

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

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

Plaintiff/Counter-Defendant

v.

National Association of Certified Home
Inspectors, a Colorado corporation,

Defendant/Counter-Plaintiff,

Case No. 2:06-CV-11957

Hon. Paul D. Borman

Magistrate Wallace Capel, Jr.

**PLAINTIFF NATIONAL ASSOCIATION OF HOME INSPECTORS' MOTION
FOR SANCTIONS, INJUNCTIVE RELIEF, SPECIFIC ENFORCEMENT, AND
ENTRY OF AN ORDER INCORPORATING TERMS OF SETTLEMENT**

BRIEF IN SUPPORT

CERTIFICATE OF SERVICE

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QUESTIONS PRESENTED

1. Whether the Court should specifically enforce the terms of the parties' settlement agreement through the issuance of an injunction and a final order encompassing those terms, where defendant National Association of Certified Home Inspectors, Inc. ("NACHI") has acted in bad faith in breaching both the spirit and terms of the settlement agreement by refusing to make the agreed changes to its name, by informing its members that they can continue to use NACHI's existing name indefinitely and are under no obligation to use NACHI's new name, and by continuing to publish defamatory and derogatory statements concerning NAHI, its staff, and its members.

2. Whether the Court should award NAHI its attorney fees and costs incurred as a result of NACHI's refusal to effectuate the settlement agreement in good faith, its violations of that agreement, and its refusal to take corrective actions.

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**PLAINTIFF NATIONAL ASSOCIATION OF HOME INSPECTORS' MOTION
FOR SANCTIONS, INJUNCTIVE RELIEF, SPECIFIC ENFORCEMENT, AND
ENTRY OF AN ORDER INCORPORATING TERMS OF SETTLEMENT**

Plaintiff National Association of Home Inspectors, Inc. ("NAHI"), asks the Court to enter an injunctive order enforcing and enjoining any further violations of the settlement agreement placed on the record by the parties, for a final order in the case setting forth the terms of the settlement so that any further violations will be contempt of court, and for an award of its attorney fees and costs incurred as a result of defendant National Association of Certified Home Inspectors' refusal to act in good faith in effectuating the terms of the settlement and its disregard for those terms.

Plaintiff further asks the Court to issue an order requiring that NACHI's sole director/owner, Nick Gromicko, attend the hearing on this motion.

Concurrence in the relief sought herein was sought but not received on July 23, 2007, thereby making it necessary to bring this motion before the Court.

BRIEF IN SUPPORT

INTRODUCTION

On April 26, 2006, plaintiff National Association of Home Inspectors, Inc. ("NAHI"), brought this action against the National Association of Certified Home Inspectors, Inc. ("NACHI"), alleging, *inter alia*, that NACHI's use of the terms "National Association of Certified Home Inspectors," "NACHI," and "C.R.I." infringed upon and acted to dilute the value of NAHI's trademarks; that NACHI engaged in unfair competitive practices in violation of the Lanham Act; that NACHI's actions violated the Michigan Consumer Protection Act, and that statements made by NACHI's sole director constituted actionable defamation.

On July 10, 2007, the parties agreed to settle this matter, and the settlement was put on the record. (Ex 1) Pursuant to the terms of the settlement, the National Association of Certified Home Inspectors, Inc., agreed to change its name to “InterNACHI” for all commercial, publicity, and marketing purposes. During the settlement discussions, Gromicko represented that the web site changes to the new name would be done within several days, and that it would take longer for NACHI members to make the changes since the old name was painted on signs, trucks, and the like. This was acceptable. Gromicko further agreed to no longer make disparaging remarks about NAHI on his website, and that he would remove all electronic documents that were offensive to NAHI. Gromicko further agreed to withdraw NACHI’s pending trademark application for the NACHI name and logo, and that he would agree not to use or contest NAHI’s right to use the “CRI” mark.

In less than two weeks after the settlement was agreed to, it became crystal clear that Gromicko’s settlement on behalf of NACHI was a sham and in bad faith, and that he has no intention of honoring the terms of that settlement. The only change thus far as to NACHI’s name has been placing the term “Inter” in very small, vertical font in front of the term “NACHI” so that the “Inter” is barely visible. The name change has not been made anywhere else, and new promotions and announcements are being published under the “NACHI” name. Even more egregiously, Gromicko has informed NACHI members that they and the NACHI chapters are not bound by the settlement agreement and can continue using the NACHI name indefinitely.

