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CAUSE NO. 2014-40964

ERIC TORRES, ADAM SINN, XS CAPITAL INVESTMENTS, 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

CAUSE NO. 2015-49014

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

DEFENDANTS/COUNTER-PLAINTIFFS'
TRADITIONAL MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants/Counter-Plaintiffs Craig Taylor ("Taylor"), Atlas Commodities, LLC ("Atlas"), and S. James Marshall ("Marshall") (collectively "Defendants") file this Traditional Motion for Partial Summary Judgment as follows:

I. INTRODUCTION

On August 15, 2013, Defendants entered into a settlement agreement (the "Settlement Agreement") with Plaintiffs Eric Torres, Adam Sinn, XS Capital Management, L.P. ("XS"), and Aspire Commodities, LP ("Aspire") (collectively "Plaintiffs"). The Settlement Agreement contained non-disparagement and non-assignment clauses. The non-disparagement clause forbids a party from disparaging or making or publishing a false **or derogatory** comment about any other

party **or** soliciting from others any comment or statement that **may be considered negative**, false, **derogatory**, **or** detrimental to the business reputation of any other party.

Plaintiffs have the violated both the non-disparagement and non-assignment provisions. It is undisputed that after entering into the Settlement Agreement, Sinn described Craig Taylor to third parties in Taylor's industry as a "cock blast," and "that fuck," who treats "everyone who works for him like a slave." It is undisputed that in group texts to third parties – all of whom are in the litigants' industry – Sinn engaged in a back and forth which included his observation that "I hate Atlas," inviting others to respond (about Atlas) that "they are such bad people" who "donate to schools and bang employees," to which Sinn responded: "scum."

It is undisputed that after sending Taylor a group photo of people from his industry – including Sinn, Torres, employees of two Atlas clients, and Sinn's lawyer, Barry Hammond – with their middle fingers extended on December 22, 2013, another of Sinn's lawyers led Taylor to believe the photo had been sent to people affiliated with Atlas with the tag line "Happy Holidays from Atlas." It is undisputed that in midst of that episode, as Taylor was seeking the Plaintiffs' assurance that it was not true, Sinn, commenting to third parties on Taylor's stress over it, said that it would be a "Xmas miracle" if Taylor had a heart attack. To those same industry third parties, it is undisputed that Sinn described sending the photo to Taylor as "funny shit. Hope he chokes on his breakfast."

Eric Torres has admitted that after entering into the Settlement Agreement, he called Taylor an "asshole" and made other derogatory comments about him to third parties, but isn't sure what the exact statements were because he destroyed his phone after being served with discovery requesting relevant texts.

It is undisputed that Torres executed an assignment of his interest in the Settlement Agreement in favor of Sinn.

Atlas, Taylor, and Marshall now move for declarations that (i) Plaintiffs breached the Settlement Agreement's non-disparagement clause by making derogatory comments about them to third parties likely to be harmful to their personal or business reputations; (ii) Plaintiffs breached the Settlement Agreement's non-disparagement clause by soliciting from third parties comments and/or statements that may be considered negative, false, derogatory and/or detrimental to the business reputations of Defendants; (iii) Plaintiffs breached the Settlement Agreement's non-assignment clause by assigning Torres' rights under the Settlement Agreement to Sinn; and (iv) the assignment is null and void. [1]

Defendants further move for an award of their reasonable and necessary attorney's fees.

II. SUMMARY JUDGMENT EVIDENCE

Defendants rely on the following:

Exhibit A: Photograph

Exhibit B: December 23, 2013 Email from Berg to Moore and Langham

Exhibit C: December 24, 2013 Email from Langham to Berg, copy to Moore

Exhibit D: December 24, 2013 Email form Berg to Langham, copy to Moore

Exhibit E: December 24, 2013 Email from Langham to Berg and Moore

Exhibit F: December 25, 2013 Email from Berg to Langham and Moore

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[1]Plaintiffs have sued Atlas and Taylor for breach of contract and declaratory judgment and Marshall for breach of contract. The same facts underlie Plaintiffs' claims and Defendants' counterclaims. Declarations of the kind requested by Defendants would necessarily defeat the Plaintiffs' claims. For the sake of clarity, however, by this motion, Defendants also seek a take-nothing judgment as to Plaintiffs' claims. *Seureau v. Tanglewood Homes Ass'n, Inc.*, 694 S.W.2d 119, 120–21 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) ("The plaintiffs did not need to include in their motion for summary judgment a request that the defendant take nothing under such a pleading. As to the plea for attorney's fees, since an award could only be granted to the prevailing party, the judgment for appellees necessarily negated any award to appellant under the so-called counterclaim.")

