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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91207895
Party	Defendant Virginia Polytechnic Institute and State University
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

HOKIE OBJECTIVE ONOMASTICS SOCIETY LLC,)	
)	
Opposer,)	Opposition No. 91207895
)	
v.)	Serial No. 85-531,923
)	
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,)	
)	
Applicant.)	

**APPLICANT’S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

Applicant, Virginia Polytechnic Institute and State University (“Applicant” or “Virginia Tech”), through the undersigned, sets forth its Reply in Further Support of its Motion for Summary Judgment.

I. INTRODUCTION

Opposer Hokie Objective Onomastics Society LLC (“Opposer” or “HOOS”) argues that the word “attorneys” does not mean lawyers and that Applicant has failed to pierce HOOS’s corporate veil. Opposer’s papers offer no support for its argument that the Settlement Agreement extending to the parties’ “attorneys” does not reach the parties’ attorneys-at-law. Nor does HOOS’s opposition provide any factual or legal support for its argument that the Board should not pierce HOOS’s corporate veil and disregard the fiction of the limited liability company which clearly functions as a façade for James Creekmore.

There is no need for a trial in this case. James Creekmore, hiding behind HOOS, is explicitly bound by the Settlement Agreement, and HOOS’s opposition should be dismissed.

II. AS HOKIE REAL ESTATE, INC.'S ATTORNEY-AT-LAW, JAMES CREEKMORE IS BOUND BY THE MUTUAL RELEASE

A. "Attorneys" means attorneys-at-law.

Opposer's argument that James Creekmore is not bound by the Settlement Agreement relies on the historical definition of the word "attorney" which has long since faded from common usage. Courts have consistently held that the word "attorney," whether used in an agreement or for purposes of notice, is construed as meaning lawyer, counsel, or attorney-at-law.¹ See, e.g., Whitcraft v. Brown, 570 F.3d 268, 272 (5th Cir. Tex. 2009) (lawyer was subject to freeze order by virtue of "attorneys" being named therein); UniFund Fin. Corp. v. Donaghue, 288 Ga. App. 81, 84 (2007) (where settlement agreement expressly released defendants' "attorneys," attorney-at-law was released); Department of Transp. v. Iowa Dep't of Job Service, 341 N.W.2d 752, 754-755 (Iowa 1983) (for service of notice purposes, "attorney" means "attorney at law"). "[I]n the modern era, the word 'attorney' does not refer to a person who is not a lawyer, unless the term 'attorney-in-fact' is used to indicate explicitly the distinction between an attorney-in-fact and an attorney-at-law." State v. Milliman, 802 N.W.2d 776, 780 (Minn. Ct. App. 2011). As early as 1924, courts were no longer confused, as Opposer appears to be, by this distinction. See, e.g., Bronough v. Jones, 173 Okla. 386, 387 (Okla. 1935) ("attorney" for purposes of notice means "attorney at law"); In re Morse, 98 Vt. 85, 91 (Vt. 1924) ("The word 'attorney,' unless clearly indicated otherwise, is construed as meaning attorney at law").

¹ By way of analogy, the wording of the Settlement Agreement tracks the well-accepted language set forth in Federal Rule of Civil Procedure 65(d)(2). Pursuant to Rule 65(d)(2), an injunction or restraining order "binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and *attorneys*; (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." There can be no doubt that "attorneys," as it is used in Rule 65(d)(2), means attorneys-at-law, and that parties' lawyers clearly fall within the scope of an injunction or restraining order.

HOOS proposes that the word “attorney” in the release be interpreted to mean agent. If the Board were to accept this definition, it would render the word “attorney” meaningless, as the Settlement Agreement also lists “agents” as released parties along with “attorneys.” Richfood, Inc. v. Jennings, 255 Va. 588, 593 (1998) (“No word or clause will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words aimlessly.”). The Settlement Agreement, which was negotiated by James Creekmore as counsel to Hokie Real Estate, Inc., does not use either of these words aimlessly. Further, Opposer has not cited one case in which the word “attorney” is used to refer to, or to include, a person who is an attorney-in-fact.