Just as egregious, however, has been the continuing disparaging remarks by Gromicko and an effort between Gromicko and other NACHI members to engage in personal attacks on NAHI’s Executive Director, Mallory Anderson. The attacks reflect an obvious lack of maturity

and common sense, but nonetheless are hurtful and clearly aimed at devastating Ms. Anderson and impugning the reputation of NAHI. Thus, far from making any attempt to honor the terms of the settlement, Gromicko and his NACHI cohorts instead are operating with the apparent belief that they can now make disparaging remarks with impunity.

As set forth below, it appears that at the time of agreeing to the settlement, Gromicko was planning on how to circumvent and breach the same. NACHI has not acted in good faith, but instead has demonstrated a total disregard and lack of respect for the federal judicial process. Accordingly, NAHI now asks the Court to summarily enforce the terms of the settlement through an injunction and to award NAHI its attorney fees and costs caused by NACHI's misconduct.

STATEMENT OF FACTS

A. The Parties

Plaintiff National Association of Home Inspectors, Inc., is a trade association that was incorporated as a non-profit corporation in 1987. NAHI has members and chapters located throughout the United States. NAHI's mission is to promote excellence and professionalism in the home inspection industry, to provide standards of practice and a code of ethics, to educate its members, and to inform the public of the benefits and scope of a professional home inspection.

Defendant National Association of Certified Home Inspectors, Inc., was originally incorporated under the laws of the State of Pennsylvania, and it is currently incorporated under the laws of Colorado. Nick Gromicko, his brother Ben Gromicko, and Dennis Workman originally formed NACHI as a nonprofit corporation on May 1, 1998. According to Workman, he and Gromicko formed NACHI as a money making scheme and in part an effort to circumvent expected legislation in Pennsylvania that required home inspectors to belong to a national home

inspector association. Gromicko, Workman, and Gromicko's brother originally divided up the states to allow each of them to profit from any dues revenue received. According to Workman, the name "National Association of Certified Home Inspectors" was proposed by Gromicko as a way of trading on NAHI's name and to allow members to claim that they were "certified" home inspectors. Gromicko, Workman, and Gromicko's brother solicited members by sending out mailings stating: "The only idea here at NACHI is inspectors getting rich. Send your check for \$289 in the enclosed blue envelope & you're in!" (Ex. 2)

For several years after its formation, NACHI's limited membership was located primarily in Pennsylvania, and it did not appear to act in interstate commerce. After Workman and Gromicko's brother ended their involvement, and in an effort to back his boisterous claim of thousands of members, Gromicko began sending unsolicited NACHI membership certificates to home inspectors across the United States, including to members of NAHI's Board of Directors. (See e.g. Ex. 3) Gromicko now claims that NACHI has over 8,000 members who have been "certified" to conduct home inspections and that are the "best inspectors" and "most educated" in North America. In the last few years, NACHI began requiring at least some of its members to pass an "online" test, which itself has roundly criticized as being easy to the point of meaninglessness, even if the taker did not look up the answers online as the test was being taken. (See e.g. Ex. 4)

Notably, NACHI was and continues to be nothing more than the alter ego of Nick Gromicko. NACHI's revised articles of incorporation provides that members have no voting rights, and, pursuant to NACHI's Bylaws, there are no members and only one Director, who, of course, is Gromicko himself. (Ex. 5)

Pursuant to Gromicko's efforts, NACHI has become a virtual home inspector association that primarily relies on its Internet based presence through its websites. NACHI uses the Internet, *inter alia*, to solicit home inspectors nationally, for interactive marketing tools to market its members' services to consumers, for "certifying" its inspectors through its interactive online examination, for marketing goods to home inspectors, for the running of the affairs of the association (subject to Gromicko's absolute veto power), for collecting dues, and for communicating with inspectors, real estate agents, and consumers through an interactive forum. Home inspectors benefit from NACHI's online presence by utilizing NACHI "certified" logos that are linked to NACHI's website to verify "certification."

B. NACHI's Wrongful Acts

Not content with trading on NAHI's name and goodwill, Gromicko began making direct and defamatory attacks against NAHI, published to real estate agents upon whom home inspectors are reliant on for referrals and home inspectors themselves. For example, Gromicko, on his own behalf and through NACHI, repeatedly published false and defamatory statements concerning NAHI and its members, including but not limited to the following statements:

- NAHI and its members engage in the bribery of real estate brokers or agents.
- NACHI has purchased or bought NAHI.
- U.S. Inspect has purchased or bought NAHI.
- NAHI was history and folded.
- NAHI died last year.
- That Civil Justice filed a lawsuit against NAHI and/or its member for bribing real estate agents.

