

IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

HOMESAFE INSPECTIONS, INC.

PLAINTIFF

v.

CAUSE NO. L15-013

**INTERNATIONAL ASSOCIATION OF
CERTIFIED HOME INSPECTORS**

DEFENDANT

AMENDED ANSWER, COUNTERCLAIM, AND THIRD-PARTY COMPLAINT

AMENDED ANSWER and DEFENSES

Defendant, International Association of Certified Home Inspectors ("InterNACHI"), submits this Amended Answer to Plaintiff's Complaint and states as follows:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Plaintiff's Complaint fails to join an indispensable party or parties.

THIRD DEFENSE

The Plaintiff lacks standing.

FOURTH DEFENSE

The damages complained of, if any, were or may have been the result of intervening and superseding causes for which Defendant had no responsibility and cannot be held liable.

FIFTH DEFENSE

The alleged contract in this case was a product of fraud in the inducement.

SIXTH DEFENSE

The alleged contract is unenforceable because of a failure of consideration.

SEVENTH DEFENSE

Plaintiff's own material breach of the terms of the alleged contract.

EIGHTH DEFENSE

Plaintiff has failed to mitigate its damage, if any.

NINTH DEFENSE

Defendant affirmatively pleads the equitable defense of laches

TENTH DEFENSE

Defendant affirmatively pleads the equitable defense of waiver.

ELEVENTH DEFENSE

Defendant affirmatively pleads the equitable defense of estoppel.

TWELFTH DEFENSE

Defendant affirmatively pleads the equitable defense of unclean hands.

THIRTEENTH DEFENSE

Plaintiff's conduct regarding the alleged contract failed to meet the conditions precedent for the enforcement of this contract.

FOURTEENTH DEFENSE

Some or all of Plaintiff's claims are subject to the Mississippi Litigation Accountability Act.

FIFTEENTH DEFENSE

Defendant entered into the alleged contract under duress.

SIXTEENTH DEFENSE

The granting of any award for punitive damages would violate Defendant's constitutional rights under the United States Constitution ("Federal Constitution") and the Constitution of the State of Mississippi ("State Constitution"), including, but not limited to, the following:

- (a) The Due Process Clause of the Fourteenth Amendment of the Federal Constitution;
- (b) The Double Jeopardy Clause of the Fifth Amendment as applied to the Fourteenth Amendment of the Federal Constitution;
- (c) The Due Process Clause of Article III, § 14 of the State Constitution;
- (d) The prohibition against twice being placed in jeopardy for the same offense provided by Article III, § 22 of the State Constitution;
- (e) The procedural safeguards provided by the Sixth Amendment of the Federal Constitution for alleged penal conduct, including, but not limited to, permitting imposition of punitive damages with a burden of proof less than "beyond a reasonable doubt";
- (f) The procedural safeguards provided by Article III, § 26 of the State Constitution for alleged penal conduct, including, but not limited to, permitting imposition of punitive damages with a burden of proof less than "beyond a reasonable doubt";
- (g) The Contract Clause of Article I, § 10 of the Federal Constitution;
- (h) The Contract Clause of Article III, § 16 of the State Constitution;
- (i) The Self-Incrimination Clause of the Fifth Amendment of the Federal Constitution;
- (j) The Self-Incrimination Clause of Article III, § 26 of the State Constitution;
- (k) The Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution; and
- (l) The award of punitive damages bears no proportional or rational relationship to any actual damages or to the type of conduct involved and violates both the Federal Constitution and State Constitution.

ANSWER TO ALLEGATIONS IN THE COMPLAINT

Defendant now responds to the allegations in Plaintiff's Complaint paragraph by paragraph as follows:

1. Defendant admits paragraph 1 of the Complaint.

2. Defendant admits paragraph 2 of the Complaint.

3. Defendant admits paragraph 3 of the Complaint.

4. Defendant admits paragraph 4 of the Complaint.

5. Defendant lacks sufficient information to admit or deny paragraph 5, and therefore denies it. Upon information and belief, one or more non-parties may have an ownership interest in the patents and/or the other rights Plaintiff claims to own.