Exhibit G: December 31, 2013 Email form Berg to Langham and Moore

Exhibit H: January 1, 2014 Email from Langham to Berg and Moore

Exhibit I: January 2, 2014 Email from Berg to Langham and Moore

Exhibit J: January 7, 2014 Email from Berg to Langham and Moore

Exhibit K: January 7, 2014 Email from Langham to Berg and Moore

Exhibit L: January 7, 2014 Email from Berg to Langham and Moore

Exhibit M: August 15, 2013 Settlement Agreement

Exhibit N: Excerpts from March 6, 2015 Deposition of Eric Torres

Exhibit O: Excerpts from April 8, 2015 Deposition of Adam Sinn

Exhibit P: Declaration of Craig Taylor

Exhibit Q: Defendants' First Set of Interrogatories and Requests for Production to Plaintiff Eric Torres

Exhibit R: Eric Torres' Response to Defendants' First Set of Interrogatories and Requests for Production

Exhibit S: Defendants' First Set of Interrogatories and Requests for Production to Plaintiff Adam Sinn

Exhibit T: Adam Sinn's Response to Defendants' First Set of Interrogatories and Requests for Production

Exhibit U: Affidavit of Kathryn E. Nelson

Exhibit V: Excerpts from September 2, 2016 Deposition of Adam Sinn

Exhibit W: Adam Sinn's Response to Defendants' Third Requests for Production

Exhibit X: Assignment Agreement between Eric Torres and Adam Sinn

Exhibit Y: Excerpts from September 13, 2016 Deposition of Eric Torres

Exhibit Z: Excerpts from May 17, 2016 Deposition of Craig Taylor

Exhibit AA: Text messages produced by Plaintiffs, Bates labelled SINN000244-245

Exhibit BB: Adam Sinn's Response to Defendants' Third Set of Interrogatories

Exhibit CC: Affidavit of Geoffrey Berg

Exhibit DD: Text messages produced by Plaintiffs, Bates labelled SINN 000224-000232

Exhibit EE: Instant messages produced by Plaintiffs, Bates labelled SINN 000233-000234

Exhibit FF: Text messages produced by Plaintiffs, Bates labelled SINN 000001- 000003

Defendants additionally rely on materials on file with the Court, including its docket sheet. Defendants adopt, as if fully set out, all evidence previously submitted by them in response to Plaintiff's prior motions for summary judgment. [2]

III. UNDISPUTED FACTS

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. Taylor is Atlas' majority shareholder.

A. THE UNDERLYING LITIGATION

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). 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.

Soon after Torres "purchased" the shares in Atlas, Taylor questioned whether Sinn was the source of Torres' investment funds. Torres prevaricated and stalled in order to protect himself and refused to admit that Sinn was indeed the source of the funds with which he "purchased" the shares in Atlas. *See* Ex. N, Torres Dep. at 11:24–13:8; 14:8–17:5.

[2] Exhibits AA and DD, text messages produced by Adam Sinn, were downloaded from his phone. The column on the left, labeled "Type," indicate whether Sinn sent or received the messages. Ex. V, 9/2/16 Sinn Depo. at 54:18-56:5.

When it became clear that Sinn had financed Torres' investment and was the true owner of Atlas' shares, Atlas offered to simply return all of Sinn's money in exchange for return of Atlas' shares and Torres' departure. *See* Ex. N, Torres Dep., at 22:16–25. 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. *See id.*

Ultimately, 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. A settlement was reached and, on August 15, 2013, the Settlement Agreement was signed. Ex. M at 1. 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. *See id.* ¶ 3.

Return of Sinn/Torres' shares of Atlas was to, and did, take place immediately. *See* Ex. M, Settlement Agreement, ¶ 1; Ex. N, Torres Dep., at 26:12–17. Taylor and Atlas made the $250,000 payment, and four subsequent payments of $10,000 each. *See* Ex. N, Torres Dep. at 26:24–27:28:3. The case was dismissed with prejudice and, at Sinn's request, the records were sealed.

The Settlement Agreement contains this 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.

Ex. M, Settlement Agreement, ¶ 19. It also prohibits any assignment of rights or obligations under the Settlement Agreement without the written consent of the other parties to the agreement:

> **Successors and Assigns.** The rights of the Parties hereto, and any of their subsidiaries and affiliates, shall inure to the benefit of any and all of their successors and assigns. **No Party may assign any of its rights or delegate any of its duties hereunder without the written consent of the other Parties**.