These defamatory statements, including accusations of criminal conduct, caused irreparable harm to NAHI and its members which in part led to the filing of this lawsuit.

NACHI also engaged in other blatant misrepresentations to consumers and real estate agents that harm the business of NAHI and its members. NACHI informs real estate agents and consumers that its members are “certified” home inspectors even though a significant number of these inspectors have never previously performed a home inspection or have had any meaningful training. It further represents to real estate agents and consumers that its “certified” home inspectors are the “best” and “most educated” inspectors in North America.

NACHI also infringed on NAHI’s common law and federally protected trademark rights. NAHI has been using its trademarks “National Association of Home Inspectors,” “NAHI,” and “NAHI CRI” continuously in interstate commerce for many years. On or about May 27, 2003, NAHI obtained United States Patent and Trademark Office registration for its marks “NAHI” and “NAHI CRI.”

NACHI’s use of the “NACHI” acronym and “National Association of Certified Home Inspectors” was designed to and in fact has caused confusion, mistake, and deception as to the affiliation, connection, or association of NACHI and its members with NAHI and its members, and as to the origin, sponsorship, or approval of NACHI, its services, and the services provided by its members. Moreover, NACHI further infringed on NAHI’s mark “National Association of Home Inspectors” by falsely identifying Gromicko as the “founder” of NAHI, by its chapters’ use of NAHI’s name, and by the use of the acronym “NAHI” in the metatags on its website in a surreptitious attempt to divert internet traffic to its website.

C. The Lawsuit

After witnessing repeated confusion based on the names and acronyms of the two associations – including receiving consumer complaints based on inspections performed by NACHI members – and having the reputation of NAHI and its members tarnished from accusations of criminal conduct, NAHI filed suit on April 26, 2006, seeking injunctive relief and damages. The claims brought by NAHI include unfair competition in violation of the Lanham Act and Michigan common law, trademark infringement, false designation of origin, violations of Michigan’s Consumer Protect Act, defamation, and injurious falsehood.

NACHI as a litigant is reflective of NACHI as an association. As an example, in response to NACHI’s discovery requests, NAHI produced over 2,300 pages of responsive documents and extensive answers to interrogatories. NACHI, however, was not so accommodating. In response to NAHI’s document requests – which sought extensive documentation – NACHI produced exactly two documents: its Bylaws and a chart created by defense counsel. NACHI took the position it had no documentation or historical records whatsoever, even as to such basic information showing the numbers of its members. NACHI further took the position that it maintains no financial statements or similar summaries, such as those used to prepare its tax returns. NACHI further refused to produce copies of its publicly available “certification” test or any financial information showing monies going into Gromicko’s pocket.¹

¹ In response to NAHI’s complaints regarding its failure to provide discovery, NACHI sent plaintiff’s counsel a user name and password to allow plaintiff’s counsel complete access to NACHI’s website, representing that its entire electronic records would be thus made available. Incredibly, at the same time it did so and without informing plaintiff’s counsel, NACHI took

In addition to informing NACHI that these responses were neither credible nor acceptable, NAHI noticed a number of depositions, including depositions of Dennis Workman, NACHI's Executive Director, and NACHI's current and former staff members. It was shortly thereafter that NACHI offered to settle this litigation.

D. The Settlement

Part way through the deposition of NAHI's Executive Director, Mallory Anderson, Nick Gromicko offered to settle the litigation on behalf of NACHI. A transcript of the settlement put on the record is attached as Ex. 1. The terms of the settlement are as follows:

1. The primary component of the settlement is NACHI's agreement to change the name under which it does business to InterNACHI. While NACHI will keep its legal name of National Association of Certified Home Inspectors on its articles of incorporation and for the sole purpose of its current legal obligations/contracts and the few instances where it has been named in state legislation and rules, NACHI agreed that it would not use "National Association of Certified Home Inspectors" or "NACHI" for any commercial, marketing, or publicity purpose and instead will use "InterNACHI." Gromicko represented during the settlement discussions that the changes made to its websites could be accomplished in several days, but that NACHI members would need a longer time to make the transition to InterNACHI, given the need to change the names on vehicles, letterheads, etc.
2. NACHI agreed to amend or withdraw its trademark application for its "NACHI" logo now pending before the U.S. Patent and Trademark Office. The parties agreed that NACHI may register its current house logo with InterNACHI in the logo instead of NACHI without objection from NAHI.
3. NACHI agreed to give up any claim to the CRI (or C.R.I.) designation. NACHI may still use "Certified Residential Inspector," and NACHI agreed not object to NAHI's use of the CRI mark or the designation of "Certified Real Estate Inspector."

offline its "members only" message system which contained a significant portion of the information sought in discovery.

