

1996

# Macris & Associates Inc v. Images & Attitude Inc : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Dennis K. Poole; Andrea Nuffer; Dennis K. Poole & Associates; Attorneys for Appellant.  
Stephen T. Hard; Roger D. Sandack; Steven E. McCowin; Giauque, Crockett, Bendinger & Peterson;  
Attorneys for Plaintiff

---

## Recommended Citation

Reply Brief, *Macris & Associates Inc v. Images & Attitude Inc*, No. 960218 (Utah Court of Appeals, 1996).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/155](https://digitalcommons.law.byu.edu/byu_ca2/155)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
IN THE UTAH COURT OF APPEALS  
KFJ

MACRIS & ASSOCIATES, INC.,  
Plaintiff and Appellee,

-vs-

IMAGES & ATTITUDE, INC., a Utah  
corporation, and THOMAS MOWER, an  
individual,

Defendants and Appellant.

IMAGES & ATTITUDE, INC.,  
Third-Party Plaintiff and  
Appellant,

-vs-

MIKE MACRIS,  
Third-Party Defendant and  
Appellee.

50

.A10

DOCKET NO. 960218-CA

COURT OF APPEALS  
NO. 960218-CA

TRIAL COURT NO. 910400358

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL COURT  
FOR UTAH COUNTY, STATE OF UTAH  
THE HONORABLE JUDGE GUY R. BURNINGHAM, DISTRICT COURT JUDGE

PRIORITY CLASSIFICATION NO. 15

DENNIS K. POOLE (2625)  
ANDREA NUFFER GODFREY (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant and  
Appellant  
4543 South 700 East, Suite 206  
Salt Lake City, Utah 84101

STEPHEN T. HARD (1359)  
ROGER D. SANDACK (2856)  
STEVEN E. McCOWIN (4621)  
GIAUQUE, CROCKETT, BENDINGER & PETERSON  
Attorneys for Plaintiff and Appellee  
First Interstate Plaza  
170 South Main Street, Suite 400  
Salt Lake City, Utah 84101

DEC 27 1996

COURT OF APPEALS

---

IN THE UTAH COURT OF APPEALS

---

MACRIS & ASSOCIATES, INC., :  
Plaintiff and Appellee, :  
-vs- : COURT OF APPEALS  
NO. 960218-CA  
:  
IMAGES & ATTITUDE, INC., a Utah :  
corporation, and THOMAS MOWER, an :  
individual, :  
Defendants and Appellant. :  
:  
IMAGES & ATTITUDE, INC., :  
Third-Party Plaintiff and :  
Appellant, :  
-vs- :  
MIKE MACRIS, : TRIAL COURT NO. 910400358  
Third-Party Defendant and :  
Appellee. :

---

REPLY BRIEF OF APPELLANT

---

APPEAL FROM THE FOURTH JUDICIAL COURT  
FOR UTAH COUNTY, STATE OF UTAH  
THE HONORABLE JUDGE GUY R. BURNINGHAM, DISTRICT COURT JUDGE

---

PRIORITY CLASSIFICATION NO. 15

---

STEPHEN T. HARD (1359)  
ROGER D. SANDACK (2856)  
STEVEN E. McCOWIN (4621)  
GIAUQUE, CROCKETT, BENDINGER & PETERSON  
Attorneys for Plaintiff and Appellee  
First Interstate Plaza  
170 South Main Street, Suite 400  
Salt Lake City, Utah 84101

DENNIS K. POOLE (2625)  
ANDREA NUFFER GODFREY (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant and  
Appellant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii
ARGUMENT . . . . .	1
I.    THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL . . . . .	1
A. <u>Macris &amp; Associates Utterly Failed In Meeting               Its Burden Of Establishing The Applicability               Of The Doctrine Of Collateral Estoppel Below</u> .	2
B. <u>The Doctrine of Collateral Estoppel Clearly               Did Not Apply to Images' Claim for Fraudulent               Inducement Against Macris &amp; Associates</u> . . . .	4
C. <u>The Trial Court Committed Plain Error in               Dismissing Images' Claim for Fraudulent In-               ducement</u> . . . . .	7
II.   THE TRIAL COURT ERRED IN DETERMINING THAT MICHAEL MACRIS WAS NOT THE AGENT OF MACRIS & ASSOCIATES AND THAT MACRIS & ASSOCIATES WAS NOT THE ALTER EGO OF MICHAEL MACRIS . . . . .	9
A. <u>Images Has Sufficiently Marshalled The Evi-               dence In Support Of The Trial Court's Findings               Of Fact</u> . . . . .	9
B. <u>Michael Macris And Macris &amp; Associates Engaged               In Disruptive And Competitive Activities</u> . . .	12
CONCLUSION . . . . .	15
CERTIFICATE OF SERVICE . . . . .	16

