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11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA
13 SOUTHERN DIVISION

14 RUSSELL ROAD FOOD AND
15 BEVERAGE, LLC, a Nevada limited
liability company,

16 Plaintiff,

17 vs.

18 FRANK SPENCER, an individual;
19 CRAZY HORSE CONSULTING, INC., an
Ohio corporation; and DOES 1 – 50,
20 inclusive,

21 Defendants.

22 FRANK SPENCER, an individual; and
23 CRAZY HORSE CONSULTING, INC., an
Ohio corporation,

24 Counterclaimants,

25 vs.

26 RUSSELL ROAD FOOD AND
27 BEVERAGE, LLC, a Nevada limited
liability company,

28 Counterdefendant.

Case No. 2:12-cv-01514-LRH-GWF

**PLAINTIFF RUSSELL ROAD FOOD AND
BEVERAGE, LLC'S REPLY BRIEF IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

Case Filed: August 24, 2012
Judge: Honorable Larry R. Hicks

TABLE OF CONTENTS

1

2 I. Introduction 1

3 II. Undisputed Facts Pursuant To LR 56-1 2

4 III. Argument 4

5 A. Defendants Have Not Raised a Triable Issue..... 5

6 B. Russell Road Obtained an Assignment of the Consent Agreement, Not an Assignment of a

7 Trademark 5

8 1. The Validity of the Consent Agreement Does Not Depend On CHATGC’s Use or

9 Ownership of Any Trademark 6

10 2. CHTAGC Did Not Assign Any Trademark to Russell Road So There Can Be No

11 Assignment in Gross 7

12 C. Russell Road Provided Consideration to CHTAGC for the Assignment 7

13 D. Nevada Law Permits CHTAGC To Convey the Consent Agreement..... 9

14 E. Russell Road Did Not Breach the Consent Agreement 9

15 1. Russell Road Obtained CHTAGC’s Rights Under the Consent Agreement, But Not Its

16 Obligations..... 10

17 2. Russell Road Did Not Breach the Consent Agreement Because Defendants Were Not

18 in Compliance With the Consent Agreement 10

19 3. At No Point Before or After this Lawsuit Was Filed Have Defendants Abided by the

20 Agreement and Given Their Consent..... 11

21 F. Defendants Have Not Satisfied the Requirements for Additional Discovery Pursuant to

22 FRCP 56(d) 12

23 1. Defendants Have Had 10 Months To Conduct Discovery But Have Chosen Not To Do

24 So 12

25 2. Defendants Have Not Set Forth The Three Required Elements in an Affidavit Seeking

26 Discovery Pursuant to FRCP 56(d)..... 13

27 IV. Conclusion 14

28

TABLE OF AUTHORITIES

Cases

Allen v. United States of America, No. 03-cv-01358, 2012 U.S. Dist. LEXIS 57647, *20 (D. Nev. April 24, 2012)..... 12, 13

Brown v. Indiana National Bank, 476 N.E.2d 888, 895, n.4 (Ind. Ct. App.)..... 10

Bush v. Nationstar Mortgage, LLC, No. 3:08-cv-00680, 2010 U.S. Dist. LEXIS 84975, *3-4 (D. Nev. Aug. 17, 2010)..... 2, 8

Davis v. Humble, No. 2:07-cv-1643, 2010 U.S. Dist. LEXIS 56997, *13 (D. Nev. June 9, 2010)13

FNBN-Rescon I, LLC v. Ritter, No. 2:11-cv-01867, 2013 U.S. Dist. LEXIS 86902, *3 (D. Nev. June 19, 2013)..... 13

Pfingston v. Ronan Eng. Co., 284 F.3d 999, 1005 (9th Cir. 2002)..... 12

ProShipLine, Inc. v. Ep-Team, Inc., No. 07-cv-5660, 2010 U.S. Dist. LEXIS 136283, *5 (W.D. Wash. Dec. 13, 2010)..... 10

Qualls v. Blue Cross of California, Inc., 22 F.3d 839, 844 (9th Cir. 1994)..... 12

St. Paul Fire & Marine Ins. Co. v. Del Webb Communities, Inc., No. 2:12-cv-00674, 2013 U.S. Dist. LEXIS 37903, *18 (D. Nev. March 19, 2013)..... 13

Thompson v. Lake, No. 3:11-cv-00644, 2013 U.S. Dist. LEXIS 13331, *23 (D. Nev. Jan. 21, 2013) 14

Winthrop Resources Corp. v. Anastasi Construction Co., Inc., No. 01-787, 2002 U.S. Dist LEXIS 6135, *3-4 (D. Minn. March 18, 2002)..... 10

Statutes

FRCP 56(d) 12, 13, 14

NRS § 104.2210..... 10

NRS § 78.585..... 9

1 **I. INTRODUCTION**

2 Even after Defendants' opposition, the undisputed, material facts warranting summary
3 judgment remain the same. A Nevada company called Crazy Horse Too A Gentlemen's Club
4 ("CHTAGC") and Carl Reid entered into a September 16, 2009 Trademark Co-Existence
5 Agreement (hereinafter "Consent Agreement") as part of a settlement of a trademark dispute
6 before the United States Patent and Trademark Office's ("USPTO") Trademark Trial and Appeal
7 Board ("TTAB"). In the Consent Agreement, Mr. Reid consented to CHTAGC's use and
8 registration of any mark that contained the phrase CRAZY HORSE, provided the mark did not
9 contain the phrase PURE GOLD'S or the terms PURE or GOLD'S.

10 In 2010, Mr. Reid assigned rights and U.S. Trademark Registration No. 3,044,028 to
11 Defendants, and in 2012, CHTAGC assigned its rights under the Consent Agreement to Russell
12 Road. By acquiring Mr. Reid's rights to the CRAZY HORSE trademark and registration by
13 assignment, federal trademark law holds that Defendants are bound by the Consent Agreement,
14 which permits Russell Road—as the assignee of CHTAGC—to use and register the CRAZY
15 HORSE III trademark. As a result, Defendants are contractually prohibited (and equitably
16 estopped) from asserting their trademark claims against Russell Road. On this basis, Russell
17 Road moves for summary judgment.