4. Nick Gromicko agreed not to use NAHI's name or acronym in discussions on NACHI's website. Nick Gromicko further agreed that he and other paid employees of NACHI will not make disparaging remarks about NAHI and will remove all offense material from its website about NAHI and as requested by NAHI.

5. NACHI agreed to remove all NAHI home inspectors from its email lists, except for those who are also members of NACHI.

6. NACHI agreed not to use NAHI's name, including the phrase "national association of home inspectors," in meta tags or hidden text on its websites.

This settlement was put on the record and thus is enforceable, even though the parties also agreed that a more formalized agreement would be drafted. The parties further agreed that all disputes under the settlement agreement would be resolved under Michigan law.

E. NACHI's Bad Faith and Blatant Disregard for the Settlement

Within days after the settlement, however, it became evident that Gromicko on behalf of NACHI had entered into the settlement agreement in bad faith and with little or no intent of abiding by its terms. In fact, what followed thereafter can only be described as appalling and is nothing short of Gromicko and NACHI thumbing their noses not only at NAHI, but also at the the entire federal judicial process.

1. *Use of Microscopic Lettering and Refusal to Use New Name*

The settlement on the record was clear that the new name to be used by NACHI was to be "InterNACHI," without hyphen or separation. *See*, Ex. 1 at p. 3. Moreover, the settlement provides that "defendant has agreed that it will henceforth begin the process of changing its assumed name on the official basis from NACHI to InterNACHI," and that NACHI "will in all public uses use the name InterNACHI, except where required by law to refer to the true legal name of the entity, by way of example and not limitation, in tax returns and other governmental

filings. . . .” (*Id.*, pp. 3-4) This was also clarified on the record that “for all commercial, publicity and marketing purposes that NACHI or the National Association of Certified Home Inspectors, Inc., will use the name of InterNACHI and will not use its corporate name or the NACHI acronym.” (*Id.*, p. 4) Although not on the record, Gromicko represented that the website changes would be made immediately – he was already having someone working on it – and that it would take longer for all the NACHI members to make the transition because of the need to change signs, vehicle signs, letterhead, etc.

NACHI’s and Gromicko’s subsequent actions make clear that they had no intention of abiding by these terms requiring the change of the NACHI name. The **only change** made by NACHI to its website was to change the logo in the top of the page to insert the term “inter” in very small letters set vertically next to the NACHI acronym, as shown by Exhibit 6. In fact, the “inter” is in such small lettering, it can barely be read. *Id.*

Gromicko’s own statements and those of other NACHI members evidence that this action was deliberately taken to circumvent the settlement. As posted by NACHI member David Nice, “I notice the little NACHI logo on the website has been changed to the new one with “inter” added virtically [sic] on the left side. Now if any NAHI guys think that is somehow some kind of victory and worth all the money the spent on lawyers, they should break out their magnifying glasses.” (Ex. 7, p. 1) Gromicko replied as follows:

We are slowly going international in many ways on our own, but there is no rush and the agreement does not require us to do anything in a certain amount of time. We are free to make the “inter” microscopic according to the agreement.

Funny thing about attorneys ... while the [sic] argue over stupid stuff for months and generate mountains of meaningless paperwork, they often forget about important stuff like “how soon” and “how big.” Then they’re all too embarrassed to complain later to a civilian (like me) that they meant to say this or that in the agreement.

Too late now.

(Ex. 7, p. 4) Contrary to Gromicko's attempt to mislead NACHI members, the parties expressly agreed that the name would be "InterNACHI" and that NACHI would start using that name for "all commercial, publicity and marketing purposes."

