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CAUSE NO. 2014-40964

ERIC TORRES, ADAM SINN, XS CAPITAL INVESTMENTS, 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

Consolidated with
CAUSE NO. 2015-49014

ERIC TORRES,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
v.	§	HARRIS COUNTY, TEXAS
S. JAMES MARSHALL,	§	
Defendant.	§	157TH JUDICIAL DISTRICT

PLAINTIFF ERIC TORRES' RESPONSE TO
DEFENDANTS' MOTION FOR DEATH PENALTY SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

Eric Torres ("Torres") file this Response to Defendants' Motion for Death Penalty Sanctions, and would respectfully show this Court:

I. INTRODUCTION

In what can only be described as a last-second desperation Hail Mary heave, Defendants seek to strike Plaintiff Eric Torres' pleadings, and render judgment against him on his valid and obvious breach of contract claim and on Defendants' counterclaim which itself was manufactured and

fabricated because, despite telling this Court in the fall 2014 that its customers had received a text message from Adam Sinn with a picture and "Happy Holidays Atlas" Defendants admitted in their testimony they never even bothered to ask their clients if they had received the picture or a text from Adam Sinn. Defendants' motion is the second reincarnation of their spoliation claim that they finally realized was not a cause of action. The motion is based on the fact that Torres turned in his iPhone in exchange for a new iPhone when he and his wife switched carriers in September 2014. Defendants have sought to make this wholly mundane act something of a vile and egregious nature through rhetoric and hyperbole, but the fact remains the same: Torres simply turned in his phone, like nearly all Americans do, when switching cellular carriers***, after having checked it and confirming that no responsive documents were on it***. In fact, Defendant Taylor has done the same thing during the course of this litigation.

Moreover, the "destruction" of the iPhone is irrelevant as the iPhone is not evidence in this case as there is no dispute about the iPhone. Defendants speculate as they are prone to do (as evidenced by their speculation that their customers received a text from Adam Sinn) that there were texts on Eric Torres' iPhone when he turned it in September 2014 that were responsive to the request for production sent by Defendants and subsequently limited by this Court by its order dated November 11, 2014. Defendants have put forth nothing more than "maybes," "possibilities" and conjecture that something could have been on the phone that would exonerate them from having to pay the remaining amount they owe from the buyback of Torres' ownership interest. Speculation is not evidence and speculation cannot serve the basis for a spoliation instruction or sanctions.[1] If anyone should be sanctioned in this matter, it is the Defendants, who filed a frivolous claim based on

[1] Moreover, this issue is irrelevant, because as a matter of law, Defendants cannot use an alleged breach as an excuse because Defendants kept Torres shares even after they repudiated the Settlement Agreement and sued for indemnity under the settlement agreement.

the Picture (which they have now abandoned) in order to fish for *ex post facto* justifications for their repudiation and apparently try to conjure up some type of wrongdoing on the part of Torres. Under the facts of this case and the established law, sanctions are not only not warranted, it would be an abuse of discretion to impose them.

II. BACKGROUND

On August 15, 2013, the Parties to this litigation resolved an underlying lawsuit between them via a mediated Settlement Agreement in which Taylor, Atlas and Marshall bought back Eric Torres' ownership interest in Atlas for an agreed amount of $500,000. The Settlement Agreement included a non-disparagement clause. A few months later, after a Christmas Party, Adam Sinn sent Craig Taylor a picture of Sinn, Torres, and their friends in a group photo in which they all have their middle fingers up (the "Picture"). Attorneys became involved, and attorneys for Taylor labelled the Picture a breach of the non-disparagement clause. The attorneys sent emails back and forth over the Christmas Holidays regarding the Picture and the attorney for Adam Sinn errantly told the attorney for Taylor that the Picture had been sent to customers of Atlas with the tag line "Happy Holidays Atlas." Sinn's attorney quickly realized his error and retracted that information, stating that he had meant Aspire, Sinn's company, not Atlas, Taylor's company. Apparently refusing to believe Sinn's attorney, Taylor repudiated the settlement agreement on December 31, 2013 based on the Picture and his belief that it had been sent to Atlas' customers when it had not been. At the time of the repudiation, $210,000 remained outstanding under the Settlement Agreement. After attempted pre-suit mediation failed, on July 17, 2014, Plaintiffs filed this lawsuit to enforce the Settlement Agreement.

