IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BUCK'S, INC., a Nebraska corporation, Plaintiff, v. BUC-EE'S, LTD., a Texas limited partnership, Defendant.	No. 8:08-cv-00519 **DEFENDANT BUC-EE'S, LTD.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS UNDER RULES 12(B)(2), 12(B)(3) AND 12(B)(6) FOR LACK OF PERSONAL JURISDICTION, IMPROPER VENUE, AND FAILURE TO STATE A CLAIM**

Two things are immediately clear from plaintiff Buck's, Inc.'s, response to defendant Buc-ee's, Ltd.'s motion to dismiss:

(1) Plaintiff's claims are based *entirely* on (a) allegations made in the Notice of Opposition filed in the United States Patent and Trademark Office ("USPTO") in Trademark Opposition No. 91177801, and (b) two settlement letters sent to plaintiff's counsel in that proceeding in an effort to settle the matter. Those documents are in evidence on this motion.

(2) Plaintiff has failed to identify any contacts by Buc-ee's with the State of Nebraska showing that there was "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

In light of this, plaintiff cannot make out even a prima facie case of personal jurisdiction. It also confirms that venue is not proper in this district, and that Counts I and II of plaintiff's complaint fail as a matter of law to state claims for relief.

I. Plaintiff Has Failed to Show That the Court Has Personal Jurisdiction Over Buc-ee's.

A. The Settlement Letters Are Insufficient to Establish Personal Jurisdiction.

Plaintiff touts the two settlement letters as the "best examples" of contacts showing that personal jurisdiction is proper here. (Filing No. 24 at 10) It follows that if those letters are insufficient to establish personal jurisdiction, plaintiff's jurisdictional argument is seriously undermined.

The two settlement letters are perfect examples of the kinds of "fortuitous" or "attenuated" contacts that do not satisfy the "purposeful availment" requirement essential for due process. *Cf. Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985) (the "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . ."") (citations omitted). Such settlement letters and other settlement contacts have repeatedly been held not to constitute the kind of contacts that will give rise to personal jurisdiction. In addition to violating notions of due process, fair play, and substantial justice, to regard such letters as the kind of "contacts" that could subject a party to personal jurisdiction would be inimical to the strong policy favoring the settlement of disputes.

In *Digi-Tel Holdings, Inc. v. Proteq Telecomm'ns (PTE), Ltd.,* 89 F.3d 519, 524 (8th Cir. 1996), the Eighth Circuit observed that "courts have hesitated to use unsuccessful settlement discussions as 'contacts' for jurisdictional purposes." The reason for this reluctance is that "[g]iving jurisdictional significance to such activities may work against public policy by hindering the settlement of claims." *Id.* at 525. The court cited with approval the discussion of this issue found in *Conwed Corp. v. Nortene, S.A.,* 404 F. Supp. 497, 504-05 (D. Minn. 1975).

In *Conwed*, the court found that a settlement meeting held in Minnesota and related settlement correspondence did not constitute the "transaction of business" within the meaning of the Minnesota long-arm statute. The court further held that, "[e]ven were the Minnesota statute held to reach this conduct, however, the due process clause would prohibit its application." 404 F. Supp. at 504. After discussing the minimum contacts and purposeful availment requirements for long-arm jurisdiction, the court found that "[i]t would offend both formulations of due process limitation" to base jurisdiction on the settlement negotiations. *Id.* The court quoted as follows from the decision in *Washington Scientific Indus., Inc. v. Pollan Indus., Inc.*, 302 F. Supp. 1354, 1358 (D. Minn. 1969):

> In the opinion of this Court, it is contrary to our 'traditional conception of fair play and substantial justice' to hold (the defendant) subject to the jurisdiction of Minnesota courts merely because it participated in a meeting in Minnesota which was designed to work out problems which had arisen in a matter which otherwise would not have subjected (the defendant) to that jurisdiction.

