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CAUSE NO. 2014-40964

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

DEFENDANTS' FIRST AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM

Defendants Craig Taylor ("Taylor") and Atlas Commodities, LLC ("Atlas") (collectively "Defendants") file this, their First Amended Answer, Affirmative Defenses, and Counterclaim complaining of Plaintiffs Eric Torres ("Torres"), Adam Sinn ("Sinn"), XS Capital Management, LP ("XS"), and Aspire Commodities, LP ("Aspire") (collectively "Plaintiffs") as follows:

I. General Denial

1. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendants generally deny all of Plaintiffs' allegations and demand strict proof thereof by a preponderance of the evidence.

II. Answer and Affirmative Defenses

2. Defendants further answer that:

   a. XS does not have the legal capacity to sue.

   b. XS is not entitled to recover in the capacity in which it sues.

   c. XS is not a Texas limited partnership as alleged.

3. Defendants assert the following affirmative defenses:

a. Plaintiffs' claims are barred, in whole or in part, by the doctrine of unclean hands.

b. To the extent Plaintiffs seek equitable relief, their claims are barred by the doctrines of estoppel, laches, and waiver.

c. Plaintiffs failed to mitigate their damages, if any.

d. Excused performance.

III. PLEA IN ABATEMENT

4. Plaintiff XS Capital Management, LP is not a limited partnership registered to do business in the State of Texas.

5. XS is not entitled to maintain suit. Its claim (if any) should be abated until such time as Plaintiffs amend their pleadings to properly reflect parties that may maintain a lawsuit in the State of Texas. In the alternative, XS is a sole proprietorship for which Sinn is liable.

IV. COUNTERCLAIM

A. DISCOVERY LEVEL

6. Discovery is intended to be conducted at level 2. Rule 190.3.

B. PARTIES

7. Defendant/Counter-Plaintiff Craig Taylor is an individual residing in Harris County, Texas.

8. Defendant/Counter-Plaintiff Atlas Commodities, LLC is a Texas limited liability company.

9. Plaintiff/Counter-Defendant Adam Sinn is an individual residing in either Harris County, Texas or Puerto Rico.

10. Plaintiff/Counter-Defendant Eric Torres is an individual residing in Harris County, Texas.

11. Plaintiff/Counter-Defendant Aspire Commodities, L.P. is a Texas limited partnership.

12. Plaintiff XS Capital Management, L.P. purports to be a Texas limited partnership, but is in fact a sole proprietorship owned and managed by Adam Sinn.

C. FACTS

13. Atlas is a commodities brokerage. For the most part, it brokers energy products, facilitating the transfer, storage, and purchase of gas, electricity, physical crude and related commodities.

14. Eric Torres, a licensed commodities broker, is a former Atlas employee.

15. Craig Taylor is Atlas' majority shareholder.

16. In or about September 2010, Torres and Taylor entered into negotiations for Torres to purchase an equity interest in Atlas. The idea was that Torres would buy into Atlas, establish and run Atlas' electricity/power transactions (known as ERCOT).

17. Taylor agreed to sell a 25% ownership interest in Atlas to Torres for $750,000. An additional 10% interest in Atlas was conveyed subject to reversion if Torres failed to meet certain revenue goals.

18. At the time of that sale, Torres represented to Taylor and Atlas that the money he used to purchase his shares in Atlas were his or his wife's. In fact, the money came from Sinn, an energy trader.

19. Having a trader own or possess a financial interest in a brokerage is potentially catastrophic for the brokerage. Other traders – those on whom the brokerage depends for its business – would, justifiably, refuse to conduct business with a brokerage knowing another trader is financially invested in the success of the company. For a trader to have such a financial interest

in the brokerage would cause the market to believe that the brokerage, which is required to be neutral between traders, favored the invested trader. This would, inevitably, destroy the brokerage. Torres and Sinn therefore went to great lengths to conceal the fact that Sinn financed Torres' purchase.

