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' MOTION TO COMPEL AND
RESPONSE TO PLAINTIFFS' MOTIONS TO QUASH

Defendants/counter-Plaintiffs Craig Taylor and Atlas Commodities, LLC (collectively "Taylor") file this Motion to Compel and respond to Plaintiffs/counter-Defendants' Motions to Quash as follows:

I. PRELIMINARY STATEMENT

In violation of a settlement agreement's non-disparagement and confidentiality clauses, on December 22, 2013, Adam Sinn texted Craig Taylor a picture of himself with a group of mutual acquaintances extending their middle fingers toward the camera. Without waiving his rights under the settlement agreement, Taylor asked for an apology, to be left alone, and nothing else. In response, Sinn offered a number of explanations about what happened. The first was that Sinn had texted the picture to a group of ***Taylor's*** clients and business associates, saying, "Happy holidays from ***Atlas***," Taylor's company. The second was that the picture was sent to a group of ***Sinn's*** clients and associates, saying, "Happy holidays from ***Aspire***," Sinn's company. Sinn also said that it was all a big misunderstanding, and that the picture either was not even sent to anyone other than those in it or that it was sent to only a few other people, and that it was never

intended to go to Taylor, but had been sent to him by accident because Sinn knows someone else named “Craig Taylor.”

In light of the initial violation and the various contradictory explanations that followed, Taylor requested that the texts be produced, and said that if they showed that no disparagement or breach of the confidentiality clause has occurred, nothing further would need to be done. Taylor made these requests over a period of weeks, always asking simply that the texts be produced, even if they were only shown to counsel. Sinn refused. Because Sinn was in breach, Taylor exercised his right to cease performance. Months later, Adam Sinn, Eric Torres, XS Capital Management, LP, and Aspire Commodities (collectively “Sinn”) filed suit and Taylor counterclaimed.

In his counterclaim, Taylor set out the various reasons he has to believe Sinn violated the settlement agreement on a number of occasions. These claims are supported by evidence attached to his counterclaim.

Taylor has now served discovery on Sinn, the non-parties in the picture, their cell phone companies, and related non-parties. The purpose of the discovery was to collect evidence of who sent what to whom, what was said, and when. Sinn has refused to answer, saying that virtually nothing is discoverable because the only issue before the Court is whether the original text sent to Taylor is a violation of the settlement agreement. In other words, if Sinn violated the settlement agreement as Taylor alleges, Taylor is not permitted to collect the evidence of it. This is not the law.

Taylor is plainly entitled to the discovery he seeks, which is limited to matters relevant to Sinn’s claims and Taylor’s counterclaims. Taylor now moves to compel.

II. FACTS

Defendants/counter-Plaintiffs incorporate, as if fully set out below, the factual statement contained in their counterclaim.

Eric Torres purchased shares in Atlas using funds surreptitiously loaned to him by Adam Sinn. Sinn is a trader and Torres a broker. Sinn and Torres knew that this transaction created a conflict, so Torres lied to Taylor about the source of the funds. When Taylor found out, all parties sued each other. That suit ended when Taylor agreed to buy Torres' shares back at a steeply discounted price. The parties entered into a settlement agreement (the "Agreement"), Taylor began making payments, Torres returned his shares, and the case was dismissed.

The Agreement contained non-disparagement and confidentiality provisions.

On December 22, 2013 at 12:06 a.m., four months after execution of the Agreement, Adam Sinn texted Craig Taylor the photo attached as Exhibit A. Appearing in the photo with their middle fingers extended toward the camera are Adam Sinn, Eric Torres, Barry Hammond (another of Sinn's lawyers), and a few other energy traders, Evan Caron, Paul Sarver, and Sean Kelly. There was no text and no explanation.

Shortly thereafter, counsel for Taylor emailed counsel for Sinn and Torres and, reserving Taylor's rights, asked simply for an apology and for Taylor to be left alone. In response, counsel for Sinn said that the picture was not intended for Taylor, but was in fact sent to people associated with ***Atlas*** – Taylor's company – with the tag line "Happy Holidays from ***Atlas***." This of course would be a far more serious breach of the Agreement than originally believed, so counsel Taylor wrote back just over an hour later requesting 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 that no related material be deleted or destroyed.