18 Knowing that they lack any viable defense, Defendants take the tack of trying to confuse
19 the issues and this Honorable Court. More specifically, even though CHTAGC clearly assigned a
20 contractual agreement to Russell Road, Defendants confuse the assignment of the Consent
21 Agreement (a contract) with the assignment of a trademark. CHTAGC assigned its rights under
22 an agreement to Russell Road, but CHTAGC did not assign any trademarks to Russell Road. Yet
23 Defendants argue at length how CHTAGC's assignment of a trademark to Russell Road is invalid
24 because there was no goodwill transferred and because CHTAGC had abandoned its trademark
25 rights. However, it is the assignment of the Consent Agreement to Russell Road that is at issue,
26 not an assignment of a trademark that did not occur. As such, Defendants' transparent attempts to
27 confuse the facts and issues widely miss the mark and fail to create any genuine issues that would
28 defeat Russell Road's Motion for Summary Judgment. As a result, Russell Road respectfully

1 requests that the Court grant its Motion or Summary Judgment.

2 **II. UNDISPUTED FACTS PURSUANT TO LR 56-1**

3 In its moving papers, Russell Road sets forth six undisputed facts that are material to the
 4 disposition of its Motion for Summary Judgment. ECF No. 45, at 9:25-11:9. Importantly, in
 5 their opposition, *Defendants do not dispute any of these six material facts*. See ECF No. 47, at
 6 12:11-13:14. Accordingly, Russell Road respectfully requests that the Court accept these six
 7 material facts as undisputed for the purposes of this Motion.

8 Instead of disputing Russell Road’s six material facts, Defendants set forth six different
 9 facts that Defendants claim are disputed and material. However, as addressed below, *none* of
 10 Defendant’s purported facts are material to the disposition of Russell Road’s Motion for
 11 Summary Judgment. And actually, the facts listed by Defendants are not only immaterial but
 12 they are completely irrelevant and inapplicable to the facts of this case.

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Defendants’ Purported Disputed Fact	Why The Purported Fact Is Not Material or Disputed
No good will was transferred with the rights supposedly granted to CHTAGC by the co-existence agreement.	Goodwill is only required to be transferred when there is an assignment of a trademark. In this case, CHTAGC assigned its rights under a contractual agreement—the Consent Agreement—to Russell Road; CHTAGC did not assign any trademarks to Russell Road. Therefore, there was no requirement that goodwill be transferred, and Defendant’s purported fact is immaterial and irrelevant. See Section III.B.2 of this Reply Brief.
Russell Road offers no evidence of any consideration paid or transferred to CHTAGC in exchange for the alleged assignment of the co-existence agreement.	As an initial matter, Russell Road did provide consideration of \$2,500, and Russell Road submitted declarations to that effect with its Reply. See Reply Declaration of John Salvador, at ¶ 4; Reply Declaration of Robert Lenson, at ¶ 3. Moreover, Defendants have no basis for saying that there was no consideration provided. In fact, they put in no declaration to that effect. Instead, they just cite to the Russell Road’s moving declarations, which simply did not address the issue of consideration because it was not an issue, but by no means did those declarations state that no consideration was given. A fact is not disputed simply because the opposing party states that it is—the

<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p>	<p>opposing party must point to specific facts that put the fact in dispute. Defendants’ conclusory allegations without factual support are insufficient to create a material fact and defeat summary judgment. <i>Bush v. Nationstar Mortgage, LLC</i>, No. 3:08-cv-00680, 2010 U.S. Dist. LEXIS 84975, *3-4 (D. Nev. Aug. 17, 2010).</p> <p>Finally, this is not a material fact in any event. <i>See</i> Section III.C. of this Reply Brief.</p>
<p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p>	<p>No good will was transferred with the rights supposedly granted to Russell Road by the purported assignment from CHTAGC.</p> <p>Goodwill is only required to be transferred when there is an assignment of a trademark. In this case, CHTAGC assigned its rights under a contractual agreement—the Consent Agreement—to Russell Road; CHTAGC did not assign any trademarks to Russell Road. Therefore, there was no requirement that goodwill be transferred, and Defendants’ purported fact is immaterial and irrelevant. <i>See</i> Section III.B.2 of this Reply Brief.</p>
<p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p>	<p>CHTAGC never acquired any tangible or intangible goods of the unrelated club Crazy Horse Too or of Reid’s business.</p> <p>The validity of the Consent Agreement does not depend on whether CHTAGC acquired any goods of an unrelated club or Reid’s business. In essence, Defendants are trying to argue that because CHTAGC did not acquire such goods, CHTAGC did not use or abandoned its trademark. Defendants are purposely confusing a party’s rights in a trademark with a party’s rights in a contractual agreement. Therefore, there was no requirement that CHTAGC acquire goods, use a trademark, or not abandon any trademark to continue to have rights in the Consent Agreement, and Defendants’ purported fact is immaterial and irrelevant. <i>See</i> Section III.B.1 of this Reply Brief.</p>
<p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p>CHTAGC never used any “Crazy Horse” mark in connection with the operation of any business.</p> <p>The validity of the Consent Agreement does not depend on CHTAGC’s continued use or non-abandonment of any trademark rights. Defendants are purposely confusing a party’s rights in a trademark with a party’s rights in a contractual agreement. Therefore, there was no requirement that CHTAGC use or not abandon any trademark to continue to have rights in the Consent Agreement, and Defendants’ purported fact is immaterial and irrelevant. <i>See</i> Section III.B.1 of this Reply Brief.</p>
<p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>CHTAGC abandoned the only trademark registration it attempted pursuant to the co-existence agreement.</p> <p>The validity of the Consent Agreement does not depend on CHTAGC’s continued use or non-abandonment of any trademark rights. Defendants are purposely confusing a party’s rights in a trademark with a party’s rights in a contractual agreement. Therefore, there was no</p>

	requirement that CHTAGC use or not abandon any trademark to continue to have rights in the Consent Agreement, and Defendants' purported fact is immaterial and irrelevant. <i>See</i> Section III.B.1 of this Reply Brief.
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As explained in the chart above, Defendants' purported disputed material facts are actually not material at all. Rather, Defendants' list of facts is nothing more than a list of irrelevant facts that Defendants set forth in an ill-conceived attempt to try to conjure disputed material facts where none exist.¹ Regardless, Defendants have failed to identify any disputed material facts, and Russell Road's Motion for Summary Judgment should be granted.

