

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

BUC-EE'S, LTD.,

Plaintiff,

vs.

BUCK'S, INC. and STEVEN BUCHANAN,

Defendants.

CASE NO. 8:17-CV-00287

**DEFENDANTS BUCK'S, INC.'S AND STEVEN BUCHANAN'S  
REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

This case should begin and end with the Co-Existence and Settlement Agreement (“Co-Existence Agreement”) entered into between Buc-ee’s, Ltd. (“Buc-ee’s” or “Plaintiff”) and Buck’s, Inc. (“Buck’s”) on September 16, 2009. However, Plaintiff is attempting to “pivot” its way out of its contractual obligations by advancing the absurd proposition that, while engaged in a bitter litigation in which it spent nearly seven months and untold thousands of dollars attempting to extract itself from the jurisdiction of this Court (see Dkt. 87, paras 28 – 33 for a summary of Plaintiff’s extensive motion practice), it suddenly decided that it had no choice but to forego discovery, accept as gospel truth the Defendants’ unsubstantiated claims that Buck’s began using its BUCKY’S trademark as early as May of 1982, and enter into a Co-Existence Agreement in which it expressly agreed that “there is no likelihood of consumer confusion arising from use and registration by Buck’s Inc. of the mark BUCKY’S for the goods and services of Buck’s Inc.” (Dkt. 88, Ex. 24, para. 1(a)) There should be no doubt that Plaintiff’s fraud claims are nothing more than a post hoc, lawyer concocted excuse to weasel out of a contract that Plaintiff entered into

eight years ago, eyes wide open, with the advice of competent counsel, but which Plaintiff now regrets because it faces potential competition from Buck's in its own backyard.

## II. ARGUMENT

“On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Torgenson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (internal quotations and citations omitted). However, “[t]he nonmovant ‘must do more than simply show that there is some metaphysical doubt as to the material facts,’ and must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Id.*, citing, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). “The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

### A. **PLAINTIFF HAS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT THE RELIANCE ELEMENT OF ITS FRAUD CLAIMS IX – XI, AND ITS OWN STATEMENTS AND CONDUCT REFUTE ITS CLAIM OF RELIANCE.**

Nowhere within the 800 plus pages of evidence submitted in support of its Opposition to Defendants' Motion for Summary Judgment has Plaintiff included so much as a self-serving declaration to support the critical reliance element of its fraud claims. Instead, Plaintiff provides the Court with nothing more than the naked and implausible assertion that Plaintiff relied upon

Defendants' unsubstantiated claims that Buck's began using its BUCKY'S trademark as early as May of 1982 when it entered into the Co-Existence Agreement.

This Court has held that “[t]he nature, extent, and reasonableness of the plaintiffs’ reliance on the purported statements is a question of fact for the jury.” *QA3 Financial Corp. v. Financial Network Inv. Corp.*, 2014 WL 2858413, at \*6 (D. Neb. June 23, 2014). However, the Court has also held that “[t]he evidence must be viewed in the context of the relationship of the parties and other statements and conduct.” *Id.* Defendants submit that due to the nature of the relationship between the parties, and other statements and conduct by Plaintiff and its counsel, as further discussed herein, the evidence against Plaintiff’s reliance claim is so one-sided that Defendants must prevail as a matter of law. See *Anderson*, 477 U.S. at 251-252 (noting the inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law.”); see also, *Mid-America Real Estate v. Iowa Realty Company, Inc.*, 385 F. Supp. 2d 828, 836 (S.D. Iowa 2005) (finding that defendant had not established a basis to rescind a settlement agreement for fraudulent inducement where the alleged misrepresentation was made against a “backdrop of mistrust and upset” between the parties). “Regardless of whether the question is one of law or fact, when considering a motion for summary judgment the determination to be made is whether any material facts are disputed, and if none are disputed summary judgment is appropriate.” *Hyman Freightways v. Carolina Freight Carriers Corp.*, 942 F.2d 500, 502 (8th Cir. 1991). Even if the Court addresses a fact question, the Court can appropriately address “the question on summary judgment if the lack of material fact dispute admits of but one conclusion.” *Id.*

1. The parties had a relationship of distrust.

The alleged misrepresentations which form the basis of Plaintiff's fraud claims IX – XI consist of statements made by Buchanan and Buck's during the 2008 Nebraska litigation. In particular, Buc-ee's points to the Complaint that Buck's filed in the Nebraska litigation on December 2, 2008, in which Buck's asserted, "Bucky's made first use of the BUCKY'S trademark in interstate commerce at least as early as May of 1982 at a retail store location in Omaha, Nebraska." (Dkt. 77, para 17, Ex. 10 at ¶3) Buc-ee's also points to a Declaration signed by Mr. Buchanan on March 4, 2009, in which he states (a) "I first began operating Bucky's Amoco on or before May 19, 1982 at 50th and Dodge Streets in Omaha, Nebraska." and (b) "My understanding is that Buc-ee's Inc. is attempting to secure a trademark registration to limit my ability to operate under the mark BUCKY'S, which I have used since at least as early as May 19, 1982." (Dkt. 77, para 18, Ex. 11 at ¶1, 8)