Later that night, counsel for Sinn emailed again, explaining that he typed "***Atlas***" when what he meant was "***Aspire***," Sinn's company. 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.

The next day, Wednesday, December 25, counsel for Taylor and Atlas again emailed counsel for Sinn, pointing out that the text 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. Sinn did not respond.

Taylor requested evidentiary support for the multiple explanations Sinn had to that point offered. None was given – ever.

Weeks and then months went by. Despite repeated requests, Sinn never produced the material he apparently still maintains would exonerate him. Because Sinn was in breach of the Agreement, Taylor ceased performance. Months later, Sinn filed this suit and Taylor counterclaimed.

The day Taylor's counterclaims were filed, he served discovery on Sinn and third parties. The discovery sought all of the information Sinn had refused to produce for months – records of what was sent, to whom, when, and whether Taylor or Atlas were mentioned. Despite the obvious relevance and lack of any privilege protecting any of this information, Sinn has refused to produce any of it, necessitating this motion. None of the Plaintiffs/counter-Defendants verified their interrogatory responses and request that verifications be provided has simply been ignored.

Sinn should be compelled to respond substantively and his various motions to quash denied.

III. TAYLOR'S DISCOVERY IS PROPER

Taylor has served the following discovery:

1. On August 18, 2014, Defendants' First Set of Interrogatories and Requests for Production of Documents to Plaintiff Adam Sinn were served on Adam Sinn.

2. On August 18, 2014, Defendants' First Set of Interrogatories and Requests for Production of Documents to Plaintiff Eric Torres were served on Eric Torres.

3. On August 18, 2014, Defendants' First Set of Interrogatories and Requests for Production of Documents to Plaintiff Aspire Commodities, L.P. were served on Aspire Commodities, L.P.

4. On August 18, 2014, Defendants' First Set of Interrogatories and Requests for Production of Documents to Plaintiff XS Capital Management, L.P. were served on XS Capital Management, L.P.

5. On August 18, 2014, Defendants' First Requests for Production of Documents to Paul Sarver were served on Paul Sarver through certified mail.

6. On August 18, 2014, Defendants' First Requests for Production of Documents to Robert B. Shults were served on Robert B. Shults by personal service.

7. On August 18, 2014, Defendants' First Requests for Production of Documents to Michael S. Bridges were served on Michael S. Bridges by personal service.

8. On August 18, 2014, Defendants' First Requests for Production of Documents to J. Christopher Yarrow were served on J. Christopher Yarrow by personal service.

9. On August 21, 2014, Defendants' Notice of Intention to Take Deposition by Written Questions was served on AT&T Mobility, LLC.

10. On August 21, 2014, Defendants' Notice of Intention to Take Deposition by Written Questions was served on Sprint Spectrum, LP

11. On August 21, 2014, Defendants' Notice of Intention to Take Deposition by Written Questions was served on Verizon Wireless.

Exhibit B.

Interrogatories 2 through 11 issued to and served on Sinn and Torres sought information regarding the photograph at issue. In response, both Sinn and Torres asserted eighteen "general" objections to the entire set and at least seven objections to each interrogatory, while providing only limited responses to five of the interrogatories, and verifying none of them.[1]

Interrogatories 2 through 4 to Aspire sought information regarding Aspire's corporate identity and structure. Interrogatories 5 through 15 sought information regarding the photograph at issue. In response, Aspire asserted eighteen "general" objections to the entire set and at least seven objections to each interrogatory, while providing no substantive responses to the interrogatories regarding its corporate identity and structure and only limited responses to four of the interrogatories regarding the photograph.

Taylor's Requests for Production Numbers 1 through 16 sought documents related to the photograph at issue, as well as its transmission(s) that is (are) the subject of this suit, from Sinn, Torres, and Aspire. In response, Sinn, Torres, and Aspire each asserted eighteen "general" objections to the entire set and at least nine objections to each request, while providing no substantive responses and producing no documents.