III. ARGUMENT

Russell Road is entitled to summary judgment that its use of the CRAZY HORSE III trademark does not infringe Defendants' claimed rights in the CRAZY HORSE trademark. Carl Reid, the prior owner of the federal trademark registration for CRAZY HORSE, entered into a Consent Agreement with CHTAGC in which he consented to CHTAGC's use of the CRAZY HORSE III trademark. CHTAGC assigned its rights in that Consent Agreement to Russell Road. Defendants, as the assignee of CRAZY HORSE trademark from Carl Reid, are bound by the Consent Agreement consenting to Russell Road's use of the CRAZY HORSE III trademark. These facts and the extensive legal authority cited in Russell Road's moving papers are undisputed by Defendants and provide the grounds necessary to grant summary judgment.

As discussed below, each and every argument raised by Defendants in their opposition is completely inapposite. Unfortunately, Defendants' opposition displays a fundamental misunderstanding of both the facts and trademark law. Even though Russell Road has made it abundantly clear that CHTAGC assigned the Consent Agreement to it—not any trademark, Defendants argue at length about the validity of a trademark assignment from CHTAGC to Russell Road that never occurred. Likewise, Defendants argue on end about the validity of CHTAGC's trademark rights even though CHTAGC's contractual rights, not trademark rights,

¹ Given how egregiously irrelevant Defendants' purported list of material facts is, Defendants appear to be intentionally misleading this Court. Defendants' opposition is even arguably a violation of Rule 11, as listing such irrelevant facts has no basis in law or fact.

² To the extent the obligations were required to be assigned to Russell Road to make the assignment valid and enforceable, the Consent Agreement also provided for that in Paragraph 2. ECF no. 45-1, Ex. E, at ¶ 2.

³ In fact, Defendants continue to pursue their allegations of infringement against Russell Road to this day, long after

1 are what were assigned to Russell Road and what are at issue. As a result, Defendants'
2 opposition fails to create any genuine issue of fact and summary judgment should be granted in
3 favor of Russell Road.

4 **A. Defendants Have Not Raised a Triable Issue**

5 In its moving papers, Russell Road set forth six undisputed, material facts that supported
6 granting its Motion for Summary Judgment. ECF No. 45, at 9:25-11:9. These six undisputed,
7 material facts were supported by evidence in the form of declarations and exhibits submitted with
8 Russell Road's moving papers. As also discussed in Section II above, not only do Defendants not
9 dispute any of these six material facts in their opposition, Defendants also did not submit any
10 evidence whatsoever to attempt to dispute them. Accordingly, Russell Road respectfully submits
11 that the Court should deem the six material facts as undisputed in deciding Russell Road's Motion
12 for Summary Judgment.

13 Likewise, after setting forth the six undisputed, material facts, Russell Road fully briefed
14 the law governing this matter. Trademark consent agreements are enforceable, and a party to a
15 trademark consent agreement cannot assert or prevail on a claim for trademark infringement.
16 ECF No. 45, at 11:24-13:7. Moreover, trademark consent agreements are assignable like any
17 other contractual agreement. ECF No. 45, at 13:8-14:21. And finally, trademark consent
18 agreements are binding on trademark assignees. ECF No. 45, at 14:22-16:3. Notably, in their
19 opposition, Defendants do not contest any of these legal principles and do not set forth any legal
20 authority to contradict any of these rules of law. Accordingly, because Defendants wholly failed
21 to dispute Russell Road's undisputed, material facts and wholly failed to contest Russell Road's
22 legal arguments entitling it to summary judgment, Defendants have failed to create a triable issue
23 and Russell Road's Motion for Summary Judgment should be granted.

24 **B. Russell Road Obtained an Assignment of the Consent Agreement, Not an**
25 **Assignment of a Trademark**

26 In their opposition, Defendants exhibit a fundamental misunderstanding of trademark law
27 and the assignment of the consent agreement from CHTAGC to Russell Road. CHTAGC
28 assigned its rights under the consent agreement to Russell Road. ECF No. 45-1, Ex. E; ECF No.

1 45-2, Ex. A; ECF No. 45-3, Ex. B. CHTAGC did not assign any trademark to Russell Road. *Id.*
2 Yet, the entirety of Defendants' opposition is premised on a failure to understand this simple
3 distinction and compounded by a mischaracterization of the facts. Defendants' arguments are all
4 directed to the assignment of a trademark, which is completely inapplicable in this case because
5 CHTAGC only assigned its contractual rights, not any trademarks to Russell Road. As discussed
6 below, by wrongly addressing the assignment of a trademark instead of the assignment of the
7 Consent Agreement, Defendants have failed to create any triable issue of fact precluding
8 summary judgment.

9 **1. The Validity of the Consent Agreement Does Not Depend On**
10 **CHATGC's Use or Ownership of Any Trademark**

11 In their opposition, Defendants argue that the Consent Agreement is somehow invalid
12 because CHTAGC abandoned its CRAZY HORSE TOO trademark. *See* ECF No. 47, at 15:1–
13 17:8. This argument is completely irrelevant and nothing more than a transparent red herring.

14 First, the Consent Agreement does not require CHTAGC to own or use any trademark in
15 order for the Consent Agreement to be valid. In fact, there are many provisions in the Consent
16 Agreement that relate to the consent to use trademarks in the future. For example, Paragraph 1
17 allows CHTAGC to use and register *any* mark that includes the phrase CRAZY HORSE if it does
18 not include PURE GOLD'S. This obviously contemplates that CHTAGC could adopt additional
19 marks other than whatever marks it was using at the time. Moreover, there is no language
20 anywhere in the Consent Agreement tying the validity of the Consent Agreement to CHTAGC's
21 continued use of any mark. And not surprisingly, Defendants have completely failed to cite any
22 legal authority whatsoever for the incorrect proposition that a Consent Agreement is invalid if a
23 trademark is abandoned, especially where the Consent Agreement provides specific consent to the
24 adoption of additional marks.

