

DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 Sixth Street P.O. Box 4249, Boulder, CO, 80306-4249	DATE FILED: March 17, 2017 8:18 AM CASE NUMBER: 2016CV31016  <p style="text-align: center;"><b>⚠ COURT USE ONLY ⚠</b></p>
<b>Plaintiff(s)</b> INTERNATIONAL ASSOCIATION OF CERTIFIED H v. <b>Defendant(s)</b> NATIONAL ASSOCIATION OF HOME INSPECTORS	
<b>Order: Motion for Leave to File Response to Motion for Default Judgment</b>	

The motion/proposed order attached hereto: DENIED.

Issue Date: 3/17/2017



THOMAS FRANCIS MULVAHILL  
 District Court Judge

<p><b>DISTRICT COURT, BOULDER COUNTY, COLORADO</b> 1777 6<sup>th</sup> Street, Boulder, CO 80302 (303) 441-3750</p>	
<p><b>Plaintiff: International Association of Certified Home Inspectors</b></p> <p>v.</p> <p><b>Defendant: National Association of Home Inspectors</b></p> <p>and</p> <p><b>Intervenor: American Society of Home Inspectors</b></p>	<p style="text-align: right;"><b>▲ COURT USE ONLY ▲</b></p>
<p><i>Attorneys for Intervenor American Society of Home Inspectors:</i> Geoffrey N. Blue, Atty. Reg. No. 32684 Scott E. Gessler, Atty. Reg. No. 28944 Klenda Gessler &amp; Blue, LLC 1624 Market St., Suite 202 Denver, Colorado 80202 (720) 432-5705 Tel Email: <a href="mailto:gblue@klendageslerblue.com">gblue@klendageslerblue.com</a> <a href="mailto:sgessler@klendageslerblue.com">sgessler@klendageslerblue.com</a></p>	<p>Case No. 16 CV 31016</p> <p>Div.:</p>
<p style="text-align: center;"><b>Intervenor American Society of Home Inspector’s Motion for Leave to File Response to Motion for Default Judgment</b></p>	

**Conferral:** the undersigned counsel has conferred with counsel for plaintiff

(“InterNACHI”), who opposes the relief sought in this motion.

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### **Introduction.**

The American Society of Home Inspectors (the “Society”) moved to intervene in this action to defend the National Association of Home Inspectors (“NAHI”) against InterNACHI’s complaint because it made numerous allegations that implicated the Society’s reputation and potentially opened the Society to a future lawsuit by InterNACHI based on those allegations. The Court granted the Society’s motion to intervene, acknowledging its reputational interest in defending against InterNACHI’s allegations. But since granting the motion to intervene, the Court has refused to allow the Society to defend against InterNACHI’s claims: (1) When the Society opposed the entry of judgment the Court nonetheless entered a default against NAHI, (2) when the Society moved to set aside the Entry of Default, the Court denied that motion without comment, and (3) when the Society sought an extension of time to respond to Plaintiff’s *Motion for Default Judgment*, the Court denied the motion, stating in part that the Society was not entitled to file a response.

The Society is filing this motion because this Court misapprehends the controlling law. As an intervenor in this matter, the Society is entitled to defend this action, which includes the ability to defend the original defendant against a default judgment.

### **Background.**

1. InterNACHI filed its *Complaint* in this action on September 13, 2016.
2. The *Complaint* alleges that the Society engaged in specific conduct that forms the basis for allegations of wrongdoing. Specifically, the *Complaint* alleges: American Society of Home Inspectors (the “Society”), including:

- a. that the Society as an organization that engages in the same type of business as both parties. *Complaint*, ¶ 12.
- b. that NAHI's members have become members of the Society. *Complaint*, ¶ 13.
- c. that InterNACHI has been unable to get the details of any private agreement between NAHI and the Society. *Complaint* ¶ 15.

3. And three of the Complaint's four claims for relief explicitly accuse the Society of wrongdoing:

- a. In the Second Claim for Relief InterNACHI claims that NAHI and the Society entered into "a *sub rosa* agreement" which purportedly deprived InterNACHI of the "opportunity to contract with individual NAHI members." *Complaint*, ¶ 21.
- b. In the Third Claim for Relief InterNACHI claims that the agreement between the Society and NAHI created an illegal restraint on trade. *Complaint*, ¶¶ 25 and 26.
- c. In the Fourth Claim for Relief, InterNACHI states that the Society conspired with NAHI to interfere with InterNACHI's business and to restrain competition. *Complaint*, ¶ 28.

4. The Society's *Motion to Intervene* was based on these allegations against it and the likelihood that Defendant, the National Association of Home Inspectors ("NAHI"), would not defend the case because it is defunct and has ceased business operations.

5. On November 8, 2016, this Court granted the Society's *Motion to Intervene*.

6. Three and a half weeks later, the Court entered default against NAHI on December 2, 2016.

7. The Society opposed the *Entry of Default* and moved to Set Aside the Entry of Default, which this Court denied.

8. Finally, on February 14, 2017, the Court denied the Society's request for an extension of time to respond to InterNACHI's motion for default judgment stating that the Society is not entitled to oppose the entry of default against another party.

9. The Society brings this *Motion* seeking leave to oppose the default judgment, because the court's reasoning is incorrect.

#### **Argument.**

10. The Colorado Supreme Court has held that a non-party whose interests can be harmed by a default judgment has the right to intervene and defend the defendant in a lawsuit.<sup>1</sup> In *Brown v. Deerkson*, the Colorado Supreme Court reversed a trial court that refused to allow intervention for the purpose of defending a defaulting party.<sup>2</sup>

11. In *Brown*, the president of a corporation sued the corporation for money he claimed the company owed him.<sup>3</sup> The company defaulted and the court entered default judgment. Two months later, a shareholder sought to defend the corporation against the lawsuit by intervening, asserting an interest in preventing the default judgment and filing an answer to the complaint.<sup>4</sup> The Colorado Supreme Court found no support in the record for

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<sup>1</sup> See *Brown v. Deerkson*, 429 P. 2d 302, 303-04 (Colo. 1967).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 303.

