

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

NEBRASKA BEEF, LTD.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY OF THE CASE AND STATEMENT ON ORAL ARGUMENT

This case concerns Nebraska Beef's failure to perform its obligations under a valid settlement agreement. The agreement resolved the United States' potential claim that Nebraska Beef violated a federal statute prohibiting discrimination against work-authorized non-citizens. At issue is whether Nebraska Beef's failure to perform its obligations under the agreement was excused by the wording of the United States' press release publicizing the agreement. Nebraska Beef contends that the United States materially breached the agreement because the agreement's background recitals stated that the United States had "reasonable cause to believe" that Nebraska Beef violated federal law while the press release stated that the United States' investigation "found" facts that would constitute a violation. The press release linked to the agreement itself.

The parties agree that the legal question is whether the difference in language materially breaches an obligation contained in the agreement, *i.e.*, whether the wording difference defeats the agreement's essential purpose or prevents Nebraska Beef from performing its obligations under the agreement. The district court correctly concluded that the wording difference did not breach the settlement agreement's obligations, let alone materially frustrate its purpose. Because the legal standard and the facts are largely undisputed, and because the district court correctly applied the law to the facts, oral argument is unnecessary.

TABLE OF CONTENTS

	PAGE
SUMMARY OF THE CASE AND STATEMENT ON ORAL ARGUMENT	
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE AND APPOSITE CASES	2
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT	7
ARGUMENT	
THE DISTRICT COURT CORRECTLY CONCLUDED THAT NEBRASKA BEEF’S OBLIGATION TO COMPLY WITH THE SETTLEMENT AGREEMENT WAS NOT DISCHARGED.....	9
A. <i>Standard Of Review</i>	9
B. <i>The Wording Of The Press Release Did Not Breach, Let Alone Materially Breach, The Settlement Agreement, Which Contained No Restrictions On How The United States Could Publicize The Agreement</i>	9
1. <i>The Press Release’s Language Did Not Breach The Agreement As A Matter Of Law</i>	10
a. <i>The Settlement Agreement Does Not Restrict The Wording Of Press Releases</i>	11
b. <i>The Wording Of The Press Release Does Not Contradict The Agreement Or Suggest A Judicial Finding Of Liability</i>	15

TABLE OF CONTENTS (continued):	PAGE
2. <i>The Wording Difference Between The Press Release And Settlement Agreement Did Not Frustrate The Essential Purpose Of The Agreement</i>	17
CONCLUSION	22
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Associated Builders & Contractors of Se. Tex. v. Rung</i> , No. 16-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016)	17
<i>Audio Odyssey, Ltd. v. United States</i> , 255 F.3d 512 (8th Cir. 2001)	10
<i>Cavanaugh v. City of Omaha</i> , 580 N.W.2d 541 (Neb. 1998)	10
<i>Fleming v. Civil Serv. Comm’n of Douglas Cnty.</i> , 792 N.W.2d 871 (Neb. 2011).....	14
<i>Fokken v. Steichen</i> , 744 N.W.2d 34 (Neb. 2008)	11
<i>Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.</i> , 111 F.3d 284 (2d Cir. 1997)	18
<i>Garrison v. Conagra Foods Packaged Foods, L.L.C.</i> , 833 F.3d 881 (8th Cir. 2016)	9
<i>Gast v. Peters</i> , 671 N.W.2d 758 (Neb. 2003).....	2, 14
<i>Gilbert v. Department of Justice</i> , 334 F.3d 1065 (Fed. Cir. 2003)	2, 10
<i>Harris v. Brownlee</i> , 477 F.3d 1043 (8th Cir. 2007)	18
<i>Lary v. United States Postal Serv.</i> , 472 F.3d 1363 (Fed. Cir. 2006), decision clarified on denial of reh’g, 493 F.3d 1355 (Fed. Cir. 2007)	18-19
<i>Maine Yankee Atomic Power Co. v. United States</i> , 225 F.3d 1336 (Fed. Cir. 2000)	10
<i>McKinnon v. Baker</i> , 370 N.W.2d 492 (Neb. 1985).....	2, 12
<i>Phipps v. Skyview Farms, Inc.</i> , 610 N.W.2d 723 (Neb. 2000).....	19