25 In short, Defendants are confusing a party's rights in a trademark with a party's rights in a
26 contractual agreement. It is true that in order to maintain one's trademark rights, the trademark
27 owner must continue to use and not abandon the trademark. The statute and cases cited by
28 Defendants stand for only that proposition and nothing more. It is not true, however, that the

1 abandonment of a trademark results in the abandonment of one's rights under a contractual
2 agreement if there is no such term in the agreement. All Defendants have done is cite statues and
3 case that set forth how a trademark is abandoned. Glaringly, Defendants *have cited no factual or*
4 *legal basis* to find a contractual Consent Agreement invalid as the result of the abandonment of a
5 trademark. As such, Defendants' argument must be rejected as irrelevant and misplaced.

6 **2. CHTAGC Did Not Assign Any Trademark to Russell Road So There**
7 **Can Be No Assignment in Gross**

8 In their opposition, Defendants argue that the assignment of the consent agreement to
9 Russell Road is unenforceable because CHTAGC did not transfer the goodwill associated with
10 CHTAGC's trademark to Russell Road. *See* ECF No. 47, at 17:9 – 21:11. This argument must
11 be rejected because Defendants are purposely confusing the assignment of a consent agreement
12 with the assignment of a trademark.

13 Again, CHTAGC assigned its rights under the Consent Agreement to Russell Road.
14 *CHTAGC did not assign any trademark to Russell Road.* Therefore, while it is true that an
15 assignment of a trademark must include the goodwill associated with it, that rule applies to the
16 assignment of a trademark, not the assignment of a contract. As such, Defendants' argument is
17 completely misplaced. It is unclear whether Defendants are purposely confusing the assignment
18 of the Consent Agreement with the assignment of a trademark in an ill-conceived attempt to try to
19 create a material issue of fact where none exists or whether Defendants have just fundamentally
20 misunderstood that it was only the assignment of the agreement that took place. In any case,
21 because CHTAGC assigned its contractual rights—not a trademark—CHTAGC did not need to
22 transfer the goodwill associated with any of its marks to Russell Road.

23 **C. Russell Road Provided Consideration to CHTAGC for the Assignment**

24 Contrary to Defendants' false assertion, Russell Road did provide consideration to
25 CHTAGC in exchange for the assignment of the consent agreement. In their opposition,
26 Defendants argues that CHTAGC's assignment of the consent agreement to Russell Road is
27 invalid because "Russell Road offers no evidence that it paid or transferred any consideration in
28 exchange for the alleged assignment." ECF No. 47, at 2:24, 16:25.

1 As an initial matter, Defendants have no basis whatsoever to conclude that no
2 consideration was given by Russell Road to CHTAGC in exchange for assignment of the consent
3 agreement. It is nothing more than pure, unbridled speculation (and arguably a violation of Rule
4 11 since there is no evidentiary basis for the assertion). *Bush v. Nationstar Mortgage, LLC*, No.
5 3:08-cv-00680, 2010 U.S. Dist. LEXIS 84975, *3-4 (D. Nev. Aug. 17, 2010) (“conclusory
6 allegations that are unsupported by factual data cannot defeat a motion for summary judgment.”).

7 It is also worth noting that Defendants have not cited any legal authority to support their
8 argument that the assignment of a consent agreement is invalid if not supported by consideration.
9 Likewise, Defendants have not cited any legal authority showing that Defendants, who were not
10 parties to the assignment of the consent agreement, even have standing to challenge the
11 assignment of the consent agreement for lack of consideration. Nevertheless, as explained below,
12 Russell Road provided monetary consideration to CHTAGC for the assignment, which is an
13 undisputed fact (though not material to Russell Road’s Motion for Summary Judgment). As such,
14 Defendants’ argument is wholly without factual basis, and consequently, the factual
15 misrepresentation is arguably sanctionable pursuant to Rule 11.

16 Moreover, Russell Road has submitted the actual assignment document, which itself
17 reflects that consideration was exchanged. ECF No. 45-1, Ex. E. The last paragraph in the
18 Recitals of the assignment reads as follows:

19 NOW, THEREFORE, in consideration of the foregoing recitals and the
20 promises and covenants contained herein and ***for good and valuable***
21 ***consideration***, the receipt and sufficiency of which is hereby acknowledged, the
Parties agree as follows:

22 ECF No. 45-1, Ex. E, at 1. Accordingly, the actual parties to the agreement acknowledge that
23 there was consideration for the assignment.

24 In any event, and most importantly, Defendants’ argument is moot because Russell Road
25 paid CHTAGC \$2,500 for the assignment of the consent agreement. Salvador Reply Declaration,
26 at ¶ 4; Lenson Reply Declaration, at ¶ 3. As this payment did not seem germane, Russell Road
27 did not address it in its moving papers. But since Defendants are now incorrectly claiming that
28 no consideration was given, Russell Road has submitted reply declarations from Russell Road

1 and CHTAGC attesting to the payment of this consideration. *Id.* As such, this is a non-issue, and
2 Defendants’ argument—which is unsupported in both law and fact—must be rejected.

3 **D. Nevada Law Permits CHTAGC To Convey the Consent Agreement**

4 In their opposition, Defendants argue that CHTAGC could not assign the Consent
5 Agreement because CHTAGC was dissolved or defunct. ECF No. 47, at 2:22, 11:9-10.

6 However, NRS § 78.585 entitled “Continuation of corporation after dissolution for winding up
7 and liquidating its business and affairs” allows a dissolved company to continue as a company to
8 convey property and distribute assets, such as the Consent Agreement that was assigned to
9 Russell Road:

10 The corporation continues as a body corporate for the purpose of prosecuting and
11 defending suits, actions, proceedings and claims of any kind or character by or
12 against it and of enabling it gradually to settle and close its business, to collect its
13 assets, to collect and discharge its obligations, ***to dispose of and convey its
14 property,*** to distribute its money and other property among the stockholders, after
15 paying or adequately providing for the payment of its liabilities and obligations,
16 and to do every other act to wind up and liquidate its business and affairs, but not
17 for the purpose of continuing the business for which it was established.