By the same reasoning, it would offend traditional notions of fair play, substantial justice, and due process to base personal jurisdiction over a Texas defendant on two letters attempting to settle a trademark opposition proceeding pending before the U.S. Patent and Trademark Office, where that defendant has no other contacts of any kind with the State of Nebraska. *See also Tol-O-Matic, Inc. v. Proma Produkt-Und Marketing G.m.b.H.*, 690 F. Supp. 798, 800-01 (D. Minn. 1987) (settlement conference, even when combined with two letters into the state threatening patent litigation, held insufficient to establish personal jurisdiction).

B. The "Effects" Test Is Inapplicable on the Facts of This Case.

The only other basis for personal jurisdiction urged by the plaintiff is the filing of the trademark opposition proceeding in the United States Patent and Trademark Office, which plaintiff contends gives rise to personal jurisdiction in Nebraska because of the "effects" it

purportedly has on plaintiff in Nebraska.[1] Plaintiff's argument misapprehends the nature of a trademark opposition proceeding.

As noted in Buc-ee's opening brief, the effects test allows for the assertion of personal jurisdiction over nonresident defendants whose acts are performed "for the very purpose" of having their consequences felt in the forum state. *Coen v. Coen*, 509 F.3d 900, 906 (8th Cir. 2007). As plaintiff acknowledges, the Eighth Circuit has held that the effects of a defendant's tortious acts can only serve as a source of personal jurisdiction where the plaintiff shows those acts (1) were intentional, (2) were uniquely or expressly aimed at the forum state, and (3) caused harm, the brunt of which was suffered, and which the defendant knew was likely to be suffered, in the forum state.

The "effects" test originated with the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984). *Calder* was a libel action in which the defendants had written an article for general publication specifically targeting the plaintiff and the plaintiff's activities in California, where she lived and worked as a professional entertainer. The article stated, among other things, that the plaintiff drank so heavily as to prevent her from fulfilling her professional obligations. The court noted that the article was drawn from California sources, and that California was the focal point of the story. It was not private correspondence, but was written for publication in the *National Enquirer*, a newspaper that the court noted had its largest circulation in California. On these facts, the Supreme Court found that the defendants' conduct was intentionally aimed at California, and that they knew the article would have a potentially "devastating" effect on the plaintiff and the plaintiff's professional career in California, where she lived and worked.

[1] Plaintiff concedes that Buc-ee's contacts are not sufficient to subject it to general jurisdiction in Nebraska. (Filing No. 24 at 7)

The facts of this case are not even remotely comparable to those in *Calder*. In this case, Buc-ee's has done nothing that was uniquely or intentionally aimed at Nebraska. The trademark opposition in question was filed in the U.S. Patent and Trademark Office, a federal agency that is far removed from Nebraska. Moreover, contrary to plaintiff's overheated rhetoric, the opposition proceeding does not concern plaintiff's right to use its mark in Nebraska or anywhere else.

As a matter of law, a trademark opposition proceeding concerns one issue and one issue only: whether a federal trademark registration should be granted. Such a proceeding does not concern, nor does it affect in a any way, a party's right to *use* a mark. *See, e.g., Merrick v. Sharp & Dohme, Inc.*, 185 F.2d 713, 717 (7th Cir. 1950) ("In a proceeding to register the right to use the mark is not involved."); *In re Marriott Corp.*, 517 F.2d 1364, 1367 (C.C.P.A. 1975) ('[T]he issue in an opposition is the applicant's right to register and not opposer's right to exclusive use . . . ."); *Light Sources, Inc. v. Cosmedico Light, Inc.*, 360 F. Supp. 2d 432, 440 (D. Conn. 2005) ("Litigation before the TTAB in opposition proceedings is . . . limited to whether one has the right to register a mark, and not whether one has the right to exclusive use of the mark in practice."). Therefore, plaintiff's attempt to characterize the opposition proceeding filed by Buc-ee's as an effort to impede or inhibit plaintiff's business is premised on a legally insupportable leap of logic that seriously misconstrues the nature of an opposition proceeding.