CASES (continued): **PAGE**

Priem v. Shires, 697 S.W.2d 860 (Tex. App. 1985).....19

Shipley v. Arkansas Blue Cross & Blue Shield,
333 F.3d 898 (8th Cir. 2003)10

Siouxland Ethanol, L.L.C. v. Sebade Bros.,
859 N.W.2d 586 (Neb. 2015).....*passim*

Thrower v. Anson, 752 N.W.2d 555 (Neb. 2008).....12

Waldoch v. Medtronic, Inc., 757 F.3d 822 (8th Cir. 2014)9

Walls v. Petrohawk Props., LP, 812 F.3d 621 (8th Cir. 2015)18

STATUTES:

8 U.S.C. 1324b..... 1-2, 19, 21

8 U.S.C. 1324b(d)(1).....12, 15

28 U.S.C. 12912

28 U.S.C. 1343(a)(4).....1

28 U.S.C. 13451

28 U.S.C. 1346(a)(2).....1

28 U.S.C. 1355.....1

MISCELLANEOUS:

Richard A. Lord, *Williston on Contracts* (4th ed. 2002)18

Restatement (Second) of Contracts (1981).....14

IN THE UNITED STATES COURT OF APPEALS
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No. 17-1344

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

NEBRASKA BEEF, LTD.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the United States’ breach of contract claim under 8 U.S.C. 1324b, 28 U.S.C. 1343(a)(4), 28 U.S.C. 1345, and 28 U.S.C. 1355. The district court found it had jurisdiction over Nebraska Beef’s counterclaims under 28 U.S.C. 1345 and 28 U.S.C. 1346(a)(2). J.A. 134.¹

¹ Citations to “J.A. ___” refer to pages in the joint appendix. Citations to “Br. ___” refer to page numbers in appellant’s opening brief.

Nebraska Beef timely filed a notice of appeal on December 19, 2016. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE AND APPOSITE CASES

Whether the district court correctly concluded that Nebraska Beef must perform its obligations under a valid settlement agreement and that those obligations were not discharged by a wording difference between the agreement and the United States' press release publicizing the agreement.

- *Gilbert v. Department of Justice*, 334 F.3d 1065 (Fed. Cir. 2003)
- *McKinnon v. Baker*, 370 N.W.2d 492 (Neb. 1985)
- *Siouxland Ethanol, L.L.C. v. Sebade Bros., L.L.C.*, 859 N.W.2d 586 (Neb. 2015)
- *Gast v. Peters*, 671 N.W.2d 758 (Neb. 2003)

STATEMENT OF THE CASE

1. The United States, through the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), began investigating Nebraska Beef for potential violations of 8 U.S.C. 1324b in 2012.² J.A. 328. The United States subsequently informed Nebraska Beef that it had reasonable cause to believe that Nebraska Beef violated the statute, which, among other things,

² OSC has since been renamed the Immigrant and Employee Rights Section. This brief uses the prior name to maintain consistency with the district court record.

generally prohibits discrimination based on citizenship status in the hiring process. J.A. 339. The United States found that Nebraska Beef discriminated against work-authorized non-citizens by requiring such individuals, but not citizens, to produce specific documents to prove employment eligibility. J.A. 339.