## TABLE OF AUTHORITIES

### **CASES**

<u>Akron Presform Mold Co. v. McNeil Corp.</u> , 496 F.2d 230, 235 (6th Cir. 1974) . . . . .	6
<u>Aragon v. Clover Club Foods Co.</u> , 857 P.2d 250, 254 n.6 (Utah App. 1993) . . . . .	5
<u>Berenda v. Langford</u> , 914 P.2d 45, 51, (Utah 1996) . . . . .	8
<u>Berry v. Berry</u> , 738 P.2d 246, 247 (Utah App. 1987) . . . . .	1
<u>Davis v. Grand County Service Area</u> , 905 P.2d 888, 892 (Utah App. 1995) . . . . .	8
<u>Envirotech Corp. v. Callahan</u> , 872 P.2d 487, 499 (Utah App. 1994) . . . . .	15
<u>Estate of Covington v. Josephson</u> , 888 P.2d 675, 677 (Utah App. 1994) . . . . .	5
<u>Horrocks v. Westfalia</u> , 892 P.2d 14 (Utah App. 1995) . . . . .	14
<u>In re Transocean Tender Offer Securities Litigation</u> , 427 F. Supp. 1211 (N.D. Ill. 1977) . . . . .	6
<u>Jones v. United States</u> , 466 F.2d 131, 136 (10th Cir. 1972) . . . . .	6
<u>Madsen v. Borthick</u> , 769 P.2d 245, 247 (Utah 1988) . . . . .	1, 5
<u>Mel Trimble Real Estate v. Monte Vista Ranch, Inc.</u> , 758 P.2d 451, 453 (Utah App. 1988) . . . . .	1
<u>Noble v. Noble</u> , 761 P.2d 1369, 1374 n. 5 (Utah 1988) . . . . .	1
<u>Ringwood v. Foreign Auto Works, Inc.</u> , 786 P.2d 1350, 1356 (Utah App. 1990) . . . . .	1
<u>State v. Higginbotham</u> , 917 P.2d 545, 548 (Utah 1996) . . . . .	11
<u>State v. Irwin</u> , 298 Utah Adv. Rep. 17, 18 (Utah App. Sept. 6, 1996) . . . . .	8
<u>State v. Labrum</u> , 925 P.2d 937, (Utah 1996) . . . . .	8
<u>State v. Moosman</u> , 794 P.2d 474, 475-76 (Utah 1990) . . . . .	11
<u>State v. Moreno</u> , 910 P.2d 1245, 1247 (Utah App. 1996) . . . . .	8

<u>Temple of the Lost Sheep, Inc. v. Abrams</u> , 930 F.2d 178, 184-85 (2d Cir. 1991)	6
<u>Timm v. Dewsnap</u> , 851 P.2d 1178, 1184 (Utah 1993)	2
<u>Vicksburg &amp; M. R. Co. v. O'Brien</u> , 119 U.S. 99, 104, 7 S.Ct. 118, 121 (1886)	14
<u>Yamaha Corp. of America v. U.S.</u> , 961 F.2d 245 (D.C. Cir. 1992)	6

## STATUTES

## OTHER AUTHORITIES

Restatement (Second) of Judgments § 27 comment c, illustration 4 (1982)	6
---	---

## ARGUMENT

Pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure, Appellant and Defendant Images & Attitude, Inc. ("Images") respectfully submits this Reply Brief of Appellant to address new matters set forth in Macris & Associates, Inc.'s ("Macris & Associates") Brief of Appellee. Macris & Associates advances many arguments in defense of Images' appeal; however, Images asserts that the two issues addressed herein are dispositive of Images' appeal.

