1/5/2015 12:21:50 PM
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Envelope No. 3648122
By: LISA COOPER
Filed: 1/5/2015 12:21:50 PM

CAUSE NO. 2014-40964

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

PLAINTIFFS/COUNTER-DEFENDANTS' MOTION TO QUASH AND FOR PROTECTIVE ORDER AGAINST DISCOVERY SERVED ON NON-PARTIES PAUL SARVER, DAVID SCHMIDLI, AND EVAN CARON

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs/Counter-Defendants file this Motion to Quash and for Protective Order Against Discovery Served on Non-Parties Paul Sarver, David Schmidli, and Evan Caron by Defendants Craig Taylor and Atlas Commodities, LLC (collectively "Defendants") and would respectfully show this Court:

I. Introduction

On December 9, 2014, Defendants served Notices of Requests for Production for Documents to Non-Parties Paul Sarver ("Sarver") and David Schmidli ("Schmidli") which were subsequently amended on December 11, 2014. On December 11, 2014, Defendants served a Notice of Requests for Production for Documents to Non-Party Evan Caron ("Caron"). Collectively the amended notices to Sarver and Schmidli and original notice to Caron will be referred to herein as the "Requests." (*See* Exhibits A, B, and C hereto). The Requests (numbering 15 requests per non-party) seek "all communications and documents" between the non-parties and Plaintiffs and between the non-parties and Plaintiffs' counsel (Barry M. Hammond, Jr.), that

directly or indirectly mention, relate or refer Defendants, as well as all documents that refer to the Picture (attached to the Requests as Exhibit 1) or any similar picture, from December 15, 2013 to January 15, 2014. Defendants have also served notices of deposition for Schmidli, Sarver, and Caron ("Deposition Notices") (*See* Exhibits D, E, and F hereto)

Defendants' Requests and Deposition Notices to these non-parties are merely an attempt at harassment of non-parties who have done nothing other than be present at a holiday party at Mr. Sinn's home and take a picture that does not reference Defendants in any way and no one (including Defendants) have ever claimed that these non-parties sent to Defendants or anyone else.

Further, Defendants' only claims in this case concern an alleged breach of the settlement agreement. The non-parties that Defendants now seek discovery from are also non-parties to the settlement agreement which Defendants allege was breached. These non-parties are not bound by the settlement agreement and their personal communications cannot possibly form the basis of any alleged breach of the settlement agreement that Defendants claim occurred. Thus, Defendants discovery requests to these non-parties are wholly irrelevant to the claims asserted by Defendants and are nothing more than an impermissible fishing expedition.

Per this Court's November 11, 2014 order and direction, Messrs. Torres and Sinn have produced their communications with themselves or third parties that referenced or concerned Defendants. There is nothing in those communications that remotely supports Defendants' unsupported suspicion that the Picture was sent to any customer of Defendants much less with any message from Plaintiffs, a fact that Defendants can easily confirm by simply asking their customers (Defendants certainly have not alleged that any of their customers actually have said they saw the Picture or a message from Plaintiffs). The only basis of this suspicion is an email

from Chanler Langham, who was counsel for Plaintiffs at the time of the Picture, and who has advised the Court (which Defendants recognized at the last hearing) that his email was an unfortunate but innocent mistake on his part and a total misunderstanding of a joke his client Mr. Sinn played on Mr. Langham. The reality of this failed joke and Mr. Langham's misunderstanding is evident from the communications Messrs. Torres and Sinn have produced already to Defendants, probably 90% of which are communications between Mr. Sinn, Mr. Torres, and a few others in the Picture that Mr. Langham had completely misunderstood Mr. Sinn's joke to Mr. Langham and had incited the Defendants by his inaccurate email suggesting the Picture was sent to customers of Atlas. Defendants' entire counterclaim is based on an attorney who misunderstood his client and all of the discovery permitted by the Court and Defendants' supposed investigation required by Texas Rule of Civil Procedure 13 would bear out that Plaintiffs did not send the Picture or any message to Defendants' customers. Defendants got to do their fishing expedition with the Court's Order and found nothing. The fishing, now directed at non-parties, is outside the scope of that Order and in any event should cease. Accordingly, Defendants' Requests and Deposition Notices to Non-Parties Paul Sarver, David Schmidli, and Evan Caron should be quashed and Plaintiffs (and indeed, the innocent non-parties) should be protected from this abusive discovery.