The United States and Nebraska Beef resolved the matter by entering into a settlement agreement. J.A. 328-337. The agreement began with recitals setting forth background facts. Those recitals stated that the United States “concluded based upon its investigation that there is reasonable cause to believe that” Nebraska Beef had violated the law but that “Nebraska Beef denies that it” did so. J.A. 328. The agreement then proceeded to the operative terms. Under the agreement, Nebraska Beef would pay a \$200,000 civil penalty to the United States, set up a back-pay process to notify and compensate affected workers, and modify company practices to avoid further statutory violations. J.A. 328-333. In exchange, the United States would release claims related to its investigation. J.A. 333. The agreement expressly permitted the United States to “notify the public * * * about this Agreement.” J.A. 329.

During settlement negotiations, Nebraska Beef proposed including a term in the agreement that would have required each party to submit any statements announcing the agreement to the other party for discussion and approval before publication. J.A. 371. The United States struck this language, stating that “OSC

cannot agree to this. The Department's press office handles publicity on settlements and OSC cannot agree to limit what the Department publicizes or how it publicizes. Please take a look at our prior press releases."³ J.A. 371. Nebraska Beef did not object to this deletion, and the parties signed the agreement without any such term.

After the agreement was executed, the United States issued a press release informing the public about the agreement. J.A. 342-343. The press release described the United States' investigation, its outcome, and the terms of the agreement. J.A. 342-343. The release stated that the United States' "investigation found that the company required non-U.S. citizens, but not similarly-situated U.S. citizens, to present specific documentary proof of their immigration status to verify their employment eligibility." J.A. 342. The release also provided a link to the executed agreement. J.A. 343.

Three days after execution of the agreement, Nebraska Beef informed the United States that it believed that the United States had breached the agreement because of the press release's wording. J.A. 345. As a result, Nebraska Beef refused to perform its civil-penalty and back-pay obligations or to report on its compliance with the agreement's other remedial terms.

³ Examples of other press releases are available in the record at J.A. 376-430. All of these press releases contain language similar to the press release in this case, as discussed in more detail below.

2. After an exchange of correspondence, the United States filed this lawsuit, alleging that Nebraska Beef's nonperformance breached the agreement. J.A. 1-6; J.A. 34-39. Nebraska Beef answered and countersued for breach of contract and declaratory relief, alleging that the United States had breached the agreement due to the wording difference between the press release and the agreement's recitals. J.A. 12-18.

Following cross motions for summary judgment, the district court granted summary judgment in favor of the United States. J.A. 480-488. The district court concluded that the recital "clauses are binding portions of the Settlement Agreement" as a matter of law. J.A. 485. However, the district court found that "[t]he United States absolutely had the right to 'notify the public' about the Settlement Agreement * * * and that right allowed the United States to inform the public." J.A. 486. The court noted that "[t]here is absolutely nothing in the Settlement Agreement that limits or constrains the statements of the United States, and on the contrary, the United States is permitted to educate the public about the Settlement Agreement." J.A. 487.

With regard to the wording difference between the press release and the recitals, the district court did "not believe that the language in the Settlement Agreement varies sufficiently so as to constitute a breach as a matter of law." J.A. 486. The court rejected the argument that the press release suggested a judicial

finding of wrongdoing, noting that the release “mentions the word ‘investigation’ four times” and that the release “provided a link to the Settlement Agreement, where it stated that Nebraska Beef denied the allegations.” J.A. 486.

The district court also concluded that the wording difference did not constitute a material breach of the agreement. J.A. 487-488. The court first noted that a material breach was one that “defeats the essential purpose of the contract.” J.A. 487 (quoting *Siouxland Ethanol, L.L.C. v. Sebade Bros., L.L.C.*, 859 N.W.2d 586, 592 (Neb. 2015)). The purpose of the agreement here, the court concluded, was “to resolve the dispute in a compromise that avoided litigation,” which the press release “did not frustrate.” J.A. 487. The court thus found that the “essential purpose” of the agreement—Nebraska Beef’s payment of a fine in exchange for the United States not pursuing legal action—“remain[ed] intact.” J.A. 487. Because the wording of the press release did not constitute a material breach, the court concluded that Nebraska Beef’s nonperformance was not excused. J.A. 487. The court thus entered summary judgment in favor of the United States and ordered Nebraska Beef to perform its obligations under the agreement. J.A. 487-488.