### I. THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL.

This Court will recall that in Images' Brief of Appellant, Images asserted that the trial court erred in dismissing Images' claim for fraudulent inducement on the basis of collateral estoppel, a branch of the doctrine of res judicata.<sup>1</sup> Images asserts that the trial court's application of collateral estoppel constitutes plain error since Macris & Associates, Inc. ("Macris & Associates") failed to meet its burden of proving by a preponderance of the evidence that the issues in the prior arbitration were identical and that the prior arbitration fully and fairly litigated the issue of fraudulent inducement between Images and Macris & Associates. The trial court's error also constituted plain error

---

<sup>1</sup>Collateral estoppel is a branch of the doctrine of res judicata. Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1356 (Utah App. 1990); Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988); Noble v. Noble, 761 P.2d 1369, 1374 n. 5 (Utah 1988); Mel Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 453 (Utah App. 1988); Berry v. Berry, 738 P.2d 246, 247 (Utah App. 1987); Cf. Brief of Appellee at 1, n.2.

for the reasons that the issues in the prior arbitration were not identical to the issues presented in the instant action and Images did not have any opportunity to fully and fairly litigate the question of whether Images was fraudulently induced into the contract with Macris & Associates in the arbitration action between Images and Affinity.

A. Macris & Associates Utterly Failed In Meeting Its Burden Of Establishing The Applicability Of The Doctrine Of Collateral Estoppel Below.

The party raising the defense of collateral estoppel has the burden of proving the applicability of the doctrine. Timm v. Dewsnup, 851 P.2d 1178, 1184 (Utah 1993). In requesting summary judgment on the basis of collateral estoppel, Macris & Associates utterly failed in its burden of establishing that the issues in the two actions were identical and had been fairly and fully litigated.

Macris & Associates merely presented a Supplemental Memorandum in Support of Macris & Associates, Inc.'s and Mike Macris' Motion for Summary Judgment Re: Fraudulent Inducement to the trial court wherein Macris & Associates alleged that the issues were identical and had been fully and fairly litigated (R. 1181-91). However, Macris & Associates presented absolutely no evidence to support its bare allegations. Macris & Associates presented no affidavits in support of the supplemental memorandum, offered no transcriptions of the arbitration hearing, and attached no part of



the record in the arbitration proceedings. Macris & Associates did not even submit the Arbiter's Order!<sup>2</sup>

In contrast, Images presented evidence in the form of affidavit testimony demonstrating that at a minimum questions of material fact existed with respect to Images' claim against Macris & Associates. The Affidavit of Tom Mower, dated September 9, 1993 (R. 1043-48) set forth material facts which supported Images' claim that Images was fraudulently induced by Macris & Associates into entering into the contract with Macris & Associates including the fact that Macris & Associates made certain representations to Images and that Images reasonably relied upon those representations in entering into the contract with Macris & Associates. (See also Images' Memorandum In Opposition to Macris & Associates, Inc.'s Motion for Summary Judgment Re: Fraudulent Inducement, R. 987-1017). Clearly, where Macris & Associates failed to present any evidence of the applicability of the doctrine of collateral estoppel and where Images presented evidence demonstrating material issues of fact concerning Images' claim for fraudulent inducement, it was error for the trial court to dismiss Images' claim for fraudulent inducement on the basis of collateral estoppel.

---

<sup>2</sup>Rather, it was Images who presented the trial court with the Order as an exhibit to Images' memorandum in opposition to Macris & Associates's supplemental memorandum. The Order did not contain findings of fact which was crucial to an order of Summary Judgment.

B. The Doctrine of Collateral Estoppel Clearly Did Not Apply to Images' Claim for Fraudulent Inducement Against Macris & Associates.

Macris & Associates, Inc.'s argument concerning collateral estoppel completely ignores one fundamental distinction which entirely affects the analysis employed by the trial court and by Macris & Associates on appeal. The distinction is that in the arbitration proceeding, the parties to that arbitration proceeding were Images and Affinity, not Macris & Associates. Accordingly, the contract between Images and Macris & Associates could not have been fully and fairly litigated. This one obvious fact alone renders irrelevant Macris & Associates' entire argument contained in the Brief of Appellee.