Defendants' original defense to not paying and pleadings at the time of the discovery at issue was that Adam Sinn's sending the Picture message constituted disparagement under the Settlement

Agreement and/or Adam Sinn's allegedly sending the Picture to Atlas' customers constituted disparagement and therefore Defendants were excused from paying the remainder they owed under the settlement. Defendants had done no investigation whatsoever to determine whether the Picture had or had not been sent to their customers and still had not two years later:

(Exh. A 231:2-7).

On or about August 18, 2014, at the same time as their pleadings complaining about actions of Adam Sinn sending the Picture and allegedly sending the Picture and Happy Holidays to Atlas to Atlas' customers, Defendants sent Requests for Production to Torres and Sinn. The requests included objectionably broad requests for Torres' communications with numerous people beginning on August 15, 2013, the date of the Settlement Agreement. The requests for production did not request the iPhone be produced, as there is no dispute regarding Torres' iPhone.

While Torres knew that he deleted texts regularly around the time he received them to reduce space and clutter on his phone, he nonetheless checked to see if he had any responsive texts. He found none.

As set out in Torres' affidavit attached hereto and incorporated herein, on or about September 15, 2014, after having checked his cellular phone for any documents responsive to the outstanding discovery requests or any relevant documents, Torres and his spouse both turned in their cellular phones as part of switching from Verizon to T-Mobile. (Torres Aff.). At the T-Mobile store, a backup of Mr. Torres' phone as it existed at the time was created to iCloud, then when the backup was complete, the backup was downloaded onto the new device, as such, the new phone was a mirror of the old phone that was being turned in. (Torres Aff.). This is common practice when upgrading iPhones. (Torres Aff.). Both before and after the backup then download, neither the old phone, nor the new phone contained any responsive or relevant documents. (Torres Aff.). Torres made no destruction of evidence (intentional or otherwise)- there was simply no evidence on the phone when it was turned in.

On September 22, 2014, Torres and Sinn served objections to the overbroad requests. On October 29, 2014, the Court held a hearing concerning this discovery and ruled that the Plaintiffs should produce their communications regarding Craig Taylor or Atlas from December 14, 2013 to January 15, 2014. Neither Torres' old phone, nor his new phone had responsive documents to this judicially narrowed set of requests, nor to the broader categories of Defendants' requests.

Torres also contacted Apple to attempt to retrieve an iCloud backup of his phone, however because he backs up only to the iCloud and is regularly connected via Wi-Fi there would not be any backups longer than a few days (and certainly not at the time of the discovery requests or Berg's December 2013 email) because iCloud only stores the three latest backups and backs up on average every 24 hours. (Torres Aff.). (Exh. B).

III. ARGUMENT & AUTHORITIES

A. Spoliation, Discovery, and Death Penalty Sanctions

Defendants' motion is a belated attempt to avoid a trial that they cannot win. Defendants suggest that there can be death penalty sanctions for what they have called throughout this case as spoliation citing *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 18 (Tex. 2014) and specifically Defendants cite a parenthetical for a case cited in a footnote in *Brookshire Bros.* The Supreme Court's language in *Brookshire Bros.* was:

> Neither the Texas Rules of Evidence nor the Texas Rules of Civil Procedure specifically address spoliation. However, this Court recognized the concept as early as 1852, when we adopted the principle that all things are presumed against the wrongdoer; this is known as the spoliation presumption. *See Cheatham v. Riddle*, 8 Tex. 162, 167 (1852) (citation omitted) (stating that "[e]verything is to be presumed *in odium spoliatoris*"); *see also Trevino*, 969 S.W.2d at 952 (observing that "[e]vidence spoliation is not a new concept" and that "all things are presumed against a wrongdoer"). However, our guidance in this area has been limited to a small spattering of cases in the nineteenth century[4] and several more in the last twenty years.[5]

Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 18 (Tex. 2014). Footnote 5 read

> *See Trevino*, 969 S.W.2d at 952 (refusing to recognize an independent tort of spoliation); *Wal–Mart Stores*, 106 S.W.3d at 722 (concluding that a party must possess a duty to preserve evidence in order for a spoliation instruction to be proper); *see also Cire v. Cummings*, 134 S.W.3d 835, 841 (Tex.2004) (holding that party's "deliberate [ ]" destruction of relevant evidence justified death-penalty sanctions).

Id. at n.5.

Defendants rely on *Khan v. Valliani*, 439 S.W.3d 528, 538 (Tex. App. – Hous. [14th Dist.] 2014, no pet.) quoting part of the opinion which includes "[a]ctions that callously disregard the rules of discovery warrant a presumption that the actor's claims are meritless . . ."*Id.* at 535. Notably, the Houston Court of Appeals reversed the dismissal in *Khan.* Further the facts show this case does not involve the "[a]ctions that callously disregard the rules of discovery."