Nebraska Beef filed a timely notice of appeal.⁴

⁴ Nebraska Beef sought a stay of the district court’s order pending appeal, which the district court denied as to the back-pay and other non-monetary remedial (continued...)

SUMMARY OF THE ARGUMENT

There is no basis to excuse Nebraska Beef from performing its obligations under a valid settlement agreement merely because it did not like the wording of the United States' press release publicizing that agreement, particularly where, as here, Nebraska Beef has derived the intended benefit of the agreement. The district court concluded as much, finding that the settlement agreement did not limit how the United States could publicize it and that the wording difference between the settlement agreement and press release did not breach, let alone materially breach, any contractual obligation as a matter of law. This Court should affirm that conclusion for any of the following three reasons.

First, no provision of the settlement agreement restricts what the United States could say in its press release. Nebraska Beef suggests that the agreement's recitals, which merely provide background information explaining that the United States had reasonable cause to believe that Nebraska Beef violated the law and that Nebraska Beef denied any wrongdoing, create limitations on the press release's wording. However, the plain language of these recitals does not create any prohibitions or restrictions on how the United States can publicize the settlement agreement. Indeed, a separate provision of the agreement expressly preserves the

(...continued)

obligations but granted as to the civil-penalty obligation upon Nebraska Beef posting a supersedeas bond.

United States' right to educate the public about the agreement. The agreement therefore protects, rather than limits, the United States' ability to publicize the details of the agreement.

Second, even if the recitals created an obligation, the press release's wording did not breach that obligation. The press release merely restated that the United States' investigation found facts sufficient to establish a legal violation. Nebraska Beef contends that the press release could be read to suggest that there was a judicial determination of liability. Br. 9-11. However, the press release made clear that the finding resulted from a government investigation and attached the settlement agreement itself, which included Nebraska Beef's liability denial. The district court correctly held that no reasonable reader could conclude that there had been a judicial finding of liability.

Third, even if the recitals created some obligation, and even if the press release breached the obligation, the breach did not frustrate the purpose of the contract and therefore was not material. As Nebraska Beef acknowledges, the purpose of the agreement was to avoid litigation regarding its employment practices without admitting liability. Br. 11-13. The district court correctly concluded that this purpose remains intact. The United States has neither pursued litigation regarding Nebraska Beef's employment practices nor suggested that Nebraska Beef has admitted liability. The press release did not state that Nebraska

Beef admitted liability. To the contrary, it linked to the settlement agreement, which contains Nebraska Beef's *denial* of liability. Moreover, Nebraska Beef has exercised its right to explain to the public that it denied liability in its own statements to the media. Any breach resulting from the wording, therefore, was immaterial.

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT NEBRASKA BEEF'S OBLIGATION TO COMPLY WITH THE SETTLEMENT AGREEMENT WAS NOT DISCHARGED

A. *Standard Of Review*

This Court reviews the district court's order granting the United States summary judgment de novo. *Waldoch v. Medtronic, Inc.*, 757 F.3d 822, 829 (8th Cir. 2014). "Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Garrison v. ConAgra Foods Packaged Foods, L.L.C.*, 833 F.3d 881, 884 (8th Cir. 2016).