18 NRS § 78.585 (emphasis added). Therefore, it was perfectly permissible for CHTAGC to dispose
19 of the asset of the Consent Agreement by assigning it to Russell Road after CHTAGC was
20 dissolved.

21 **E. Russell Road Did Not Breach the Consent Agreement**

22 In their 24 page opposition, Defendants dedicate 10 lines of text to a unconvincing
23 conclusory allegation that Russell Road breached the Consent Agreement. ECF No. 41, at 21:1-
24 10. The fact that Defendants made little more than a passing reference to this argument
25 underscores the fact that Defendants themselves do not believe their own baseless argument.
26 First, Defendants incorrectly characterize the consideration given by CHTAGC to Reid. As
27 discussed in Russell Road’s moving papers, CHTAGC had successfully petitioned to cancel
28 Reid’s CRAZY HORSE trademark registration and Reid was in default. ECF No. 45, at 5:8-6:23.
CHTAGC withdrew the petition to cancel and did not pursue the default judgment against Reid.
Id. This is unquestionably more than sufficient consideration. And second, as discussed below,
Russell Road did not breach the Consent Agreement by filing this lawsuit to enforce the Consent

1 Agreement because (i) Russell Road acquired the rights but not obligations under the Consent
 2 Agreement, and (ii) Defendants were not in compliance with the Consent Agreement by refusing
 3 to provide their consent both before and after Russell Road filed the Complaint.

4 **1. Russell Road Obtained CHTAGC's Rights Under the Consent**
 5 **Agreement, But Not Its Obligations**

6 As an initial matter, CHTAGC's assignment specifically states that CHTAGC assigned its
 7 rights under the Consent Agreement to Russell Road, but did not assign or delegate its obligations
 8 under the Consent Agreement to Russell Road.² ECF No. 45-1, Ex. E, at ¶¶ 1-2. In this regard,
 9 contract law specifically permits assignment of the rights but not obligations of a consent
 10 agreement. *See* NRS § 104.2210 (specifically allowing the assignment of rights and non-
 11 delegation of performance); *ProShipLine, Inc. v. Ep-Team, Inc.*, No. 07-cv-5660, 2010 U.S. Dist.
 12 LEXIS 136283, *5 (W.D. Wash. Dec. 13, 2010) (“Ep-Team had assigned its rights (not
 13 obligations) under the contract to ProShipLine in 2006”); *Winthrop Resources Corp. v. Anastasi*
 14 *Construction Co., Inc.*, No. 01-787, 2002 U.S. Dist LEXIS 6135, *3-4 (D. Minn. March 18, 2002)
 15 (in contract at issue, assignor assigned rights but not obligations); *Brown v. Indiana National*
 16 *Bank*, 476 N.E.2d 888, 895, n.4 (Ind. Ct. App.) (assignment of a contract may assign rights
 17 without delegating duties). Accordingly, because CHTAGC did not assign or delegate its
 18 obligations under the Consent Agreement to Russell Road, Russell Road was not under an
 19 obligation to refrain from challenging Defendants' use or registration of the CRAZY HORSE
 20 mark. As such, there could be no breach of the Consent Agreement by Russell Road.

21 **2. Russell Road Did Not Breach the Consent Agreement Because**
 22 **Defendants Were Not in Compliance With the Consent Agreement**

23 Although CHTAGC did agree not to challenge Mr. Reid's use and registration of the
 24 CRAZY HORSE trademark, there is an important limitation on that agreement in the Consent
 25 Agreement. Paragraph 3 of the Consent Agreement specifically states that CHTAGC's
 26 agreement not to challenge Mr. Reid's use and registration of the CRAZY HORSE trademark is

27 _____
 28 ² To the extent the obligations were required to be assigned to Russell Road to make the assignment valid and enforceable, the Consent Agreement also provided for that in Paragraph 2. ECF no. 45-1, Ex. E, at ¶ 2.

1 only required “provided that Mr. Reid is otherwise in compliance with this Agreement.” ECF
 2 No. 45-1, Ex. B, ¶ 3. This important limitation is stated specifically in the Consent Agreement
 3 and cannot be ignored. *Id.*

4 In this regard, Defendants were not “otherwise in compliance” with the Consent
 5 Agreement because they refused to consent to Russell Road’s use of the CRAZY HORSE III
 6 trademark and continued to assert that Russell Road’s use of its CRAZY HORSE III trademark
 7 infringed Defendants’ asserted rights in the CRAZY HORSE trademark. Tarabichi Reply Decl.,
 8 ¶¶ 2-5; *see also* ECF Nos. 1, 19-2, 19-3 (detailing Defendants’ threats of trademark
 9 infringement). Between August 16, 2012 (when CHTAGC assigned the Consent Agreement to
 10 Russell Road) and August 24, 2013 (when Russell Road filed its Complaint in this action),
 11 Defendants’ counsel was advised that the CHTAGC had assigned its rights under the Consent
 12 Agreement to Russell Road, but Defendants chose to maintain their assertions of infringement.³
 13 Tarabichi Reply Decl., ¶¶ 2-5. As a result, Defendants were not in compliance with the Consent
 14 Agreement, and Russell Road was not subject to the obligations in Paragraph 3 of the Consent
 15 Agreement. *Id.*

16 **3. At No Point Before or After this Lawsuit Was Filed Have Defendants**
 17 **Abided by the Agreement and Given Their Consent**

18 Defendants’ argument that Russell Road breached the Consent Agreement is a desperate
 19 attempt to avoid enforcement of the agreement and rings hollow. Interestingly, in making this
 20 argument, Defendants are essentially stating that, if Russell Road had not filed its Complaint,
 21 Defendants would have provided their consent as required under the Consent Agreement. Yet,
 22 Defendants have never been willing to provide such consent—both before and after the
 23 Complaint was filed. Before the Complaint was filed, Defendants refused to co-exist as required
 24 by the Consent Agreement. Tarabichi Reply Decl., ¶¶ 2-5. And after the Complaint was filed,
 25 Defendants never once offered to resolve the lawsuit by complying with the Consent Agreement
 26 and providing their consent to Russell Road’s use of its CRAZY HORSE III mark. *Id.* Instead,

27 _____
 28 ³ In fact, Defendants continue to pursue their allegations of infringement against Russell Road to this day, long after
 Russell Road filed its Complaint for declaratory relief.