It is important to note that these statements were made in the course of a bitterly contested trademark dispute that began in the Trademark Trial and Appeal Board and ultimately found its way into this Court. In response to Defendants' Motion for Summary Judgment and Motion to Stay Case Progression, Plaintiff is vehemently arguing that it has not yet conducted sufficient discovery to respond to Defendants' motion, yet in the same breath Plaintiff expects the Court to believe that back in 2009, while represented by competent counsel from the Osha Liang firm, it accepted Defendants' naked assertions on a critical litigation issue at face value without conducting any depositions or other meaningful discovery. This is a patently absurd proposition, and Defendants respectfully submit that no jury would conceivably believe that competitors engaged in a contested legal dispute for more than two and half years (Plaintiff filed its Notice of Opposition on June 13, 2007, and signed the Co-Existence Agreement on September 16, 2009),

who spent untold sums of money on lawyers, and served numerous subpoenas and discovery requests, and filed a motion to dismiss, motion for reconsideration and petition for writ of mandamus (see Dkt. 87, paras 28 – 33 for a summary of Plaintiff’s extensive motion practice), would inexplicably wake up one morning and decide to accept Buck’s unsubstantiated date of first use as an etched in stone fact without pursuing the right to discovery that was firmly within its grasp.<sup>1</sup>

Buck’s made a similar allegation of use (“Applicant states that it began offering goods or services under the BUCKY’S mark prior to 1982”) on August 28, 2008, three months prior to filing its Complaint in the 2008 Nebraska Litigation, while responding to Buc-ee’s First Set of Interrogatories in the Opposition Proceeding. (Dkt. 88, Passarelli Decl., Ex. 7, p. 7) Plaintiff obviously didn’t believe this allegation because it subsequently served a flurry of subpoenas on potential witnesses and an Amended Notice of Deposition on Buchanan. (See Dkt. 87, paras. 15 – 21 and exhibits cited therein.) Even after Buck’s made the substantially similar and allegedly fraudulent statement in its December 2, 2008 Complaint, Plaintiff spent, and caused Buck’s to spend, a small fortune in legal fees in connection with Plaintiff’s motion to dismiss, motion for reconsideration and petition for writ of mandamus.

2. Plaintiff’s current arguments demonstrate a lack of reliance.

Furthermore, in Buc-ee’s Opposition to Defendants’ Motion for Summary Judgment, Plaintiff is brutally critical of the exact same evidence of use – the only evidence of use – that Buck’s produced to Plaintiff prior to execution of the Co-Existence Agreement. Specifically, with

---

<sup>1</sup> For the avoidance of doubt, nothing herein should be construed to suggest that Defendants’ use claims were false. Defendants’ merely contend that it would have been wholly unreasonable for Plaintiff to rely upon those unsubstantiated claims in the context of a two and a half year legal dispute wherein Plaintiff had repeatedly expressed and demonstrated skepticism regarding such claims. More to the point, Defendants contend that Plaintiff entered into the Co-Existence Agreement for completely different reasons, and is trying to re-write history in an effort to extract itself from a contract it now regrets.

respect to the undated letter from Dennis Mailliard, provided to Plaintiff's counsel Brian Wunder on June 13, 2008, in which Mr. Mailliard states that he created the BUCKY'S logo in June of 1980, Plaintiff states:

Defendants produced an undated letter drafted by the alleged logo designer Dennis Mailliard stating that the Bucky's logo was designed in 1980 for advertising mailers. (Fink Decl., Ex. 27). But in the prior litigation, Mr. Mailliard provided a document in October of 2008 stating that his agency did not handle Buck's "direct mail" "until recently," that the undated letter was only drafted "when discussing a current mail piece," that Mr. Mailliard had no document supporting the 1980 date in his undated letter (sic), and that Mr. Mailliard's alleged 1980 date was based in part on what Buchanan told him. (Fink Decl., Ex. 28) Therefore, this letter was likely drafted decades after the alleged fact and *is wholly uncorroborated*.

(Dkt. 110, pp. 12-13) (Emphasis added). In other words, Plaintiff is expressly acknowledging that at the time it entered into the Co-Existence Agreement, it was in possession of information demonstrating that Mr. Mailliard's letter supporting Buck's alleged date of first use was "wholly uncorroborated".