The following illustration, though unsophisticated, amply demonstrates the fallaciousness of Macris & Associates' argument:

Suppose A is hit in the back of the head with a hard object. When A regains consciousness, he sees B and C standing above him, each with a slingshot in one hand and a pile of rocks in the other. A sustains severe injuries as a result of the incident. A brings a civil action against B for battery to recover damages resulting from being hit in the head with a rock. Upon a motion for summary judgment, the trial court specifically finds that "A was not injured by being hit in the head by a rock thrown by B." A then brings a civil action against C to recover damages resulting from being hit in the head with a rock by C.

If the trial court in the action against C in the above illustration employed Macris & Associates' analysis as contained in Section I.B.4. of the Brief of Appellee, the trial court could find that the doctrine of collateral estoppel barred A's action against C because the trial court in the earlier action made a finding that

A had not been hit in the head! Clearly, the application of the doctrine of collateral estoppel would be improper in this instance.

Likewise, collateral estoppel was improperly applied in the instant case. The earlier arbitration involved Images' claims against Affinity for allegedly fraudulent misrepresentations made by Affinity which induced Images into entering into a contract with Affinity. Macris & Associates was not a party to the arbitration proceedings. Accordingly, Images' contract with Macris & Associates was not at issue in the earlier arbitration proceeding. The doctrine of res judicata, of which collateral estoppel is a branch, is designed to preclude issues which either were litigated in a prior action, or could have or should have been litigated in a prior action. Estate of Covington v. Josephson, 888 P.2d 675, 677 (Utah App. 1994); Aragon v. Clover Club Foods Co., 857 P.2d 250, 254 n.6 (Utah App. 1993); Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988). Here, Images claims against Macris & Associates were not litigated in the arbitration, nor could they or should they have been litigated in the arbitration proceeding. Accordingly, the application of the doctrine of collateral estoppel to bar Images' claim for fraudulent misrepresentation against Macris & Associates was improper.

Macris & Associates' analysis of the difference between "ultimate issues" and "evidentiary facts", though impressive, has absolutely no bearing to the issue of whether the trial court improperly applied the doctrine of collateral estoppel. In the sources cited by Macris & Associates to support its position, in-

cluding the Restatement illustration, the courts dealt with either the same parties in the prior and later actions or the same ultimate issues (Brief of Appellee at 25-29). Restatement (Second) of Judgments § 27 comment c, illustration 4 (1982) (dealt with A and B in both actions); In re Transocean Tender Offer Securities Litigation, 427 F. Supp. 1211 (N.D. Ill. 1977) (shareholders sued same companies in both actions); Yamaha Corp. of America v. U.S., 961 F.2d 245 (D.C. Cir. 1992) (Yamaha-America's rights under section 526 of the Tariff Act were litigated in prior and later actions); Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 235 (6th Cir. 1974) ("the unlawful aspects of the license agreement between Sun and Presform" were at issue in both actions.); Temple of the Lost Sheep, Inc. v. Abrams, 930 F.2d 178, 184-85 (2d Cir. 1991) (identical Section 1983 claims were litigated in both actions); and Jones v. United States, 466 F.2d 131, 136 (10th Cir. 1972) (tax treatment for payments received pursuant to the same contract at issue in both cases).

Conversely, the present action included Images' claims against Macris & Associates relative to the contract between Images and Macris & Associates, whereas the prior arbitration dealt with Images' claims against Affinity relative to a completely different contract between Images and Affinity. While the two cases may have had "evidentiary facts" in common, i.e. certain statements made by

Michael Macris, an agent of Affinity and Macris & Associates,<sup>3</sup> the "ultimate issues" were different. One simply cannot separate the cause of action for fraudulent inducement from its elements. The fact that different contracts and different companies were involved are more than mere evidentiary facts but rather affect the ultimate issue. Simply because the arbiter found that Images had not been fraudulently induced into the contract with Affinity has no bearing upon whether Images was fraudulently induced into the contract with Macris & Associates. To hold otherwise would be akin to holding that since A was not hit in the head by a rock thrown by B, then A was not hit in the head by a rock thrown by C. (See illustration supra.)