Defendants also rely on *In re RH White Oak, LLC*, No. 14-15-00789-CV, 2016 WL 3213411, at *9 (Tex. App.- Hous. [14th Dist.] June 9, 2016). However, that case involved perjury and false claims of forged documents. *Id.* ("Here, the trial court explained that this was an exceptional case because of relators' perjury in denying the existence of the signed October 6, 2008 letter and false claims that the letter was forged.") The court noted that

> Turning to whether the sanctions were excessive, we observe that the trial court may not use discovery sanctions to adjudicate the merits of a party's claims unless the party's hindrance of the discovery process justifies a presumption that its claims lack merit. . . . "Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules." *TransAmerican Natural Gas Corp.*, 811 S.W.2d at 918. Thus, a trial court may abuse its discretion by imposing death penalty sanctions in the first instance when the court has not yet attempted to compel compliance with the discovery rules.
>
> ***
>
> On the other hand, in a case involving the fabrication of evidence or the giving of false and misleading testimony, it may not be possible to cure the misconduct with lesser sanctions.

Id at *7.

Defendants did not bring this motion at any time during the case despite the fact that they sued for spoliation as far back as June 2015. The conduct alleged (not even proven) does not even closely resemble the cases upon which Defendants rely. Defendants do not allege that Torres failed to comply with discovery orders of this Court and there is no evidence that Torres did or engaged in callous disregard for the discovery process. Further, this belated attempt by Defendants to jump to death penalty sanctions in a desperate attempt to avoid trial deprived the Court of considering such issues during discovery. On that very ground alone the Court must deny this motion.

Moreover, as will be shown herein, there is no spoliation. "[A] party may be entitled to a remedy for the opposing party's spoliation of evidence if the party establishes three elements: (1) the

party who destroyed or failed to produce evidence had a duty to preserve it; (2) the party either negligently or intentionally breached that duty by destroying the evidence or rendering it unavailable; and (3) the breach prejudiced the nonspoliating party." *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 19 (Tex. 2014). "In evaluating prejudice. . .courts should consider the destroyed evidence's relevance, whether other cumulative evidence exists to take the place of the spoliated evidence, and whether the destroyed evidence supports "key issues in the case." *Id. "*[A] party alleging spoliation bears the burden of establishing that the nonproducing party had a duty to preserve the evidence." *Id.* at 20. "[S]uch a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim." *Id.* While an intentional destruction of evidence may, absent evidence to the contrary, be sufficient by itself to support a finding that the spoliated evidence is both relevant and harmful to the spoliating party, a negligent spoliation could not be enough to support such a finding without some proof about what the destroyed evidence would show. *Id.* at 22.

"After a court determines that a party has spoliated evidence by breaching its duty to preserve such evidence, it may impose an appropriate remedy." *Id.* at 21. "In accordance with…well-settled precedent on remedying discovery abuse, however, the remedy must have a direct relationship to the act of spoliation and may not be excessive." *Id.* "[T]he remedy crafted by the trial court must be proportionate when weighing the culpability of the spoliating party and the prejudice to the nonspoliating party. *Id. citing Schmid v. Milwaukee Elec. Tool Corp.,* 13 F.3d 76, 79 (3d Cir.1994) (in crafting a remedy for spoliation, assessing (1) the degree of fault of party who failed to preserve evidence, (2) the degree of prejudice suffered by the opposing party, and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party).

The standards set out in *Brookshire Bros.* are hefty, and are based on an even lesser sanction of a spoliation instruction/presumption than the death penalty sanctions that Atlas Parties seek here. And the Court in *Brookshire Bros.* expressly found that "a party must intentionally spoliate evidence in order for a spoliation instruction to constitute an appropriate remedy." *Id.* at 23. As such, for death penalty sanctions to be appropriate here, a sanction far greater than a spoliation instruction, the Atlas Parties *must prove Torres intentionally destroyed evidence*, which is a proposition far, far removed from the facts of this case. Finally, the Court in *Brookshire Bros.* noted that "although negligence is generally an insufficient level of culpability to warrant a severe spoliation sanction like an instruction, such a remedy may nevertheless be justified if the prejudice to a party is 'extraordinary, denying it the ability to adequately defend its case.'" *Id.* at 25. However, "[t]his narrow exception to the intent requirement is meant to address situations akin to those presented in *Silvestri*, in which the only available evidence from which General Motors could develop its defenses—the car in which an air bag allegedly failed to deploy—was irreparably altered before General Motors even had a chance to examine it." *Id.* at 28. The Supreme Court then found in *Brooksire Bros*. that "even without the missing video footage, other evidence was available to Aldridge to prove the elements of his slip-and-fall claim." *Id.*