Regarding the financial statement sent to Mr. Wunder on February 24, 2009, which contains a handwritten notation indicating that the document covered a period beginning May 19, 1982, Plaintiff states:

In Buchanan's deposition, Defendants produced a single "Operating Statement" for "Buchanan Standard," (Fink Decl., Ex. 47) that is purportedly from 1982, but even this document *tellingly fails* to show the term "Bucky's" at all.

(Dkt. 110, pp. 20-21) (Emphasis added). Although this document "tellingly fails" to demonstrate use of the BUCKY'S trademark, Plaintiff and its prior counsel from the Osha Liang firm were presented with this exact same document prior to entering into the Co-Existence Agreement. One would think that such a "telling" failure would have set off alarm bells for Plaintiff and its prior counsel, and caused Plaintiff to question to veracity of Buck's claimed date of first use.

Apparently, Plaintiff would have the Court believe that Plaintiff's counsel from the Osha Liang firm advised its client to forgo discovery on a critical element of Buck's claim, and enter into the Co-Existence Agreement, even though the only evidence to back up Buck's alleged use date was "wholly uncorroborated" and "tellingly fails" to demonstrate use of the BUCKY'S trademark. If this was really the advice that Plaintiff received from its counsel, then Defendants would respectfully submit that Plaintiff should be pursuing a malpractice claim against Osha Liang rather than the fraud claims it has raised against Defendants. Plaintiff's position is simply implausible, and Plaintiff has produced not even a scintilla of evidence to support its wholly implausible claim. See *Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

Finally, the following passage from Buc-ee's Opposition to Defendants' Motion for Summary Judgment illustrates the absurdity of Plaintiff's position:

Indeed, Buc-ee's filed its opposition based on the belief that its first use predated Defendants'. But when Buc-ee's first learned of the May 1982 date, Buc-ee's pivoted, and took steps to verify that date—serving interrogatories, reviewing interrogatory responses and serving third party discovery. But then Buc-ee's received Buchanan's 1982 representation, and settlement followed thereafter.

(Dkt. 110, pp. 48)

The above passage expressly acknowledges that Plaintiff was aware of the May 1982 date before it "received Buchanan's 1982 representation," and that this awareness caused Plaintiff to engage in "serving interrogatories, reviewing interrogatory responses and serving third party discovery" in an effort to "verify the date". In other words, when Plaintiff first learned that Buck's claimed use dating back to 1982, Plaintiff did not believe this claim, and set out to verify it through discovery in the TTAB opposition proceeding. Even though this discovery uncovered nothing to

verify Buck's use date – beyond the “wholly uncorroborated” Mailliard letter and the financial statement that “tellingly fails” to demonstrate use of the BUCKY'S trademark – Plaintiff is asking the Court to believe that it was somehow convinced of (and therefore relied upon) the veracity of Defendants' claim when it subsequently saw the same exact claim in the black and white print of Buck's December 2, 2008 Complaint and/or in Buchanan's March 4, 2009 declaration.

3. The Co-Existence Agreement itself refutes any reliance on Defendants' statements.

The Co-Existence Agreement itself undermines the critical reliance element of Plaintiff's fraud claims. As indicated in Defendants' original submission, the sixth WHEREAS clause states that “both parties have used their respective marks in their respective businesses for their respective goods and services since as early as 1989 without any known instances of actual confusion as to the source of origin of the goods and services”. (Dkt. 88, Passarelli Decl., Ex. 24, p. 1). Plaintiff correctly notes that the wording “since as early as 1989” would technically include 1982. (Dkt. 110, p. 50) However, the obvious purpose of this language is to set the stage for the parties' subsequent agreement to co-exist, by acknowledging that the marks have already managed to co-exist for an extensive period of time. Certainly, if the parties were in agreement that the marks had co-existed “since as early as 1982”, they would have said as much in the sixth WHEREAS clause insofar as 27 years of co-existence would provide a clearer and more accurate picture of their peaceful co-existence than 20 years. The only explanation for stating “since as early as 1989” is that the parties did not agree that the marks had co-existed since 1982, and could only agree that they had co-existed “since as early as 1989”.

More importantly, Plaintiff cannot escape the fact that it expressly agreed in the Co-Existence Agreement “that there is no likelihood of consumer confusion arising from use and registration by Buck's Inc. of the mark BUCKY'S for the goods and services of Buck's Inc. and

that there is no likelihood of confusion arising from the use by Buc-ee's of the mark BUC-EE'S for the goods and services of Buc-ee's." (Dkt. 88, Passarelli Decl., Ex. 24, para. 1(a)) There are only two plausible explanations for this agreement. The first and most plausible explanation is that Plaintiff genuinely believed that the BUCKY'S and BUC-EE'S trademarks were not confusingly similar. Under that scenario, Plaintiff entered into the Co-Existence Agreement because it made the independent determination that the BUCKY'S and BUC-EE'S trademarks could co-exist in overlapping markets. Having made this determination, Plaintiff's options were to enter into a settlement with Buck's or try to outspend and outmaneuver Buck's by asserting a frivolous counterclaim that the marks were confusingly similar. Buck's understandably opted to settle.