Nor can an opposition proceeding be viewed as targeting any particular state. As plaintiff acknowledges in its brief (Filing No. 24 at 11), a federal registration presumptively covers the entire United States. Because Buc-ee's had been using its mark since 1982, long before the 1989 date of first use asserted by plaintiff in its trademark application, and because the trademark examiner had conditionally refused registration of Buc-ee's mark on the ground that it was likely to cause confusion with plaintiff's mark, which was the subject of a pending application for the

same services, Buc-ee's had no choice but to file an opposition to plaintiff's trademark application based on its prior use.[2]

Far from targeting Nebraska, the notice of opposition was directed at plaintiff's attempt to obtain a *nationwide* registration for its mark. It was not in any sense targeted at plaintiff's activities in Nebraska. Likewise, the two settlement letters were attempts by Buc-ee's to resolve the trademark opposition by reaching an agreement with plaintiff regarding the parties' use of their respective marks throughout the United States. In short, neither the trademark opposition nor the related settlement proposals were "uniquely" or "intentionally" or "expressly" aimed at the State of Nebraska, as plaintiff repeats like a mantra throughout its brief, nor were they done "for the very purpose of having [their] consequences felt" in Nebraska. That plaintiff happens to reside in Nebraska is merely fortuitous. Were plaintiff's position correct, it would mean that whenever someone files an opposition proceeding in the U.S. Patent and Trademark Office, they would potentially subject themselves to personal jurisdiction in all fifty states, depending upon where the applicant resides or does business.

Plaintiff's position on this motion also is inconsistent with the allegations in its own complaint. When it suits plaintiff's purpose, as here, it argues that the filing of the opposition was "uniquely" and "intentionally" aimed at Nebraska. In its complaint, however, plaintiff asserts that, because it has expanded its use of the "Bucky's" mark into Iowa, Missouri and Illinois, and it is actively seeking to expand the use of the mark into Kansas and Florida, it has been harmed "in all states in which Bucky's currently conducts business under the BUCKY'S

[2] In this regard, plaintiff has misstated what Buc-ee's alleged in its notice of opposition. Contrary to plaintiff's claims, Buc-ee's did not allege that there is a likelihood of confusion between the parties' respective marks. It was the trademark examiner who had raised that issue in refusing Buc-ee's trademark application for BUC-EE'S on the ground that it was confusingly similar to plaintiff's mark BUCKY'S. To overcome that objection, Buc-ee's filed an opposition to plaintiff's application on the basis of Buc-ee's prior use of BUC-EE'S. Accordingly, Buc-ee's alleged in its notice of opposition that *if* the examiner was correct, *then* plaintiff's application to register BUCKY'S should be refused because Buc-ee's has priority, and because in that event Buc-ee's would be damaged by plaintiff's use of the mark BUCKY'S. (*See* Filing No. 21-4 at ¶¶ 8-9)

trademark, including the state of Nebraska, and in all states into which Bucky's intends to expand its business under the BUCKY'S trademark." (Pl.'s Compl. ¶ 27) Plaintiff further alleges that Buc-ee's "knew or should have known" that the acts complained of "were likely to cause harm to Bucky's in all states in which Bucky's currently conducts business under the BUCKY'S trademark, including the state of Nebraska, and in all states into which Bucky's intends to expand its business under the BUCKY'S trademark." (Pl.'s Compl. ¶ 28) These allegations fly in the face of plaintiff's claims on this motion that Buc-ee's actions were "uniquely" and "intentionally" aimed at Nebraska.

Finally, it has been held that the effects test does not apply with the same force to a corporation as to an individual, as was the case in *Calder*, because a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997); *see also IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 260-66 (3d Cir. 1998) (analyzing the application of *Calder* to business torts and surveying the approach taken in the various circuits).

Plaintiff cannot establish personal jurisdiction here under the effects test.

C. The "Additional Factors" Urged by Plaintiff Do Not Support Personal Jurisdiction.

Plaintiff argues that considerations of justice, judicial economy, and the convenience of the parties also favor the Court's exercise of personal jurisdiction.