B. <u>In a case more on point than anything Defendants offer, the Court of Appeals recognized that conduct similar as here was not spoliation</u>

In a case even more compelling on all points than this case, the court of appeals, even assuming there was a duty to preserve the evidence, and with definitive proof that there was, in fact, some evidence to preserve, affirmed that there was no spoliation. In *Muhs v. Whataburger, Inc.*, a director of risk management for Whataburger took photos of an accident scene, but hadn't printed them and could not produce them at trial because she had switched her cell phone provider from

Sprint to Verizon in order to take advantage of the OnStar feature, which required Verizon, in a new vehicle that she had purchased. No. 13-09-00434-CV, 2010 WL 4657955, at *11 (Tex. App. – Corpus Christi Nov. 18, 2010, pet denied) (not designated for publication). Much like Torres did here in contacting Apple, the risk management director in *Whataburger* also testified that she attempted to retrieve the photographs in 2008 at the request of Whataburger's attorney by contacting Sprint via telephone and online chat. *Id.* As a result of this evidence, and the conclusion that any harm to the other party would have been minimal, the appeals court upheld the trial court's decision to refuse a spoliation instruction because this evidence could lead it to the conclusion that there was no negligent or intentional destruction of evidence. *Id. at* 12.

C. <u>The iPhone is Not Evidence</u>

Atlas Parties' motion argues that Torres destroyed evidence by turning in his phone when he switched cellular plan carriers. However, the phone itself is not evidence. The evidence Atlas Parties complain about are phantom text messages from Torres to third parties in which Torres disparages Taylor, but there is no evidence that any such text messages ever existed. As will be shown below, the Atlas Parties do not even establish that there was any evidence to preserve, they simply want to the Court to speculate that there were ever text messages from Torres about Taylor. Because the Atlas Parties know that they cannot show that any evidence actually exited to be destroyed, they instead focus on the "destruction" (ordinary, mundane turning in of a phone when upgrading phones and changing carriers) of the phone itself because at least that they can prove actually existed. But the phone is not evidence.

D. <u>There was no duty to preserve Torres' texts</u>

The December 24, 2013 email from Mr. Berg improperly demanded the phones and computers not be disposed of. The iPhone and computers are not evidence. Moreover, as evidence by

the Atlas Parties' Exhibit A to their motion, the issue at that time was Adam Sinn sending the Picture to Taylor and Sinn's alleged text to Atlas' customers. In fact, there was no allegation that Torres sent anything.

At the time the August 15, 2014 discovery requests, the pleadings in the case concerned Adam Sinn's sending the Picture and allegedly texting Atlas' customers with Happy Holidays Atlas. Again, there was no allegation that Torres sent any text or did anything wrong.

Furthermore, the Atlas Parties have abandoned their claim regarding the Picture and the text Sinn allegedly sent to their customers (*See* Response to Torres and Sinn Parties Motion for Summary Judgment, p. 7).

Accordingly there was no duty to preserve texts concerning anything other than the Picture (even if they existed which, as discussed herein, there is no proof by the Atlas Parties that there were such texts). *See Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723 (Tex. 2003) (finding reversible error for spoliation instruction when Wal-Mart had no notice there would be a claim related to the evidence). The Atlas Parties defense was that Sinn sent the Picture or Sinn sent a text with the picture and "Happy Holidays Atlas" to Atlas customers. That the Atlas Parties would use this a ruse to later claim that Torres' disparaged the Atlas Parties by calling the Atlas Parties' names was and is not reasonable, and thus there was no duty to preserve any of Torres' texts.

E. <u>There was no intentional or negligent destruction of evidence</u>

Furthermore, there is no proof that any evidence was destroyed at all. Instead, the Atlas Parties rely solely on speculation that there was any "evidence" to be deleted. Texas Courts have rejected evidence of spoliation based on speculation. *See Lively v. Blackwell,* 51 S.W.3d 637, 642 (Tex. App.—Tyler 2001, pet. denied) (holding that "[i]n the context of a trial, there are few, if any, more inflammatory accusations than that one party destroyed evidence. Where, as here, the only