The discovery is also intended to investigate and verify the claims made by Sinn himself. For example, on December 24, 2013, Sinn claimed that sending the picture to Craig Taylor was in error, and that he actually knows more than one Craig Taylor, "believe it or not." The actual Craig Taylor does not believe it; inasmuch as Sinn's credibility will be at issue during the trial of this case – and a witness' credibility, especially a party, is always at issue – Taylor does not think the jury will believe it either, and they are certainly entitled to know whether he was or is being truthful. If he was being truthful, Taylor would be entitled to know what was said to the "other

[1] None of the Plaintiffs/counter-Defendants verified their interrogatory responses. The day after they were received, counsel for Taylor wrote to counsel for Sinn asking when verifications would be provided, but counsel for Sinn did not respond at all. Exhibit C.

Craig Taylor" about the actual Craig Taylor. So Interrogatory No. 5 asked about the supposed "other Craig Taylor":

> Identify by full name, address, telephone number, email address, and business affiliation every person you knew as "Craig Taylor" as of December 24, 2013.

Sinn responded by pasting the same boilerplate objections and refusal to answer contained in virtually all of his responses:

> In addition to the General Objections, Sinn objects to this interrogatory as overbroad, unduly burdensome, harassing, and not reasonably calculated to lead to the discovery of admissible evidence. Sinn further objects to this interrogatory as vague, compound, and outside the scope of disputed issues. Adam Sinn reserves the right to amend this response pending the decision of the Court concerning the scope of allowable discovery.

These boilerplate, non-specific and inaccurate objections are contained everywhere in all of the Sinn Plaintiff/counter-Defendants' responses, and as such are waived.

Sinn maintains that the only issue before the Court is whether his original sending of the photograph attached as Exhibit A is itself a breach of the Agreement. This cannot be true for a number of reasons. But Taylor's case is not about Exhibit A alone. It is about the number of explanations Sinn has offered for it and whether any of them are true, because if any of them are, they are evidence of his breaches of the Agreement. If they are not true, they will be weighed by the jury when considering whether Sinn is credible.

This case is also about the comments Sinn has made about Taylor and/or Atlas in violation of the Agreement. Interrogatory No. 9 asked Sinn and Torres what was said immediately before and after the photo was taken, who said it, and whether Taylor was mentioned. Even this, Sinn says, is not discoverable.

The third party discovery – to cell phone carriers and individuals – seeks to establish who sent what text to whom and when. If Sinn claims not to have sent the photo and text to Paul

Sarver (who is pictured) for example, each of their wireless carriers' records will bear that out. If the wireless carriers' records reflect otherwise, Sinn and Sarver may explain that different pictures and text were exchanged. Taylor has chosen the least intrusive method of investigating the claims and counter-claims at issue here. The alternative is to request that the Court compel Sinn to turn his phone over to an expert for analysis.

Sinn has moved to quash, has objected or outright refused to answer all of Taylor's discovery. The information sought is relevant, likely admissible, but at a minimum is reasonably calculated to lead to the discovery of admissible evidence. Sinn's objections should be overruled, his motions to quash denied, and Taylor's motion to compel granted.

IV. ARGUMENT AND AUTHORITIES

Parties are entitled to engage in discovery reasonably calculated to lead to the discovery of admissible evidence. Tex.R.Civ.P. 192.3. This is precisely what Taylor has done.[2]

Taylor's suit against Sinn is for Sinn's breaches of the Agreement. On a number of occasions, Sinn has admitted to sending an obscene photo to friends with a statement or statements which mention Taylor, Atlas, or both. Why Sinn decided to send it to Taylor in the first place is at issue. What Sinn said at the time, to whom, and why, are all relevant inquiries.

[2] Each of the Sinn Plaintiffs/counter-Defendants have has asserted boilerplate "General Objections" to all of the discovery. Exhibit B. Those "General Objections" are invoked in response to each of the individual answers and are then followed each and every time by the same "overbroad, unduly burdensome, harassing, and not reasonably calculated to lead to the discovery of admissible evidence" boilerplate. *Id*. These are precisely the kind of useless, cumulative, wasteful responses Rule 193.2 was enacted to eliminate. ("An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown.") The Sinn Plaintiff/counter-Defendants' objections have therefore been waived. *In re Park Cities Bank*, 409 S.W.3d 859, 878 (Tex.App – Tyler 2013, orig. proceeding) ("[P]rophylactic objections are now prohibited by the rules of procedure. . . prophylactic or general objections violate Rules 193.2(a) and (e), among others; trial court should strike, ruling that each such objection has been waived").