The second less plausible explanation, which Plaintiff appears to be advancing, involves false representations by Plaintiff in the Co-Existence Agreement, and subsequent misrepresentations to the federal government. Under this explanation, Plaintiff in its corporate heart of hearts, truly believed that the BUCKY'S and BUC-EE'S trademarks were confusingly similar. However, based upon Buck's unsubstantiated claim of first use, which Plaintiff accepted as fact without any supporting evidence and without even deposing Buchanan, Plaintiff realized that it could not prevail in its litigation with Buck's. Consequently, Plaintiff falsely agreed in the Co-Existence Agreement that the BUCKY'S and BUC-EE'S trademarks were not confusingly similar in order to extract itself from a losing litigation. Then, in order to obtain a federal trademark registration, Plaintiff falsely represented to the United States Patent and Trademark Office that the marks were not confusingly similar when it submitted its Request to Lift Suspension of U.S. Service Mark Application Serial No. 78853252 for the mark BUC-EE'S in Class 35, which quoted extensively from the Consent to Use and Register executed by Buck's, and further provided:

Applicant also respectfully submits that there is no likelihood of confusion and there will be no likelihood of confusion from registration of Applicant's mark BUC-EE'S over the Buck's mark, BUCKY'S, for the reasons set forth herein.

(Dkt. 88, Passarelli Decl., para 32, Ex. 26) The only conceivable way that Plaintiff can rationalize its fraud claims is to argue that Plaintiff itself lied in the Co-Existence Agreement and subsequently lied to the United States Patent and Trademark Office. This scenario is implausible, but if it is true it is a self-indictment of Plaintiff's own fraudulent conduct rather than any conduct by Defendants.

In any case, this issue begins and ends with the Co-Existence Agreement. The Co-Existence Agreement clearly resolved all issues in the previous litigation. The disputed claim of first use was an issue in the previous litigation, which became irrelevant and was specifically resolved in paragraph 1(a) of the Co-Existence and cannot now be re-litigated. Buc-ee's cannot avoid the Co-Existence Agreement because it now thinks it is disadvantageous. To allow Buc-ee's to do so would be inconsistent with the Eight Circuit's rules on settlement agreements. *See Worthy v. McKeeson Corp.*, 756 F.2d 1370, 1373 (1985) (citing *Young v. Powell*, 729 F.2d 563, 566 (8th Cir.1984) (if claim is an issue in the lawsuit and parties settle all disputed issues in the case, claim is clearly within scope of settlement agreement). "If a settlement does not resolve all issues in a case, the parties should not stipulate to a dismissal without reserving the unresolved issues or in some appropriate way indicating their intent as to such issues." *Id.* (citing *Young*, 729 F.3d at 567 n. 3). Moreover, parties to a voluntary settlement agreement cannot avoid the agreement simply because the agreement ultimately proves to be disadvantageous. *Id.* (citing *Trnka v. Elanco Products Co.*, 709 F.2d 1223, 1227 (8th Cir.1983)). *See also Syverson v. FirePond, Inc.*, 383 F.3d 745, 750 (8th Cir. 2004) (party cannot have reasonably relied on statements made that were contrary to the express provisions of a written agreement that party signed); *Cromwell v. Campbell Soup Co.*, 264 F.3d 756, 762-63 (8th Cir. 2001).

In short, the Co-Existence Agreement, the nature of the relationship between the parties, and other statements and conduct by Plaintiff and its counsel, fully refute the reliance elements of Plaintiff's fraud claims IX-XI, and the undisputed facts are stacked so one-sided against Plaintiff that Defendants must prevail as a matter of law.

**B. BUCK'S HAS NOT "CAUSED" ANYTHING. IT HAS MERELY EXERCISED ITS RIGHTS UNDER THE CO-EXISTENCE AGREEMENT.**

Throughout its opposition papers, Plaintiff repeatedly accused Defendants of "causing confusion" by entering the Houston marketplace. To be clear, Buck's has done nothing more than exercise its rights under the Co-Existence Agreement, and expanded its use of a trademark that Plaintiff has expressly agreed is not confusingly similar to its own BUC-EE'S trademark. Specifically, the Co-Existence Agreement provides that:

"The parties believe that there is no likelihood of consumer confusion arising from use and registration by Buck's Inc. of the mark BUCKY'S for the goods and services of Buck's Inc. and that there is no likelihood of confusion arising from the use by Buc-ee's of the mark BUC-EE'S for the goods and services of Buc-ee's. This belief is based upon the fact that the respective goods and services have been sold under the respective marks for over five years without causing a single known instance of actual confusion. *In addition, the marks are spelled differently and the marks have a different appearance as used.* Further the way the marks are used by the respective parties and the channels of trade in which the respective customers see and are presented with the respective marks are believed by the parties to cause the different appearance of the marks to be a primary factor for *creating distinct overall commercial impressions for the respective marks* so that the source of origin of the goods and services is not likely to be confused by the relevant consumers in the relevant channels of trade.