20. Soon after Torres "purchased" "his" shares in Atlas, rumors began circulating that Sinn was the source of Torres' investment funds. Taylor and others at Atlas questioned Torres, who insisted that the money was his or his wife's. When asked for some evidence to support Torres' contention, he prevaricated, stalled for time and lied – repeatedly.

21. When it became clear that Sinn had financed Torres' investment and was the true owner of Atlas' shares and had, with Torres, done everything possible to conceal this crucial fact, a meeting was held between Torres, Sinn, their representatives, and Taylor, James Marshall (a 10% Atlas owner), Atlas and their representatives. Atlas offered to simply return all of Sinn's money in exchange for return of Atlas' shares and Torres' departure. Atlas was prepared to absorb the damage that had been done to the company and its reputation in order to be rid of Sinn and Torres. Sinn and Torres refused.

22. In the meantime, extremely damaging rumors circulated in the energy industry that Sinn owned a share of Atlas. Customers began refusing to do business with Atlas as a result. Atlas representatives travelled around the country reassuring customers, potential customers, and anyone who would listen that neither Sinn nor any other trader had any undue influence on the company.

23. As he did here, Torres preemptively filed suit against Atlas, Taylor and Marshall. Atlas and Taylor counterclaimed and joined Sinn, XS and Aspire for, among other things, rescission of the sale to Torres/Sinn of Atlas shares. As discovery progressed, it became

increasingly obvious that Torres and Sinn could no longer conceal the fact that Sinn secretly funded Torres' purchase and did everything possible to keep that fact hidden.

24. A settlement was reached and on August 15, 2013, a settlement agreement was signed (the "Settlement Agreement"). Though Sinn/Torres had paid $750,000 for shares of Atlas and the company had grown since the sale, Atlas/Taylor agreed to buy back their shares for $500,000 paid out without interest over two years as follows: $250,000 up front, and then $10,000 per month for twenty-five months.

25. Return of Sinn/Torres' shares of Atlas was to, and did, take place immediately.

26. Taylor and Atlas made the $250,000 payment, and four subsequent payments of $10,000 each. The case was dismissed with prejudice and, at Sinn's request, the records were sealed.

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.

28. The Settlement Agreement contained the following non-disparagement provision:

> **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 form socializing, fraternizing, or doing business with any other Party.

29. On December 22, 2013 at 12:06 a.m., four months after execution of the Settlement Agreement, Taylor was at home watching television. His phone lit up, indicating that he had received a text message. It was from Sinn. The message contained no text, just a photograph of

Sinn, Torres, Barry Hammond (another of Sinn's lawyers), and a few other energy traders, Evan Caron, Paul Sarver, and Sean Kelly. They are standing in front of a Christmas tree – and all but Caron are extending their middle fingers at the camera. Exhibit A. At the time the picture was taken, Caron and Kelly were traders at companies which do business with Atlas. Sarver is a former Atlas employee who now works for a competitor.

30. In addition to being juvenile and stupid, the unsolicited contact by Sinn was a breach of the Settlement Agreement.

31. Taylor and Atlas were nevertheless not interested in reinstituting litigation or seeing the settlement unravel because Sinn and a few apparently intoxicated friends were not imaginative enough to do anything more amusing than say "f-you" with their fingers. So on Monday, December 23, 2013, Counsel for Taylor and Atlas sent the following email to counsel for Torres and Sinn:

> As you know, the settlement agreement between our clients contains confidentiality and non-disparagement clauses. I can't say I've ever seen a violation of those provisions quite like this one, but Mr. Sinn texted the attached picture to Craig Taylor this past weekend. As you can see, the photo features Mr. Sinn and Mr. Torres. Also making an appearance is Chanler's co-counsel, not exactly living up to the highest standards of professionalism by upholding his middle finger instead of the dignity of the profession, as the rules require.
>
> Whether they thought they were being funny or trying to accomplish something else isn't clear. I'm going to guess, though, that this picture was not taken right after your clients and co-counsel either refused to discuss Atlas, Taylor, Marshall or the settlement or used "words to the effect that all disputes among [the Parties] have been fully settled and resolved" and nothing else, as the agreement requires.
>
> It looks to me like they were just drunk. Whatever the case, Mr. Taylor isn't amused, and I don't blame him.
>
> This case took a lot of effort from all of us to get settled and I don't want to undo it over this. Without waiving Atlas' right to act in response to any future violation(s), and without asking that either of your clients admit to having violated it, request is made that Mr. Sinn, Mr. Torres and Chanler's co-counsel (whose name escapes me at the moment) each apologize to Mr. Taylor before Christmas and then leave him alone.

If you would like to discuss, please let me know.

Exhibit B.

32. The next day, counsel for Sinn responded by saying that the picture was not intended for Taylor, but was in fact sent to people associated with ***Atlas*** with the tag line "Happy Holidays from ***Atlas***." Exhibit C (emphasis added). This of course would be a far more serious breach of the Settlement Agreement than originally believed, so counsel for Atlas and Taylor wrote back just over an hour later requesting (i) that Sinn provide "the picture with the tag line, a list of senders, and a full list of recipients, including all names, phone numbers, and email addresses," and (ii) that no related material be deleted or destroyed. Exhibit D.

33. Later that night (at 8:30 on Christmas Eve), counsel for Sinn emailed again, explaining that in his response to counsel for Atlas, he typed "***Atlas***" when what he meant was "***Aspire***," Sinn's company. In other words, Sinn was now claiming that the photograph was sent to people associated with ***Aspire*** with the tag line "Happy Holidays from ***Aspire***". Along with this explanation, counsel for Sinn forwarded to counsel for Taylor and Atlas an email from Sinn in which he explained:

> I thought I was sending the photo to someone else, I know multiple Craig's [sic] and even two Craig Taylor's [sic] believe it or not. This is the first I've learned of Craig Taylor getting sent this photo errantly. Everyone needs to lighten up a bit, and yes I sent it to a bunch of folks as a joke. If Craig has [sic] issue I can surely apologize, but in now [sic] way are the others in the photo apologizing for something I did by accident.

Exhibit E.

34. The next day, Wednesday, December 25, counsel for Taylor and Atlas again emailed counsel for Sinn, pointing out that the message received by Taylor contained no text – no "tag line" – at all, just a picture, and requesting that he forward what Sinn now claimed were "holiday cards" to ***Aspire*** associates by Friday, December 27. Exhibit F.

35. By the following Tuesday, December 31, Sinn had not responded at all, so counsel for Taylor and Atlas again emailed counsel for Sinn and said:

> I didn't receive any of these, so I will assume your client does not intend to provide them.
>
> Contacting people associated with Atlas with an obscene message purporting to be "from Atlas" is a violation of the settlement agreement. This breach by Mr. Sinn and Mr. Torres excuses further performance by Atlas, which will now consider what action it should take to protect itself.

Exhibit G.

36. The following day, January 1, 2014, counsel for Sinn emailed the following *non sequitur* to counsel for Taylor and Atlas:

> I assume from your response that you did not understand that I wrote a typo in my previous email. The places where I referenced "***Atlas***" should have referenced "***Aspire***." It is my understanding that Mr. Taylor received the message and photo in error. It was not meant for him to receive it and it was not directed at him either. Indeed, the message had nothing to do with Mr. Taylor or the lawsuit that we amicably resolved.
>
> We did not send any messages to people associated with your client's company, we also did not purport to send any messages "from" your client's company. This apparently is all a big misunderstanding. I don't think it would be appropriate to claim that the mistaken message or my typo is some breach of the settlement agreement. I also don't think it would be appropriate to unilaterally cease your clients performance under the settlement agreement based on a mistaken text message.
>
> With that said, we sincerely apologize for any inconvenience this may have caused you and your client.

Exhibit H (emphasis added).