1 Defendants counterclaimed for infringement and filed a motion for preliminary injunction (which
 2 was denied). ECF Nos. 12, 14, and 28. Defendants also never wrote to Russell Road to allege
 3 that any breach of the Consent Agreement had taken place.⁴ Defendants did not do so because
 4 they knew they were in breach of the Consent Agreement, and Russell Road's attempt to enforce
 5 the Consent Agreement by filing this lawsuit is entirely permissible.

6 **F. Defendants Have Not Satisfied the Requirements for Additional Discovery**
 7 **Pursuant to FRCP 56(d)**

8 In their opposition, Defendants argue that this Court should defer considering Russell
 9 Road's Motion for Summary Judgment because Defendants purportedly need discovery pursuant
 10 to FRCP 56(d) in order to oppose Russell Road's Motion for Summary Judgment.⁵ ECF No. 47,
 11 at 21:11-2:18. However, as discussed below, Defendant's request to defer Russell Road's Motion
 12 for Summary Judgment to allow Defendants to conduct discovery should be denied because (1)
 13 Defendants have had ample opportunity to conduct discovery and have failed to do so, and (2)
 14 Defendants have not submitted an affidavit setting forth the three requirements required by FRCP
 15 56(d).

16 **1. Defendants Have Had 10 Months To Conduct Discovery But Have**
 17 **Chosen Not To Do So**

18 A party that moves to defer the court's consideration of a motion for summary judgment
 19 to allow the moving party to conduct discovery necessary to oppose such motion must show that
 20 "it was diligent in pursuing its previous discovery opportunities." *Allen v. United States of*
 21 *America*, No. 03-cv-01358, 2012 U.S. Dist. LEXIS 57647, *20 (D. Nev. April 24, 2012); *Qualls*
 22 *v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) ("We will only find that the
 23 district court abused its discretion if the movant diligently pursued its *previous* discovery
 24 opportunities"). Failing to meet this burden is grounds for denying a Rule 56(d) request. *Id.*;

25 ⁴ Instead, Defendants feebly argue that they provided notice through a reply brief filed in connection with their
 26 motion for preliminary injunction. That is hardly how a notice of breach would be given. Rather, Defendants are
 trying to manufacture arguments in a desperate attempt to avoid enforcement of the Consent Agreement.

27 ⁵ The 2010 amendments to the Federal Rules of Civil Procedure changed the subparagraph lettering for Rule 56.
 28 Prior to the 2010 amendments, FRCP 56(f) set forth the rule regarding the need for discovery to oppose a motion for
 summary judgment. That rule has now been changed to FRCP 56(d), but the rule remains the same and the case
 interpreting former FRCP 56(f) are equally applicable to the interpretation of FRCP 56(d).

1 *Pfingston v. Ronan Eng. Co.*, 284 F.3d 999, 1005 (9th Cir. 2002) (affirming denial of 56(f)
2 request for discovery because “the failure to conduct discovery diligently is grounds for the denial
3 of a Rule 56(f) motion”); *Davis v. Humble*, No. 2:07-cv-1643, 2010 U.S. Dist. LEXIS 56997, *13
4 (D. Nev. June 9, 2010) (denying 56(f) request because “Plaintiff had ample opportunity do
5 conduct discovery, but failed to do so).

6 In the instant case, Defendants have had 10 months to conduct any purportedly necessary
7 discovery but have failed to do so.⁶ More specifically, discovery first opened in this case on
8 December 17, 2012 when the parties first held their Rule 26(f) conference. ECF No. 27, at 1:6.
9 Russell Road did not file its Motion for Summary Judgment until October 14, 2013. ECF No. 45.
10 That gave Defendants 10 months to conduct any discovery they sought was necessary. Moreover,
11 Russell Road put Defendants on notice that it would be filing a Motion for Summary Judgment at
12 least as early as May of 2013. ECF No. 41, at 2:13; ECF No. 43, at 2:15. Consequently, it is
13 clear that Defendants have had more than sufficient time to take any necessary discovery and
14 their intentional failure to do so requires denying their request for discovery pursuant to Rule
15 56(d).

16 **2. Defendants Have Not Set Forth The Three Required Elements in an**
17 **Affidavit Seeking Discovery Pursuant to FRCP 56(d)**

18 Under FRCP 56(d), a party requesting additional time to conduct discovery to oppose a
19 motion for summary judgment must show (1) it has set forth in affidavit form the specific facts it
20 hopes to elicit from further discovery, (2) the facts sought exist, and (3) the sought-after facts are
21 essential to oppose summary judgment. *FNBN-Rescon I, LLC v. Ritter*, No. 2:11-cv-01867, 2013
22 U.S. Dist. LEXIS 86902, *3 (D. Nev. June 19, 2013); *St. Paul Fire & Marine Ins. Co. v. Del*
23 *Webb Communities, Inc.*, No. 2:12-cv-00674, 2013 U.S. Dist. LEXIS 37903, *18 (D. Nev. March
24 19, 2013). If these three requirements are not satisfied, the request for discovery should be denied
25 and the court should rule on the summary judgment motion. *Id.*; *Allen v. United States of*

26 ⁶ Knowing that they have had 10 months to conduct discovery, Defendants point to the discovery cut-off date of
27 February 2, 2014 while intentionally failing to disclose that discovery opened on December 17, 2012. The relevant
28 inquiry is not when discovery closes but whether Defendants have had ample opportunity to conduct discovery. In
this case, Defendants have had more than enough time and have not provided any reasons justifying their failure to
diligently pursue discovery in this case.