basis for the accusation consists of speculation and conjecture and a reasonable explanation for the missing evidence exists…it is legitimate and proper to exclude evidence of alleged spoliation); *see also Bryan v. Zenith Ins. Co.*, No. 03-00-00573-CV, 2001 WL 617925, at *4 (Tex. App.—Austin June 7, 2001) (not designated for publication) (holding that "when the only basis for the accusation [of spoliation] is speculation, and where a reasonable explanation can be given for the missing evidence, the accusation of spoliation can severely tarnish the accused party's credibility in court. In such circumstances, it is proper to exclude evidence of alleged spoliation so as not to unfairly prejudice a party to the suit.). In this case, similar to their unsupported assertions that Sinn sent texts to Atlas's customers or employees, the Taylor Parties' spoliation argument depends on assuming without any proof that there were communications on the iPhone that were forever lost when the phone was turned in.[2] However, there is absolutely no evidence such communications existed – the Atlas Parties presume they do, but without any basis whatsoever.

The Atlas Parties try to turn a bunch of "maybe" and "I don't recall" answers into affirmations that Torres did, in fact, send text messages to people about Taylor or Atlas, but that attempt is a complete misstatement of the testimony of Eric Torres. The only evidence the Atlas Parties present is Torres' deposition testimony, and of course, only select parts of particular testimony. The Atlas Parties present essentially two propositions that it asserts proves Torres (apparently intentionally since such a mind-state is required to get this level of sanction) "destroyed evidence" when he turned in his cellular phone upon switching carriers and upgrading to a new iPhone: (a) Torres did not find the Picture and text on his phone because he regularly deletes his texts, and (b) Torres can't recall if he had any conversations, other than with Adam Sinn, who is also

[2] It should be noted that this Court permitted and Defendants obtained (several months ago) the records from Torres' carrier concerning the communications that occurred during the relevant time period set by the Court so if Defendants actually knew of a relevant communication that was made, they could have brought that to the Court.

a signatory to the Settlement Agreement, about Craig Taylor so, therefore, in Atlas Parties' stretched logic, he admits he did have such conversations/communications. Neither of these propositions leads to the conclusion Atlas Parties need to prove to obtain sanctions, let alone death penalty sanctions.

a. <u>The Picture text</u>.

The Atlas Parties request that this Court infer from the cited testimony of Eric Torres on page 9 of their Motion that Torres "intentionally deleted it after receiving notice to preserve evidence almost a year before." However, the Atlas Parties do not introduce evidence of this point, they introduce only suspicions of a possibility. The Atlas Parties assert that they sent a litigation hold email on December 24, 2014. (Defs.' Ex. A). Then they quote testimony that Torres did not find the Picture text message on his phone because deletes his texts on a regular basis. (Defs. Ex. G p.56:13-22). From this they ask that it be inferred that Torres deleted that message ***after*** receiving notice of this "litigation hold," and then request the highly speculative inference that ***therefore*** Torres intentionally deleted that message after receiving the notice. However, the unquoted portion of Torres' testimony on the subject does not lead to that conclusion:

(Defs.' Ex. G 56:17-57:3). Torres testimony simply states that he deletes his texts regularly, and would have likely deleted this picture shortly after receiving it. The Picture and any texts were sent on December 22, 2014. (Exh. C). There is no evidence that Torres **knew** of the litigation hold when he deleted that text, and there were two full days between Torres receiving that Picture and the "litigation hold" letter. ***Further, the only text that Torres deleted was the one that the Atlas Parties already have.***

As will shown below, there is also no evidence of any further text messages that Torres was a part of. Instead, the Atlas Parties would just like a speculative inference to be made in their favor without evidence in order to obtain death penalty sanctions. However, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence" *King Ranch Inc. v. Chapman*, 118 S.W.3d 742, 755 (Tex. 2003).

b. <u>The possibility of texts is not the same as evidence of texts</u>

Continuing their mantra of asking the Court grant them relief in this case based on their suspicions, the Atlas Parties further argue that a series of Torres saying "I don't know" or "I don't recall" regarding a series of questions about whether he texted or had conversations with people other than Adam Sinn regarding Craig Taylor is equivalent to "admissions that he has disparaged Taylor and that he sends and receives text messages." (Defs. Motion p. 11). However, there is no evidence that Torres ever disparaged Taylor. In fact, the only even arguable testimony presented that Torres ever said even remotely bad about Taylor is this exchange:

[redacted]

(Defs.' Ex. G 35:18-21).

