

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

National Association of Home
Inspectors, Inc., a Minnesota
non-profit corporation,

Plaintiff/Counter-Defendant

Case No. 2:06-CV-11957
Hon. Paul D. Borman

v.

National Association of Certified Home
Inspectors, a Colorado corporation,

Defendant/Counter-Plaintiff,

**DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR
SANCTIONS, INJUNCTIVE RELIEF, SPECIFIC ENFORCEMENT, AND ENTRY
OF AN ORDER INCORPORATING TERMS OF SETTLEMENT**

QUESTIONS PRESENTED

1. Whether defendant, National Association of Certified Home Inspectors, Inc., now doing business as InterNACHI (“NACHI” or “InterNACHI”), violated any term of the settlement agreement entered on the record with plaintiff, National Association of Home Inspectors (“NAHI”)?

2. Whether the Court has authority to add terms to the settlement agreement to which the parties did not agree?

3. Whether the Court has authority to enter sanctions when NACHI violated no agreement, Court Order, including Protective Order, and violated no rule of law?

STATEMENT OF MOST APPROPRIATE AUTHORITY

INTRODUCTION

This action, alleging trademark, unfair competition, defamation, and similar claims between the parties, settled on July 10, 2007 – the second day of NACHI’s deposition of NAHI’s Executive Director, Mallory Anderson. NAHI, in the guise of “enforcing” that settlement, now asks the Court to undo or re-write the settlement. Through the prism of buyer’s remorse, NAHI brings up as “background” the irrelevant and now thoroughly discredited allegations it made against NACHI in its Amended Complaint (“Complaint”). And, having thus “established” NACHI as a bad actor through those allegations and random post-settlement message board posts, argues that the appropriate remedy for the alleged violations is the judicial imposition of terms that not only were not agreed to, but were specifically raised, considered, and rejected.

The settlement, however, was reasonable and may not be set aside or altered. Unfortunately, NAHI raced to the Court without giving the settlement a chance and, in its haste, has failed to call the Court’s attention to significant evidence that undermines its Motion, even evidence that appears in the very Exhibits it submitted.¹

In short, there is no basis to enter the settlement as an order of the Court because NACHI did not violate it and because the parties specifically agreed it would not be an order of the Court. At worst, there was no meeting of the minds with respect to some very specific portions of the settlement. These include the amount of free speech allowed Mr. Gromicko beyond not disparaging NAHI by its name or acronym, the design of the new InterNACHI logo, and the

¹ For example, NACHI had advised NAHI that it was days away from launching a new web site with its new name. See, page of the document attached to NAHI’s Motion as Exhibit 16.

timeframe within which the transition to InterNACHI would be completed.² NAHI had ample opportunity to address these issues during settlement discussions, but did not. It is not the Court's role to make and enforce new obligations after the parties resolved their disputes own. For these reasons and for the reasons below, the Court should deny NAHI's Motion.

FALSE, MISLEADING, AND UNSUPPORTED STATEMENTS IN PLAINTIFF'S STATEMENT OF FACTS

In a nutshell, this dispute is between two trade associations with completely different philosophies as to how each should conduct its own business and how their members (home inspectors) should conduct their respective affairs with homeowners and realtors. For example, NACHI and its founder, Nick Gromicko, contend that NAHI promotes unethical conduct because, until this year, NAHI's Code of Ethics allowed NAHI members to perform repairs on homes they inspect. NACHI has also criticized NAHI because NAHI allows its members to pay real estate agents for referrals. NAHI's defamation and similar claims against NACHI arise out of NACHI's public statements concerning these ethical issues.

For its part, NAHI has consistently claimed that NACHI is a "sham" organization because NACHI allows applicants and members to take its many courses, quizzes and examinations online. And, as what can only be described as a red herring, NAHI also claims that NACHI's name and mark infringe on its rights in its name and mark even though **NACHI has used the same name and mark since before 1998**. Documents and deposition testimony prove that NAHI was aware of NACHI's name and mark since at least as early as 2000; Ms Anderson testified that NAHI already was aware of and concerned about NACHI when she accepted her

² Contrary to NAHI's Motion, NACHI had changed its mark, logo and tagline on every page of its 210,000 page website within a week of entering into the settlement. This was not a matter of simply hitting a "find and replace" button.

position with NAHI in 2000. Dep. Tr. 36:7 – 37:10.³ Yet NAHI delayed filing this suit until 2006, well past the date after which NACHI built up tremendous equity in its name and surpassed NAHI in membership, and well beyond Michigan’s three years laches period.⁴

NAHI’s Statement of Facts contains a remarkable amount of false, misleading and unsupported assertions and, other than to try to bias the Court against NACHI, those assertions have little or no relevance to the issues raised by NAHI’s Motion. Although irrelevant, NACHI wants to remedy any damage those assertions may have caused, so we address them below, and, for ease of reference, follow NAHI’s organizational structure.