Even though it would take just a few minutes to make the name change on NACHI's homepage and not much longer than that to make the name change on the remainder of the website, Gromicko and NACHI have refused to do so. (*See e.g.* Ex. 8) Just the opposite, Gromicko continues to make announcements and roll out new offerings using the NACHI name. (Ex. 9)

2. *Gromicko Announces that No Changes Necessary for NACHI Members*

When Gromicko first announced that NACHI was going to change its name to InterNACHI, at least one NACHI member requested a copy of the new logo and banners for use on the member's website. (Ex. 7, p. 2) This move was discouraged by other members. As written by NACHI member David Nice,

There should be no hurry for members or chapters to use the new logos since we are not a party to the agreement. We can use the old ones as long as we want. I wouldn't assume that the chapter sites have to change either, as the chapters are also not a party to the agreement.

(*Id.*, p. 3) Nice later wrote

I'll happily be head of a movement of members to keep our individual websites and marketing materials the same as they reference NACHI (Until NAHI folds).

I hope as the new logos roll out, that it is made clear that members use of the new logo and changing any reference to NACHI and the "Natiional [sic] Association of Certified Home Inspectors", by members and chapters is purely voluntary.

(*Id.*, p. 6) In response, **Gromicko confirmed this misinformation that there was no need for any NACHI member to use the new name or make any changes whatsoever:**

Correct. The National Association of Certified Home Inspectors, Inc. was the lone defendant and it only owns one website www.nachi.org and is not bound to complete anything by a certain time (despite a room full of attorneys authoring the settlement agreement) and is not bound to make “inter” any particular size (it can be microscopic according to the agreement).

(*Id.*, p. 6) As a result of this false statement by Gromicko, at least one NACHI member who had already made the name change reversed the change and put “NACHI” back on his website. (*Id.*, p. 8; Ex. 10)

Similarly, NACHI member Mario Kyriacou directly asked Gromicko if NACHI members should start using InterNACHI and the purported new logo. (Ex. 11, p. 2) Gromicko’s response was a resounding “no”:

Mario, no, you don’t have to do anything ever. We just wanted to reveal what we are doing *now* so that if you wanted to begin switching to the new logo, you can.

(*Id.*, p. 3)

3. *Defamatory Statements and Accusations of Criminal Conduct Continue*

As set forth above, part of the misconduct by NACHI that led to this litigation was a constant barrage of defamatory statements and accusations of criminal conduct concerning NACHI made by Gromicko on behalf of NACHI. The settlement put on the record was to put an end to this misconduct. Specifically, the parties agreed that “Nick Gromicko and any paid employees of the defendant shall not refer to the plaintiff in any disparaging context.” (Ex. 1, p. 5)

Figuratively speaking, the ink was not even dry on paper before Gromicko blatantly violated this agreement, both directly and by using Jim Bushart, head of NACHI’s Ethics and

Standards of Practice Committee, as a proxy. What followed is best described as appalling, as well as immature and offensive.

During her deposition, NAHI's Executive Director, Mallory Anderson, testified that prior to taking employment to serve as the Executive Director, she worked as a secretary for an the Executive Vice President of Mentor, a developer of catheters and penile implants. The agreement to settle this case was made part way through Ms. Anderson's deposition, but NACHI nonetheless ordered a copy of the deposition transcript. It has now become apparent why.

Gromicko and/or NACHI's attorney forwarded a copy of the transcript to Bushart to serve as a proxy for making derogatory comments about Anderson and NAHI on NACHI's publicly published message board. (Ex. 12) After Bushart published the portion of the transcript concerning Anderson's past employment, Gromicko started making incredibly offensive, immature, and hurtful comments concerning Anderson and NAHI. Gromicko's comments are as follows:

I wonder if she had to be *certified* to run the 3-point test on the pumps? Like the Hanes underwear's Inspector 12, they're not penile pumps 'till she says they're penile pumps! (Ex. 12, p. 5)

I wonder if their members get a discount on these:
<http://www.urology.coloplast.com/ere...late-erect.htm>. LOL. (*Id.*, p. 6)

How was the 3-point test performed. What were the *entrance* requirements? (*Id.*, p. 9)

Adds new meaning to their "FULL MEMBER" status. (*Id.*, §2, p. 1)

I suspected they were developing a competing product to my extendable pole spectroscopy <http://www.nachi.org/spectroscope.htm> ... but I had no idea they were going to build them right into their members (no play on words intended). (*Id.*, §3, p. 1)

I didn't know that when they said they were trying to "pump up their new members" that they meant it literally not figuratively! (*Id.*, §3, p. 3)

They call themselves “the friendly association” maybe a bit too friendly! (*Id.*, §3, p. 4)

When I advised them to “raise them higher and make them harder” I was referring to their Standards and requirements! (*Id.*)

These were just Gromicko’s comments, and do not include those as equally offensive and insulting made by other NACHI’s members with Gromicko’s encouragement.