Ex. M, Settlement Agreement, ¶ 27 (emphasis added).

B. ADAM SINN'S TEXT TO CRAIG TAYLOR

On December 22, 2013 at 12:06 a.m., four months after execution of the Settlement Agreement, Taylor received a text message from Sinn. Ex. P, Taylor Aff., ¶ 3. 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. *Id.* They are standing in front of a Christmas tree—and all but Caron are extending their middle fingers at the camera. Ex. A. At the time the picture was taken, Caron and Kelly were traders at companies which, at the time, did business with Atlas. Ex. P, Taylor Aff., ¶ 4. Sarver is a former Atlas employee who worked for a competitor. Ex. P, Taylor Aff., ¶ 5.

Taylor and Atlas were 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.

Ex. B.

The next day, on December 23, 2013, 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***." Ex. C (emphasis added). Associating Atlas with that kind of vulgarity from people known to have been involved in litigation with Atlas would be far more serious than originally believed, so counsel for Defendants 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***. Ex. D.

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.

Ex. E.

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. Ex. F.

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.

Ex. G.

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 [*sic*] 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.

Ex. H (emphasis added).

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.

Ex. I. Again, Sinn did not respond.

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 date 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.

Ex. J.

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. Ex. K.

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.

Ex. L. The Plaintiffs' conduct – sending the picture, repeatedly providing conflicting explanations, and refusing to provide material supporting their claims of compliance, led to an unavoidable conclusion: The Plaintiffs had breached the Settlement Agreement, depriving the Defendants of the benefit of the bargain and leaving them with no choice but to cease payment.

The parties mediated, first by phone and then in person on April 1, 2014. The Plaintiffs refused to produce relevant information, including the text exchange described by his lawyer in emails.

Plaintiffs' withholding of relevant material has lasted years – they have continually refused to produce documents demonstrating their disparagement of the Defendants and only providing limited discovery when ordered to do so by this Court. The assignment which Sinn and Torres represented did not exist was not produced until August of 2016. The second deposition of Adam Sinn – necessitated by the withholding from production of relevant texts – took six months to schedule because of Sinn's residence in Puerto Rico and his refusal to make a trip to Texas to be deposed. *See* Defendants'/Counter-Plaintiffs' Response to Adam Sinn's Motion to Quash Deposition Notice for Adam Sinn, Motion for Protection and Motion for Costs filed September 2, 2016 at p. 2-6 and Exhibit A to it. The Plaintiffs have, in short, repeatedly attempted to circumvent the ordinary process of discovery, refused to cooperate in the most basic scheduling matters and have moved on more than one occasion for sanctions in an attempt to bully or further delay these proceedings. Defendants move that the Court take judicial notice of the years-long delays necessitated by the Plaintiffs' withholding of discoverable evidence and filing of baseless motions such as their various motions for sanctions.

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A. I said you can send the cops over to my house and have me arrested and throw a big party this weekend. You're awesome.

Q. I am awesome?

A. Yeah.

Ex. V, 9/2/2016 Sinn Dep. at 8:7-9:24 (objections and colloquy omitted).

The Defendants first sought relevant material in order to verify Plaintiffs' compliance with the Settlement Agreement and to avoid litigation. They later sought it during discovery. At every stage, the Plaintiffs have obstructed that process, prolonging this litigation and making it far more costly than it should have been.

C. TORRES PREEMPTIVELY FILES SUIT AND DESTROYS EVIDENCE

On July 17, 2014, Torres filed this lawsuit against Atlas and Taylor for breach of the Settlement Agreement, complaining of their failure to pay them monies he claimed were due. Atlas and Taylor answered on August 18, 2014 and asserted a claim for breach of the non-disparagement provision of the Settlement Agreement. That same day, Defendants served their First Set of Interrogatories and Requests for Production on Torres and the Sinn Parties. *See* Ex. Q at 2; Ex. S at 2. Defendants requested information regarding the photograph attached as Exhibit A, including Torres' copies of the photo and all relevant text messages. Exs. Q, S. On September 22, 2014, both Torres and the Sinn Parties served general, boilerplate objections to the requests and produced no documents at all. *See* Exs. R, T.