A. Parties

First, NAHI attributes to Dennis Workman inflammatory statements concerning the founding of NACHI and Mr. Gromicko’s supposed reasons for forming it. Those statements are unsupported by any record reference and, because Mr. Workman was Mr. Gromicko’s attorney at the time he incorporated NACHI in 1998, Mr. Workman is precluded from testifying as to any privileged communications with Mr. Gromicko. Gromicko Affidavit at para. 9.

Next, NAHI claims Mr. Gromicko solicited members by sending out mailings stating: “The only idea here at NACHI is inspectors getting rich...” The sole support for this is a one-page exhibit (Ex. 2) from 1999⁵, but NAHI presents no evidence as to who wrote the document, whether or how the document was delivered, or that NACHI ever transmitted it or any similar document to anyone.

³ Ms. Anderson’s deposition transcript is attached to this Brief as Exhibit 1.

⁴ See, e.g., Narton Corp. v. Stmicroelectronics, 305 F.3d 397, 408 (6th Cir. 2002)(affirming summary judgment for defendant in trademark infringement case; delay beyond three year period is presumptively prejudicial and unreasonable); Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc., 270 F.3d 298, 320-21 (6th Cir. 2001)(same).

⁵ Laches and statute of limitations are two of NACHI’s defenses, so the fact that NAHI’s Exhibit is dated 1999 is highly relevant.

Third, NAHI alleges that Mr. Gromicko sent unsolicited NACHI membership certificates to home inspectors across the United States, including to members of NAHI's Board of Directors, and attaches a single two-page exhibit (Ex. 3) to its Motion. This allegation was covered in detail during Ms. Anderson's deposition; she admitted that NAHI has no other documents in support of this allegation. Anderson Dep. at 31:7 – 31:10, 33:8 – 33:11, and 36:7 – 37:10. And, far from nefarious, the explanation for that document (as NAHI is well aware), is that NACHI entered into an agreement with a franchisor, WIN Home Inspection Services ("WIN"), whereby NACHI granted membership to all WIN's franchisees because WIN's eligibility criteria were as strict as NACHI's. See paragraph 20 of the Affidavit of Nick Gromicko, which is attached hereto as Exhibit 2. See also Anderson Dep. at 34:2 – 35:14. Moreover, Ms. Anderson admitted that NAHI has sent at least one unsolicited invitation to membership to one of NACHI's officers, Anderson Dep. at 132:10 – 134:4, and agreed that trade associations commonly reduce membership fees to attract new members. *Id.* at 132:1 – 132:6.

Next, NAHI claims that for several years after its formation, NACHI had a small number of members, primarily in Pennsylvania. During her deposition, however, Ms. Anderson admitted she had no idea how many members NACHI had in 2000 and no idea how many states NACHI had members in. Anderson Dep. at 40:12 – 40:17.

NAHI also alleges that Mr. Gromicko is lying when he states that NACHI has more than 8,000 members, but NAHI offers no evidence to support this. NACHI, in fact, has 8,653 dues paying members in North America and a list of each and every one of them may be viewed at www.nachi.org/memberlist.htm. Gromicko Aff. at para. 12.

NAHI claims that in the last few years NACHI began “requiring at least some of its members” to pass an online test, and again, offers no evidence. In truth, NACHI’s membership requirements are extensive and apply to all applicants. A list of those requirements is attached the Affidavit of Nick Gromicko as Attachment 7. In fact, during her deposition as a Rule 30(b)(6) representative, Ms. Anderson admitted to *not* knowing NACHI’s membership criteria. Anderson Dep. at 86:15 – 86:19. Given an opportunity to view NACHI’s membership requirements, Ms. Anderson admitted NAHI has no evidence that NACHI is not enforcing its requirements. Anderson Dep. at 90:17 – 90:23.