6. Defendant denies paragraph 6 of the Complaint.

7. With regard to paragraph 7, Defendant is uncertain what Plaintiff means by "national organization," but admits it is a 501(c)(6) trade association with members in every state. Defendant denies that portion of paragraph 7 that alleges that many of Plaintiffs members are utilizing Plaintiffs claimed patented method of use of infrared cameras to inspect homes.

8. Defendant admits that it entered into a written agreement with Plaintiff and a true copy of that agreement was attached as Exhibit "A" to the filed Complaint. That Agreement speaks for itself and therefore Plaintiffs characterization of it is irrelevant. Defendant denies the remaining allegations of paragraph 8.

9. Defendant denies the allegations of paragraph 9 of the Complaint.

10. The Complaint contains two paragraphs numbered "10." Defendant denies both.

11. Defendant denies paragraph 11 of the Complaint.

12. Paragraph 12 reincorporates other allegations in the Complaint. To the extent a response is required, Defendant incorporates his previous response, paragraph by paragraph, and denies anything to which an adequate response has not been pled.

13. Defendant denies paragraph 13 of the Complaint.

14. Defendant denies paragraph 14 of the Complaint.

15. Defendant denies paragraph 15 of the Complaint.

16. Defendant denies paragraph 16 of the Complaint.

17. Paragraph 17 reincorporates other allegations in the Complaint. To the extent a response is required, Defendant incorporates his previous response, paragraph by paragraph, and denies anything to which an adequate response has not been pled.

18. Defendant denies paragraph 18 of the Complaint.

19. Defendant denies paragraph 19 of the Complaint.

20. Paragraph 20 reincorporates other allegations in the Complaint. To the extent a response is required, Defendant incorporates his previous response, paragraph by paragraph, and denies anything to which an adequate response has not been pled.

21. Defendant denies paragraph 21 of the Complaint.

22. Defendant denies paragraph 22 of the Complaint.

23. Paragraph 23 reincorporates other allegations in the Complaint. To the extent a response is required, Defendant incorporates his previous response, paragraph by paragraph, and denies anything to which an adequate response has not been pled.

24. Defendant denies paragraph 24 of the Complaint.

25. Defendant denies paragraph 25 of the Complaint.

26. Defendant denies paragraph 26 of the Complaint.

27. Paragraph 27 reincorporates other allegations in the Complaint. To the extent a response is required, Defendant incorporates his previous response, paragraph by paragraph, and denies anything to which an adequate response has not been pled.

28. Defendant denies paragraph 28 of the Complaint.

29. Defendant denies paragraph 29 of the Complaint.

30. Defendant denies paragraph 30 of the Complaint.

31. Paragraph 31 reincorporates other allegations in the Complaint. To the extent a response is required, Defendant incorporates his previous response, paragraph by paragraph, and denies anything to which an adequate response has not been pled.

32. Defendant denies paragraph 32 of the Complaint.

33. Defendant denies paragraph 33 of the Complaint.

34. Defendant denies paragraph 34 of the Complaint.

35. Defendant denies paragraph 35 of the Complaint and all of its sub-parts.

WHEREFORE PREMISES CONSIDERED, the Defendant, having denied each and every allegation of the Plaintiffs Complaint which may impute liability, and having asserted certain affirmative defenses, and reserving the right to amend the Answer, respectfully requests that the Plaintiffs Complaint be dismissed with costs assessed against the Plaintiff, attorney's

fees as may be allowed by law, and further requests such other relief which the Court may find warranted in the premises.

COUNTERCLAIM

Defendant, for its Counterclaim against Plaintiff, alleges as follows:

1. Defendant is and was at all times relevant to this action a trade association representing the interests of approximately 13,000 home inspectors. It is a Colorado nonprofit corporation and the I.R.S. has granted it tax-exempt status under Section 501(c)(6) of the Internal Revenue Code.