On September 29, 2014, one week later, Defendants moved to compel responses to the requests. Faced with having to produce the evidence, Torres destroyed it:

Q. What type of phone did you have at the time that you received that picture?

A. Brand?

Q. Yes.

A. IPhone.

Q. IPhone? Which model?

A. I think it was—The newest one is 6, so it was probably an iPhone 5.

Q. Do you know whether your text messages were backed up?

A. Naturally the iCloud does a sync. It syncs to whatever your most recent format of your phone is and everything; so there is a—a back-up. I don't know how often it does it. Whenever I get on wi-fi, whatever the case may be.

Q. Did you search, for example, iTunes for messages that might have been responsive?

A. Search iTunes? No. I don't…

Q. ***Did you get rid of that phone?***

A. ***That phone was sold back to T-Mobile, if I recall correctly, as part of a new contract with them.***

Q. ***When?***

A. October, possibly.

Q. Of 2—

A. —of 2014. ***October of 2014.***

Q. Do you remember the exact date?

A. I don't remember the exact date off the top of my head, no.

Ex. N, Torres Dep. at 55:7–56:4, 56:13–58:6 (emphasis added). After hearing Defendants' motion, on November 11, 2014, the Court compelled Torres to produce documents responsive to the requests, but Torres had already disposed of the phone containing those documents. *See* Ex. N, Torres Dep., at 56:13–58:6.

D. PLAINTIFFS HAVE BREACHED THE SETTLEMENT AGREEMENT'S NON-ASSIGNMENT CLAUSE

Sinn and Torres have both now admitted that Sinn was the source of the funds Torres used to purchase a share of Atlas. Ex. N, Torres Dep., at 11:21–12:8; Ex. O, Sinn Dep., at 23:12–24:6. It was during discovery that Defendants learned for the first time that the funds received and to be received under the Settlement Agreement were assigned by Torres to Sinn in repayment of that "loan." Plaintiffs nevertheless refused to produce the written assignment Torres testified existed. After Atlas amended its counterclaim to allege breach of the non-assignment provision, Plaintiffs changed their position; they now say that despite the existence of an actual written assignment and testimony confirming its contents, no assignment exists.

Both Sinn and Torres testified that all money paid to Torres under the Agreement ($290,000 to date) went to Sinn:

> Q. Okay. That money was going directly to Adam Sinn, or at least to his representative.
>
> A. Sure.
>
> Q. None of it was going to you.
>
> A. No.
>
> Q. And none of the remainder was going to you.
>
> A. Correct.
>
> Q. It all goes to Adam Sinn, ultimately.
>
> A. Ultimately, yes.

See Ex. N, Torres Dep., at 27:25–28:21. The money went to Sinn, according to Torres' 2015 testimony, because of an assignment by Torres in favor of Sinn:

> Q. Okay. Did you sign some agreement with Adam Sinn saying: All the money under this settlement agreement is going to you?

A. If I recall correctly, I did. I don't remember the exact document; but I think after the settlement day, between that until the actual final agreement, there was a document that I signed where the $500,000 was to be paid to Adam Sinn, essentially—

Q. Okay.

A. —to cut out the middleman, basically.

Q. Do you know if that document was produced in this litigation?

A. I don't think so, no. [3]

See Ex. N, Torres Dep., at 28:22–29:9.

At his 2015 deposition, Sinn agreed:

Q. All right. So, Atlas made that first 250,000-dollar payment. Where did that go?

A. To Susman Godfrey.

Q. And what did Susman Godfrey do with it?

A. They then distributed it out.

Q. To whom?

A. To myself.

Q. Did Mr. Torres get any of it?

A. No.

Q. Okay. And then Atlas made payments of $10,000 per month for four months, correct?

A. Correct.

Q. And those payments also went to Susman Godfrey, right?

A. They did.

[3] For well over a year, Plaintiffs refused to produce documentation of this assignment. (Ex. U, Nelson Aff., ¶3.)

Q. Susman Godfrey was the law firm which represented you before you hired Rapp & Krock, correct?

A. Yes.

Q. All right. And Susman Godfrey represented you in the lawsuit that was settled by this Settlement Agreement, right?

A. Correct.

Q. Okay. So, $10,000 a month for four months went to Susman Godfrey, right?

A. Correct.

Q. And what happened to each of those payments of $10,000?

A. They were distributed out to me.

Q. Did Mr. Torres get any of those funds?

A. No.

Ex. O, Sinn Dep., at 35:16–36:20.