NAHI’s Motion also continues NAHI’s longstanding criticism of NACHI’s online examinations.⁶ Although claiming that NACHI’s online examination “has been roundly criticized as being easy to the point of meaninglessness,” NAHI offers no evidence to support this. In truth, NACHI does not have a single online test for applicants; each time an applicant takes the exam the NACHI website generates a list of exam questions from a database.⁷ Gromicko Aff. at para. 22. Moreover, when asked if she had ever taken NACHI’s online exam, Ms. Anderson admitted she had taken it and failed it. Anderson Dep at 99:6 – 100:2.⁸ She also admitted that NACHI’s test includes questions that measure the applicant’s knowledge in the area of home inspections. Anderson Dep. at 100:11 – 101:11. Despite NAHI’s claims that NACHI’s exams are easy, NACHI’s statistics show that 61 % of all people who take its main online entrance examination fail it. Gromicko Aff. at para. 23. There is no way the Court can

⁶ This reflects a fundamental difference in their philosophies: NACHI has entered the digital age and, to the extent possible, wants to be a paperless organization. NAHI prefers the more traditional paper model.

⁷ In fact, NACHI believes NAHI has copied some of NACHI’s test questions and incorporated them into NAHI’s tests. Gromicko Aff. at para. 24.

⁸ Later she tried to modify that testimony to state that she failed the test only because she had not completed it, but her initial testimony speaks for itself. She testified she did “bad” on it. Anderson Dep. at 99:22.

compare and contrast NACHI's test questions with those of NAHI because NAHI has refused to provide NACHI with copies of its exams, and continued to refuse to provide them even after NACHI agreed it would enter into an attorneys-eyes-only protective order.⁹

NAHI claims NACHI is the "alter ego" of Mr. Gromicko because he is the sole member of its Board of Directors. Colorado law, however, allows this. See paragraph 10 of the Declaration of Mark S. Cohen, which is attached as Exhibit 4. NACHI maintains a board of advisors and Gromicko has never failed to abide by its advice. Gromicko Aff. at para. 25. Gromicko receives no compensation from NACHI for his services. *Id.* The alter ego analysis has no place here.¹⁰

Finally, NAHI belittles NACHI as a "virtual home inspection association." NACHI does rely heavily on the Internet; NACHI believes this is one reason for its success. By maintaining a strong web presence and keeping its overhead low, NACHI can offer outstanding value to its members. A full list of benefits NACHI offers its members is attached to the Affidavit of Nick Gromicko as Attachment 9. NACHI prospers because of what it offers.

B. NACHI'S Allegedly Wrongful Acts.

Ms. Anderson's testimony demonstrates that NAHI has no basis for any claim of defamation or any similar claim. She admitted that Mr. Gromicko's statements about bribes were comments on NAHI's policy of allowing its members to pay real estate agents for referrals and that this was a topic of legitimate debate in the industry. Anderson Dep. at 222:7 – 228:8.

⁹ See paragraphs 5 through 7 of the Declaration of Barbara Mandell, which is attached as Exhibit 3.

¹⁰ Even if the alter ego theory did apply, NAHI has no evidence to support it. A corporation is an alter ego of its owner, or another entity under Michigan law if (1) "the corporate entity [is] a mere instrumentality of another entity or individual," (2) "the corporate entity [is] used to commit a fraud or wrong," and (3) "there [was] an unjust loss or injury to the Plaintiff." *Becker v. Rotary Air Force Management, Inc.*, slip op, 2007 WL 677895 (E.D. Mich. 2007).

She even admitted that on the day of her deposition NAHI's website featured an article about the pros and cons of such referrals. Anderson Dep. at 226:18 – 228:8. Gromicko's comments were protected speech and, had this case not settled, NACHI has a sufficient basis for summary judgment on this claim.

With regard to NAHI's claim that Mr. Gromicko has falsely stated he had founded NAHI, Ms. Anderson admitted that there was only one such instance, Anderson Dep at 156:12 – 156:16, a letter NACHI submitted on NACHI's (not NAHI's) letterhead to a local government in Colorado, prepared not by Mr. Gromicko, but by his attorney. Gromicko Aff. at para. 29. The use of "NAHI" was an obvious typographical error. Had this case not settled, NACHI would have won summary judgment on this claim.

NAHI offers no evidence that Mr. Gromicko said that U.S. Inspect purchased NAHI, but, in any event, NAHI did enter into an agreement with U.S. Inspect whereby its inspectors could be NAHI members. Anderson Dep. 253:5 — 254:7. The reason is that, unlike NACHI and other major home inspector trade associations, NAHI allows its members to pay referral fees to real estate agents. Gromicko Aff. at para. 30. Any suggestion by Mr. Gromicko that U.S. Inspect had "bought" NAHI was a fair comment by him on the deal between U.S. Inspect and NAHI and, therefore, subject to dismissal on summary judgment.