B. *The Wording Of The Press Release Did Not Breach, Let Alone Materially Breach, The Settlement Agreement, Which Contained No Restrictions On How The United States Could Publicize The Agreement*

Key facts in this case are undisputed: the United States and Nebraska Beef entered into a valid settlement agreement, and Nebraska Beef refused to perform its obligations under that agreement. The sole question before this Court is

whether Nebraska Beef's nonperformance was excused by the United States' wording of the press release publicizing the agreement. To demonstrate that its nonperformance is excused, Nebraska Beef must establish that the agreement created an obligation for the United States with respect to press releases; that the United States breached that obligation; and that the breach was material. See *Gilbert v. Department of Justice*, 334 F.3d 1065, 1071 (Fed. Cir. 2003). A failure to establish any of these points would be fatal to Nebraska Beef's case. Nebraska Beef cannot establish any of them.⁵

1. *The Press Release's Language Did Not Breach The Agreement As A Matter Of Law*

The press release's wording did not breach any obligation created by the settlement agreement. A breach of contract "is a nonperformance of a duty." *Cavanaugh v. City of Omaha*, 580 N.W.2d 541, 545 (Neb. 1998); see also *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000) ("Failure to perform a contractual duty when it is due is a breach of the contract.") (citation omitted). Embedded in this well-established definition of breach are two

⁵ Federal common law applies to disputes concerning contracts to which the United States is a party. See *Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 520 (8th Cir. 2001). Courts can look to approaches of other federal courts and general common law principles as set forth in state law, the Restatement, or other secondary sources to determine what the law is. See *Shiple v. Arkansas Blue Cross & Blue Shield*, 333 F.3d 898, 902 (8th Cir. 2003). Here, there is no dispute about the state of the law; the dispute centers on application of well-established common law principles to the facts of the case.

components: (1) the existence of some contractual duty, and (2) nonperformance of that duty. Here, the settlement agreement does not create any contractual duty related to publicity of the agreement, and the press release's wording does not constitute nonperformance of any such duty.

a. The Settlement Agreement Does Not Restrict The Wording Of Press Releases

The threshold issue here is whether the settlement agreement created any publicity-related duties. The district court concluded that it did not, finding that “[t]here is absolutely nothing in the Settlement Agreement that limits or constrains the statements of the United States, and on the contrary, the United States is permitted to educate the public about the Settlement Agreement.” J.A. 487. The district court was correct, and Nebraska Beef does not directly address this holding in its opening brief. The agreement's recitals, even if considered binding parts of the agreement, did not create any obligations for the United States, particularly with regard to the language of press releases. Nor does any other provision of the agreement restrict the United States' wording choices in press releases.

Determining whether the settlement agreement confers obligations requires interpretation of its terms. If the terms “are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense.” *Fokken v. Steichen*, 744 N.W.2d 34, 41 (Neb. 2008). This means that the “terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person

would understand them.” *Thrower v. Anson*, 752 N.W.2d 555, 561 (Neb. 2008).

A court can deviate from the plain and ordinary meaning of the contract only where a “provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.” *Ibid.*

Here, Nebraska Beef suggests that the two following recitals restrict the United States’ choice of language in press releases:

WHEREAS, the Office of Special Counsel concluded based upon its investigation that there is reasonable cause to believe that Respondent used documentary practices based on citizenship status in violation of the Act.

WHEREAS, Nebraska Beef denies that it has used any documentary policies or practices based on citizenship status in its employment eligibility verification process in violation of [the Act].

J.A. 328. They do not. These paragraphs merely echo the legal standard that the United States must meet before filing a complaint under 8 U.S.C. 1324b(d)(1) and state Nebraska Beef’s denial of the factual underpinnings of that determination.

The recitals are unambiguous; neither provision establishes any obligations on the United States. The language is plainly and ordinarily designed to set forth background information, not to create restrictions on how the United States may publicize the agreement. See *McKinnon v. Baker*, 370 N.W.2d 492, 494 (Neb. 1985) (Recitals “are generally background statements and do not ordinarily form any part of the real agreement.”). Indeed, the recitals do not mention press releases at all, and they do not contain any prescriptive verbs such as “shall” or “must”—

language that is ordinarily used to create obligations, including elsewhere in this very agreement. See, *e.g.*, J.A. 328 (noting that Nebraska Beef “*shall* pay a civil penalty”) (emphasis added).