II. Background

On August 15, 2013, without admitting or allocating fault or liability, Craig Taylor, Atlas Commodities, Eric Torres, Adam Sinn, and Aspire Commodities 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"). Pursuant to the Settlement Agreement, Atlas paid $250,000 of the $500,000 settlement amount to Eric Torres. Taylor and Atlas agreed

that "[t]he 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." Taylor and Atlas have only made four of the required monthly payments, and have failed to pay 21 monthly payments.

On December 21, 2013, Sinn hosted a holiday party at his home. During the party, Sinn and four other attendees took a photograph holding up their middle finger to the camera. On December 22, 2013, Sinn sent the photograph via picture message to Craig Taylor, Joonsup Park, David Schmidli, and the persons pictured in the photograph.

Because Defendants acknowledge the Settlement Agreement and their obligation to pay Mr. Torres, the central issue in this dispute and Defendants' counterclaim is the picture message that Sinn sent to Craig Taylor on December 22, 2013. The crux of Defendants' Declaratory Judgment and Breach of Contract counterclaims is that Defendant is concerned that the same or similar picture messages/photos were sent to customers of Defendant Atlas. This is not so. Plaintiffs in this case have already produced their "communications to each other and third parties concerning Craig Taylor or Atlas Commodities, L.P. during the time frame of December 15, 2013 to January 15, 2014" pursuant to the Court's November 11, 2014 Order on Discovery Motions and Special Exceptions. Thus, Defendants already would have been provided the documents responsive to Requests Nos. 1, 2, 3, 4, 7, 8, 9, and 10 to Sarver and Schmidli, and likely what was intended to Caron.[1] As such, these requests are unreasonably duplicative, and clearly propounded solely for the purpose of harassment of Plaintiffs and the non-parties. Absent Defendants presenting something found in the communications already produced by Plaintiffs to indicate that any communications, texts, or pictures were sent to Atlas customers, Defendants

[1] Defendants' Notice of Requests for Production of Documents to Eva Caron, who is a non-party, does not actually include any requests for documents.

should not be allowed to harass these non-parties for their private communications, especially given that Defendants do not even appear to be seeking any potential communications between these non-parties and customers of Atlas relating to this photograph. Instead, Defendants just seem curious to see what a group of prior acquaintances think about him. This is simply not discoverable, relevant, or of any value whatsoever to the judicial system.

III. Objections to the Requests

Plaintiffs object as follows to the Requests to Non-Parties Paul Sarver and David Schmidli, and apparently what was also intended for Evan Caron:

- Request Nos. 1, 2, 3, 4, 7, 8, 9, and 10 to Sarver and Schmidli (and perhaps Caron): As shown above, these requests seek communication between these non-parties and plaintiffs that indirectly or directly relate to Defendants. This has already been produced by Plaintiffs in this case, and is unnecessarily duplicative and harassing to Plaintiffs and the non-parties. Plaintiffs also object to these requests as overbroad, seeking communications that "indirectly" relate or refer to Defendants which is ambiguous and without a cogent definition.

- Request Nos. 5, 6, 11 and 12 to Sarver and Schmidli (and perhaps Caron): these requests seek communications to or from Barry Hammond, another non-party who is also not a customer or even potential customer of Atlas, and the non-parties plaintiffs that indirectly or directly relate to Defendants. These requests are harassing and irrelevant as they would be between non-parties to both the case and the settlement agreement which forms the basis of Defendants' claims. Again, if Defendants' problem is that they think there were communications to their clients, these communications between non-party, non-clients have no bearing on the case. Plaintiffs therefore object to the requests as not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs also object to these requests as overbroad, seeking communications that "indirectly" relate or refer to Defendants which is ambiguous and without a cogent definition.

- Request No. 13 to Sarver and Schmidli (and perhaps Caron): this request seeks all documents or communications containing, mentioning, relating to or referring to the photograph or any other photograph in which any of the individuals in the subject photo are extending their middle finger. This request is strange, absurd and irrelevant. Should any such photos exist, Defendants have no need to discover "any other photos" in that such

> photos would have absolutely no bearing on this case. Specifically many of the other individuals in the Picture are, again, not parties to the settlement agreement. Thus, such pictures (should any exist), even if it actually did disparage Taylor or Atlas, would not have any bearing on whether the Plaintiffs in this case breached the settlement agreement. There is no allegation by anyone (mistakenly or otherwise) that Taylor, Atlas or any of their clients or customers ever received any other photo from anyone other than the Picture at issue. Furthermore, if the issue is whether the photo was sent to Atlas customers, then communications of conversations between these non-parties who are neither customers of Atlas nor signatories to the underlying settlement agreement, or between said non-parties and other people who are not customers of Atlas is wholly irrelevant to the litigation. Thus, Plaintiffs object to this request as not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs also object to this request as violating privacy rights.