2. Sometime prior to October 23, 2013, the exact date being unknown to Defendant, an InterNACHI member telephoned InterNACHI and spoke with Mr. Nick Gromicko, InterNACHI's founder. Mr. Gromicko was at InterNACHI's headquarters in Boulder, Colorado, when this conversation took place. The member explained that the Plaintiff had sued him and that Plaintiff claimed it owned a patent that gave Plaintiff the exclusive right to use any form of infrared technology in home inspections.

3. Mr. Gromicko asked the member to provide details of the lawsuit and then contacted the Plaintiff by telephone from his Boulder office. Mr. Gromicko spoke with Kevin Seddon, who represented that he was the President of the Plaintiff corporation. Defendant believes Mr. Seddon was in Mississippi during this phone call.

4. During the phone call, Mr. Seddon represented that Plaintiff held a patent that gave it the exclusive right to use any form of infrared technology in home inspections. Mr. Seddon further stated that Plaintiff would continue to sue individual home inspectors, including InterNACHI members, who were using any form of infrared technology in home inspections. This Counterclaim and the Third-Party Complaint refers to these statements by Mr. Seddon as, "the representations."

5. At all times relevant to this action, Plaintiff maintained a public website that contained false representations concerning the extent of its patent rights. These material misrepresentations include but are not limited to:

a. "HomeSafe is the only home inspection company that offers advanced inspections utilizing infrared and acoustic technologies which can, in effect, "see" and "hear" through the walls, floors and ceilings of a property." This is false, as many inspectors use infrared technologies.

b. Homesafe owned a patent on "equipment." In truth, Homesafe has no patent on infrared equipment *per se*.

c. "These patents cover the use of an infrared camera to locate many thermal anomalies - including, but not limited to, air quality and energy issues, water intrusion problems and

electrical and wiring hazards.” In truth, Homesafe has no exclusive right to use infrared cameras, but only on a specific process that involves using them.

d. **“Patent No. 7,369,955 - Residential Indoor Environmental Quality Inspection**

Method: This patent covers the usage of an infrared camera to locate any thermal anomaly - including but not limited to an uncontrolled or hidden water intrusion - in conjunction with obtaining data relating to indoor air quality, including visual confirmation of mold, collection of mold samples, measurement of relative humidity, installation of a constant air/gas monitor system and/or other measurements including air pressure measurements. A thermal anomaly is an unexplained difference in temperature from one area of a house to another, often indicating a problem that can't be detected by ordinary means. Thermal anomalies signify a problem with faulty wiring, hidden moisture, missing insulation, heat/energy loss, termite infestations and more.” In truth, Homesafe has no patent on the use of infrared technology to find thermal anomalies, but only a patent on a particular process that uses infrared technology.

e. **“Patent No. 7,445,377 - Non-Destructive Residential Inspection Method and**

Apparatus: This patent covers HomeSafe's method for creating a "thermal window," that is, preparing a house for an IR inspection by creating a temperature differential between the inside and the outside of the house, followed by obtaining temperature profiles of the house's interior and exterior components. These temperature profiles are then analyzed to uncover thermal anomalies indicating problems such as moisture intrusion or electrical issues. This method helps to create more optimal conditions for efficient usage of IR and better interpretation of IR data in the inspection process.” In truth, this patent covered seven claims. The first claim was not to the use of infrared technology *per se*, but was rather a claim to a specific process that included the use of infrared technology by creating a ten degree temperature differential. The other six claims pertained to methods used to attempt to identify problems in a structure's electrical system. The patent doesn't even apply to the creation of ANY temperature differential. Homesafe does not own the exclusive right to the creation of any temperature differential at all.

6. InterNACHI is not presently seeking leave to add a claim under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. § 1961 et seq. However, based on the allegations in paragraphs 5 immediately above, there is evidence Plaintiff violated the federal wire fraud statute, 18 U.S.C. § 1343, by making communications by phone and email in furtherance of its scheme to defraud, and by making false representations on its website concerning the extent of its patents. Plaintiff may have also violated the federal mail fraud statute, 18 U.S.C. § 1341. As discovery is ongoing, InterNACHI reserves the right to seek to add a civil RICO claim.