B. As established in Applicant’s motion, a party need not be a signatory to be bound by a release.

Opposer’s reliance on Persinger & Co. v. Larrowe, 477 S.E.2d 506 (Va. 1996) for the proposition that, because neither Mr. Creekmore nor HOOS actually signed the Settlement Agreement, they are not bound by it, is misguided. That a party does not actually sign an agreement does not mean that it cannot be held bound by it. Commonwealth v. CCA Indus., 82 Va. Cir. 621, 630 (Va. Cir. Ct. 2009) (where agreement expressly bound ICREC’s “personal representatives, assigns, and other successors in interest,” successors in interest who were not signatories to the agreement were bound). See also Mobile Med. Diagnostics v. Shapiro, 2004 Cal. App. Unpub. LEXIS 1790 (plaintiff, alter-ego of signatory to earlier settlement agreement with defendant, was barred from asserting claims against defendant where observing plaintiff’s “corporate separateness” would unjustly allow it to avoid the effect of prior settlement); Fuls v. Shastina Properties, Inc., 448 F. Supp. 983, 989 (N.D. Ca. 1979) (terms of release agreement extended to alter-ego of party to the agreement). As Hokie Real Estate, Inc.’s counsel during the settlement process, James Creekmore was and is well aware of the contents of the Settlement

Agreement and has the responsibility to know that the mutual release contained within binds him.

C. Opposer's other grab-bag arguments are all meritless.

Opposer makes several other baseless arguments in support of its contention that James Creekmore is not bound by the Settlement Agreement. Not a single case cited by HOOS actually supports its arguments or contains facts remotely similar to those present here. Opposer's selective quotations from these cases are invariably specious.

First, Virginia Tech has not alleged that James Creekmore authorized Hokie Real Estate, Inc. or John Wilburn to act as his agents. James Creekmore is bound by the Settlement Agreement not because Hokie Real Estate, Inc. or John Wilburn were acting as his agents, but because the Settlement Agreement (which James Creekmore negotiated) explicitly includes "attorneys" as released parties.

HOOS's argument that interpreting "attorneys" to mean attorneys-at-law would render the Settlement Agreement void is also unsupported. The case Opposer cites for the proposition that the Settlement Agreement would be illegal as restricting James Creekmore's right to practice law, Blick v. Marks, Stokes and Harrison, 360 S.E.2d 345, 348 (Va. 1987), does not stand for this proposition at all. Rather, the Court in Blick held that, where a lawyer violated a statutory provision prohibiting substitute judges of courts from later appearing as counsel in cases arising out of the same circumstances as cases brought before them, such violation did not prejudice the litigants, and therefore the service contract between the law firm and clients was not void. Further, James Creekmore is not practicing law here; he is acting as HOOS's alter-ego, not its lawyer. Carnegie Trust Co. v. Security Life Ins. Co., 68 S.E. 412, 416 (Va. 1910), also cited by Opposer, is similarly of no help to Opposer. There the Court held that the agreement at issue

was enforceable. Opposer's attempts to escape the plain language of the Settlement Agreement binding James Creekmore are entirely meritless.

III. BY PIERCING OF ITS CORPORATE VEIL, OPPOSER HOOS IS ALSO BOUND BY THE MUTUAL RELEASE

Virginia Tech has clearly met the requisite burden for piercing HOOS's corporate veil. In deciding whether to disregard the corporate entity and pierce the corporate veil, Virginia courts consider whether shareholders "controlled or used the corporation to evade a personal obligation, to perpetrate fraud or a crime, to commit an injustice, or to gain an unfair advantage. Piercing the corporate veil is also justified when the unity of interest and ownership is such that the separate personalities of the individuals no longer exist and to adhere to that separateness would work an injustice." Mid Atl. Eng'g Tech. Servs. v. Miller Hardman Designs, LLC, 2013 Va. Cir. LEXIS 74, at *3-*4 (Va. Cir. Ct. Mar. 25, 2013) (internal citations omitted). See also C.F. Trust, Inc. v. First Flight Ltd. P'ship, 266 Va. 3, 10 (Va. 2003).

Virginia Tech has established as a matter of law that James Creekmore has used HOOS to evade his personal obligations under the Settlement Agreement and that HOOS is nothing more than a sham entity behind which James Creekmore aims to do indirectly what he cannot do directly. It is clear in this case that "the unity of interest and ownership is such that the separate personalities of [HOOS] and [James Creekmore] no longer exist, and to adhere to that separateness would work an injustice." Brooks v. Becker, 67 Va. Cir. 24, 27 (2005) (holding sole officer, director and shareholder liable for corporation's debt where he knowingly violated his duties as an officer, director and shareholder and treated the corporation's funds as his "personal piggy bank"); 313 Freemason v. Freemason Assocs., 61 Va. Cir. 690, 696 (2002) (piercing corporate veil where corporation "was the adjunct, creature, instrumentality, device, stooge, or dummy of [shareholders]"), affirmed by Dana v. 313 Freemason, 266 Va. 491 (2003).