In the first place, it is doubtful that "judicial economy" is even relevant to the question of personal jurisdiction, which concerns a court's power to exercise jurisdiction over a non-resident defendant. Moreover, to the extent "justice" and "convenience of the parties" may be relevant as secondary factors, they are concerned primarily with "fair play and substantial justice" for the

defendant, as is clear from the due process analysis discussed above and in Buc-ee's opening brief. [3]

None of the cases cited by plaintiff to support its argument on this point even addresses the question of personal jurisdiction. All were concerned with whether or not a court had *subject matter jurisdiction* over a declaratory judgment claim, which is an entirely different issue. While those cases may have some relevance to a companion motion on subject matter jurisdiction that Buc-ee's will be filing shortly (and which may have been filed by the time the Court reads this), they have no relevance here.

Because Buc-ee's does not have sufficient minimum contacts with the State of Nebraska to subject it to personal jurisdiction in this district, this action should be dismissed for lack of personal jurisdiction.

II. Plaintiff Has Failed to Show that Venue Is Proper in This District.

Plaintiff argues in its brief that venue is proper here because "a substantial part of the events giving rise to Bucky's claims occurred in Nebraska and a substantial part of the property that stands to be affected in this action is situated in Nebraska." (Filing No. 24 at 19) Neither basis applies here.

Subsection 1391(b)(2) requires that a "substantial" part of the events or omissions giving rise to the claim must have occurred in the judicial district or a "substantial" part of the property that is the subject of the action must be situated in that district. In this case, the primary event

[3] It also should be noted that, while plaintiff tries to make much of a claim that a TTAB proceeding often takes as much as 560 days to reach a final hearing (Filing No. 24 at 16 n.4), the opposition proceeding at issue here was filed on June 13, 2007 (*see* Pl.'s Compl. ¶ 15) and had been on file for 537 days when plaintiff filed this case on December 2, 2008, and moved to suspend that proceeding. The opposition was already in the testimony period, the last phase before final briefs and argument, and likely would have concluded long before this case could be tried. This case was never about expediting the resolution of the dispute between the parties over plaintiff's right to a federal registration, but, on the contrary, was about stopping that proceeding before it could reach a final resolution adverse to plaintiff.

that allegedly gives rise to plaintiff's claims occurred when Buc-ee's filed a trademark opposition proceeding in the U.S. Patent and Trademark Office, which did not occur in Nebraska. Apart from the filing of that opposition, plaintiff points only to the two settlement letters sent to plaintiff's counsel as a basis for its claims. For the same reasons already discussed in connection with personal jurisdiction, those letters cannot form the basis of venue in this district.

Moreover, for the reasons discussed in the following section and in Buc-ee's opening brief, neither the pleadings filed in the opposition proceeding nor the settlement letters sent in an effort to settle that proceeding can provide a basis for plaintiff's tort claims. Accordingly, they cannot in any sense be said to "give rise" to those claims.

As to plaintiff's declaratory judgment claim regarding its right to a federal registration for its trademark and its exclusive right to use the mark throughout most of the United States except for Texas, the statement of that claim shows on its face that neither the events giving rise to the claim nor any alleged "property" that stands to be affected by the claim can be said to be in "substantial part" in Nebraska. As plaintiff acknowledges, a federal registration presumptively extends to the whole of the United States, and the primary dispute between the parties relates to the right to use their respective marks *outside* the states of Nebraska and Texas. Contrary to what plaintiff asserts in its brief, Buc-ee's has never contended that plaintiff has no right to use its mark or to expand its use in Nebraska, which is shown by plaintiff's own evidence. (*See* Filing No. 25-3 at Exs. A & B)

Finally, Buc-ee's showed in its opening brief that venue is not proper under the "property" provision of section 1391(b)(2), and plaintiff has provided no serious argument to the contrary. Because venue is not proper in this district, this action should be dismissed.

III. Plaintiff's State Law Claims Fail to State Viable Claims for Relief.

A. The Claims Are Barred by Judicial Privilege.

As Buc-ee's showed in its opening brief, under Nebraska law claims and statements made in the course of judicial or quasi-judicial proceedings are absolutely privileged if they bear some relation to the proceeding. (Filing No. 20 at 11) Buc-ee's further showed that this privilege extends to any part of the judicial proceeding or process. (*Id.*) As indicated in the authorities cited there, this is a question of law for the court.