7. Upon information and belief, Mr. Gromicko and Mr. Seddon communicated by email following their phone conversation, and in those emails Mr. Seddon again made the representations he had made during the phone call with Mr. Gromicko. Mr. Gromicko was very concerned about the prospect of Plaintiff filing large numbers of lawsuits against InterNACHI members because most home inspectors operate on a thin margin and simply can't afford to retain counsel to represent them in litigation. Additionally, a home inspector that must take time off to participate in litigation is losing money. Mr. Gromicko explained that he wanted to meet

with Mr. Seddon as soon as possible to discuss the issue and to try to arrive at a resolution. Mr. Seddon agreed to meet with Mr. Gromicko in Las Vegas, Nevada.

8. When Mr. Gromicko and Mr. Seddon met in Las Vegas, Mr. Seddon again made the representations identical to those he had previously made. Mr. Seddon presented Mr. Gromicko with a proposed agreement that he had apparently already drafted by himself, which Mr. Gromicko signed on behalf of InterNACHI. That is the agreement attached to Plaintiff's Complaint in this action.

9. Subsequent to Plaintiff's filing this action, Defendant researched the records of the U.S. Patent and Trademark Office (USPTO) and learned that Plaintiff does not have a patent that grants it the exclusive right to use any form of infrared technology in home inspections. See, paragraphs 8 and 9 below.

10. On November 4, 2008, the USPTO granted Patent No. 7445377 to Plaintiff. This patent covered seven claims. The first claim was not to the use of infrared technology *per se*, but was rather a claim to a specific process that included the use of infrared technology. The other six claims pertained to methods used to attempt to identify problems in a structure's electrical system. The application for this patent was filed by Kevin Seddon and Peng Lee on March 11, 2004, both of whom assigned their interest in it to the Plaintiff on July 20, 2005.

11. On July 1, 2014, the USPTO granted Patent No. 8764285 to Plaintiff. This patent covered two claims, neither of which patented the right to the use of infrared technology *per se*. The first claim was to a computerized method for facilitating inspection of a building, and the second pertained to the use of the method identified in the first claim to detect an electrical defect. The application for this patent was filed by Kevin Seddon and Peng Lee on September 12, 2008, both of whom assigned their interest in it to the Plaintiff retroactive to July 20, 2005.

12. Mr. Seddon and/or Mr. Lee have applied for a number of other patents and assigned their rights in the applications to Plaintiff.

13. Paragraphs 1 through 12 above are incorporated into each Counterclaim. Further, the allegations in each Counterclaim are incorporated into all other Counterclaims. Further all allegations are incorporated into the Third Party Complaint below.

FIRST COUNTERCLAIM – FRAUDULENT MISREPRESENTATION

14. Plaintiff repeatedly represented to Defendant that it owned the exclusive right to the use of any infrared technology in home inspections.

15. Plaintiff repeatedly represented to InterNACHI that it would continue to sue all home inspectors, including InterNACHI members, that used infrared technology in home inspections.

16. Plaintiff sued or threatened to sue at least one InterNACHI member for allegedly using infrared technology in violation of Plaintiff's claimed rights. Plaintiff may have sued or threatened to sue other InterNACHI members.

18. Plaintiff's representations that it owned the exclusive right to the use of any infrared technology in home inspections was a material statement in Defendant's decision to execute the agreement that forms the basis for Plaintiff's lawsuit.

19. Plaintiff made the representations knowing them to be false or with reckless disregard for the truth or falsity of the representations.

20. Defendant reasonably relied on the representations.

21. As a result of Plaintiff's misrepresentations, Defendant has been damaged in an amount to be proven at trial. These damages include, but are not limited to, attorney's fees, expenses, and costs incurred by Defendant in defending this action.

WHEREFORE, Defendant prays for judgment against Plaintiff in an amount to be proven at trial; for costs, attorney's fees as allowed by law, and expenses as allowed by law; for punitive damages as allowed by law; and for such other relief as the Court deems just.

SECOND COUNTERCLAIM – NEGLIGENT MISREPRESENTATION

22. Plaintiff was negligent in repeatedly representing that it owned the exclusive right to the use of any infrared technology in home inspections.