HOOS's Responses to Applicant's First Set of Interrogatories make it clear that James Creekmore is hiding behind HOOS in an attempt to wiggle his way out of the Settlement Agreement that binds him. First, in looking at the sufficiency of HOOS's capitalization, the "most important" factor in determining whether to pierce the corporate veil, 313 Freemason, 61 Va. Cir. 690 at 693, the entire capitalization for HOOS was merely \$300.00, \$200.00 of which was contributed by James Creekmore himself. Opposer's Responses to Applicant's First Set of Interrogatories, Ans. No. 2. He is the sole member and manager of HOOS and has been "the sole person involved in conducting Opposer's operations since its inception. He conducts all aspects of its operations." Id., Ans. Nos. 1(a), 4, 7. James Creekmore and HOOS share the same place of business (id., As. No. 1(b)), and HOOS's government filing fees have been personally paid by James Creekmore (id., Ans. No. 5).

Further, it is clear that Opposer is exactly the type of façade that 313 Freemason proscribes. The timeline of events surrounding HOOS's formation and opposition to Virginia Tech's application to register its HOKIE Mark makes it particularly obvious that HOOS is nothing more than a sham entity. On February 2, 2012 Virginia Tech filed its application to register its HOKIE Mark, which was published for opposition on July 10, 2012. Less than one month later, HOOS was founded. On November 7, 2012, four months before HOOS even held its first "educational" event on March 5, 2013, HOOS filed a Notice of Opposition to Virginia Tech's application. Id., Ans. No. 11. Although HOOS has continued to hold infrequent events, it has done so only to maintain this façade. James Creekmore unmistakably created HOOS for the sole purpose of obstructing Applicant's trademarks behind the shield of a limited liability company.

Virginia courts continually hold such misuse of the corporate form to evade personal obligations or commit injustices as grounds for piercing the corporate veil. See Mid. Atl. Eng'g Tech. Servs., 2013 Va. Cir. LEXIS at *4-*7; Brooks, 67 Va. at 27; 313 Freemason, 61 Va. Cir. 690 at 696.

Furthermore, HOOS's Opposition offers no support for its argument that the corporate veil should not be pierced here. In fact, not one of the three decisions cited by HOOS refused to pierce the corporate veil at issue. In C.F. Trust, Inc., 580 S.E.2d at 810, the Court recognized a claim for "outsider reverse piercing," holding that reverse veil piercing can be applied to a Virginia limited partnership the same way it is applied to Virginia corporations, notwithstanding that the Court recognized that piercing the corporate veil is an "extraordinary measure." In 313 Freemason, 61 Va. Cir. at 695-96, the Court pierced the corporate veil and held the shareholder defendants personally liable for the jury verdict and attorney's fees where the corporation was merely a "façade" for the operations of the dominant stockholders. In Mid. Atl. Eng'g Tech. Servs., 2013 Va. Cir. LEXIS at *4-*5 (also cited by Virginia Tech in its motion), the Court pierced the corporate veil and set aside the fiction of the limited liability company, despite the fact that, as Opposer points out, "limited liability companies are designed to operate without the same formalities as corporations."

IV. CONCLUSION

The Board has the opportunity to put an end to this legal charade. It would be a waste of judicial resources to permit HOOS's opposition to go forward where HOOS is so clearly a sham entity that was created – and still exists today – for the sole purpose of obstructing Virginia Tech's trademark rights. The record indisputably establishes that HOOS is contractually estopped from challenging Virginia Tech's application to register its HOKIE Mark as a matter of

law, and HOOS's opposition to Virginia Tech's application to register its HOKIE Mark should be dismissed.

Dated: December 11, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing APPLICANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, was sent by regular mail today, December 11, 2013, to Opposer's counsel: Keith Finch, The Creekmore Law Firm PC, 318 North Main Street, Blacksburg, VA 24060, with a courtesy copy by e-mail to the address <keith@creekmorelaw.com>.

Dated: December 11, 2013

s/William S. Walker, Jr./

WILLIAM S. WALKER, JR.