Q. But you do have a written agreement on the total of 500,000 under the Settlement Agreement?

A. I don't recall, but potentially we do.

Q. Okay. Well, if it's not written, it's certainly oral, correct?

A. Like, I literally don't recall. I mean, I know he said that, but I don't recall.

Q. Okay.

A. I don't recall what the specific structure—

Q. Then let me—let me put it this way. He says to you in one way or another, oral, written, whatever you leave open the possibility.

A. Okay.

Q. ***You just don't recall. He says: Hey, I owe you this money. Under the Settlement Agreement, it's $500,000. It's yours. I assign it to you.***

A. ***Uh-huh.***

Q. ***Is that right?***

A. ***Basically correct.***

Q. ***Right. Whether it's written or oral, you don't remember, but that's how it happened?***

A. ***Correct.***

Ex. O, Sinn Dep., at 38:24–39:20 (emphasis added).

On August 8, 2016, after years of resistance and having been ordered to do so by the Court, Defendants finally produced a document entitled "ASSIGNMENT OF INTEREST IN SETTLEMENT AGREEMENT AND AMOUNT," Bates-numbered SINN000266 (emphasis in the original). Accompanying the production was the following statement from counsel for Plaintiffs:

> the assignment was prepared by prior counsel for Mr. Sinn and Mr. Torres and signed by Mr. Torres in anticipation of litigation in June 2014 (several months after Defendants' breach by failing to pay Torres) but was not considered effective and Mr. Torres is a party plaintiff asserting his claims to payment in this case.

Ex. W, Sinn's Response to Taylor and Atlas' Third Set of Requests for Production at 6; Ex. X, SINN000266. The assignment itself, dated June 30, 2014, provides that:

> effective as of the 15th day of August, 2013 (the "Effective Date"), Eric Torres ("Torres") does hereby assign, transfer and convey to XS Capital Management, L.P. ("XS") all right, title, and interest in the Settlement Agreement dated on or about August 15, 2012 [*sic*] [4] by and between Torres, XS, Adam Sinn ("Sinn"), Aspire Commodities, L.P. ("Aspire"), Craig Taylor ("Taylor"); S. James Marshall ("Marshall"); and Atlas Commodities L.L.C. ("Atlas") (the "Settlement Agreement") and any amounts receivable by Torres pursuant to the Settlement Agreement. . . . Torres acknowledges and warrants that as of the Effective Date, he shall have no right, title, or interest in the Settlement Amount, and XS shall have the full right to enforce payment of the Settlement Amount.

[4] Though the document mistakenly refers to an "August 15, 2012" settlement agreement, it intends to reference the August 15, 2013 agreement. See Ex. V, September 2, 2016 Sinn Dep. at 71:14-73:24 and Exhibit Y, September 13, 2016 Deposition of Eric Torres at 18:3-18:17.

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Ex.Y, September 13, 2016 Torres Depo. at p. 18:18-19:4 (emphasis added, ellipsis in the original). At a minimum, according to the Plaintiffs, from August 15, 2013 until "a couple of days" before his September 13, 2016 deposition, an assignment from Torres in favor of Sinn existed. As both Sinn and Torres testified, that assignment was honored during past payments and will be through any future payments.

It is undisputed that none of the Defendants consented to the Torres-Sinn assignment and none were ever asked, as the Settlement Agreement Requires. *See* Ex. P, Taylor Aff., ¶ 7 and Ex. Y, September 13, 2016 deposition of Eric Torres at p. 12:16-13:1. At his deposition, Taylor testified that he believed that under the Settlement Agreement, $250,000 would go to Adam Sinn and $250,000 would go to Eric Torres. See Ex. Z, May 17, 2016 Deposition of Craig Taylor at p. 120:6-121:21. Defendants believed that the money belonged to Eric Torres and that they were "giving the money back to Eric Torres." *Id.* at 126:20-127:21. Had the Defendants known that the full amount of the settlement had been assigned to Adam Sinn, they never would have agreed to it:

> Q. Okay. The -- the -- I understand that you're making or Atlas is making a claim or Craig Taylor is making a claim that there is a breach of the no-assignment clause in this contract in the Settlement Agreement.
> Do you understand that?
>
> A. I do.
>
> Q. Okay. What are the damages that Atlas has suffered as a result of that –
>
> Q. (BY MR. KROCK) -- or Craig Taylor?
>
> A. I was -- I was never able to negotiate on those terms. We -- we wanted to negotiate on those terms. We wanted to point out that -- and wanted Adam and Eric to admit that this money was 100 percent Adam's, and, therefore, we were -- we were effectively robbed of -- of a fair deal.
>
> ***We would never -- we would not have given back $500,000.*** We were defrauded by them. We suffered great damage by their -- by their lie and by their deception.