NAHI also claims that Mr. Gromicko has said that NAHI was "history," had "folded," or "died." Ms. Anderson's testimony makes clear than any such statements by Gromicko were in the context of his opinion that NAHI was on the decline. Anderson Dep at 217:25 – 225:14. In determining whether a statement is a statement of fact or opinion, courts employ a totality of circumstances. These factors are: (1) the specific language used, (2) whether the statement is

verifiable, (3) the general context of the statement, and (4) the broader context in which the statement appeared. *Nichols v. Moore*, 396 F.Supp.2d 783 (E.D. Mich, 2005). Applying this test, any statement by Mr. Gromicko that NAHI was “history,” had “folded,” or “died” would be statements of opinion. Gromicko Aff. at para. 31. Had the case not settled, NACHI has a basis for summary judgment on this issue or to prevail at trial.

Similarly, with regard to its claim that Mr. Gromicko stated Civil Justice had filed suit against NAHI or a NAHI member, NAHI offers no evidence of this, but Ms. Anderson admitted there had been a suit against U.S. Inspect and that at the time some U.S. Inspect inspectors were NAHI members. Anderson Dep. at 254:8 – 255:21. See also Cohen Declaration at para. 11 and the Complaint against Civil Justice attached to it as Attachment 1. Had this case not settled, NACHI would have won summary judgment on this issue.

NAHI also claims that NACHI misrepresents its inspectors as “certified” and as “the best and most educated in the world.” These claims lack merit. NACHI certifies only that its members have met NACHI’s membership criteria, and, in fact, the home page on NACHI’s website specifically states that NACHI does not guaranty or warranty inspections performed by NACHI members. Gromicko Aff. at para. 31. NACHI’s statements that its members are the best and most educated are examples of statements commonly used in advertising and marketing services. Despite record setting coaching from NAHI’s counsel, Ms. Anderson admitted those are subjective statements of opinion. Anderson Dep at 102:23 – 116:5. Had the case not settled, NACHI would have won summary judgment on these claims.

NAHI also alleges that NACHI wrongfully used the term “National Association of Home Inspectors” in the metadata for its website, but NAHI produced only one document that even

purports to confirm that. Moreover, Ms. Anderson admitted that Pennsylvania law requires home inspectors to be members of a “national association” of home inspectors and that it was fair for NACHI to use “national association” in its metatags. Id. at 188:17 – 190:12 and 192:4 – 192:9. She also admitted that NACHI is a national association of “home inspectors.” Id. at 192:9 – 192:10. Although she testified NAHI had never engaged in such conduct, id. at 198:9 – 198:15, NACHI has evidence that NAHI has done precisely what it accuses NACHI of doing. Gromicko Aff. at para 33. Had the case not settled, NACHI would have won summary judgment on this issue as well.

C. The Lawsuit.

Again, NAHI reports as facts mere assertions not relevant to its Motion, but included only to try to show NACHI in a bad light. Lacking space to address them all, by way of example, NAHI claims it produced many documents and NACHI produced none. In truth, NAHI has “two big filing cabinets” of documents pertaining to NACHI that it did not produce; Ms. Anderson only produced what NAHI’s counsel told her to produce. Anderson Dep at 41:22 – 43:22. Moreover, NAHI fails to disclose that almost all of NACHI’s documents are uploaded to its web site and that NACHI gave NAHI’s attorney a user name and password so he would have full and complete access to its more than 210,000-plus pages. Gromicko Aff. at para. 13.

NAHI’s claim that NACHI refused to provide copies of its online examination is particularly ironic when NACHI offered to provide *all* its test questions to NAHI if NAHI provided copies of its exams for NACHI’s counsel’s review only, but NAHI refused.¹¹

Finally, NAHI’s speculation that NACHI offered to settle due to concerns about

¹¹ We assume NAHI fears that producing its own exam risks a determination NACHI’s entrance exam is as challenging or more challenging than NAHI’s exam, thus undermining NAHI’s marketing claim that NACHI is a sham organization.

anticipated testimony from Mr. Workman is nonsense. Settlement discussions did not begin until after Day 1 of Ms. Anderson’s deposition, which clearly provided grounds for summary judgment in NACHI’s favor on most if not all of NAHI’s claims.

D. The Settlement.

The transcript of the settlement speaks for itself.

E. Alleged Bad Faith and Alleged Blatant Disregard for the Settlement.

Far from acting in bad faith, the actual time line shows that NACHI complied immediately with its agreement. NACHI announced the settlement and name change the very next day, through a message on its website. Gromicko Aff. at para. 16. Within a week NACHI changed its logo and tagline on every page of its 210,000-plus page website. The new tagline reads, “An International Association of Certified Home Inspectors.” Id. at para. 15. Also within a week, NACHI applied for a Colorado trade name for “InterNACHI.” Id. at para. 19. Prior to NAHI’s filing of its Motion, NACHI also announced an entirely new website with the new public name. Id. at para. 17. NACHI also moved 600,000 lines of data to the new InterNACHI website, an undertaking that consumed two and one-half days. Id. at para. 18. This is less than one percent of the data that needs to be transferred to make the new InterNACHI site. Id.