Moreover, other parts of the agreement expressly permit the United States to inform the public about the agreement. Specifically, as noted above, a separate provision of the agreement provides that:

The Office of Special Counsel maintains its right, as a federal agency statutorily charged with serving and educating the public regarding the scope of its enforcement activities, to notify the public, including but not limited to individuals [Nebraska Beef] identifies and notifies pursuant to [the back-pay provisions], about this Agreement.

J.A. 329. This provision unambiguously reserves rather than limits the United States’ right to educate the public regarding the agreement. This paragraph contains no mandatory or prohibitory language limiting public notice “about this Agreement” and does not purport to govern what the United States could say about the agreement. Rather, the provision permits the United States to publicize the agreement and contains no prohibitions or restrictions on how it may do so.⁶

⁶ In the district court, Nebraska Beef argued that this provision only permitted the United States to “notify the public about the actual terms of the Settlement Agreement.” J.A. 448. But Nebraska Beef does not point to any contractual language that *restricts* what wording the United States could use in its press release. In any event, even if the United States were required to publicize the actual terms of the agreement, the United States did so here by linking to the entire agreement in its press release.

The terms of the agreement are unambiguous, and thus the Court need not look outside the terms' plain meaning. However, even if the agreement were ambiguous, unrebutted extrinsic evidence demonstrates that the parties did not intend to agree to restrictions on the wording of press releases. As discussed above, Nebraska Beef sought to include a term in the settlement agreement that would have permitted it to review the language of any press release, but the United States rejected that request. J.A. 371. The course of the negotiations constitute extrinsic evidence that further demonstrates that the agreement did not restrict the United States' discretion in choosing language for its press release. See Restatement (Second) of Contracts § 212 cmt. b (1981).

In short, Nebraska Beef asks this Court to read into the agreement a provision restricting the language of press releases that simply does not exist. This is contrary to well-established law. See *Gast v. Peters*, 671 N.W.2d 758, 763 (Neb. 2003) ("A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include."); see also *Fleming v. Civil Serv. Comm'n of Douglas Cnty.*, 792 N.W.2d 871, 880 (Neb. 2011) (courts should not read into agreements provisions for which the parties "could have negotiated for but did not").

b. The Wording Of The Press Release Does Not Contradict The Agreement Or Suggest A Judicial Finding Of Liability

Even if the recitals created some publicity-related obligation, which they do not, the district court correctly concluded that the press release’s language does not “constitute a breach [of any such obligation] as a matter of law.” J.A. 486.

Nebraska Beef argues that there was a breach because the press release’s statement that the United States’ “investigation found” facts constituting a legal violation contradicted the recital that the United States “had reasonable cause to believe” that Nebraska Beef had violated the law as a result of its “investigation.” Br. 8-11.

There is no contradiction between the two statements, let alone a disparity sufficient to constitute a breach of any supposed obligation. The language of the settlement agreement—that the “Office of Special Counsel concluded based upon its investigation that there is *reasonable cause to believe* that Respondent used documentary practices based on citizenship status in violation of the Act”—echoes the statutory standard that the United States must meet before commencing proceedings for violation of the statute. J.A. 328 (emphasis added); see 8 U.S.C. 1324b(d)(1) (OSC must “determine whether or not there is *reasonable cause to believe* that the charge [of illegal immigration-related employment conduct] is true and whether or not to bring a complaint with respect to the charge before an administrative law judge”) (emphasis added). The wording of the press release—that “[t]he department’s investigation found that the company required non-U.S.

citizens, but not similarly-situated U.S. citizens, to present specific documentary proof of their immigration status to verify their employment eligibility” (J.A. 342)—merely translated that legal standard for a non-legal audience. Both the settlement agreement and the press release refer to the United States’ investigation and (accurately) describe its result—a finding of facts sufficient to commence a complaint against Nebraska Beef under applicable law.