(Dkt. 88, Passarelli Decl., Ex. 24, para. 1(a)) (Emphasis added). It is important to note that the parties agreed that the BUCKY'S and BUC-EE'S marks were not confusingly similar, and acknowledged the "distinct overall commercial impressions for the respective marks," immediately after Buchanan gave Plaintiff's principals, Arch Aplin III and Don Wasek, a tour of the BUCKY'S convenience store located at 35<sup>th</sup> and Broadway in Council Bluffs, Iowa to show

how the signage was presented to customers and how the store operated. (Dkt. 88, Buchanan Decl., para. 11)

The Agreement also provides that each party will receive an unrestricted federal trademark registration and further contains an unconditional covenant not to sue:

Buc-ee's agrees that Buck's may use and register the trademark BUCKY'S in connection with retail store services featuring convenience store items, gasoline, and any related goods or services throughout the United States. Buc-ee's agrees that it will not directly or indirectly attempt to interfere with Buck's use or registration of the trademark BUCKY'S with the United States Patent or (sic) Trademark Office in connection with retail store services featuring convenience store items and gasoline and any related goods or service. Buc-ee's agrees that during the term of this Agreement it shall not sue or otherwise bring official action in court or in the US Patent and Trademark Office with regard to the use by Buck's of the BUCKY'S mark as permitted in this Agreement. Buc-ee's agrees that during the term of this Agreement it shall not use the trademark BUCKY'S or any trademark that contains the word BUCKY'S in connection with retail services featuring convenience store items, gasoline, and any related goods or services in the United States.

(Dkt. 88, Passarelli Decl., Ex. 24, para. 1(c)) The above covenant not to sue is not contingent upon Buck's staying out of the Houston marketplace, and despite Plaintiff's tortured reading of the Co-Existence Agreement, it is not contingent upon an ongoing lack of confusion.

The parties could have agreed to a settlement that divided up the United States, providing each party with exclusive geographic zones of protection. In fact, the parties pursued such a settlement but could not agree upon a geographic division. (See, for example, Dkt. 88, Passarelli Decl., para. 10, Ex. 6) Alternatively, the parties could have expressly created a land rush situation, where the first party to enter a new marketplace obtained exclusive rights to that new marketplace. They did not agree to that either. Instead, the parties agreed to a Co-Existence Agreement which expressly created a situation in which the parties would inevitably find themselves in an overlapping marketplace. When that inevitability occurred, one party would be the senior user in that marketplace, and the other party would be the junior user. It was inevitable that there would

be a junior user in an overlapping marketplace, but the Co-Existence Agreement does not place any special obligations (or cast blame) on the junior user. Instead, the Co-Existence Agreement acknowledges the possibility that, notwithstanding their mutual agreement that the BUCKY'S and BUC-EE'S trademarks were not confusingly similar, confusion might nonetheless arise, in which case the parties would have a mutual obligation under Section 8 of the Co-Existence Agreement to "cooperate in good faith to take appropriate steps and measures to eliminate such actual confusion and to avoid any future likelihood of confusion." (Dkt. 88, Passarelli Decl., Ex. 24, para. 8)

**C. THE CO-EXISTENCE AGREEMENT IS CLEAR AND UNAMBIGUOUS, AND A COMPLETE DEFENSE TO CLAIMS I-VIII REGARDING BUCK'S PERMITTED USE OF THE "BUCKY'S" MARK**

"The initial question of whether a contract is ambiguous is a question of law to be determined by the trial court. Under Nebraska law, once the trial court determines that a contract is unambiguous, its construction is a matter of law to be decided by the trial court." *ACTONet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836, 843 (8th Cir 2000) (citations omitted).

Plaintiff has repeatedly submitted, in both this litigation and the related Texas litigation, the May 17, 2017 Declaration of Arch Aplin III, its signatory to the Co-Existence Agreement, to support its contention that the Co-Existence agreement somehow forbids the parties from using their respective marks in ways that would create confusion. The Declaration states in part:

9. At the time I signed the Agreement I understood, and still understand today, the Agreement to be premised on the parties using their respective marks in ways that did not cause actual confusion or likelihood of confusion. I understood, and still understand today, that the parties' (sic) did not intend the Agreement to allow the parties to use their respective marks in ways that would create confusion.