23. As a result of Plaintiff's negligent misrepresentations, Defendant has been damaged in an amount to be proven at trial. These damages include, but are not limited to, attorney's fees, expenses, and costs incurred by Defendant in defending this action.

WHEREFORE, Defendant prays for judgment against Plaintiff in an amount to be proven at trial; for costs, attorney's fees as allowed by law, and expenses as allowed by law; and for such other relief as the Court deems just.

THIRD COUNTERCLAIM – UNJUST ENRICHMENT

23. Pursuant to the agreement Plaintiff and Defendant executed, Defendant provided valuable and favorable publicity for Plaintiff's benefit.

24. Because the representations Plaintiff made to induce Defendant to sign the agreement were false, there was no consideration provided to Defendant in return for the publicity Defendant provided for the benefit of Plaintiff.

25. Plaintiff has been unjustly enriched in an amount to be proven at trial.

26. Equity requires that the Plaintiff pay Defendant the reasonable value of all the publicity that Defendant provided for Plaintiff's benefit.

WHEREFORE, Defendant prays for judgment against Plaintiff in an amount to be proven at trial; for costs, attorney's fees as allowed by law, and expenses as allowed by law; and for such other relief as the Court deems just.

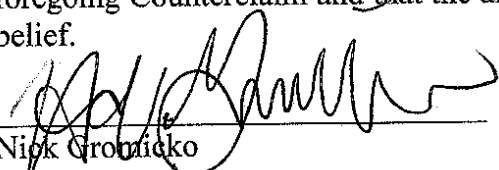
REQUEST FOR ADDITIONAL EQUITABLE RELIEF

Because Kevin Seddon used the Plaintiff corporation to perpetuate a fraud, the Court should disregard the separateness of the corporation and hold Mr. Seddon personally liable for any obligations of the Plaintiff to InterNACHI.

VERIFICATION

State of Colorado)
) ss
County of Boulder)

I, Nick Gromicko, being first duly sworn upon oath, state that I have reviewed the foregoing Counterclaim and that the allegations therein are true to the best of my knowledge and belief.



Nick Gromicko

I certify that on August 14, 2015, Nick Gromicko appeared before me and executed the foregoing Verification in my presence after first being sworn upon oath.

MARK S. COHEN
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 10/19/2015



NOTARY PUBLIC

THIRD-PARTY COMPLAINT

Defendant and Third-Party Plaintiff, InterNACHI, for its Complaint against Third-Party Defendant, Kevin Seddon, alleges as follows:

1. InterNACHI is and was at all times relevant to this action a trade association representing the interests of approximately 13,000 home inspectors. It is a Colorado nonprofit corporation and the I.R.S. has granted it tax-exempt status under Section 501(c)(6) of the Internal Revenue Code.
2. Kevin Seddon is a resident of the State of Mississippi, with an address of 101 Cedar Hill Drive, Oxford, MS 38655.
3. At all times relevant to this action Mr. Seddon was the President of the Plaintiff corporation.

4. Upon information and belief, Mr. Seddon is and was at all times relevant to this action the sole shareholder or the majority shareholder of the Plaintiff corporation.

5. Upon information and belief, Mr. Seddon is and was at all times relevant to this action a member of the Board of Directors of the Plaintiff corporation.

6. All of the allegations contained in the foregoing Counterclaim are incorporated herein by reference.

7. The allegations in paragraphs 1 through 6 immediately above are incorporated into each of the following claims, and the allegations in each claim are incorporated into all other claims.

FIRST COUNTERCLAIM – FRAUDULENT MISREPRESENTATION

8. Mr. Seddon repeatedly represented to Defendant that Plaintiff owned the exclusive right to the use of any infrared technology in home inspections.

9. Mr. Seddon repeatedly represented to InterNACHI that Plaintiff would continue to sue all home inspectors, including InterNACHI members, that used infrared technology in home inspections.

10. Mr. Seddon caused Plaintiff to sue or threaten to sue at least one InterNACHI member for allegedly using infrared technology in violation of Plaintiff's claimed rights.

