ESTTA Tracking number: **ESTTA802079**

Filing date: **02/17/2017**

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

Proceeding	92065051
Party	Plaintiff Master Inspector Certification Board, Inc.
Correspondence Address	JAMES A SHERIDAN SHERIDAN LAW LLC 1600 JACKSON ST STE 350 GOLDEN, CO 80401 UNITED STATES email@sheridanlaw.com
Submission	Motion to Strike
Filer's Name	James A. Sheridan
Filer's e-mail	jsheridan@sheridanlaw.com, email@sheridanlaw.com
Signature	/James A. Sheridan, 43114/
Date	02/17/2017
Attachments	MotionToStrike.pdf(372267 bytes)

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MASTER INSPECTOR CERTIFICATION BOARD, INC.	)	**Certification Mark: CERTIFIED INSPECTION EXPERT**
Petitioner	)	
v.	)	**Cancellation No. 92065051**
PHILLIP NATHAN THORNBERRY	)	
Registrant	)	

MOTION TO STRIKE

Pursuant to F.R.C.P. 12(f) and sections 506.01 and 506.02 of the TTAB Manual of Procedure, Petitioner moves to strike paragraphs 26, 27, 28, 34, 35, 36, 37, and 38 from Registrant's Answer. (This Motion refers to those as "the allegations"). The basis for this Motion is set forth below.

I. INTRODUCTION

Rule 12(f) provides:

> The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

The function of a Rule 12(f) motion to strike is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524 (9th Cir. 1993) (Trial court properly struck allegations from a

counterclaim barred by the statute of limitations or res judicata). Such motions provide an added statutory protection from the burdens of litigation that is unavailable during the ultimate merits inquiry. *Makaeff v. Trump University, LLC,* 736 F. 3d 1180 (9th Cir. 2013). See, e.g., *F.D.I.C. v. Niblo*, 821 F.Supp. 441 at footnote 5 (N.D. Tex. 1993) (A court may strike immaterial matter to narrow the relevant issues for trial to those which have support in law); *Healing v. Jones,* 174 F.Supp. 211, 220 (D. Ariz. 1959) (Superfluous historical allegations are a proper subject of a motion to strike).

In this action, Registrant's Answer contains numerous assertions Registrant apparently believes that, if true, would constitute grounds to pierce Petitioner's corporate veil and treat it as the alter ego of the International Association of Certified Home Inspectors (InterNACHI). Registrant apparently included these allegations to show Petitioner knew of Registrant's application and the subsequent registration of Registrant's mark.

Petitioner admits it knew Registrant had applied for a trademark on Certified Inspection Expert at or shortly after the time Registrant submitted its application on July 7, 2014. Petitioner further admits it had constructive notice when the mark was published for opposition. Petitioner also admits knowing that the USPTO registered the mark on August 25, 2015. Therefore, Registrant's allegations attempt to prove assertions Petitioner does not contest.

Registrant's allegations are immaterial, impertinent, and scandalous. The TTAB should therefore strike those allegations, as explained more fully below.

BACKGROUND

Petitioner is a nonprofit corporation with tax-exempt status under Section 501(c)(6) of the Internal Revenue Code. Petitioner's sole function is to administer the Certified Master Inspector

mark and award it to qualifying home inspectors. InterNACHI is also a nonprofit corporation with tax-exempt status under Section 501(c)(6) of the Internal Revenue Code. Unlike Petitioner, InterNACHI is a trade association. InterNACHI represents more than 17,000 home inspectors.

Nick Gromicko founded InterNACHI and now serves as its Chief Operating Officer (not CEO). He later established Petitioner to create a professional designation for home inspectors that would have the highest standards in the industry. He felt this would greatly benefit consumers. Mr. Gromicko now runs Petitioner's day to day operations, while also serving as InterNACHI's C.O.O. and one member of its four-person Board of Directors. Any home inspector may apply to Petitioner for designation as a Certified Master Inspector – even if the applicant is not an InterNACHI member.

Nikolai Gromicko, referred to in paragraph 27 of Registrant's Answer is Nick Gromicko's son. Nikolai is not the founder, chairman, COO, or Executive Director of InterNACHI, contrary to Registrant's suggestion.

II. ARGUMENT

A. The Allegations Are Immaterial.

An allegation is "immaterial" if it is "irrelevant." See, e.g., comment to Rule 401 of the Mississippi Rules of Evidence, which states:

> Rule 401 makes no distinction between relevancy and materiality. The concept of materiality is merged into the concept of relevancy and retains no independent viability.

See also, *Whittlestone, Inc. v. Handi–Craft Co.,* 618 F.3d 970, 974 (9th Cir. 2010) ("Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being plead." In commenting on what is immaterial under F.R.C.P. 12(f), respected

legal scholars have opined that "immaterial" matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 706–07 (1990).

F.R.E. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides, "evidence which is not relevant is not admissible."

Because Petitioner admits it knew Registrant had applied for a trademark on Certified Inspection Expert at or shortly after the time Registrant submitted its application on July 7, 2014, and further admits it had constructive notice when the mark was published for opposition and when the USPTO registered the mark on August 25, 2015, the allegations are immaterial and irrelevant.