And if they had come to the table at that -- at that mediation and said all along, "100 percent it was our money. It was my money, too bad," we would have negotiated differently.

Q. And my question is, ***what damages -- what amount of money has been -- has Atlas or Craig Taylor suffered in a loss as a result of the alleged breach of the assignment?***

A. ***Whatever money that we would not have otherwise settled on.*** That was part of the settlement negotiation.

Id. at 243:16-244:23 (emphasis added).

The assignment exists, Plaintiffs' attempts to explain it away notwithstanding. Pursuant to the assignment, payment of the settlement funds did not go to Eric Torres, they went to Adam Sinn. The Court should declare it null and void and find as a matter of law that Defendants need not perform. *See Long Trusts v. Griffin*, 222 S.W.3d 412, 415–16 (Tex.2007), citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex.1994) ("A fundamental principle of contract law is that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform.").

E. PLAINTIFFS HAVE REPEATEDLY BREACHED THE NON-DISPARAGEMENT CLAUSE

Adam Sinn has admitted to making several negative and derogatory comments about Taylor:

Q. Do you remember calling Craig Taylor a cock blast?

A. Not specifically.

Q. Have you called him a cock blast?

A. I mean, possibly.

Q. What's a cock blast?

A. I would have no idea. Probably something like a dipshit.

Q. Well, it's not good. It doesn't sound good, is it?

...

A. Yeah. It's probably not flattering.

Q. (By Mr. Berg) Would you call [it] a Christmas miracle if Craig Taylor had a heart attack?

A. Yeah. I think I jokingly—jokingly said that.

...

Q. Dave Schmidli said, "Looks like a Christmas card." And you said, "Funny shit. Hope he chokes on his breakfast." You were talking about Craig Taylor?

A. That moment in time, yes.

Ex. O, Sinn Dep., at 53:1–16; 56:18–21. Ex. EE, Adam Sinn's text messages at SINN 2032.

Five months after his deposition, Sinn produced additional disparaging and derogatory text messages regarding both Taylor and Atlas. On October 4, 2013, only one and one-half months after the execution of the Settlement Agreement, Sinn had the following conversation via text message with Evan Caron and Joonsup Park, third parties who work in the Defendants' industry[6]:

From Caron/Park:	Lol
	Wow they on google
From Sinn:	Lol
	Scam
	I hate atlas
From Caron:	They are such bad people
From Caron/Park:	They donate to schools
	And bang employees
From Sinn:	scum

Ex. AA, at SINN000244.[7]

[6] In his response to Interrogatory No. 2 in Defendants' Third Set of Interrogatories, Sinn matched the following phone numbers with the corresponding people: 713-202-5987 = Evan Caron; 732-221-9945 = Joon Park; 561-628-5238 Dave Schmidli; 713-634-8660 = Barry Hammond; 303-717-3271 = Paul Sarver; and 713-377-2320 = Chanler Langham Ex. BB, Sinn's Obj. & Ans.to Defs.' 3d Set of Interrog. at 4.

[7] This limited set of text messages was not designated "Confidential." It is attached as Exhibit AA.

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V. ARGUMENT AND AUTHORITIES

A. ATLAS' PERFORMANCE UNDER THE SETTLEMENT AGREEMENT IS EXCUSED

Torres' assignment of his interest in the Settlement Agreement violated that agreement. The Plaintiffs' disparagement of the Defendants violated the Settlement Agreement. When a party breaches a contract, the other party is excused from any obligation to perform. *See Long Trusts v. Griffin*, 222 S.W.3d 412, 415–16 (Tex.2007), citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex.1994). Plaintiffs repeatedly breached the Settlement Agreement. As a result, Atlas was and is under no further obligation to perform.

B. SUMMARY JUDGMENT IS APPROPRIATE ON DEFENDANTS' CLAIM FOR DECLARATORY RELIEF

At least two actual, existing, and bonafide controversies exist among the parties to the Agreement: (i) Torres assigned his interest in the Settlement Agreement to Sinn in violation of that agreement; and (ii) The Plaintiffs' disparagement of the Defendants violated the non-disparagement clause of the Settlement Agreement.