Atlas Parties apparently take the possibility that Torres may have called Taylor a name to Adam Sinn but not recalling doing so as "admitting that he had repeatedly made derogatory comments about Taylor." (Defs. Mot. p.8). Then, from this purely speculative conclusion, the Atlas Parties then ask that the inference be made that if he sends and receives text messages like basically every other human being on the planet, and if he "repeatedly made derogatory comments about Taylor" (a total mischaracterization of the evidence by the Atlas Parties) then there must have been some text messages on his phone at some point in time in which Torres is disparaging Taylor and presume further it would have been sometime after the non-disparagement clause came into being in the Settlement Agreement in August of 2013. Atlas Parties' counsel's questions don't even define a time period for his questions about calling Taylor an "asshole," so again the Court is asked to make yet another supposition to arrive at the speculative conclusion, based on equally speculative premises.

The Atlas Parties did not pursue discovery from any third parties other than Evan Caron to try to confirm these suspicions. And Evan Caron's testimony does not support that there were texts from Torres that disparaged Taylor and that are no longer in existence. Accordingly, the Atlas Parties cannot show there were texts that were on the iPhone and are no longer available.

F. <u>There is no prejudice to the Atlas Parties</u>

In crafting a remedy for spoliation, the Court should assess (1) the degree of fault of party who failed to preserve evidence, (2) the degree of prejudice suffered by the opposing party, and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party. *Brookshire Bros. v. Aldridge*, 438 S.W.3d at 21.

With regards to the first prong, Torres simply turned his own, and his wife's phone into the new carrier when switching carriers and upgrading their phones. Torres checked the phone first, and

found nothing responsive or relevant on it. A backup was performed in the store to iCloud and then downloaded onto his new phone. Torres was simply doing what everyone else does when they upgrade their phone. Torres' acts are not only not negligent but they are reasonable efforts to identify relevant information and take steps to preserve it. The Atlas Parties speculate (again) **without evidence** that even if Torres had deleted texts from his phone that some forensic examiner could have recovered the deleted texts. The Atlas Parties' endless speculation is not a substitute for evidence.

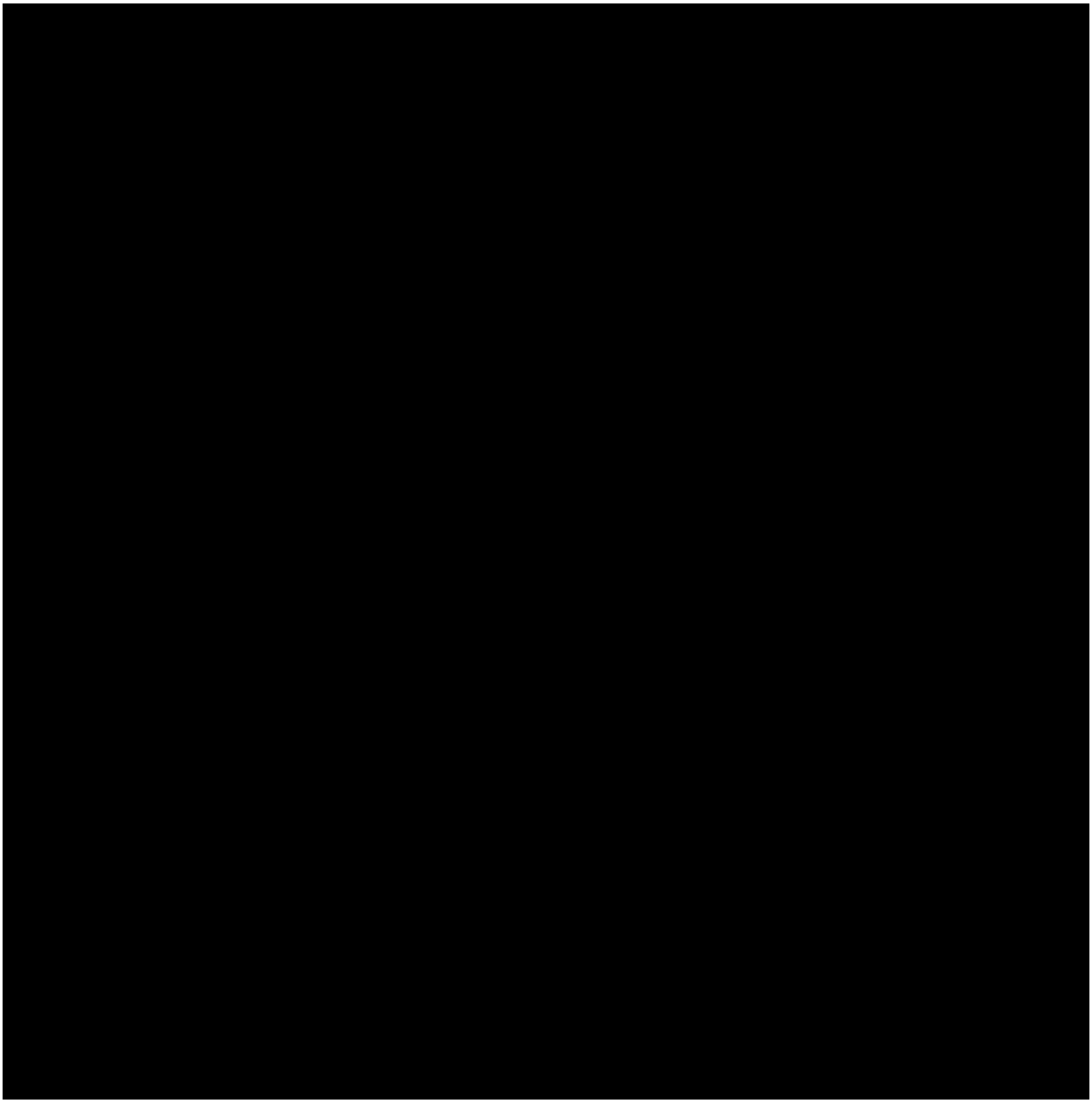
Regarding the second prong, the Atlas Parties offer no evidence that they were actually harmed or prejudice by the fact that the iPhone was turned in. This is yet another basis to deny the spoliation instruction. *See Backes v. Misko*, No. 05-14-00566-CV, 2015 WL 1138258, at *16 (Tex. App. Dallas, Mar. 13, 2015, no pet.) (finding that deletion of online posts (something that actually existed) was not spoliation because "Misko has provided no evidence from which the trial court could conclude she was prejudiced in her ability to present her case such that she may be entitled to a spoliation presumption"). The Atlas Parties offer no evidence that the deleted texts could have been recovered months later when they served their discovery. Moreover, the Atlas Parties already have texts from Sinn (and already have the one text there is evidence that Torres actually received-the Picture with the commentary) to serve as the basis for their excuse defenses, and as Plaintiffs have pointed out clearly, the Atlas Parties are precluded from an excuse defense because the Atlas Parties have ratified the Settlement Agreement and kept the shares they obtained under it, as well as sued to enforce the indemnity provision of the contract. The Atlas Parties have abandoned their claim regarding the picture and the texts Sinn allegedly sent to their customers (*See* Response to Torres and Sinn Parties Motion for Summary Judgment, p. 7).