Using Bushart and Anderson’s deposition as a spring board, Gromicko has also continued his defamatory comments concerning NAHI, including accusations of criminal conduct. For example, Bushart published that portion of Anderson’s deposition wherein she testified that she had talked to members of other associations and that they were all in agreement that NACHI should be put out of business. Gromicko’s response was as follows:

This a a clear violation of the RICO Act (a CRIMINAL, not civil case). We fully expect her to do some jail time. Wait till you see what we have coming out of PA. It is an all out for-profit criminal conspiracy.

(Ex. 13, p. 4) Similarly, Gromicko wrote:

We will file what is called a Civil RICO first and then a criminal complaint. Conspiring with others to put NACHI members out of business for personal enrichment is a criminal offense. She should do jail time.

(Ex. 14, p. 8)

In setting up the stage for the continuation of his false and nonsensical accusations of criminal conduct, Gromicko was clearly directing Bushart on what to post, as shown from Gromicko’s posting on his message board:

Jim [Bushart], could you post the portion of the testimony where she admits to her financial ownership in the management company that is under contract with the association in question and the portion where she admits it’s [sic] her only account. It goes to the criminal conspiracy case and how she was personally enriched by conspiring to harm NACHI member’s business.

(Ex. 13, p. 5)

Gromicko also once again started publishing the same type of defamatory comments that led to this lawsuit, including statements that NAHI and its members “bribe” realtors:

If that “someone” is an association that permits its members to sell repair services on their own supposedly impartial inspections and permits its members to bribe REALTORS via preferred vendor schemes when the other major associations prohibit it, and many states outlaw it.... Don't we have a moral duty to taunt and insult as a form of peaceful protest attempting to affect change? No ethics, no peace!

(Ex. 15, p. 1)

F. NACHI and Gromicko Refuse to Take Corrective Action and Abide by Settlement

After being notified of the blatant violations of the settlement as set forth above, plaintiff's counsel demanded through defense counsel that Gromicko and NACHI take corrective action – a demand that was refused in its entirety. (Ex. 16) Gromicko himself insisted on getting the last word in this conversation, sending plaintiff's counsel an email that ended with “go f*** yourself. I know, I'm offensive and immature.” (*Id.*)

ARGUMENT

As set forth above, immediately upon agreeing to settle this matter, NACHI, by and through Gromicko, took every action to avoid the terms of the agreement, to such an extent that a reasonable inference is that NACHI entered into the agreement in bad faith and without an intention to abide by its terms. NAHI now asks the Court to specifically enforce the terms of the settlement by injunction, to grant NAHI sanctions in the amount of its attorney fees and costs in bringing this matter before the Court, and to enter the terms of the settlement in an Order so that any future violations by NACHI will be a contempt of court.

A. This Court Has Authority to Specifically Enforce Settlement Agreement

As held by the Sixth Circuit, a federal district court has the “inherent authority and equitable power to enforce agreements in settlement in litigation before it.” *Bowater North America Corporation v. Murray Machinery, Inc.*, 773 F.3d 71, 76 (6th Cir. 1985). In *Aro Corporation v. Allied Witan Company*, 531 F.2d 1368, 1371 (6th Cir. 1976), the Sixth Circuit held that a “court below had not only the inherent power but, when required in the interests of justice, the duty to enforce the agreement which had settled the dispute pending before it.” As further held by the Court in *Aro Corporation*, public policy strongly favors settlement, and the attorneys involved, as officers of the Court, have a duty to undertake every reasonable effort to see that the terms of the agreement are carried out in a timely fashion:

Agreements settling litigation are solemn undertakings, invoking a duty upon the involved lawyers, as officers of the court, to make every reasonable effort to see that the agreed terms are fully and timely carried out. Public policy strongly favors settlement of disputes without litigation. . . . Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.

Id. at 1372.

As further held by Sixth Circuit in affirming the entry of an order by the district court encompassing the terms of the settlement agreement put on the record:

Once concluded, a settlement agreement is as binding, conclusive, and final as if it had been incorporated into a judgment. *Clinton St. Greater Bethlehem Church v. City of Detroit*, 484 F.2d 185, 189 (6th Cir. 1973). Summary enforcement of a settlement agreement for which there is no dispute as to the terms of the agreement is the only appropriate judicial response, absent proof of fraud or duress.