11. Upon information and belief, Mr. Seddon placed the false statements concerning its patent rights on Plaintiff's website or sanctioned the placement of those statements knowing them to be false or misleading. (See, para. 5 of Counterclaim).

12. Mr. Seddon's representations that Plaintiff owned the exclusive right to the use of any infrared technology in home inspections was a material statement in Defendant's decision to execute the agreement that forms the basis for Plaintiff's lawsuit.

13. Mr. Seddon made the representations knowing them to be false or with reckless disregard for the truth or falsity of the representations.

14. InterNACHI reasonably relied on the representations.

15. As a result of Mr. Seddon's misrepresentations, Defendant has been damaged in an amount to be proven at trial. These damages include, but are not limited to, attorney's fees, expenses, and costs incurred by Defendant in defending this action.

WHEREFORE, Defendant prays for judgment against Mr. Seddon in an amount to be proven at trial; for costs, attorney's fees as allowed by law, and expenses as allowed by law; for punitive damages as allowed by law; and for such other relief as the Court deems just.

SECOND COUNTERCLAIM – NEGLIGENT MISREPRESENTATION

16. Mr. Seddon was negligent in repeatedly representing that Homesafe owned the exclusive right to the use of any infrared technology in home inspections.

17. Mr. Seddon was negligent in placing or sanctioning the placement of false and/or misleading statements on Plaintiff's website concerning the extent of its patent rights.

18. As a result of Mr. Seddon's negligent misrepresentations, Defendant has been damaged in an amount to be proven at trial. These damages include, but are not limited to, attorney's fees, expenses, and costs incurred by Defendant in defending this action.

WHEREFORE, Defendant prays for judgment against Mr. Seddon in an amount to be proven at trial; for costs, attorney's fees as allowed by law, and expenses as allowed by law; and for such other relief as the Court deems just.

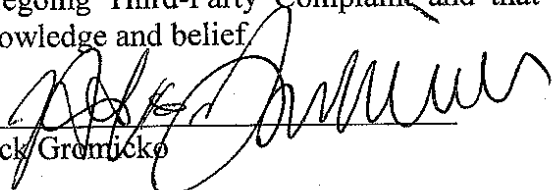
REQUEST FOR ADDITIONAL EQUITABLE RELIEF

Because Kevin Seddon used the Plaintiff corporation to perpetuate a fraud, the Court should disregard the separateness of the corporation and hold Mr. Seddon personally liable for any obligations of the Plaintiff to InterNACHI.

VERIFICATION

State of Colorado)
) ss
County of Boulder)

I, Nick Gromicko, being first duly sworn upon oath, state that I have reviewed the foregoing Third-Party Complaint and that the allegations therein are true to the best of my knowledge and belief.



Nick Gromicko

I certify that on August 14, 2015, Nick Gromicko appeared before me and executed the foregoing Verification in my presence after first being sworn upon oath.



NOTARY PUBLIC

**MARK S. COHEN
NOTARY PUBLIC
STATE OF COLORADO**
My Commission Expires 10/19/2015

JURY DEMAND

Defendant demands a jury trial on all claims so triable.

RESPECTFULLY SUBMITTED, this ___ day of August, 2015.

INTERNATIONAL ASSOCIATION OF
CERTIFIED HOME INSPECTORS

By: _____

Lawrence L. Little, MSB #1283
Lawrence L. Little & Associates, PA
829 North Lamar Blvd., Suite 6
Oxford, MS 38655
Telephone: (662) 236-9396
Facsimile: (662) 236-9579
larry@larrylittlelaw.com

and

Mark Cohen, J.D., LL.M.
Pro Hac Vice
P. O. Box 974
Nederland, CO 80466
(303) 638-3410
mark@cohenslaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day forwarded a true and exact copy of this document, via U.S. Mail, postage prepaid, to:

Stephan L. McDavid
McDavid & Associates
1109 Van Buren Avenue
P. O. Box 1113
Oxford, MS 38655

This ___ day of August, 2015.

Lawrence L. Little