Plaintiff does not contest that the state-law claims in Counts I and II of its complaint are based solely on statements made in pleadings in Trademark Opposition No. 91177801 and two settlement letters in that proceeding. Plaintiff argues, however, without citing a single authority, that the privilege does not apply here because it is limited to claims of "libel, slander and defamation." (Filing No. 24 at 20).

The cases that have considered the issue do not support plaintiff's position. For example, in *Ruberton v. Gabage*, 654 A.2d 1002 (N.J. Super. 1995), the court said:

> If the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and *quasi*-judicial proceedings, is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label.

Id. at 1006 (but noting an exception for malicious prosecution claims, which may only be brought after the prior proceeding has terminated in favor of the plaintiff); a*ccord Silberg v. Anderson*, 786 P.2d 365, 368, 371 (Cal. 1990) ("[a]lthough originally enacted with reference to defamation," statutory privilege held applicable to "any communication" and "all torts except malicious prosecution," including abuse of process, intentional infliction of emotional distress, intentional inducement of breach of contract, intentional interference with prospective economic advantage, negligent misrepresentation, invasion of privacy, negligence, and fraud).

There is no reason to think that Nebraska courts would treat this any differently if the issue were presented to them. The reason that the privilege usually comes up in defamation cases is because the complaining party is asserting that the statements made were false – which is precisely what plaintiff does here – and this most often occurs in an action for defamation. That plaintiff tries to fit its claims of allegedly false statements in connection with a judicial proceeding into the framework of claims for unfair competition and deceptive trade practices cannot alter the basic principle, recognized in Nebraska and elsewhere, that statements made in the course of a judicial proceeding are absolutely privileged as a matter of law. This protection would be eviscerated if a plaintiff could circumvent it merely by asserting its claim under a different label.

This absolute privilege has been held to extend to settlement letters sent in the course of a judicial proceeding. As the court said in *Oesterle v. Wallace*, 725 N.W.2d 470 (Mich. Ct. App. 2006), in holding that statements made in a settlement letter could not be made the basis of an action, citing cases from various jurisdictions: "With the possible exception of Florida, other jurisdictions appear to have uniformly applied the absolute judicial proceedings privilege to statements made by attorneys during settlement negotiations." *Id.* at 475 (citations and footnotes omitted); *accord Chard v. Galton,* 559 P.2d 1280, 1282-83 (Or. 1977) (settlement letter privileged); *Vodopia v. Ziff-Davis Pub. Co.*, 663 N.Y.S.2d 178, 179 (N.Y. App. Div. 1997) (settlement letter privileged); *see also Russell v. Clark*, 620 S.W.2d 865, 866, 870 (Tex. Civ. App. 1981, *writ ref'd n.r.e.*) (letter to plaintiffs' investors seeking evidence for use in pending litigation privileged).

These authorities are consistent with the decision of the Nebraska Supreme Court in *Cummings v. Kirby,* 343 N.W.2d 747 (Neb. 1984), that statements made with reference to

matters "incident to" a judicial proceeding are "absolutely privileged as a matter of law" if they have "some relation" to the proceeding. *Id.* at 748-49. In that case, the court held that statements made by an attorney after the conclusion of trial during a meeting with his client, to the effect that others referred to her son as a "crook," were absolutely privileged because the statements made were incident to the judicial proceedings. If the privilege extends to statements made after a trial has concluded, it stands to reason that it also extends to a settlement letter sent during the course of a proceeding in an effort to settle it.