1. Allegations Regarding Logo.

The settlement contains no limitations on the design of the InterNACHI name within the new logo. A logo is a symbol of a name uniquely designed for ready recognition, and should not be confused with the name itself.¹² NACHI’s new logo does not violate the agreement.

2. Applicability of Settlement to NACHI Members.

¹² Because the settlement transcript follows the English alphabet, “Inter” necessarily appears before (to the left of) “NACHI”; that, however, does not purport to restrict the placement of “Inter” to the left of “NACHI” in a logo.

NAHI alleges that NACHI is wrongfully discouraging its members from using InterNACHI when the settlement requires only that “the Defendant” (NACHI) would “begin the process” of changing its assumed name. The parties acknowledged that NACHI could not bind its members to, for example, change the names on their trucks and, accordingly, they were omitted from the settlement. Nevertheless, because NACHI wants its members and vendors to support its marketing efforts, NACHI has encouraged them to begin using InterNACHI. Gromicko Aff. at paragraphs 34-35.

3. Alleged Continuing Defamation and Criminal Conduct.

NAHI asserts that what led to this *litigation* was a “constant barrage of defamatory statements and accusations of criminal conduct,” but what led to the *settlement* was the fact NACHI could not prove those claims. Ms. Anderson, who testified as NAHI’s representative, admitted that Mr. Gromicko had a right to express opinions on ethical issues in the industry. Anderson Dep. at 222:7 – 228:8.

NAHI says the agreement provides that Mr. Gromicko and NACHI’s paid employees “shall not refer to the plaintiff in any disparaging context,” but neglects to inform the Court that the actual agreement was that Gromicko and NACHI’s paid employees would not “refer to the plaintiff *by name or by its acronym NAHI* in any disparaging context.” (Emphasis added). Settlement Agreement Tr. 5:14 – 5:16; 7:8 – 7:23. That limitation was specifically added to the record, with no objection by NAHI’s counsel. There is no term preventing Mr. Gromicko from *all* comments concerning NAHI and no term that Mr. Gromicko would refrain from making comments concerning individuals. Because NAHI has no evidence that Mr. Gromicko or any

paid employee of NACHI disparaged plaintiff by its name or acronym, there is no evidence NACHI breached the agreement.

Mr. Gromicko did provide a copy of the transcript of Ms. Anderson's deposition to other NACHI members, which generated the strings from the message board that NAHI selectively quotes. Deposition transcripts are, however, public documents, and the fact that they are not filed with the Clerk of the Court does not preclude access to them by third parties. *In re Consumers Power Co. Securities Litigation*, 109 F.R.D. 45 (E.D.Mich. 1985).¹³ Moreover, despite repeated requests by NACHI, NAHI consistently refused to agree to a protective order and so there was none governing that transcript. Mandell Dec. at paragraphs 5 – 7. Further, by making dubious NAHI's claim to moral superiority, (for example, NACHI learned from Ms. Anderson that NAHI, like NACHI, depends on its members to self report on their experience through affidavits), much of Ms. Anderson's testimony was fair game for comment. NAHI, its chapters and members have and continue to make public statements suggesting that NACHI is a "sham" organization, with unqualified inspectors, and these statements have harmed and continue to harm NACHI's members. NACHI members and others in the industry had a right to read the transcript, then to form and express their own opinions on the differences and similarities between the organizations. NACHI's message board is an electronic forum where all visitors may be heard on matters of concern in the industry, and in that regard is similar to a university classroom. It deserves the same protection.

Further, if NAHI (or anyone) has objections to comments on NACHI's message board, they may post their own responses without being a member. NACHI takes pride in its

¹³ NAHI's counsel should know this because he provided a transcript of the deposition of Mr. Gromicko taken in a matter before the U.S. Trademark Trial and Appeal Board in 2006 to his client.

uncensored message board, which over the years has sported many negative comments about Mr. Gromicko himself, none of which has ever been removed. Gromicko Aff. at para. 39.

NACHI agrees that some of the posted comments are silly, immature, or even uncouth, but the people making those comments are not parties to the settlement and, more importantly, under the terms of the settlement agreement, their statements are not subject to the control of the parties and, therefore, are not subject to alteration or deletion:

“... the parties recognize that public message boards on their respective web sites, to the extent they maintain them, bear messages posted by third parties and whose actions are not subject to the control of the parties themselves.”

