

CAUSE NO. 2014-40964

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

**DEFENDANTS' (1) RESPONSE TO PLAINTIFFS' MOTION TO QUASH AND
FOR PROTECTIVE ORDER AND (2) MOTION TO COMPEL**

Defendants Craig Taylor ("Taylor") and Atlas Commodities, LLC ("Atlas") (collectively "Defendants") file this (1) Response to Plaintiffs' Motion to Quash and for Protective Order and (2) Motion to Compel as follows:

I. BACKGROUND

Since filing this suit, Plaintiffs Eric Torres ("Torres"), Adam Sinn ("Sinn"), XS Capital Investments, LP ("XS"), and Aspire Commodities, LP ("Aspire") (collectively "Plaintiffs") have not only resisted discovery, they have insisted that none was warranted at all and refused to respond. Every action taken by Plaintiffs during this litigation has been in furtherance of avoiding discovery. Just last week, after their counsel repeatedly complained that a heavy workload and a prepaid vacation prevented him from timely responding to discovery requests, Plaintiffs managed to file motions for summary judgment in an attempt to preempt the discovery that they had no time to participate in. Their Motion to Quash and for Protective Order is another attempt to evade the discovery the Court has already ruled they must participate in.

Despite the Court's November 11, 2014 order, Plaintiffs have still not produced "records of their communications to each other and third parties concerning Craig Taylor or Atlas

Commodities, L.P. [*sic*] during the time frame December 15, 2013 to January 15, 2014.” Defendants move—for the second time—to compel those records and to enforce the Court’s prior discovery order.

II. MOTION TO COMPEL

A. Plaintiffs Must Prove that the Withheld Communications Are Both Privileged and Exempt Under Rule 193.3(c).

Plaintiffs have withheld large portions of their text messages as well as emails based on the attorney-client privilege. Despite repeated requests (Exhibits A and B), they refuse to provide a privilege log pursuant to Texas Rule of Civil Procedure 193.3(b), claiming that the withheld text messages and emails fall under the exemption provided in Rule 193.3(c). Exhibit C. Defendants hereby request a hearing on Plaintiffs’ claims that certain text messages and emails fall within the attorney-client privilege and are exempt from the privilege log requirement. Tex. R. Civ. P. 193.4(a); *see In re BP Prods. N. Am. Inc.*, 263 S.W.3d 113 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding).

There is no presumption that documents are privileged. *In re BP*, 263 S.W.3d at 111. The party who seeks to resist discovery bears the burden of pleading and proving an applicable privilege. *Id.* To meet this burden, the party asserting a privilege must make a prima facie showing of the applicability of the privilege and provide some evidence to support the assertion of privilege. *In re Lumbermen’s Underwriting Alliance*, 421 S.W.3d 289, 295 (Tex. App.—Texarkana 2014, orig. proceeding). The evidence may be testimony at the hearing on the party’s claims of privilege or by affidavit served at least seven days before the hearing. Tex. R. Civ. P. 193.4(a); *In re Anderson*, 163 S.W.3d 136, 141 (Tex. App.—San Antonio 2005, orig. proceeding). A privilege log itself is not evidence that a privilege applies. *In re Anderson*, 163 S.W.3d at 141. After examining

the evidence, the court may require an *in camera* review of the documents if necessary to determine the applicability of the privilege. Tex. R. Civ. P. 193.4(a); *In re BP*, 263 S.W.3d at 112.

Rule 193.3 (b) allows a party to request a “privilege log” identifying documents withheld on the basis of privilege. Rule 193.3 (c) provides an exemption:

(c) Exemption. Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer’s representative or a privileged document of a lawyer or lawyer’s representative—

(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

(2) concerning the litigation in which discovery is requested.