To generate a discrepancy, Nebraska Beef isolates the word “found” in the press release and contends that the word connotes a court decision or a jury verdict on liability. See Br. 9-10. This unreasonable reading ignores the context of the entire press release. The “department’s investigation” immediately precedes and is the subject of the verb “found.” J.A. 342. No reasonable reader could conclude that there was a jury verdict or a court decision on the findings—only that the Department of Justice’s *investigation* so concluded. As the district court found, “[t]he press release itself mentions the word ‘investigation’ four times” (J.A. 486), further undermining Nebraska Beef’s argument that a reasonable reader would understand the press release to communicate a conclusive judicial determination. Finally, the press release did not in any way contradict Nebraska Beef’s denial of liability; to the contrary, as the district court found, the release “provided a link to

the Settlement Agreement, where it stated that Nebraska Beef denied the allegations.” J.A. 486.⁷

No reasonable reader of the press release and no reasonable fact-finder could conclude, as Nebraska Beef contends, that the press release as a whole “told the public that Nebraska Beef had broken the law.” Br. 11. This Court should reject Nebraska Beef’s unreasonably wooden reading of the press release and affirm the district court’s conclusion that read in full, the press release’s wording did not breach the agreement as a matter of law.

2. *The Wording Difference Between The Press Release And Settlement Agreement Did Not Frustrate The Essential Purpose Of The Agreement*

Even if the settlement agreement created some obligation on the United States with respect to press releases, and even if the press release’s wording

⁷ Nebraska Beef cites only *Associated Builders & Contractors of Southeast Texas v. Rung*, No. 16-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016), for its breach argument. See Br. 9. There, a district court in Texas preliminarily enjoined regulations that required putative federal contractors to report non-final agency allegations of labor law violations when seeking government contracts. *Id.* at *7-8. The district court found that Congress created specific remedies for violations of the relevant federal labor laws and that therefore the executive branch could not impose additional penalties—such as restricting federal contracting—for statutory violations or allegations of wrongdoing. *Ibid.* The case did not concern interpretation of a contract or preclude the United States from informing the public that its “investigation found” facts that would constitute a legal violation after it settled potential claims of such wrongdoing. See J.A. 342. Accordingly, the case is wholly inapposite.

breached that obligation, the breach was not material as a matter of law, as the district court correctly concluded. J.A. 487-488.

A “‘material breach’ is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract.” 23 Richard A. Lord, *Williston on Contracts* § 63:3, at 438 (4th ed. 2002); *Siouxland Ethanol, L.L.C. v. Sebade Bros., L.L.C.*, 859 N.W.2d 586, 592 (Neb. 2015). Therefore, a breach is material where it “is so substantial that it defeats the object of the parties in making the contract.” *Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997); *Walls v. Petrohawk Props., LP*, 812 F.3d 621, 625 (8th Cir. 2015) (“[A] breach is material where there is a failure to perform an essential term or condition that substantially defeats the purpose of the contract for the other party.”) (citation and internal quotation marks omitted).

The question whether a breach “is material is measured by examining the extent to which the injured party will obtain the substantial benefit . . . reasonably anticipated.” *Harris v. Brownlee*, 477 F.3d 1043, 1047 (8th Cir. 2007) (citation and internal quotation marks omitted). Therefore, in determining whether a breach is material, “courts often look to whether the breached obligation is an important part of the contract.” *Lary v. United States Postal Serv.*, 472 F.3d

1363, 1367 (Fed. Cir. 2006), decision clarified on denial of reh'g, 493 F.3d 1355 (Fed. Cir. 2007). Determining whether a breach is material requires “weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case.” *Phipps v. Skyview Farms, Inc.*, 610 N.W.2d 723, 730-731 (Neb. 2000). A “relatively minor and unimportant” breach does not excuse the non-breaching party from performing its contractual obligations. *Siouxland Ethanol, L.L.C.*, 859 N.W.2d at 592.