Settlement Tr. at 6:9 – 6:13. NACHI made it clear that it would not, as part of any settlement, restrict the free speech rights of its members. Mandell Dec. at para. 8; Cohen Dec. at para. 6.

F. Alleged Refusal to Take Corrective Action and Abide by Settlement.

NAHI fails to call the Court’s attention to the content in Exhibit 16 that demonstrates NACHI has acted with “lightning speed” to comply with the agreement, as Mr. Gromicko wrote in his email to Mr. Roach on July 23, 2007. Although not diplomatic, Mr. Gromicko’s email to Mr. Roach that included the phrase, “go f--- yourself,” was his “civilian”¹⁴ way of advising Mr. Roach of his displeasure with Mr. Roach’s insistence that NACHI and Gromicko abide by terms to which they never agreed.¹⁵ It was also an understandable response to Mr. Roach’s false claim that NACHI had taken no action to comply with the agreement when, in fact, Mr. Roach was well aware that NACHI had taken significant action to comply with the agreement. In any event,

¹⁴ The Civility Principles do not apply to parties, only judges and attorneys. See <http://www.mieb.uscourts.gov/rulesAndForms/CVprinciples.pdf>.

¹⁵ The U.S. Supreme Court has recognized that the word “f---” is protected by the First Amendment, at least when its use does not constitute “fighting words.” *Cohen v. California*, 403 U.S. 15 (19___). Mr. Gromicko’s response to Mr. Roach’s email reminds one of the lawyer whose pithy response to an obnoxious letter concluded: “**** you. Strong letter to follow.” See, *Amicus Humoriae: An Anthology of Legal Humor*, Carolina Acad. Press, page 94.

the issues before the Court have nothing to do with how Mr. Gromicko worded his email to Mr. Roach; the issues concern the settlement, and Mr. Gromicko's email to Mr. Roach is not relevant.

ARGUMENT

I. NACHI DID NOT BREACH THE SETTLEMENT AGREEMENT.

NAHI identifies five ways it contends NACHI breached the settlement agreement:

- Putting the term “Inter” in extremely small, vertical letters in the logo instead of using the agreed name InterNACHI.
- Refusing to change the name of the association to “InterNACHI” on the website and publishing announcements and new offerings using the names “NACHI” and “National Association of Certified Home Inspectors.”
- Informing NACHI members that they have no obligation to ever use the new name “InterNACHI” and that they may indefinitely continue using the names “NACHI” and “National Association of Certified Home Inspectors.”
- Gromicko directly and indirectly through NACHI Committee Member Bushart and others making disparaging remarks concerning NAHI and its staff members.
- Gromicko making defamatory statements of criminal conduct by NAHI and its Executive Director.

NAHI Brief, p. 17. Notably, NAHI fails to reference a single one of the provisions of the agreement it claims NACHI violated. If, as NACHI can show, it violated not a single term, then NAHI's entire case for sanctions, injunctive relief and specific enforcement fails.

A. The agreement does not require a new logo acceptable to NAHI. In response to NAHI's stated concern that the names of the parties are too similar, NACHI agreed to begin using the assumed name, InterNACHI, Settlement, TR. 3:12 – 3:18, in all public uses. Id., 4:3 and 4:15. The agreement, however, contains no limitations on how InterNACHI may appear in connection with any logos, although NAHI did agree not to oppose registration if NACHI sought to register certain trademarks. Id., 10:17 – 13:10.

B. NAHI misleads the Court with respect to the extent of the changes NACHI has made thus far. The parties acknowledged during settlement that it would take time, up to two years¹⁶, in fact, for NACHI to transition to its new assumed name. Gromicko Aff. at para. 38. As a result, the agreement contains no deadline for completing the transition; it simply says that NACHI will “begin the process of changing its assumed name...” Settlement transcript, 3:15 – 3:16. The extent of the voluminous changes NACHI has made thus far are as noted, above, and in the accompanying affidavit of Nick Gromicko. And, contrary to NAHI’s second bullet, above, NACHI **never** refused to change its name on its web site, rather, it changed its web site. Further, although NACHI has acknowledged to its membership that it cannot tell them what to do, at the same time it has recommended that they follow along with NACHI’s change to InterNACHI. Gromicko Aff. at paragraphs 16, 17, and 35.