Again, the Atlas Parties did not pursue discovery from any third parties other than Evan Caron to try to confirm their suspicions of the existence of some evidence destroyed by Torres. However, Evan Caron's testimony does not support that there were texts from Torres that disparaged Taylor and that are no longer in existence. Accordingly, the Atlas Parties cannot show there were texts or that they were prejudiced by any act of Torres.

Third, as will be shown below, this is nothing near the extraordinary type of case in which death penalty sanctions would be warranted.

G. <u>Taylor himself also "destroyed" his phone and any evidence thereon</u>

It is a familiar theme in this case that the Atlas Parties complain and base claims on activities of other people that they, namely Craig Taylor, do as well (i.e.- the disparagement claims based on juvenile name-calling when Taylor's ICE chats reveal he calls Sinn and Torres, as well as Sinn's friends, who Atlas Parties refer to as "industry third parties," liars, "tards," "pusses," and "dipshits."- Exh. D). In this instance, Atlas Parties seek death penalty sanctions against Torres because he turned in his cellular phone when he switched carriers. Interestingly, Taylor also turned in his phone in the same manner:



Counsel for Atlas is certainly quick to point out that Torres had a duty to preserve his phone, but that duty, if it exists, which it does not because the phone itself is not evidence, also extends equally to Taylor. Taylor is unsure if all of his texts and communications were preserved from his phone. There is evidence in the record of Taylor ***actually*** disparaging both Torres and Sinn. (Exh. D). And, just as the Atlas Parties argue about Torres, there were no text messages at all produced by Taylor. Therefore, by the Atlas Parties' own logic, Taylor has spoliated evidence and as such the

Atlas Parties should have their pleadings struck as death penalty sanctions. The reality is that turning in an iPhone, whether by Taylor or Torres, does not constitute spoliation

H. <u>Death Penalty Sanctions are Reserved for only the Most Egregious Cases of Destruction of Actual Evidence and is not Applicable in this Circumstance</u>.