The essential purpose of the contract here, as Nebraska Beef acknowledges, was for Nebraska Beef to avoid litigation regarding its employment practices without admitting liability. Br. 11-12 (quoting *Priem v. Shires*, 697 S.W.2d 860, 864 (Tex. App. 1985) (explaining that the purpose of a settlement agreement is to compromise “doubtful and disputed claims so as to avoid litigation and buy peace without admitting liability”) (emphasis omitted)). The United States’ press release did not in any way interfere with this purpose. Nebraska Beef avoided litigation of the United States’ 8 U.S.C. 1324b claim and did not have to admit liability. Nothing in the press release made it impossible, or even difficult, for Nebraska Beef to perform its obligations under the contract, nor did the press release substantially defeat the purpose of the contract.

Nebraska Beef's sole argument to the contrary is that the wording of the release impeded its ability to resolve the case without admitting liability. See Br. 11-13. Yet, Nebraska Beef never explains how this purpose was defeated. Nebraska Beef has *not* admitted liability, and the United States has never represented—in the press release or elsewhere—that it has. Nowhere did the United States suggest that Nebraska Beef admitted liability, and nothing in the United States' press release forced Nebraska Beef to admit liability. To the contrary, the press release linked to the actual settlement agreement, which contained Nebraska Beef's denial of liability. J.A. 343.

Moreover, Nebraska Beef retained (and retains) its right to deny liability, and it has exercised that right. In its own press release announcing the settlement agreement, Nebraska Beef noted that the United States acknowledged “that Nebraska Beef denies any wrongful conduct on its part.” J.A. 352; see also J.A. 355 (news article noting that “the company denies any wrongful conduct on its part”). In sum, while Nebraska Beef states that one of the critical purposes of the agreement was to “maintain its denial of liability” (Br. 12), it never explains how the press release's language *defeated* this purpose, and it cannot do so.

The supposed breach's relative unimportance to the central purposes of the contract is further demonstrated by the lack of any tangible harm to Nebraska Beef. As the Nebraska Supreme Court has held, one way to determine whether a breach

is material is to look at the harm resulting from the breach in light of the general custom. See *Siouxland Ethanol, L.L.C.*, 859 N.W.2d at 592. Here, Nebraska Beef produced no evidence that it was harmed in any real sense by the wording of the United States' press release. Indeed, Nebraska Beef admits that it has not "lost any profits, revenue, clients, customers, contracts, or accounts because or as a result of the Press Release." J.A. 360. This lack of harm, viewed in light of the Department of Justice's general custom to use language in press releases similar to that at issue here, further demonstrates the lack of materiality of any breach. J.A. 300 (collecting press releases that use the word "found" to describe the results of an investigation).

Nebraska Beef has achieved its goals in the settlement agreement: it has not admitted liability (nor has the United States claimed that it has), the United States ceased its investigation, and the United States did not file a lawsuit under 8 U.S.C. 1324b against Nebraska Beef. In light of the purposes of the settlement, the wording difference between the press release and the agreement was at most a "relatively minor and unimportant" breach. *Siouxland Ethanol, L.L.C.*, 859 N.W.2d at 592. The district court therefore correctly concluded that "[t]he 'essential purpose' of the agreement, the negotiation that Nebraska Beef would pay a fine in exchange for the United States' not pursuing legal action against them, remains intact" and that "Nebraska Beef still has the benefit of its bargain." J.A.

487-488. Nebraska Beef's inability to show materiality is fatal to its case and requires it to perform its obligations under the settlement agreement.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief For The United States As Appellee:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 4879 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2013, in 14-point Times New Roman font.

(3) the brief was scanned for viruses using Symantec Endpoint Protection version 12.1.6, and it is virus-free.

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Date: April 25, 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2017, I electronically filed the foregoing Brief For The United States As Appellee with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, I will transmit by Federal Express two-day delivery ten paper copies of the foregoing brief to the Clerk of the Court and one paper copy to counsel for appellant.

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