10. I understood, and still understand today, that the parties intended the Agreement to explicitly qualify the allowed uses of the parties' respective marks to uses that do not cause actual confusion or likelihood of confusion.

(Dkt. 109, Aplin Decl., paras 9-10) The problem, of course, with Mr. Aplin's subjective understanding of the parties' intent, is that the plain and unambiguous language of the Co-Existence Agreement does not reflect any such intent.

“Under Nebraska law, the intent of the parties must be determined by the plain and ordinary meaning of the contract language as the ordinary or reasonable person would understand it. ‘A contract is ambiguous when a word, phrase or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.’ This determination is to be made on an objective basis, ‘not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.’” *ACTONet*, at 843. (citations omitted)

Despite Plaintiff's contention that the parties intended the Co-Existence Agreement to only permit trademark uses that do not cause actual confusion or likelihood of confusion, the Co-Existence Agreement expressly acknowledges that actual confusion may arise, and expressly provides a mutual obligation for the parties to address such confusion:

8. Avoidance of Consumer Confusion. The parties believe that compliance with the terms and conditions of this Agreement will avoid any consumer confusion between the parties' respective trademark uses. Notwithstanding the foregoing, in the event that either party encounters any instances of actual consumer confusion between the parties' respective trademark uses, such party will promptly notify the other party and the parties will cooperate in good faith to take appropriate steps and measures to eliminate such actual confusion and to avoid any future likelihood of confusion.

(Dkt. 88, Passarelli Decl., Ex. 24, para. 8) As such, Mr. Aplin's professed understanding of the parties' intent is directly at odds with the clear language of Section 8 and cannot be relied upon by Plaintiff to modify the Co-Existence Agreement.

Plaintiff has similarly tried to contort Section 3(b) of the Co-Existence Agreement to somehow forbid the parties from using their trademarks in a manner that creates confusion. (Dkt., p 2) The full text of Section 3(b), without use of the ellipses which Plaintiff uses throughout its opposition brief, reads as follows:

(b) Subject to the limitation set forth in Section 3(a) above and the agreement by the parties herein to take appropriate steps to avoid any likelihood of confusion, and because the parties agree that no likelihood of confusion will result from their separate use of their respective marks, either party may expand into any geographical territory without objection, interference, or filing of any legal action by the other party.

(Dkt. 88, Passarelli Decl., Ex. 24, para. 3(b)) Clearly, Section 3(b) is not intended to create any sort of prohibition, and is merely referring to the mutual obligation set forth in Section 8. Specifically, Section 3(b) references “the agreement by the parties to take appropriate steps to avoid any likelihood of confusion”. The words “take appropriate steps” appear nowhere in the body of the Co-Existence Agreement except in Section 8, so Section 3(b) can only be cross referencing the parties mutual obligations under Section 8. As such, the clear language of Section 3(b) states that the parties may expand into any geographical territory without objection, and that “the parties will cooperate in good faith to take appropriate steps and measures to eliminate” any confusion that arises from such expansion. In this instance, rather than notify Buck’s of its confusion concerns and cooperate in good faith to eliminate and avoid such confusion, Plaintiff committed multiple breaches of the Co-Existence Agreement by suing Buck’s in the State of Texas.

It should also be noted that Section 3(a) of the Co-Existence Agreement includes a *temporary* restriction prohibiting *Plaintiff* from expanding its BUC-EE’S trademark into certain markets:

(a) Buc-ee's agrees that for a period of five (5) years after the Effective Date, Buc-ee's will refrain from expanding its use of the BUC-EE'S trademark or any trademark that contains the word BUC-EE'S into the states of Nebraska, Iowa, Missouri, Illinois, Kansas, Tennessee and South Carolina.

(Dkt. 88, Passarelli Decl., Ex. 24, para. 3(a)) If the parties intended for Buck's to refrain from expanding into the Houston marketplace, either permanently or temporarily, Section 3 would have been the place to do it. Insofar as Section 3 of the Co-Existence Agreement clearly addresses the concept of exclusive marketplaces, and does not prohibit Buck's from expanding into the Houston marketplace, Plaintiff clearly missed its opportunity to carve out exclusivity for itself, and cannot eight years later ask this Court to renegotiate the Co-Existence Agreement on its behalf.

A party to a contract "can not use judicial interpretation to seek relief from what in hindsight may have been poor business judgment. Where 'two sophisticated parties [negotiate] a commercial contract which was executed in the absence of fraud, duress, or any other form of unconscionability, we will not rewrite the contract in order to save a contracting party from its own poor decisions.'" *ACTONet*, 219 F.3d at 845-846, citing, *LaSociete Generale Immobiliere v. Minneapolis Community Development Agency*, 44 F.3d 629, 637 (8th Cir. 1994).