37. Taylor and Atlas hoped Sinn was being truthful. The last thing Taylor or Atlas wanted was to have Sinn play what passes to him as a “joke” on Atlas by defaming the company and breaching the settlement agreement. Given Sinn’s past fraudulent conduct directed at Taylor and Atlas, his reputation for dishonesty, and days-long dissembling in the wake of Taylor’s receipt

of the defamatory text, and consistent refusal to provide a single shred of proof that what he was saying was true, however, Taylor and Atlas were in no way prepared to simply take Sinn's word for it.

37. The next day, January 2, 2014, counsel for Taylor and Atlas responded to counsel for Sinn:

> Thanks for the clarification, but I do understand that you claim your previous email's reference to Atlas was a typo. I hope that is the case and look forward to receiving the original texts with the original tag lines and a list of recipients so that it can be confirmed.

Exhibit I. Again, Sinn did not respond.

38. On January 7, still having had no response from Sinn, counsel for Taylor and Atlas emailed again, this time pointing out that Sinn had to that point simply ignored repeated requests that he produce whatever it was that he sent out, so:

> Request is made -- again -- that you provide the original texts in full, with a list of senders and recipients. If you do not provide it by the close of business on Friday, January 10, 2014, Atlas will assume that it is because to do so would confirm Mr. Sinn and Mr. Torres' breach of the settlement agreement.
>
> Breach by Mr. Sinn and Mr. Torres excuses further performance by Atlas. If Mr. Sinn or Mr. Torres have breached the settlement agreement, Atlas will have no obligation to make further payment, and such payments will not be made.

Exhibit J.

39. That same day, instead of simply producing the texts which Sinn claimed would vindicate him, thus avoiding this entire dispute, he invoked the mediation clause of the Settlement agreement, requesting that the parties make themselves available for a teleconference with the parties' agreed mediator, Paul Clote. Exhibit K.

40. Taylor and Atlas agreed about an hour later, but pointed out that none of this would be necessary if Sinn would simply produce the documents he claimed would exonerate him: Taylor

and Atlas would not invoke their right to cease performance, no attorneys' fees would be incurred, and no costs of any kind would be necessary. If litigation followed, Taylor and Atlas would be entitled to production of those messages in discovery anyway – all at much greater expense than simply producing them ahead of time. All Sinn had to do was show Taylor and Atlas – even Taylor and Atlas' counsel for his eyes only – what Sinn claimed were messages unrelated in any way to Atlas or Taylor. Counsel for Taylor and Atlas therefore responded:

> I agree that Mr. Sinn and Mr. Torres' breach of the settlement agreement requires that the parties to confer with Paul Clote before initiating any action. I am available tomorrow afternoon anytime, Thursday from 1:30-2:45, Friday morning until 11:00, and Tuesday the 14th from 1:30-3:00.
>
> As you know, if Mr. Clote is not able to assist us in resolving this matter and litigation follows, your clients will be required to produce in discovery what we're requesting now. If the texts didn't mention Atlas or go to anyone associated with Atlas, as you now claim, there will be nothing to drag third parties into. If that isn't the case, however, we will find out about it during discovery and those third parties will, at a minimum, be witnesses anyway. It is curious that Mr. Sinn and Mr. Torres would prefer to spend time and money jumping through all of these hoops instead of just forwarding what they claim would exonerate them and dispose of this issue completely.
>
> Neither Mr. Sinn nor Mr. Torres have any reason to believe that Atlas wants to litigate further, as you now claim. It doesn't. Craig Taylor, James Marshall, and Atlas want nothing more to do with your clients. It wasn't Atlas that contacted them and it isn't Atlas which is refusing to prove something so simple.
>
> If this was all a mistake, proving it is easy (which I guess you don't deny since you promise to provide some of the evidence to Mr. Clote). What makes absolutely no sense at all is to insist on spending thousands of dollars going through a mediator instead of just forwarding the requested information. It does make sense if Mr. Sinn and Mr. Torres have something to hide, though.
>
> If your clients were actually concerned that Atlas was looking for an excuse to initiate litigation, you could have asked at any time over the last two-plus-weeks for an assurance that if you provided the material, Atlas would consider the issue resolved. Atlas would have said yes because litigation isn't what it wants. Instead, Mr. Sinn and Mr. Torres have done everything they can not to have to turn over what they sent out.