RE/MAX Intern., Inc. v. Realty One, Inc., 271 F.3d 633, 650 (6th Cir. 2001).

Enforcement of a settlement agreement by a district court is reviewed under an abuse of discretion standard. *RE/MAX Intern., Inc.*, 271 F.3d at 645. In determining whether an agreement has been reached on all material terms, an evidentiary hearing is only required “where facts material to an agreement are disputed.” *Id.* at 646. “[S]ummary enforcement of a settlement agreement has been deemed appropriate where no substantial dispute exists regarding the entry into and terms of an agreement.” *Id.* Moreover, oral settlement agreements on the record are enforceable when entered into, even if the parties agree to later memorialize the agreement in writing. *Id.* An injunction against further violations is also a proper mechanism for enforcing the terms of the settlement. *Aro Corporation*, 531 F.2d at 1374.

As set forth in Exhibit 1, the parties entered into an unambiguous settlement on the record in this case. Before the figurative ink was dry on paper, NACHI, by and through its sole director/owner, Nick Gromicko, was actively working to avoid the terms of the settlement and to blatantly breach those terms. As set forth in more detail above, these violations include:

- 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 NACHI and its staff members.
- Gromicko making defamatory statements of criminal conduct by NACHI and its Executive Director.

Accordingly, it is beyond dispute that NACHI, by and through Gromicko, has violated the terms of the settlement agreement between the parties.

B. This Court Has Inherent Authority To Award Attorney Fees for Bad Faith Conduct

The Sixth Circuit has made clear that district courts have authority to award attorney fees to a party who has incurred additional legal expense due to the other parties refusal to effectuate a settlement agreement in good faith. For example, in *Jaynes v. Austin*, 20 Fed. Appx. 421, 427 (6th Cir. 2001), the court held that a district court has discretion to award attorney fees against a party that delays and obstructs a final resolution of a lawsuit by refusing to honor the terms of a settlement agreement. As held by that court,

[A]s part of its inherent powers, a district court may award attorney fees in its discretion without statutory authorization for willful violation of a court order by the losing party and for bad faith or oppressive litigation practices. [Citations omitted] Moreover, the district court has supervisory power to regulate the conduct of attorneys and parties before it, which may include awarding attorney fees. [Citations omitted] However, to award attorney fees under a court's "inherent powers" requires "a finding that an attorney 'willfully-abuse[d] judicial processes by conduct tantamount to bad faith.'" [Citations omitted]

Id. at 427. In *Jaynes*, the Sixth Circuit affirmed the decision of the district court to enter three attorney fee awards to plaintiffs where the defendants had in bad faith obstructed the final resolution of the case by insisting that the plaintiffs sign releases that exceeded the scope of the terms of the settlement agreement. *Id.*

In this case, it is evident that Gromicko and NACHI intended to circumvent both the spirit and intent of the settlement agreement as those terms were being placed on the record. Their bad faith is evidenced by NACHI ordering – on an expedited basis – the transcript of Mallory Anderson's deposition even though the matter had been settled to engage in further attacks against NAHI and Anderson. This act was accomplished with the assistance of defense

counsel. It is also evidenced by the only change being made to NACHI's name was to insert the term "Inter" in microscopic, vertical lettering in the logo. It is further evidenced by informing NACHI members that they have no obligation ever to start using the new name "InterNACHI" and instead can continue to use the NACHI name and acronym. It is further evidenced by the refusal of defense counsel to attempt any correct measures, with Gromicko's own response being to tell plaintiff's counsel to "f*** off."

NACHI's actions in attempting to delay and circumvent the settlement evidences a complete lack of respect for the Court and the federal judicial process, as well as for NAHI. Its bad faith is sanctionable, and NAHI asks that the Court award NAHI its full amount of attorney fees and costs incurred as a result of NACHI's violations of the settlement.

CONCLUSION

For the above-stated reasons, plaintiff National Association of Home Inspectors, Inc., asks the Court to summarily enforce the settlement by injunction and by incorporating the terms of the settlement into a final order and for an award of attorney fees incurred as a result of NACHI's misconduct and bad faith.

Respectfully submitted,

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Dated: July 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2007, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Barbara Mandell, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: none.

s/James E. Roach _____
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