B. The Claims Are Barred by the Noerr-Pennington Doctrine.

Plaintiff's attempt to give the impression that the Eighth Circuit has limited the *Noerr-Pennington* doctrine to antitrust claims is equally misguided. The Eighth Circuit has held expressly to the contrary. For example, in *Porous Media Corp. v. Pall Corp.,* 186 F.3d 1077 (8th Cir. 1999), the court affirmed the dismissal of a claim for malicious prosecution on the alternate basis of *Noerr-Pennington* immunity. In doing so, the court explicitly stated that the *Noerr-Pennington* doctrine is "not limited to [the] antitrust context," but immunizes the act of filing suit from "tort liability." *Id.* at 1080 n. 4 (citing *Hufsmith v. Weaver,* 817 F.2d 455, 458-59 (8th Cir. 1987)).[4]

In *Hufsmith,* the court said that while the Supreme Court had never decided whether the *Noerr-Pennington* doctrine applied outside the antitrust area, "this court has long indicated that the doctrine may be so extended." 817 F.2d at 458 (citing cases applying the doctrine to claims of tortious interference with business, tortious infliction of economic harm, and actions under 42 U.S.C. § 1983). The court in *Hufsmith* accordingly held that the *Noerr-Pennington* doctrine barred a claim for tortious interference with contract based upon allegations of the filing and

[4] The case cited by plaintiff, *Entergy Arkansas, Inc. v. Nebraska,* 358 F.3d 528 (8th Cir. 2004), is not on point. That case did not involve a tort claim, but was a review of a state licensing proceeding in which the plaintiff claimed that the state had violated a compact to which all parties had agreed.

appeal of a "false and fraudulent" lawsuit. *Id.* at 459. We assume that plaintiff merely overlooked this long-established Eighth Circuit precedent.[5]

Like the judicial privilege, the *Noerr-Pennington* doctrine has been held to extend to matters incident to the litigation, such as letters that threaten litigation. *E.g., Matsushita Elecs. Corp. v. Loral Corp.*, 974 F. Supp 345, 359 (S.D.N.Y. 1997) (citing cases from various jurisdictions). By the same rationale, it would extend to settlement letters relating to the litigation.

Because the *Noerr-Pennington* doctrine applies to the tort claims in Counts I and II of plaintiff's complaint, the only way to avoid its application is to show that the opposition proceeding at issue here was a sham, something that plaintiff has not even attempted to do. Counts I and II of plaintiff's complaint therefore are barred as a matter of law.

Accordingly, under both Nebraska law and the *Noerr-Pennington* doctrine, Buc-ee's action in filing an opposition to plaintiff's application to register the mark "Bucky's," and all allegations and statements made in connection with that proceeding, are privileged and cannot form the basis of a claim for relief under either state unfair competition law or the Nebraska deceptive trade practices act. For this reason, those claims should be dismissed under Rule 12(b)(6) for failure to state a claim for relief.

Oral Argument

Buc-ee's does not believe oral argument is necessary. The issues and the evidence are clear, and the controlling authorities are thoroughly covered in the briefs. Oral argument likely would be a waste of the Court's time, as it normally amounts to little more than a rehashing of points already covered in the briefs. For the reasons discussed above and in Buc-ee's opening

[5] Although the argument seems moot in light of the Eighth Circuit cases cited above, plaintiff argues that in *Thermos Co. v. Igloo Prods. Corp.*, 1995 WL 745832 (N.D. Ill. 1995), the court applied the *Noerr-Pennington* doctrine only to antitrust claims, and not to the other claims in suit. What plaintiff fails to note is that the court in *Thermos* did not consider the *Noerr-Pennington* doctrine as applied to the other claims because it had been raised only in connection with the antitrust claims. Dismissal of the other claims was sought, and granted, on the basis of res judicata.

brief, Buc-ee's submits that plaintiff has failed to make even a prima facie showing of personal jurisdiction, and that, in any event, the evidence presented to the Court on this motion shows clearly that personal jurisdiction is lacking here and that venue is not proper. It also is clear as a matter of law that Counts I and II of plaintiff's complaint do not state viable claims for relief.

Conclusion

For the reasons stated above and in Buc-ee's opening brief, this action should be dismissed for lack of personal jurisdiction and/or improper venue. Alternatively, plaintiff's state law claims for unfair competition and violation of the Nebraska Uniform Deceptive Trade Practices Act (Counts I and II of plaintiff's complaint) should be dismissed for failure to state a claim.

Dated: March 19, 2009

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Certificate of Service

I certify that on March 19, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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