B. The Allegations Are Impertinent.

"Impertinent" matter consists of statements that do not pertain, and are not necessary, to the issues in question." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 711 (1990).

Because Petitioner admits it knew Registrant had applied for a trademark on Certified Inspection Expert at or shortly after the time Registrant submitted its application on July 7, 2014, and further admits it had constructive notice that the USPTO registered the mark on August 25, 2015, the allegations are impertinent.

C. The Allegations are Scandalous.

A "scandalous" allegation is one that reflects unnecessarily on a person's moral character, or uses repulsive language that detracts from the dignity of the court." *Cabble v. Rollieson,* 2006 WL 464078, at *11 (S.D.N.Y. Feb. 27, 2006).

Registrant apparently intends the allegations to show that Petitioner and InterNACHI are alter egos of each other. As explained above, the issue is moot because Petitioner does not deny being on notice of Registrant's application and the subsequent registration. However, the allegations falsely suggest that Petitioner has engaged in some type of fraud or wrong that would justify piercing its corporate veil and treating it as InterNACHI's alter ego.

Piercing the corporate veil is an equitable remedy. While the test may vary slightly from state to state and circuit to circuit, the general principles are the same. The modern-day test was summarized more than one hundred years ago, in *U.S. v. Milwaukee Refrigerator Transit Co.,* 142 F. 247 (C.C.E.D. Wisc. 1905). In that famous decision, the Court wrote:

> If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

This is still good law. The decision was cited as recently as 2011. See, *Wells Fargo Bank, N.A. v. Konover*, Not Reported in F.Supp.2d, 2011 WL 1225986 (D.Conn. 2011).

In paragraph 26 of his Answer, Registrant alleges Petitioner and InterNACHI share the same address, same counsel, and have at least one common director. No law prevents this, nor is any of this a recognized basis to pierce the corporate veil.

In paragraph 27 of his Answer, Registrant confuses Nick Gromicko and Nikolai Gromicko, but apparently intended to allege that Nick Gromicko plays a role in both Petitioner and InterNACHI. Again, no law prevents this, nor is this a recognized basis to pierce the corporate veil.

In paragraph 28 of his Answer, Registrant alleges Petitioner and InterNACHI share common office space and repeats some of the allegations in paragraph 26. None of these things is a recognized basis to pierce the corporate veil.

In paragraphs 34 through 38 of his Answer, Registrant again repeats many of the allegations in paragraphs 26 through 28, but also adds new allegations concerning an alleged business deal between Registrant and InterNACHI. Again, none of these things is relevant to the veil piercing inquiry.

When a court considers disregarding a corporate entity, *i.e.,* 'piercing the corporate veil,' the court applies the law of the state of incorporation. *In re Cambridge Biotech Corp.,* 186 F.3d 1356, 1376 n. 11 (Fed. Cir. 1999). Petitioner and InterNACHI are both Colorado nonprofit corporations.

In Colorado, courts consider a variety of factors to determine whether the corporate form should be disregarded including:

> (1) whether the corporation is operated as a separate entity, (2) commingling of funds and other assets, (3) failure to maintain adequate corporate records, (4) the nature of the corporation's ownership and control, (5) absence of corporate assets and undercapitalization, (6) use of the corporation as a mere shell, (7) disregard of legal formalities, and (8) diversion of the corporation's funds or assets to noncorporate uses.

Leonard v. McMorris, 63 P.3d 323 (Colo. 2003). Colorado has never held that merely because two entities share an address, share office space, or share the same lawyer, they lose their

separate identities. Nor has any Colorado case ever held that one person performing services for more than one entity justifies piercing the corporate veil.

Registrant's allegations are scandalous, and the TTAB should strike them.

III. CONCLUSION

The TTAB should strike the allegations because they are immaterial and impertinent. They attempt to prove something Petitioner does not dispute. Registrant's allegations are also scandalous.

The TTAB should not compel Petitioner and non-party InterNACHI to participate in lengthy and expensive veil piercing litigation when such is not necessary to resolve the issues raised by the pleadings.

WHEREFORE, Petitioner asks the TTAB to strike paragraphs 26, 27, 28, 34, 35, 36, 37, and 38 from Registrant's Answer, and for such other relief as the Board deems just.

Dated: February 17, 2017

Respectfully submitted,

/James A. Sheridan 43114/
James A. Sheridan
Libby Huskey
Sheridan Law LLC
1600 Jackson Street, Ste. 350
Golden, CO 80401
Telephone: 303-953-9083
Facsimile: 720-548-9810
Attorneys for Petitioner
Master Inspector Certification Board, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2017, I served a true and correct copy of the foregoing PETITION FOR CANCELLATION by U.S. mail, postage prepaid, and addressed to the following:

Alix L. Vollmer, Esq.
RWS Inspector Services Group, LLC
698 Pro-Med Lane
Carmel, Indiana 46032

/James A. Sheridan 43114/
James A. Sheridan
Sheridan Law LLC