Pursuant to Rule 193.4(a), Defendants request that the Court hold a hearing on Plaintiffs’ claims that the documents are privileged and that they fall within the exemption from the requirement to provide a privilege log. The exemption under Rule 193.3(c) is narrow, and Plaintiffs bear the burden to prove that it and the underlying attorney-client privilege apply. First of all, any communications that include third parties are not protected by the privilege. *See* Tex. R. Evid. 503. The evidence produced thus far indicates that group communications took place among Sinn, Torres, Barry Hammond (who Sinn claims as his counsel), and several third parties. Plaintiffs must show that the withheld communications took place between themselves and their attorneys only and not any third parties. *See* Tex. R. Civ. P. 193.3(c). Moreover, Plaintiffs must demonstrate that the communications were created or made from the point at which Plaintiffs consulted with counsel for legal services “in the prosecution or defense of a specific claim in the litigation in which discovery is requested.” *See* Tex. R. Civ. P. 193.3(c). The withheld communications were made long before Plaintiffs instituted this suit. Plaintiffs must show that the withheld communications were made for the purpose of obtaining legal services in prosecution or defense of the instant

litigation. *See In re Anderson*, 163 S.W.3d at 142 (“The memorandum was created before this litigation arose. It was not created for the purpose of obtaining professional legal services in the defense of Anderson’s suit.”). Any communications about Taylor, Atlas, or the photograph at issue—what Plaintiffs describe as a “failed joke”—are exempt only if they were made with an eye toward obtaining legal services with regard to this lawsuit. *See* Tex. R. Civ. P. 193.3(c).

B. Plaintiffs Have Failed to Comply with Their Obligations Under the Rules and this Court’s Order

On November 11, 2014, rejecting the Plaintiffs’ insupportable argument that they should not have to answer Defendants’ discovery requests because they sought irrelevant information, this Court ordered Plaintiffs to produce “records of their communications to each other and third parties concerning Craig Taylor or Atlas Commodities, L.P. during the time frame December 15, 2013 to January 15, 2014.” Plaintiffs have nevertheless failed to do so, in violation both of the Texas Rules of Civil Procedure and this Court’s order.

Plaintiffs have refused to produce records of voice call records of Eric Torres from January 5, 2014 through January 15, 2014, records of text and picture messages of Eric Torres from December 15, 2013 through January 15, 2014, very few instant messages, and no emails at all. Defendants respectfully request that the Court enforce its order and compel Plaintiffs to produce the responsive records.

III. RESPONSE TO MOTION TO QUASH AND FOR PROTECTIVE ORDER

In another desperate attempt to avoid discovery, Plaintiffs have moved to quash production of the same records the Court ordered produced on November 11, 2014, but which Plaintiffs refuse to produce, from certain third parties. Defendants issued requests for production and subpoenas duces tecum to third parties Paul Sarver, David Schmidli, and Evan Caron—all of whom appeared

in the photograph at issue—for communications that mention, relate, or refer to Taylor or Atlas from December 15, 2013 to January 15, 2014. (Exhibits D–I.)

Without apparent irony, Plaintiffs argue that, because they have already produced the records, the requests are therefore duplicative and propounded solely for harassment. The Plaintiffs have not produced this information. But even if they had, in light of the Plaintiffs’ inexcusable refusal to acknowledge and comply with their discovery obligations, Defendants are entitled to conduct this third party discovery to determine the extent to which the Plaintiffs have altered, destroyed or withheld evidence. Plaintiffs’ contention that records of these communications are “irrelevant” is particularly curious given the Court’s November 11, 2004 order to produce them.

IV. CONCLUSION AND PRAYER

For these reasons, Defendants Craig Taylor (“Taylor”) and Atlas Commodities, LLC (“Atlas”) respectfully request that the Court (1) conduct a hearing on Plaintiffs’ claims that the documents withheld fall under the attorney-client privilege and are exempt from the privilege log requirement, (2) compel Plaintiffs to produce all “records of their communications to each other and third parties concerning Craig Taylor or Atlas Commodities, L.P. [*sic*] during the time frame December 15, 2013 to January 15, 2014,” and (3) deny Plaintiffs’ Motion to Quash and for Protective Order, and any other and further relief to which they may be entitled.

Respectfully submitted,

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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 January 6, 2015 as follows:

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