1 *America*, No. 03-cv-01358, 2012 U.S. Dist. LEXIS 153485, *28 (D. Nev. Nov. 13, 2012)
2 (“Plaintiff has failed to set forth (in affidavit or any other form) specific facts he hopes to elicit
3 from further discovery.”); *Thompson v. Lake*, No. 3:11-cv-00644, 2013 U.S. Dist. LEXIS 13331,
4 *23 (D. Nev. Jan. 21, 2013) (denying request because party did not set forth the “specific facts
5 further discovery would reveal”).

6 In the instant case, Defendants have not satisfied the three requirements for a request for
7 discovery pursuant to FRCP 56(d). Rather, Defendants’ counsel Harold Schwarz simply
8 submitted a declaration stating that Defendants need additional discovery. ECF No. 47, at 24, ¶
9 5. The most specific statement contained in the declaration is a general, conclusory statement that
10 Defendants want to “investigate the validity of the assignment and co-existence agreement.” ECF
11 No. 47, at 25, ¶ 7. But the declaration does not set out the “specific facts” that Defendants hope
12 to elicit through discovery. Likewise, neither the declaration nor Defendants’ opposition make a
13 shown that the facts sought exist or that the sought-after facts are essential to opposing Russell
14 Road’s Motion for Summary Judgment. Of course, this is not surprising since Defendants never
15 specified the sought-after facts to begin with. As a result, Defendants’ request for discovery
16 pursuant to FRCP 56(d) should be denied for failure to satisfy the three requirements.

17 **IV. CONCLUSION**

18 For all the foregoing reasons, Russell Road respectfully requests that the Court grant its
19 Motion for Summary Judgment.

20
21
22 Dated: November 25, 2013

Respectfully submitted,

OWENS TARABICHI LLP

23
24
25 By 
26 Bruno W. Tarabichi
27 Attorneys for Plaintiff
28 Russell Road Food and Beverage, LLC

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9 Attorneys for Plaintiff
10 Russell Road Food and Beverage, LLC

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA
13 SOUTHERN DIVISION

14 RUSSELL ROAD FOOD AND
15 BEVERAGE, LLC, a Nevada limited
liability company,

16 Plaintiff,

17 vs.

18 FRANK SPENCER, an individual;
19 CRAZY HORSE CONSULTING, INC., an
Ohio corporation; and DOES 1 – 50,
20 inclusive,

21 Defendants.

22 FRANK SPENCER, an individual; and
23 CRAZY HORSE CONSULTING, INC., an
Ohio corporation,

24 Counterclaimants,

25 vs.

26 RUSSELL ROAD FOOD AND
27 BEVERAGE, LLC, a Nevada limited
liability company,

28 Counterdefendant.

Case No. 2:12-cv-01514-LRH-GWF

**REPLY DECLARATION OF JOHN J.
SALVADOR IN SUPPORT OF PLAINTIFF
RUSSELL ROAD FOOD AND
BEVERAGE, LLC'S MOTION FOR
SUMMARY JUDGMENT**

Case Filed: August 24, 2012
Judge: Honorable Larry R. Hicks

1 I, JOHN J. SALVADOR, declare as follows:

2 1. I am an individual residing and doing business in Detroit, Michigan. At all
3 relevant times, I have been the President and sole owner of the Nevada company Crazy Horse
4 Too A Gentlemen's Club ("CHTAGC"). I make this Declaration in support of Russell Road's
5 Motion for Summary Judgment. The matters set forth herein are of my own personal knowledge,
6 and if called upon to testify as to such matters, I could and would do so.

7 2. On September 16, 2009, CHTAGC and Carl Reid entered into a Trademark Co-
8 Existence Agreement (hereinafter "Consent Agreement"). A true and correct copy of the Consent
9 Agreement was attached as Exhibit A to my declaration submitted with Russell Road's moving
10 papers in connection with Russell Road's Motion for Summary Judgment. See ECF No. 45-3,
11 Ex. A.

12 3. On August 16, 2012, CHTAGC assigned its rights under the Consent Agreement
13 to Russell Road. The assignment is reflected in an agreement entitled "Assignment of Trademark
14 Co-Existence Agreement." A true and correct copy of the Assignment of Trademark Co-
15 Existence Agreement was attached as Exhibit B to my declaration submitted with Russell Road's
16 moving papers in connection with Russell Road's Motion for Summary Judgment. See ECF No.
17 45-3, Ex. B.

18 4. In exchange for the Assignment of Trademark Co-Existence Agreement, Russell
19 Road agreed to pay CHTAGC \$2,500. On August 30, 2012, Russell Road sent the \$2,500
20 payment to CHTAGC. I received the payment of \$2,500 from Russell Road to CHTAGC for the
21 Assignment of Trademark Co-Existence Agreement.

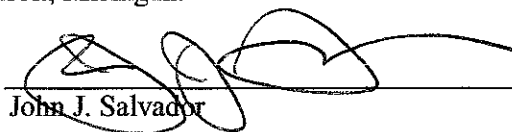
22
23 I declare under penalty of perjury under the laws of the State of Michigan that the
24 foregoing is true and correct.

25 Executed November 22, 2013 at Detroit, Michigan.

26

27

28


John J. Salvador

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10 Russell Road Food and Beverage, LLC

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA
13 SOUTHERN DIVISION

14 RUSSELL ROAD FOOD AND
15 BEVERAGE, LLC, a Nevada limited
liability company,

16 Plaintiff,

17 vs.

18 FRANK SPENCER, an individual;
19 CRAZY HORSE CONSULTING, INC., an
Ohio corporation; and DOES 1 – 50,
20 inclusive,

21 Defendants.

22 FRANK SPENCER, an individual; and
23 CRAZY HORSE CONSULTING, INC., an
Ohio corporation,

24 Counterclaimants,

25 vs.