Generally, "[c]ase determinative sanctions may be imposed in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules." *GTE Commc'ns Sys. Corp. v. Tanner,* 856 S.W.2d 725, 729 (Tex. 1993). "[S]triking pleadings is a harsh sanction that must be used as a last resort after the trial court has considered lesser sanctions, and that in all but the most egregious and exceptional cases, the trial court must test lesser sanctions before resorting to death penalty sanctions." *Cire v. Cummings*, 134 S.W.3d 835, 842 (Tex. 2004). In *Cire,* the case relied on the Atlas Parties rely on in referencing footnote 5 of the *Brookshire Bros*. opinions, the court found that death penalty sanctions were warranted without even testing lesser sanctions on a factual record that is radically different than the one in this case. In *Cire,* Cire requested production of the audiotapes in discovery and Cummings objected to the request. *Id.* at 837. Cire then moved to compel production. *Id.* Cummings did not file a response. *Id.* Without an oral hearing, the trial court entered an order compelling production. *Id.* The trial court found that Cummings filed evasive, incomplete answers and frivolous objections to discovery requests. *Id.* The trial court also ordered that Cummings's counsel pay $250 in attorney's fees to Cire's counsel. *Id.* Cummings did not comply with the trial court's order. *Id.* Instead, Cummings sought a writ of mandamus, which was denied by the court of appeals and the Texas Supreme Court. *Id.* The trial court again ordered Cummings to comply with the discovery requests, and after Cummings again refused to comply, the trial court granted Cire's second motion to compel. *Id.* Again, Cummings refused to comply, so Cire filed a motion to strike Cummings's

pleadings. *Id.* Cire presented evidence at the sanctions hearing that Cummings burned the audiotapes in the presence of Elizabeth Martinez, and that Cummings laughed with her friends about being a habitual liar. *Id.*

There is simply nothing like the level of egregiousness in *Cire* present here. In *Cire*, the spoliator *burned the evidence* with her friend after eschewing two Court orders compelling production. Here, Torres simply turned in his phone, after having checked it for responsive materials, along with his spouse's phone when they switched cellular phone carriers. He checked his phone prior to turning it in and found nothing relevant or responsive on the device. Thus, when he turned in his phone, he did not "destroy" any evidence. Further still, when he turned in his phone, he understood that a backup was made to iCloud, and then downloaded onto the new device, so he believed his new phone contained the very same things as his old phone. There is simply nothing nefarious about this activity, despite the Atlas Parties' desperate attempt to manufacture it as such.

Furthermore, the case the Atlas Parties offer as their comparator, *Plorin v. Bedrock Found. & House Leveling Co.*, (a case decided before *Aldridge)*, barely requires any analysis to show that it is completely different that the case at bar. 755 S.W.2d 490 (Tex. App. –Dallas 1988, *writ denied*). In *Plorin,* the evidence at issue was the foundation, which was alleged to have been defective. *Id. at* 490-91. The parties agreed on an inspection of the foundation for discovery purposes. *Id.* at 491. The homeowner then had the foundation repaired before the agreed inspection could take place, thereby destroying the evidence of any foundation defect, which was the very thing at issue in the case. *Id.* The Court of Appeals relied on the agreement for the discovery as a basis for its decision to grant death penalty sanctions for discovery abuse. *See id, at* 491 ("For the Plorins to do so [repair the alleged defects] after agreeing to Bedrock's request to inspect the defects of which the Plorins were

complaining, even after the agreed to inspection had been postponed at the Plorins' request, was a flagrant abuse of discovery."). There is ***nothing*** similar about these cases.

IV. CONCLUSION

Because the Atlas Parties failed to raise this issue during discovery, failed to prove that any evidence existed that was destroyed, fail to show a duty to preserve the phone or texts, failed to base their allegations of spoliation on anything besides speculation, are not prejudiced by the alleged destruction of the supposed texts which may or may not have ever existed, and fail to show that Torres' turning in his phone (and his wife's) as part of switching cellular carriers (despite checking the phone for responsive and relevant data and despite having a backup done which was immediately downloaded to the new device) is the kind of extraordinary egregious activity that can warrant death penalty sanctions, the Atlas Parties' Motion must be denied.

WHEREFORE, Plaintiffs pray that the court deny the Defendants' Motion for Death Penalty Sanctions and grant all relief to Torres as he may be entitled.

Respectfully submitted,

RAPP & KROCK, PC

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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of October, 2016, a true and correct copy of this document was served on counsel of record in accordance with the Texas Rules of Civil Procedure.

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