- Request Nos. 14 and 15 to Sarver and Schmidli (and perhaps Caron): These requests seek production of all communications in their custody or control that directly or indirectly mention, relate, or refer to Craig Taylor or Atlas. These requests are extremely overbroad as the request does not even define the authors or participants of the communications it seeks. These requests could easily call for attorney-client communications (if such exist), or call for absolutely mundane and irrelevant responses such as texts between one of the non-parties, and say, hypothetically, their parents (if such exist). Further, and again, such communications (should they exist) have nothing to do with the parties to the settlement agreement and could not possibly be considered a breach of that settlement agreement. In short, they have no relevance to the case asserted by Defendants. These requests are also objectionable as violating privacy rights, are clearly propounded for the purposes of harassment, and are not reasonably calculated to lead to the discovery of admissible evidence.

It is abundantly clear that these document requests propounded to non-parties Schmidli, Caron, and Sarver are nothing more than a harassing fishing expedition. If Defendants are concerned about whether the subject photo or other communication was sent to their clients, then Defendants have a far easier, less harassing means of determining that rather than seeking large batches of non-parties' personal communications: asking their clients if they received any such communications or photos. Absent a showing from either (a) the documents already produced by Plaintiffs pursuant to the Court's November 11, 2014 order, and (b) receipt of such

communications by one or more of Atlas' clients, Defendants should not be permitted to seek overbroad, personally invasive discovery from non-parties to merely satisfy Mr. Taylor's irrelevant curiosity.

IV. Motion to Quash and Motion for Protection

TRCP 192.6(a) provides that "A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought." TRCP 192.6(b) provides that this Court "may make any order in the interest of justice" to "protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights."

As shown above, the wide range of personal, confidential, and non-party information sought by Defendants' Requests goes far beyond any possible scope of relevancy, and appears to have been sent for the sole purpose of harassment. Request Nos. 1-15 to Schmidli and Sarver (and the presumably missing requests to Caron) seek the production of information wholly unrelated to the facts at issue or the claims asserted, and amount to nothing more than an improper fishing expedition. *See Kmart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) ("We reject the notion that any discovery device can be used to 'fish'"); *In Re American Home Assurance Co.*, 88 S.W.3d 370, 374 (Tex. App.—Texarkana 2002, no pet.) ("discovery requests must be reasonably tailored to include only matters relevant to the case" and "may not be used as a fishing expedition or to impose unreasonable discovery expenses on the opposing party.").

Defendants are not entitled to the personal, confidential, and non-party documents sought in Request Nos. 1-15, many of which they would already have from Plaintiffs' production pursuant to the November 11, 2014 order. Accordingly, this Court should quash the overly broad

and unduly burdensome Requests.

Further the Court should quash Defendants' Deposition Notices which seek to depose these non-parties. As discussed above, Defendants are merely attempting to harass non-parties who have no connection with this matter other than the unfortunate fact that they took a picture at Sinn's holiday party.

WHEREFORE, Plaintiffs request that the Court quash the Requests and the Deposition Notices, and grant Plaintiffs all further relief in law or in equity to which they are entitled.

Respectfully submitted,

RAPP & KROCK, PC

s/ Kenneth M. Krock

Kenneth M. Krock
State Bar No. 00796908
Terri S. Morgan
State Bar No. 08286500
Megan N. Brown
State Bar No. 24078269
3050 Post Oak Boulevard, Suite 1425
Houston, Texas 77056
(713) 759-9977 telephone
(713) 759-9967 facsimile
kkrock@rk-lawfirm.com
tmorgan@rk-lawfirm.com
mbrown@rk-lawfirm.com
ATTORNEYS FOR PLAINTIFFS/COUNTER-DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of January 2015, a true and correct copy of this document was served on counsel of record in accordance with the Texas Rules of Civil Procedure.

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

Via Eserve

s/ Kenneth M. Krock
Kenneth M. Krock