26 RUSSELL ROAD FOOD AND
27 BEVERAGE, LLC, a Nevada limited
liability company,

28 Counterdefendant.

Case No. 2:12-cv-01514-LRH-GWF

**REPLY DECLARATION OF ROBERT
LENSON IN SUPPORT OF PLAINTIFF
RUSSELL ROAD FOOD AND
BEVERAGE, LLC'S MOTION FOR
SUMMARY JUDGMENT**

Case Filed: August 24, 2012
Judge: Honorable Larry R. Hicks

1 I, ROBERT LENSON, declare as follows:

2 1. I am the Chief Financial Officer (“CFO”) of Plaintiff Russell Road Food and
3 Beverage, LLC (“Russell Road”). I make this Declaration in support of Russell Road’s Motion
4 for Summary Judgment. The matters set forth herein are of my own personal knowledge, and if
5 called upon to testify as to such matters, I could and would do so.

6 2. On August 16, 2012, Crazy Horse Too A Gentlemen’s Club (“CHTAGC”)
7 assigned its rights under the Consent Agreement between CHTAGC and Carl Reid to Russell
8 Road. The assignment is reflected in an agreement entitled “Assignment of Trademark Co-
9 Existence Agreement.” A true and correct copy of the Assignment of Trademark Co-Existence
10 Agreement was attached as Exhibit A to the Declaration of Nando Sostilio (ECF No. 45-2, Ex. A)
11 and as Exhibit B to the Declaration of John Salvador (ECF No. 45-3, Ex. B).

12 3. In exchange for the Assignment of Trademark Co-Existence Agreement, Russell
13 Road agreed to pay CHTAGC \$2,500. On August 30, 2012, Russell Road sent the payment of
14 \$2,500 to CHTAGC.

15

16 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
17 is true and correct.

18 Executed November 22, 2013 at Boston, Massachusetts.

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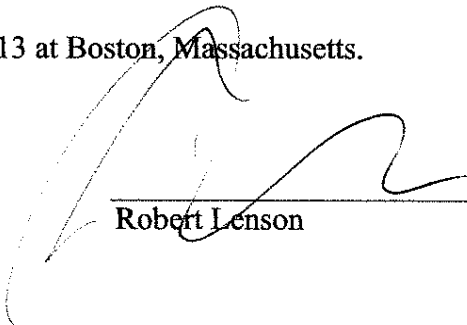
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Robert Lenson

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9 Attorneys for Plaintiff
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11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA
13 SOUTHERN DIVISION

14 RUSSELL ROAD FOOD AND
15 BEVERAGE, LLC, a Nevada limited
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16 Plaintiff,

17 vs.

18 FRANK SPENCER, an individual;
19 CRAZY HORSE CONSULTING, INC., an
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20 inclusive,

21 Defendants.

22 FRANK SPENCER, an individual; and
23 CRAZY HORSE CONSULTING, INC., an
Ohio corporation,

24 Counterclaimants,

25 vs.

26 RUSSELL ROAD FOOD AND
27 BEVERAGE, LLC, a Nevada limited
liability company,

28 Counterdefendant.

Case No. 2:12-cv-01514-LRH-GWF

**REPLY DECLARATION OF BRUNO
TARABICHI IN SUPPORT OF PLAINTIFF
RUSSELL ROAD FOOD AND
BEVERAGE, LLC'S MOTION FOR
SUMMARY JUDGMENT**

Case Filed: August 24, 2012
Judge: Honorable Larry R. Hicks

1 I, BRUNO TARABICHI, declare as follows:

2 1. I am an attorney at law, duly admitted into practice before all courts for the State
3 of California. I am a partner in the law firm of Owens Tarabichi LLP, counsel for Plaintiff
4 Russell Road Food and Beverage, LLC (“Russell Road”). I make this Reply Declaration in
5 support of Russell Road’s Reply Brief In Support Of Motion for Summary Judgment. The
6 matters set forth herein are of my own personal knowledge, and if called upon to testify as to such
7 matters, I could and would do so.

8 2. On August 16, 2012, a Nevada company called Crazy Horse Too A Gentlemen’s
9 Club (“CHTAGC”) assigned its rights under a Trademark Co-Existence Agreement (“Consent
10 Agreement”) to Russell Road. A true and correct copy of the assignment of the Consent
11 Agreement is attached as Exhibit E to my previously filed declaration submitted with Russell
12 Road’s moving papers in support of its Motion for Summary Judgment. *See* ECF No. 45-1, Ex.
13 E.

14 3. On August 24, 2012, Russell Road filed its Complaint for declaratory relief of
15 trademark non-infringement. *See* ECF No. 1.

16 4. Since I began representing Russell Road in this dispute with Defendants, I have
17 communicated and corresponded with Defendant Frank Spencer (before learning that Mr.
18 Spencer was represented by counsel), Defendants’ counsel Jay Moldovanyi and the law firm of
19 Fay Sharpe LLP (who handled the dispute prior to the litigation being commenced but
20 subsequently first appeared in this action by filing a pro hac application on March 28, 2013),
21 Defendants’ counsel Jack Gordon and the law firm of Kent, Beatty & Gordon, LLP (who initially
22 handled this litigation but was dismissed by Defendants after this Court denied Defendants’
23 Motion for Preliminary Injunction), and Harold M. Schwarz III and the law firm of Stark & Knoll
24 Co., LPA (who is lead trial counsel after Defendants’ dismissal of Kent, Beatty & Gordon, LLP).

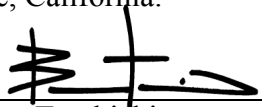
25 5. Both before and after Russell Road filed its Complaint in this action, I have
26 communicated with Defendants’ counsel about the Consent Agreement and asked them to abide
27 by the Consent Agreement, informing them not only of Defendants’ obligation to comply with the
28 Consent Agreement but also reminding Defendants that it would resolve and settle the current

1 dispute between the parties. However, Defendants have repeatedly refused to provide their
2 consent as required by the Consent Agreement and instead maintained their allegations of
3 trademark infringement in violation of the Consent Agreement.

4
5 I declare under penalty of perjury under the laws of the State of California that the
6 foregoing is true and correct.

7 Executed November 25, 2013 at San Jose, California.

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Bruno Tarabichi