C. The agreement requires only that NACHI’s paid employees and Mr. Gromicko not disparage Plaintiff by name or by its acronym; it does not prohibit all alleged disparagement and does not bar other references to Plaintiff:

6 MS. MANDELL: The next clause is the
7 nondisparagement clause, and the parties have agreed as
8 follows: Nick Gromicko and all other paid -- is it all
9 other paid employees?
10 MR. COHEN: No. Nick Gromicko and any paid.
11 MS. MANDELL: Nick Gromicko and any paid
12 employees of the defendant shall not refer to the
13 plaintiff in any disparaging context.
14 MR. COHEN: I think we should say should not
15 refer to the plaintiff by name or by its acronym NAHI in
16 any disparaging context.

¹⁶ During the settlement discussions Mr. Gromicko telephoned NACHI’s webmaster, Chris Morrell, who advised him that to make the necessary changes might take up to two years because of technical issues and because many links on NACHI’s website lead to pages that NACHI does not control, such as vendor sites, and it would take time to get the vendors to make the necessary changes. Gromicko Aff. at para. 38; Cohen Dec. at para. 9.

NAHI raised no objection after Mr. Cohen placed that limitation on the non-disparagement clause. Other portions of the settlement transcript confirm that this was the agreement. Mr. Roach specifically agreed to it, and page 7 of the settlement transcript proves this:

8 MR. ROACH: Right. That sounds good. And
9 just to clarify as to the point made before that, the
10 concept behind the prohibition on Mr. Gromicko engaging
11 in discussions concerning NAHI or the National
12 Association of Home Inspectors by name was to prevent
13 NAHI or the National Association of Home Inspectors,
14 those terms being used in the discussions by Mr.
15 Gromicko. So the concept is that he is free to discuss
16 events in the home inspection industry, but however in
17 doing so he will not refer to NAHI or the National
18 Association of Home Inspectors.
19 MS. MANDELL: By name.
20 MR. ROACH: By name.

There simply was no agreement that Mr. Gromicko would refrain from referring indirectly to NAHI, no agreement that he would refrain from commenting on ethical issues in the industry, no agreement that he would refrain from comments on specific individuals, and no agreement that he would refrain from all perceived disparagement of any kind whatsoever. The Sixth Circuit in *Byrnes v. Marks*, 2000 U.S. App. LEXIS 6812 at **8 (6th Cir. Apr. 11, 2000) (attached hereto as Exhibit 5), quoted with approval a statement by Bankruptcy Judge Steven Rhodes, refusing to add or imply terms to a settlement placed by attorneys on the record:

The Court fully expects, and reasonably so, that when counsel, officers of the court, announce to the Court, on the record, that there has been a settlement and that they are placing the terms of that settlement on the record, that they will indeed place all of the important and significant provisions of their settlement on the record.

This Court would likewise be justified in assuming that the non-disparagement clause, as limited, was an important and significant provision. Because, and contrary to bullets number 4 and 5,

Mr. Gromicko never made a defamatory or disparaging comment in which he referred to NAHI by name or its acronym, NACHI did not violate the terms of the agreement.

D. The agreement's very limited non-disparagement provision does not apply to statements made by NACHI's members on its web site:

9 In either case the parties recognize that
10 public message boards on their respective web sites, to
11 the extent they maintain them, bear messages posted by
12 third parties and whose actions are not subject to the
13 control of the parties themselves.
14 MR. ROACH: Let's stop there and go off the
15 record a moment.
16 (A recess was had from
17 12:30 p.m. to 12:50 p.m.)
18 MS. MANDELL: Back on the record.
19 Further to this paragraph two, Mr. Gromicko
20 agrees that on defendant's NACHI.org web site he will
21 not mention -- he will not refer to plaintiff by name,
22 plaintiff National Association of Home Inspectors, Inc.
23 by name.

Settlement TR. At 6. The off the record discussion made clear that NACHI could not and would not sacrifice the First Amendment rights of its members. Mandell Dec. at para. 8; Cohen Dec. at para. 6. NACHI's insistence on this limitation is consistent with the commitment to free speech that Mr. Gromicko and NACHI have demonstrated over the years. NACHI would not have agreed to any settlement that in any way restricted the free speech rights of its members or that placed any limitations on comments made on its message board. Id.