Discovery aimed entirely at Sinn's breaches, his inconsistent statements and allegations the Plaintiffs/counter-Defendants themselves have made are entirely discoverable. [3]

The Agreement prohibits disparagement of Taylor and Atlas. It also requires that the parties maintain confidentiality about the Agreement. In addition to the initial sending of the photo to Taylor, Sinn has repeatedly given Taylor reason to believe that he has breached both provisions by sending it to others while mentioning Taylor. In his own petition, Sinn admits to having sent the photo to everyone in it as well as Joonsup Park and David Schmidli. Plaintiff's First Amended Petition at p. 5, ¶26. Sinn claims in that same paragraph that he made no negative comments about Taylor or Atlas. Taylor served discovery on this point – one made by Sinn himself in his live pleading – but he refused to answer. Taylor vehemently disputes Sinn's contention, and has evidence that it is false. But Sinn's position is that Taylor, the Court, and the jury must take his word for it. This is not the law.

Discovery on these points is critical and well within the scope of permissible discovery. To limit discovery by prohibiting Taylor from collecting evidence about these matters is to permit a party to breach a contract and then insist evidence of his breach is beyond the scope of discovery, contrary to the most basic of Texas law: that parties are entitled to engage in broad, wide-ranging discovery before presenting their case to a jury. This point could not be clearer: "The purpose of discovery is the administration of justice by allowing the parties to obtain the fullest knowledge of facts prior to trial. Discovery rules must be given a broad and liberal

[3] Sinn claims that any request or interrogatory which might reveal a breach he has committed and anything that impeaches his prior statements is irrelevant and part of a "fishing expedition." But Taylor has supported each of the discovery requests with specific allegations, and even submitted evidence to support those claims, which he is not required to do. Tex.R.Civ.P. 45(b). This is the opposite of a fishing expedition. *In re Sears, Roebuck & Co.*, 123 S.W.3d 573, 578 (Tex.App. – Houston [14th Dist.] 2003, orig. proceeding) ("A "fishing expedition" is one aimed not at supporting existing claims but at finding new ones.")

treatment." *In re Energy Transfer Partners, L.P.*, 2009 WL 1028056 (Tex. App.—Tyler 2009, orig. proceeding) (mem. op.) (internal citations omitted).

In *Avary v. Bank of Am., N.A.*, 72 S.W.3d 779 (Tex.App.-Dallas 2002, pet. denied), the district court granted the defendant bank summary judgment after a settlement agreement fell apart. The Dallas Court of Appeals reversed, in part because discovery was strictly limited in precisely the way Sinn has unilaterally refused to comply with the rules of discovery here. The Dallas Court wrote:

> The general rule regarding the scope of discovery is very broad: "In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." TEX.R. CIV. P. 192.3(a) & cmt. 7 ("A court abuses its discretion in unreasonably restricting a party's access to information through discovery.").

Avary, 72 S.W.3d at 802.

This is a breach of contract case. Taylor will be expected to meet his burden of pleading and proof. The only way to do that is to conduct the discovery he has served on Sinn and the non-parties he has served. There is no reason to deviate from the general rule regarding the very broad scope of discovery. *See, eg, Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996) ("The party seeking enforcement [of a settlement agreement] must pursue a separate breach-of-contract claim, which is subject to the normal rules of pleading and proof.").

V. CONCLUSION

Sinn's objections should be overruled, his motions to quash denied, and Taylor's motion to compel granted.

A proposed order is attached.

Respectfully submitted,

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By: /s/ Geoffrey Berg

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CERTIFICATE OF CONFERENCE

I have conferred with counsel for Plaintiffs/counter-Defendants and he is opposed to the relief requested in this motion.

/s/ Geoffrey Berg
Geoffrey Berg

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 September 29, 2014 as follows:

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