Plaintiff also points to the introductory clause of Section 1 as purportedly creating an affirmative obligation for the parties to refrain from using their respective marks in a manner that might cause confusion. (Dkt. 110, pp. 32 -33) The introductory clause reads as follows:

1. Co-Existence Agreement. In consideration of the covenants and agreements set forth herein, and in order to recognize the rights of each of the parties in and to their respective trademarks, and to continue to avoid any consumer confusion and any likelihood of confusion between their respective trademarks, the parties agree as follows:"

(Dkt. 88, Passarelli Decl., Ex. 24, para. 1) Plaintiff conveniently ignores the portion of this clause that reads "in order to recognize the rights of each of the parties in and to their respective trademarks". A simple reading of the Co-Existence Agreement reveals that the overarching intent

of the entire document is to memorialize the parties' agreement that the BUCKY'S and BUC-EE'S trademarks are not confusingly similar, that each party owns rights in its respective trademark, that each party is allowed to obtain unrestricted federal trademark registrations for its respective trademark, and that each party is allowed to use its respective trademark throughout the entire United States. Any reading of the introductory clause of Section 1 to create an affirmative obligation for either party to stay out of any overlapping geographic markets would be nonsensical and directly conflict with the balance of the Co-Existence Agreement.

Again, the only provision of the entire Co-Existence Agreement that expressly relates to avoiding confusion is Section 8 which creates a mutual obligation to "cooperate in good faith" which Plaintiff itself has not fulfilled. "Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party." *Weber v. North Loup River Pub. Power and Irrigation Dist.*, 288 Neb. 959, 970 (Neb. 2014). Thus, Buc-ee's own conduct precludes Buc-ee's from recovering for breach.

Plaintiff contends that "Buc-ee's is entitled to discovery regarding the understanding and intent of the parties when entering into the Agreement to respond to Defendants' argument that the Agreement is unambiguous, permits Buck's to cause confusion, and provides and unconditional covenant not to sue." (Dkt. 110, p. 25) However, the Court need merely read the Co-Existence Agreement to determine that its contents are clear and unambiguous. The law is clear that Plaintiff is not entitled to introduce evidence of the parties' subjective understandings or intentions in an effort to create ambiguities where none exist.

The Supreme Court of Nebraska has held that "an unambiguous contract is not subject to interpretation or construction and that in such a contract the intention of the parties must be

determined from its contents alone.” *T.V. Transmission, Inc. v. City of Lincoln*, 220 Neb. 887, 374 N.W.2d 49, 52 (1985). Furthermore, “[t]he parties are bound by the terms of their contract even though their actual intent may have been different than that expressed in the document.” *Id.*, at 892. Despite Plaintiff’s tortured reading, the Co-Existence Agreement is clear and unambiguous and permits Buck’s to engage in the very actions that form the basis of Plaintiff’s Claims I-VIII.

**D. INADVERTENT USE OF THE WORD “BUC-EE’S” BY BUCK’S CONTRACTOR WAS NOMINAL, NON-TRADEMARK USE WHICH WAS IMMEDIATELY CORRECTED AND DOES NOT CONSTITUTE AN ACTIONABLE BREACH**

Plaintiff correctly notes that Defendants failed to address Plaintiff’s claim that they breached the Co-Existence Agreement by purportedly making use of the BUC-EE’S trademark. Although clearly much ado about nothing, Defendants will herein address and dispose of Plaintiff’s claim.

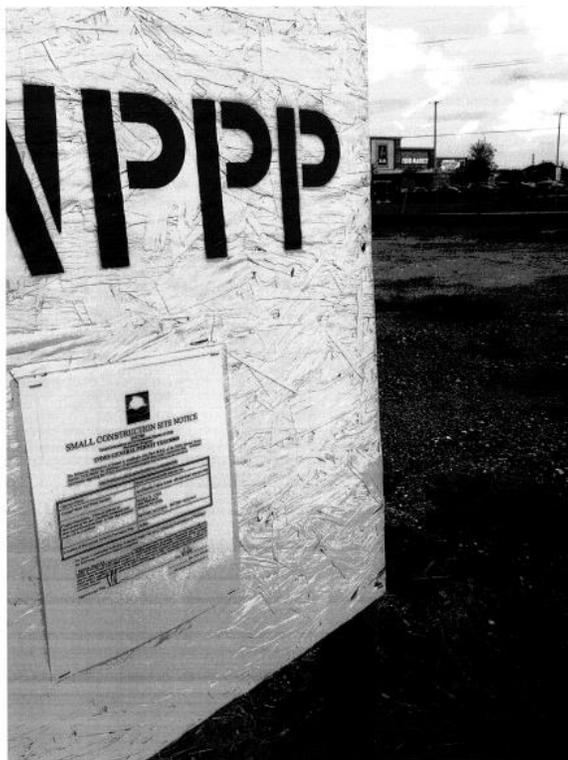
Buck’s received notice of the inadvertent use of “Buc-ee’s Express” on a Small Construction Site Notice posted by a subcontractor used by its contractor, KHH Interest, Inc. d/b/a Cactus Commercial (“Cactus”), at 3535 Highway 6 South, Houston, Texas (“Site 1200”) on August 23, 2017 when the Plaintiff filed its Motion for Leave to Join an Additional Party with the United States District Court for the District of Texas, Houston Division (Tex. Dkt. 58, p. 4). An image of the Small Construction Site Notice with “Buc-ee’s Express” printed on it was included as a portion of the filing. (*Id.*).

