent part that “The Parties agree that this Agreement, the negotiations preceding this Agreement, and the amount of consideration paid pursuant to this Agreement are confidential and will not be disclosed by any Party to any other person or entity, *except* ... in the event that a Party must bring or defend a lawsuit filed by or against a Party to protect rights under this Agreement.” Accordingly, this petition to protect Plaintiffs’ rights under the Settlement Agreement has not been filed under seal.

#### The Text Message

25. On December 21, 2013, Sinn hosted a holiday party at his home. Several of Sinn’s friends, employees, and acquaintances attended the holiday party. During the party, Sinn and several friends took a photograph holding up their middle finger to the camera. Later that evening, Sinn sent the photograph via text message to Craig Taylor. The text message that Sinn sent Craig Taylor did not contain any text.

26. On December 22, 2013, Sinn sent the photograph via group text message to the persons pictured in the photograph, Joonsup Park and David Schmidli. Sinn did not send the photograph to any customers or affiliates of Atlas, nor did he make any negative remarks about Taylor or Atlas.

27. Sinn sincerely apologizes for sending the photograph to Taylor and understands that it was not done in good taste. However, sending the photograph to Taylor does not constitute disparagement under the Settlement Agreement.

28. The photograph that Sinn sent Taylor does not contain 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.” Nor does

the photograph that Sinn sent Taylor “solicit from any third party any comments, statements, or the like that may be considered negative, false, derogatory or detrimental to the business reputation” of Taylor or Atlas.

29. The photograph and text message that Sinn sent the persons pictured in the photograph similarly contains no “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.” Nor does the photograph or text message that Sinn sent the persons pictured in the photograph “solicit from any third party any comments, statements, or the like that may be considered negative, false, derogatory or detrimental to the business reputation” of Taylor or Atlas.

30. While the photograph may have been distasteful, Sinn’s actions did not and could not have harmed Taylor’s or Atlas’s business or personal reputation. Although the Settlement Agreement provides “the Parties agree that they will not restrict, limit, or prohibit any third party or employee from socializing, fraternizing, or doing business with any other Party,” Taylor and Atlas have banned and continue to ban all of their employees from socializing or doing business with each of the persons pictured in the photograph. Taylor and Atlas also have banned and continue to ban all of their employees from socializing or doing business with each person who received the photograph.

31. Moreover, Torres never sent the photograph to anybody—not Taylor, not Atlas, nor any clients or affiliates of Taylor or Atlas. Neither did Torres make 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.” This is important because Torres assigned, transferred, and conveyed all of his right, title, and

ownership interest to Atlas, in exchange for payment of the full \$500,000 settlement amount.

32. Unfortunately and inexplicably, Taylor and Atlas have used this incident involving Sinn as a pretext to avoid their monthly payment obligations to Torres. Taylor and Atlas unilaterally ceased making settlement payments without first complying with the dispute resolution provisions of the Settlement Agreement. Taylor and Atlas are now delinquent and continue to owe over \$200,000 in settlement funds.

33. Pursuant to the dispute resolution provisions within the Settlement Agreement, Plaintiffs have made numerous good faith attempts to resolve this matter via correspondence with opposing counsel, phone conferences with the mediator, and formal mediation. Despite these efforts, Taylor and Atlas consistently have used this minor incident as a pretext and unjustified excuse to completely evade payment.

#### Breach of Contract

34. Plaintiffs incorporate by reference the allegations set forth above as though the same were fully set forth herein.

35. The Settlement Agreement is a valid and enforceable contract.

36. Plaintiffs and Defendants are each a party to the Settlement Agreement.

37. Plaintiffs performed all of their obligations under the Settlement Agreement.

38. Defendants' unilateral cessation of settlement payments without first complying with the dispute resolution provisions of the Settlement Agreement constitutes breach of the Settlement Agreement.

39. Defendants' failure and refusal to pay the remaining settlement funds constitutes breach of the Settlement Agreement, and proximately caused damages to Plaintiffs in an amount over \$200,000 but not more than \$1,000,000.

40. All conditions precedent to recovery have been met, waived, or excused.

### Declaratory Judgment

41. Plaintiffs incorporate by reference the allegations set forth above as though the same were fully set forth herein.

42. Plaintiffs are persons whose rights and legal relations are affected by the Settlement Agreement, and under Texas Civil Practice & Remedies Code §37.004, Plaintiffs request that the Court determine questions of construction arising under the Settlement Agreement.

43. Plaintiffs ask this Court to declare that Taylor and Atlas are delinquent under the terms of the Settlement Agreement and owe Torres unpaid settlement funds in the amount of \$210,000.

44. Plaintiffs ask this Court to declare that Torres did not and has not violated the non-disparagement clause of the Settlement Agreement.

45. Plaintiffs ask this Court to declare that the photograph Sinn sent Taylor on December 21, 2013, does not constitute disparagement under the terms of the Settlement Agreement.

46. Plaintiffs ask this Court to declare that the photograph and text message that Sinn sent the persons pictured in the photograph on December 22, 2013, does not constitute disparagement under the terms of the Settlement Agreement.

47. Plaintiffs ask this Court to declare that the photograph and text message that Sinn sent on December 21 and December 22, 2013 did not excuse Defendants' performance under the Settlement Agreement.

48. Plaintiffs ask this Court to declare that Taylor and Atlas must pay all of the monthly payments that they have failed to pay and timely remit payment for all remaining



monthly settlement payments.

49. Plaintiffs are ready, willing and able to comply with all their obligations under the Settlement Agreement.

Attorneys' Fees

50. Pursuant to Texas Civil Practice & Remedies Code §38.001(8), Plaintiffs request court costs and reasonable attorneys' fees incurred in bringing this action for breach of contract.

51. Pursuant to Texas Civil Practice & Remedies Code §37.009, Plaintiffs request court costs and reasonable and necessary attorneys' fees incurred in bringing this action for declaratory relief.

Prayer

WHEREFORE, Plaintiffs respectfully request that the Court declare that Taylor and Atlas are delinquent under the terms of the Settlement Agreement and owe Torres unpaid settlement funds in the amount of \$210,000.

Plaintiffs ask this Court to declare that Torres did not and has not violated the non-disparagement clause of the Settlement Agreement.

Plaintiffs ask this Court to declare that the photograph Sinn sent Taylor on December 21, 2013, does not constitute disparagement under the terms of the Settlement Agreement.

Plaintiffs ask this Court to declare that the photograph and text message that Sinn sent on December 22, 2013, does not constitute disparagement under the terms of the Settlement Agreement.

Plaintiffs ask this Court to declare that the photograph and text message that Sinn sent on December 21 and December 22, 2013 did not excuse Defendants' performance under the Settlement Agreement.

Plaintiffs ask this Court to declare that Defendants Taylor and Atlas must pay Plaintiffs

all of the monthly payments that they have failed to pay and timely remit payment for all remaining monthly settlement payments.

Plaintiffs request actual damages for settlement payments that Defendants unilaterally ceased and failed to make under the Settlement Agreement.

Plaintiffs request costs of court and suit, attorneys' fees as provided for by law, pre- and post- judgment interest as provided by law, and any and all other relief to which they may be entitled.

Respectfully submitted,

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