C. The Trial Court Committed Plain Error in Dismissing Images' Claim for Fraudulent Inducement.

The trial court's error in dismissing Images' claim against Macris & Associates for fraudulent inducement rises to the magnitude of plain error. This Court has defined plain error as follows:

The first requirement for a finding of plain error is that the error be "plain," i.e., from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error. . . . The second and somewhat interrelated requirement for a finding of plain error is that the error

---

<sup>3</sup>As set forth earlier, Macris & Associates completely failed to cite to portions of the record below to demonstrate that Macris & Associates ever established which factual issues were found in the prior arbitration and which factual issues were binding upon Images. Moreover, misrepresentations concerning such factual issues as the advertising may not have been material to Images's contract with Affinity, but would, however, be very material to Images's contract with Macris & Associates.

affect the substantial rights of [a party], i.e., that the error be harmful.

Davis v. Grand County Service Area, 905 P.2d 888, 892 (Utah App. 1995). Images asserts that it should have been obvious to the trial court that it was committing error when it misapplied the doctrine of collateral estoppel. This is particularly true where Images' claims in each action were against different companies as a result of separate contracts.

Clearly, the second requirement for finding plain error is likewise met in this case. The substantial rights of Images were obviously effected by the denial of its claim for fraudulent inducement. Had Images been allowed to present evidence of its fraudulent inducement claim, the trial court could have invalidated the entire contract resulting in no liability on the part of Images. Instead, the trial court erroneously applied the doctrine of collateral estoppel and dismissed Images' meritorious cause of action.

Since the trial court committed plain error in applying the doctrine of collateral estoppel, it is immaterial whether Images asserted, for the first time on appeal, that the claims in the two actions were not identical. Utah appellate courts consider plain error even where raised for the first time on appeal. State v. Irwin, 298 Utah Adv. Rep. 17, 18 (Utah App. Sept. 6, 1996); State v. Labrum, 925 P.2d 937, (Utah 1996); Berenda v. Langford, 914 P.2d 45, 51, (Utah 1996); State v. Moreno, 910 P.2d 1245, 1247 (Utah App. 1996); Davis, 905 P.2d at 892 (Utah App. 1995). Conse-

quently, it is proper for this Court to review all aspects of the trial court's application of the doctrine of collateral estoppel for plain error despite Macris & Associates' protestations to the contrary.

II. THE TRIAL COURT ERRED IN DETERMINING THAT MICHAEL MACRIS WAS NOT THE AGENT OF MACRIS & ASSOCIATES AND THAT MACRIS & ASSOCIATES WAS NOT THE ALTER EGO OF MICHAEL MACRIS.

A. Images Has Sufficiently Marshalled The Evidence In Support Of The Trial Court's Findings Of Fact.

Macris & Associates begins its attack on Images' alter ego claim by asserting that Images failed to sufficiently marshal the evidence in support of the trial court's findings that the actions of Michael Macris were not attributable to Macris & Associates and that Macris & Associates was not the alter ego of Michael Macris. To support its insufficient marshalling argument, Macris & Associates purports to offer a summary of evidence supporting the trial court's findings. (Brief of Appellee at 34-36). Macris & Associates' summary is, at best, disingenuous.

For instance, Macris & Associates stated in the Brief of Appellee:

10. Others testified that they knew Mike Macris operated his distributorship through Macris & Associates, Inc., and separated his other companies and their duties. (See, e.g., Marge Aliparandi [sic] testimony, R. 4745.)

(Brief of Appellee at 37). This statement is a deliberate misrepresentation of the record below. At trial, Margie Aliprandi was asked by counsel for Macris & Associates: "Do you know whether

Macris & Associates was a distributorship with any multi-level marketing company?" (R. 4745). In answer to this question, Margie Aliprandi responded: "He was my sponsor." This answer actually indicates that the distinction between Michael Macris and Macris & Associates was blurred for at least Margie Aliprandi. Moreover, as set forth in Images' Brief of Appellant, every witness, other than the Macrises themselves, testified that they did not understand the relationship between Michael Macris and his various companies. (See Brief of Appellant at 27-29).