A Small Construction Site Notice is a notice required by law that is the size of a standard piece of copy paper. (Harris Depo. 68:12 – 23, 86:22-23, Ex. 179) The Small Construction Site Notice at Site 1200 is posted behind a fence, and to view the Small Construction Site Notice, an individual would have to get out of his car and peer through or climb over the fence in order to view the Small Construction Site Notice (Harris Depo. 90:15-18). The inadvertent use of “Buc-

ee's Express" instead of "Bucky's" on the Small Construction Site Notice was the result of a typographical error made by a subcontractor's employee who typed the notice incorrectly. (Harris Depo. 72:9-15)

On August 24, 2017, the day after Plaintiff's Motion for Leave to Join an Additional Party was filed, Cactus and its subcontractor took steps to correct the error Plaintiff's pointed out on the Small Construction Site Notice. That day, Kevin Harris, President of Cactus Commercial, confirmed to Buck's that the Small Construction Site Notice posted at Site 1200 was revised from "Buc-ee's Express" to "Bucky's 1200". (Harris Depo. 91:21 – 92:25, Ex. 179)

To put Plaintiff's breach of contract claim in perspective, the Small Construction Site Notice at issue, as posted on Buck's job site, is so small that it is stapled to a 4 x 8 board bearing the large letters "SWPPP" (which stands for "Storm Water Pollution Prevention Plan") so that it can be located on the construction site by government inspectors. (Harris Depo. 86:22 – 87:14, Ex. 179):





The contract provision at issue is set out in Section 1(b) of the Co-Existence Agreement, and provides as follows:

Buck's agrees that it shall not use the trademark or service mark BUC-EE'S or any trademark or service mark that contains the word BUC-EE'S in connection with retail store services featuring convenience store items, gasoline, and any related goods or services in the United States.

(Dkt. 88, Passarelli Decl., Ex. 24, para. 1(b)) There is absolutely nothing about this inadvertent use of "Buc-ee's Express" that could remotely be viewed as "trademark or service mark" use. It was an inadvertent, typewritten usage, in standard text, on a government form the size of a standard sheet of typing paper, barely legible from a few feet away, and completely invisible from any distance that any member of the consuming public might cross paths with it. As such, this inadvertent use, by definition, does not violate Section 1(b) of the Co-Existence Agreement.

Furthermore, the inadvertent use was immediately corrected, and Plaintiff can point to no damages that it suffered as a result of this inadvertent use. As such, even assuming that the use was a technical violation of the Co-Existence Agreement (which Defendants obviously dispute), such use was clearly not a material breach of the Co-Existence Agreement and Plaintiff's breach of contract claim has been rendered moot by the corrective action taken by Buck's contractor. Furthermore, Buc-ee's own breaches of the Co-Existence Agreement preclude Buc-ee's from recovering for breach. (*See supra*, pg. 17).

### **III. CONCLUSION**

For the reasons stated above, Defendants' Motion for Summary Judgment should be granted and Buc-ee's Amended Complaint should be dismissed with prejudice.

Dated this 8th day of December, 2017.

BUCK'S, INC. AND STEVEN  
BUCHANAN, Defendants

By: /s/ John P. Passarelli

John P. Passarelli (Attorney in Charge)  
NE State Bar No. 16018  
Patrick C. Stephenson  
NE State Bar No.: 19138  
Maggie L. Ebert  
NE State Bar No.: 24394  
KUTAK ROCK LLP  
The Omaha Building  
1650 Farnam Street  
Omaha, NE 68102-2186  
Telephone: 402-231-8913  
Facsimile: 402-346-1148  
john.passarelli@kutakrock.com  
patrick.stephenson@kutakrock.com  
maggie.ebert@kutakrock.com

### **CERTIFICATE OF SERVICE**

I hereby certify that on December 8, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent electronic notification of this filing to all CM/ECF participants.

/s/ John P. Passarelli  
John P. Passarelli