1. TORRES' INTEREST IN THE SETTLEMENT AGREEMENT WAS ASSIGNED TO SINN IN VIOLATION OF THE NON-ASSIGNMENT CLAUSE

It is undisputed that the Settlement Agreement prohibits Plaintiffs from "assign[ing] any of its rights or delegat[ing] any of its duties hereunder without the written consent of the other Parties." Ex. M, Settlement Agreement, ¶ 27. It is undisputed that the Defendants would not have agreed to the Settlement Agreement's terms if they had known about the Torres to Sinn assignment and they would not have consented to the assignment post-execution had they been asked. *See* Ex. P, Taylor Decl. at p. 2, ¶7 and Ex. Z, May 17, 2016 Deposition of Craig Taylor at 243:16-244:23.

> [A]n assignment is a contract between the assignor of a right and an assignee, who receives the authority to assert that right. As with any other contract term, parties to a contract can agree their rights in a particular agreement are not assignable. These "anti-assignment" clauses are enforceable in Texas unless rendered ineffective by a statute.

Pagosa Oil & Gas, LLC v. Marrs & Smith P'ship, 323 S.W.3d 203, 211 (Tex. App.—El Paso 2010, pet. denied). Because Defendants did not give written consent to the Sinn/Torres assignment, it is void. *Jetall Cos. v. Four Seasons Food Distributors, Inc.*, 474 S.W.3d 780, 783 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (Under Article 15.1(a) of the purchase and sale agreement, the undisputed absence of written consent from PMCF Properties rendered the attempted assignment to Jetall void ab initio—a 'nullity, passing no title and conferring no rights whatsoever.'").

Contrary to their earlier testimony and in the face of the actual assignment itself, Sinn now claims that no assignment exists[8]; Torres says that one existed but is no longer applicable.[9] The existence and interpretation of an assignment is a question of law. *See, eg*, *Rancho La Valencia, Inc. v. Aquaplex, Inc.*, 297 S.W.3d 781, 784 (Tex.App.-Amarillo 2008), *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex.1994). There is a bonafide dispute as to the existence and applicability of the Torres to Sinn assignment (this confusion exists not only between Plaintiffs and Defendants but between Plaintiffs Eric Torres and Adam Sinn, who cannot agree whether an assignment ever existed). Defendants therefore move that the Court enter declaratory judgment resolving the rights and duties of the parties to the Settlement Agreement – that the assignment exists and is a nullity. *Jetall Cos.*, 474 S.W.3d 780, 783.

2. THE PLAINTIFFS DISPARAGED THE DEFENDANTS IN VIOLATION OF THE SETTLEMENT AGREEMENT'S NON-DISPARAGEMENT CLAUSE

The Settlement Agreement's non-disparagement clause prohibits Plaintiffs from

[8] Ex. V, September 2, 2016 Deposition of Adam Sinn at 104:2–105:8; 101:19-102:2; and 103:7-20

[9] Exhibit Y, September 13, 2016 Torres Depo. at p. 12:16-31 and 18:18-19:4.

> directly or indirectly, disparage, mak[ing]or publish[ing] 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.

Ex. M, Settlement Agreement, ¶ 19.

"[I]ndirectly" making a "derogatory" comment "likely to be harmful" to a person's personal or business reputation is much broader than ordinary slander or libel. "Derogatory" means "showing a critical or disrespectful attitude."[10] Referring to Atlas and Taylor in conversations with people in the Defendants' industry as "scum," a "cock blast," "that fuck," who treats employees "like slaves," and inviting those third parties to make their own negative comments about Defendants simply cannot be described as anything other than derogatory and likely harmful to the Defendants' personal or business reputations.

When the parties resolved their underlying dispute, the idea was to buy peace and be rid of one another.[11] As the parties' emails show, after their first indication of a potential breach, the Defendants asked for the Plaintiffs' assurance that the Settlement Agreement was not being violated and noted they "want nothing more to do with" the Plaintiffs. Ex. L, Berg Email to Langham. The Plaintiffs repeatedly refused to provide it. Ex. B - L.

The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *Winchek v. Am. Exp. Travel Related Servs. Co.,* 232 S.W.3d 197, 201, 204 (Tex.App.-Houston [1st Dist.] 2007, no pet.). Damages for comments

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[10] Oxford Dictionaries, derogatory, http://www.oxforddictionaries.com/us/definition/american_english/derogatory (last accessed September 12, 2016.)

[11] See Ex. M, the Settlement Agreement at p. 2, "each of the Parties…desires to completely and permanently resolve any and all claims, disputes, issues or matters that exist or may exist among them."

which reflect negatively on a person's ability to conduct his or her business are presumed, though they may be nominal. *In re Lipsky*, 460 S.W.3d 579, 595 and 596 (Tex. 2015) ("When an offending publication qualifies as defamation per se, a plaintiff may recover general damages without proof of any specific loss. Thus, if Lipsky's remarks concerning Range are actionable per se, then any failure in proof as to special damages is irrelevant.") (internal citations omitted).