<sup>4</sup> *Id.*

the trial court's refusal to permit the intervenor to defend the corporation against the lawsuit.<sup>5</sup> Further, the Supreme Court held it was "prejudicial, reversible error" to refuse the intervenor the opportunity to defend the claims against the defendant.<sup>6</sup>

12. The Society moved to intervene and submitted an answer, just as the intervenor did in *Brown*. As part of the motion to intervene, the Society explained its interest in preventing a default judgment against NAHI.<sup>7</sup> Frank Lesh, the Society's Executive Director expanded on those reputational interests in the attached affidavit (**Exhibit A**).

13. This Court properly allowed the Society to intervene, in recognition of the important interests at stake.

14. The Society is the only home inspector organization to employ a lobbyist in Washington, D.C., and that lobbyist has been very successful in representing the Society and the entire home inspector industry.<sup>8</sup> The Society has established a strong working relationship with the Department of Housing and Urban Development and the Department of Energy.<sup>9</sup> The Society was able to convince HUD to recommend home inspections prior to home sales when a purchaser uses a Veterans Administration or a Housing and Urban Development loan guarantee.<sup>10</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Mot. to Intervene, ¶¶19-21.

<sup>8</sup> Ex. \_\_\_, Lesh Aff., ¶¶7-8.

<sup>9</sup> Ex. \_\_\_, Lesh Aff., ¶ 8.

<sup>10</sup> Ex. \_\_\_, Lesh Aff., ¶ 8.

15. The Society is the only home inspector organization whose home inspector certification program is accredited by a third-party.<sup>11</sup> The Society hosts the largest home inspection educational conference in North America.<sup>12</sup>

16. The Society has invested substantial time and money into its reputation. Home inspectors have high ethical standards and expects entities they do business with to meet the same ethical standards. The Society's reputation is a business asset that enables it to attract members so long as that reputation is not tarnished.

17. The Society also has an interest in defending NAHI because the Society assumed the obligation to support and represent all of NAHI's members who chose to accept the offer to transfer their membership to the Society. This assumption of obligations serves as the basis for InterNACHI's claims against NAHI, claiming that this assumption of obligations interfered with InterNACHI's ability to compete with the Society for members, restrained trade and constituted a consumer protection violation. In other words, while InterNACHI did not name the Society as a defendant, its claims could easily have been asserted against the Society using the same logic InterNACHI employed in bringing this action against NAHI.

18. InterNACHI's allegations threaten to damage the Society's reputation. This will cause direct harm by making it more difficult for the Society to attract and retain members and to influence federal policy.

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<sup>11</sup> Ex. \_\_, Lesh Aff., ¶ 9.

<sup>12</sup> Ex. \_\_, Lesh Aff., ¶ 10.

19. Because the court entered default against NAHI, the allegations that the Society conspired with NAHI to restrain trade and to harm InterNACHI are now deemed admitted.<sup>13</sup> Facts such as this harm the Society's ability to influence the federal government as well as its ability to attract members.<sup>14</sup> While these "deemed admitted" facts can be disputed in other venues, the Society will incur substantial costs to overcome a court order that declares certain facts "admitted," this ruling will create confusion in the marketplace of home inspectors choosing the membership organization they prefer, and it will hinder the Society's ability to compete against InterNACHI for members.

20. As in *Brown*, the Society followed the proper procedure to intervene and defend NAHI against InterNACHI's claims—it submitted an Answer to the complaint with its motion to intervene and asserted, and proved, its interests in defending NAHI against InterNACHI's allegations.<sup>15</sup> The Court acknowledged the interests by allowing it to intervene. Since granting the intervention, however, the Court has not permitted the Society to act pursuant to the intervenor status this court granted it. The Court has rejected the Society's attempts to defend against InterNACHI's allegations. The Court must allow the Society to respond to the motion for default judgment, and after that motion is briefed,

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<sup>13</sup> See *Dickinson v. Lincoln Bldg. Corp.*, 2015 COA 170M, ¶ 22, 378 P.3d 797, 804, as modified (Dec. 17, 2015), cert. denied, No. 15SC1091, 2016 WL 4097791 (Colo. Aug. 1, 2016) ("When a trial court enters default against a defendant, ... [t]he allegations in the plaintiff's complaint are also deemed admitted.).

<sup>14</sup> Ex. \_\_, Lesh Aff., (stating that home inspector members will be reluctant to join the Society if it is viewed as restraining trade.

<sup>15</sup> *Brown*, 429 P.2d at 303.



should deny the motion for default judgment, set aside the entry of default and allow the Society to defend this action.

FOR THESE REASONS, the Court should permit the Society to respond to the motion for default judgment, and grant it all such further relief as is just, proper, or appropriate.

Respectfully submitted this 9th day of March 2017,

*American Society of Home Inspectors*

Klenda Gessler & Blue, LLC

*s / Geoffrey N. Blue* \_\_\_\_\_

Geoffrey N. Blue

Attachment to Order 2016CV31016

**CERTIFICATE OF SERVICE**

I certify that on this 9<sup>th</sup> day of March 2017, the foregoing **Intervenor American Society of Home Inspector's Motion for Leave to File Response to Motion for Default Judgment** was electronically served via ICCES on the following:

Mark Cohen  
P.O. Box 19192  
Boulder, CO 80308  
*Attorney for Plaintiff*

By: s/ Victoria Ray  
Victoria Ray, Paralegal

Attachment to Order - 2016CV31016