II. THE COURT LACKS AUTHORITY TO ADD TERMS TO THE SETTLEMENT AGREEMENT TO WHICH THE PARTIES DID NOT AGREE.

Courts retain the inherent power to enforce settlement agreements entered into in settlement of litigation pending before them, but before doing so the court must conclude that agreement has been reached on all material terms. *Brock v. The Scheuner Corporation*, 841 F.2d

151, 154 (6th Cir. 1988). The court “must enforce the settlement as agreed to by the parties and is not permitted to alter the terms of the agreement.” *Id.* at 154.¹⁷

Thus, the Court must take note that NACHI specifically refused to agree to a severability clause. Settlement TR., 20:8 – 20:10. NACHI wanted to make clear that the settlement was a package deal so that if any provision of the settlement were held invalid, the entire settlement would be null. NACHI made specific concessions to NAHI in return for specific limitations on the non-disparagement clause that would preserve the free speech rights of its members, employees, and Mr. Gromicko. Thus, not only may the Court not vary the agreement with respect to enforcement of a broader non-disparagement clause than the one agreed upon, the entire agreement would fall in the event the Court fails to strictly construe it in accordance with its precise terms and finds that the free speech rights of those who post on the message board may be abrogated.

The entire agreement would also fall if the Court decided to enter the settlement agreement as either an order or an injunction. This issue also was specifically addressed during settlement discussions, when Mr. Roach proposed that the settlement be incorporated by reference into the Order of Dismissal, to imbue it with the force of an order. Settlement TR. 19:24 – 20:3. Then followed an off the record discussion in which Ms. Mandell said that NACHI would only agree to a “plain vanilla order of dismissal, with prejudice and no costs and would not agree to reference the agreement in the Order.” Mandell Dec. at para. 9; Cohen Dec. at para. 7. Back on the record, Mr. Roach confirmed the off the record agreement that the Order would say only that all claims would be dismissed with prejudice and without the assessment of

¹⁷ The Sixth Circuit in *Brock* vacated the Order of the district court, entered to enforce an oral settlement between the parties, on the grounds that the district court erred by varying the terms of the agreement when it awarded plaintiff its attorneys fees incurred in its enforcement of the agreement.

attorneys fees or costs. Settlement TR. 20:4 – 20:16; Mandell Dec. at para. 9; Cohen Dec. at para. 7. Mandell thanked Mr. Roach. Mandell Dec. at para. 9.

Likewise, the Court has no authority to vary the terms of the agreement by imposing timelines under which NACHI's transition to its new name must be completed. If that were an important and significant term to NAHI, it would have requested that it be included. NAHI, however, was silent. Nor may the Court require any particular actions on the part of NACHI's members. If that were an important and significant term to NAHI, it would have requested that it be included. Again, however, NAHI was silent.

Finally, the Court has no authority to impose a protective order against the continued posting of the Anderson transcript and associated commentary. The analysis of the Court in *Karhani v. Meijer*, 270 F. Supp. 2d 926, 932 (E.D. Mich 2003), in which it denied on constitutional grounds Meijer's motion to enjoin plaintiffs' leaflet activity, applies here-- "so long as the means are peaceful, the communication need not meet standards of acceptability." NAHI rebuffed multiple efforts by NACHI to come to terms on a protective order, forcing NACHI to file a motion to compel the order (Dkt entry 30), which has not been heard. The Court ought not now rescue NAHI from its earlier failure to cooperate.

III. NAHI LACKS ANY BASIS TO CLAIM SANCTIONS AGAINST NACHI

In its bid for attorneys fees, NAHI cites only one unpublished opinion of the Sixth Circuit, *Jaynes v. Austin*, 20 Fed. Appx. 421 (6th Cir. Sept. 25, 2001)¹⁸. Jaynes, however, was a situation where the Sixth Circuit upheld an award of attorneys fees against the defendant for *overreaching by "attempt[ing] to include new terms in General Releases that were not included*

¹⁸ Because, contrary to 6 CIR. R. 28 (g), NAHI did not include a copy of the case, NACHI has done so. That opinion is attached as Exhibit 6.

in the Settlement Agreement and not agreed to or bargained for.” Thus, rather than support an award *against* NACHI, who is relying for support on the plain and unambiguous language of the agreement, Jaynes would support an award *in NACHI’s favor* for having to respond to this premature and baseless motion to enforce a broader agreement than what was negotiated. As the Sixth Circuit concluded in Jaynes:

In its First Order, the district court stated that “there is no question in the Court’s mind that the defendant has attempted to impose a new term in the proposed releases which is definitively outside the contemplation of the parties in their settlement negotiations. This he may not do.

Id. at 427. Under 6 CIR. R. 28 (g), unpublished decisions may only be cited in the courts of this Circuit “if no published opinion would serve as well.” Given that *Jaynes v. Austin* completely fails to support NAHI’s motion, one may assume that no published opinion does so either.

CONCLUSION

For all the foregoing reasons, the Court should deny NAHI’s Motion.

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CERTIFICATE OF SERVICE

I hereby certify that on August ____, 2007, I caused to be served the foregoing paper on James E. Roach via email to jroach@vmclaw.com

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