> Mr. Sinn, XS, Aspire, and Mr. Torres are in breach of the settlement agreement. Because of their breach, further performance by Mr. Taylor, Mr. Marshall, and Atlas is excused. This email will be printed and sent by certified mail and facsimile to you and Melissa pursuant to paragraph 20 of the Settlement Agreement.

Exhibit L. Because Plaintiffs' breach excused further performance by Defendants, payment from Atlas and Taylor to Sinn was halted.

41. The parties mediated, first by phone and then in person. Sinn steadfastly refused to produce what he actually sent.

42. Weeks, and then months went by. Despite repeated requests, Sinn never produced the material he apparently still maintains would exonerate him. Meanwhile, because Sinn, Torres, XS, and Aspire have breached the Settlement Agreement, further performance by Atlas, Taylor, and Marshall is excused and no further payments have been made.

D. CAUSES OF ACTION

DECLARATORY JUDGMENT

43. An actual, existing, and bonafide controversy exists among the parties to the Agreement that should be determined by declaratory judgment. Therefore, pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, Taylor and Atlas seek a declaration that (i) Atlas and Taylor have performed, tendered performance, or attempted to tender performance of all of their obligations under the Agreement; (ii) Sinn and Torres breached the Agreement when they sent the obscene text message described herein to persons associated with Atlas under Atlas's name and/or participated in its creation; and (iii) Atlas and Taylor are excused from further performance of their obligations under the Agreement.

44. Taylor and Atlas are entitled to recover reasonable and necessary attorneys' fees and costs in connection with their request for declaratory judgment.

BREACH OF CONTRACT

45. Torres, Taylor, Marshall, Atlas, Sinn, XS, and Aspire have a valid, enforceable contract.

46. Defendants fully performed, attempted to perform, and/or tendered performance of all of their obligations under the contract.

47. As described above, Plaintiffs have materially breached their obligations to Defendants under the contract.

48. Defendants have suffered damages as a result of the breaches of contract alleged herein.

49. Defendants are entitled to recover reasonable and necessary attorneys' fees and costs in connection with Sinn, Torres, XS, and Aspire's breach.

MAXIMUM AMOUNT OF DAMAGES

50. Defendant/counter-Plaintiff seeks a maximum of $1,500,000 in damages, exclusive of pre- and post-judgment interest, attorneys' fees, and costs of court.

CONDITIONS PRECEDENT

51. All conditions precedent to recovery by Defendants have been performed or have occurred.

V. JURY DEMAND

52. Atlas and Taylor have demanded trial by jury and the required jury fee has been paid.

VI. CONCLUSION

53. Defendants Craig Taylor and Atlas Commodities, LLC pray that a take-nothing judgment be rendered against Plaintiffs, and that, on final trial of this cause, Defendants have and recover judgment of and against Plaintiffs as follows:

a. an award of actual damages in an amount to be determined by the jury;

b. an award of damages for loss of goodwill or loss of business reputation in an amount to be determined by the jury;

c. an award of attorney's fees in an amount to be determined by the jury pursuant to Chapters 37 and 38 of the Texas Civil Practice and Remedies Code;

d. for prejudgment interest on all amounts awarded at the legal rate until final judgment;

e. for post-judgment interest at the highest rate allowed by law, on all amounts awarded until paid;

f. for costs of court and for all other and further relief to which they may show themselves to be justly entitled.

Respectfully submitted,

BERG FELDMAN JOHNSON BELL, LLP

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ATTORNEYS FOR CRAIG TAYLOR AND ATLAS COMMODITIES, LLC

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 28, 2014 as follows:

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