As a result of the Plaintiffs' years-long (and continuing) refusal to disclose all of their acts of disparagement of the Defendants (including but not limited to Torres' destruction of evidence), the Defendants have been forced to litigate this matter since it was first filed. This motion for summary judgment (filed just two weeks after Adam Sinn's deposition and three days after Eric Torres') is being filed as soon as possible under the circumstances.

The parties do not dispute that the Settlement Agreement is a valid contract. The parties do not dispute that Atlas made an initial payment of $250,000 and an additional four payments of $10,000 each. *See* Ex. N, Torres Dep. at 26:24–27:28:3. The parties do not dispute that following Sinn's comments about Taylor and Atlas, Mercuria, where one of the people in the photograph worked at the time, stopped doing business with Atlas. *See* Ex. P, Taylor Decl. at p. 1-2, ¶4-6.

Summary judgment declaring the Plaintiffs in breach of the non-disparagement clause is appropriate.

C. Defendants Should be Awarded Their Reasonable and Necessary Attorneys' Fees and Costs

This is a suit for breach of a written contract and for declaratory relief. Both Texas Civil Practice and Remedies Code §38.001, et seq., and §37.009 provide for an award of fees to a non-breaching party. Such an award would be reasonable, necessary, equitable and just.

Defendants engaged the undersigned counsel and firm and have agreed to pay reasonable and necessary fees for prosecution of its claims against Plaintiffs. Ex. CC. The undersigned counsel

has kept, in the ordinary course of business, records of time reasonably and necessarily spent on this matter. *Id.*

Plaintiffs sued Defendants claiming that the Defendants breached the Settlement Agreement. Defendants claim that performance is excused because of the Plaintiffs' breaches and seek declarations to that effect. The claims at issue all arise from the same transaction or series of transactions and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts (who said what about whom and to whom, whether an assignment exists and whether it is enforceable). Segregation of fees is therefore unnecessary. *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 143 (Tex.App.-Waco 2005, pet. denied).

The undersigned counsel for Defendants have spent 1,044.6 hours defending or prosecuting the Defendants' claims for declaratory relief and breach of contract at the following rates: $475 per hour for Geoffrey Berg and $300 per hour for Kathryn Nelson. Paralegals have spent 140.3 hours on this matter. Ex. CC. The rates at which Geoffrey Berg has been billed on this matter are discounted. Taking into consideration the usual and customary fees charged in Harris County, Texas, these rates are reasonable for the services provided to Defendants. *Id.*

Defendants request the Court award them reasonable and necessary fees of no less than $432,308.50 and pre- and post-judgment interest at the highest statutory rate. In addition, the following conditional attorneys' fees are also reasonable and would be necessary in the event of the events triggering them: in the event Plaintiffs file a Motion for New Trial or an appeal to a court of appeals: $3,500 for responding to a motion for new trial; $10,000 for responding to an appeal filed at the Court of Appeals; $15,000.00 for filing or responding to a Petition for Review before the Texas Supreme Court; and $10,000.00 for preparing a brief on the merits if requested by the Texas Supreme Court. Ex. CC.

VI. DECLARATIONS SOUGHT

Defendants move the Court to enter judgment declaring as follows:

(i) Plaintiffs breached the Settlement Agreement's non-disparagement clause by making derogatory comments about them to third parties likely to be harmful to their personal or business reputations;

(ii) Plaintiffs breached the Settlement Agreement's non-disparagement clause by soliciting from third parties comments and/or statements that may be considered negative, false, derogatory and/or detrimental to the business reputations of Defendants;

(iii) Plaintiffs breached the Settlement Agreement's non-assignment clause by assigning Torres' rights under the Settlement Agreement to XS;

(iv) the assignment is null and void; and

(v) Defendants' performance under the Settlement Agreement is excused.

CONCLUSION

Defendants/Counter-Plaintiffs Craig Taylor and Atlas Commodities, LLC respectfully request that the Court grant their Traditional Motion for Partial Summary Judgment in its entirety, enter the declarations requested, render judgment in favor of Defendants on Plaintiffs' claims, award them their reasonable and necessary attorneys' fees and costs, and for any other and further relief to which they may be entitled. A proposed order is attached.

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, or facsimile on September 16, 2016 as follows:

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