The other so-called examples of insufficient marshalling cited by Macris & Associates are simply immaterial and do not necessarily support the trial court's findings of fact. Images does not dispute that Michael Macris held himself out as the President of Macris & Associates or that Macris & Associates was a corporation. (See Brief of Appellee at 36-37, ¶'s 2, 3, 7). Nor does Images dispute that Macris & Associates kept some corporate records. (See Brief of Appellee at 36-37, ¶'s 8-9). However, these factors do not necessarily support a finding that Macris & Associates was a separate and distinct entity. Any charlatan wishing to avoid liability for wrongdoing by hiding behind the facade of a corporation would take at least these steps to create the appearance of a separate and distinct corporation. While this evidence may support the trial court's findings of fact, they are insignificant in comparison to the overwhelming evidence suggesting that Michael Macris was acting as the agent for Macris & Associates when he engaged in competitive activities and that Macris & Associates



was the alter ego of Michael Macris. The evidence propounded by Macris & Associates is "insufficient to support the findings against [Images'] attack." State v. Higginbotham, 917 P.2d 545, 548 (Utah 1996).

Macris & Associates' other evidentiary examples are simply irrelevant. The evidence propounded in Paragraphs 1, 4, 5 and 6 of Macris & Associates' brief are merely actions taken by Tom Mower and/or Images; none of which constitutes evidence of Michael Macris' actions or the actions of Macris & Associates. (See Brief of Appellee at 36-37). Macris & Associates' inability to propound concrete and sound examples to support its argument for insufficient marshalling only shows that the evidence supporting the trial court's findings was weak. Images fulfilled its obligation to marshal the evidence in support of the trial court's findings of fact. Images further demonstrated that the marshalled evidence is insufficient to support those findings. State v. Higginbotham, 917 at 548; State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990).

For instance, the evidence presented to the trial court demonstrated that the Images distributors with whom Michael Macris worked closely were unaware of any distinct corporate existence of Macris & Associates, or that Michael Macris was merely an employee of that corporation. (R. 4732-34, 4749, 5591, 5594, 5596 and 5615). Moreover, Michael Macris continued to work in the same representative capacity for Macris & Associates even after he had resigned as President of Macris & Associates. He continued to communicate with Images on behalf of Macris & Associates, through counsel (Trial

Exhibit 9, 39, 54); he continued to write checks on behalf of Macris & Associates (R. 5505); and he represented himself as President of Macris & Associates even when he was no longer an officer (R. 5540). Finally, even Valerie Macris acknowledged that Macris & Associates did not always adhere to corporate formalities (R. 5125).

There was never any meaningful distinction between Michael Macris and Macris & Associates. Rather Michael Macris used the corporate shell to shield himself from liability for engaging in competitive activities while reaping the rewards of his contract between Images and Macris & Associates. Such conduct resulted in injustice and inequity to Images. The evidence presented to the trial court and to this Court overwhelmingly supports Images' position that the trial court erred in making its findings of fact.

B. Michael Macris And Macris & Associates Engaged In Disruptive And Competitive Activities.

In Section II.D. of the Brief of Appellee, Macris & Associates claims that the alleged competitive activities of Macris took place after Images allegedly breached the contract with Macris & Associates, and therefore, Macris was not contractually restricted from competing with Images. (Brief of Appellee). This position completely ignores the substantial evidence presented at trial that Michael Macris was testing and distributing nail gel products not endorsed by Images which Michael Macris manufactured for his com-

panies, Affinity and American Polymer<sup>4</sup>, to Images distributors long before Images allegedly breached the contract with Macris & Associates (R. 4681, 4683, 4774, 4845). The policies and procedures of Images proscribed conduct which "may cause loss to the Company or to another Images Distributor." (Trial Exhibit 83 at 7).<sup>5</sup> By testing unendorsed nail gels, Michael Macris was furthering the business of his other companies in competition with Images. Michael Macris was also known to the Images distributors as their "upline."

Macris & Associates apparently believes that the only competitive actions of Michael Macris at issue at trial were those activities he engaged in while creating Emily Rose, which according to Macris & Associates, occurred after the alleged breach by Images. (Brief of Appellee at 41). This position is erroneous, however, in view of the substantial evidence which suggested that Michael Macris was supplying unendorsed nail gels to Images distributors prior to the alleged breach by Images (Brief of Appellant at 25-30).

Separating the actions of Michael Macris on behalf of himself, Macris & Associates, Affinity, American Polymer and Emily Rose, was the only way the trial court could rationalize its find-

---

<sup>4</sup>American Polymer manufactured nail gels for companies other than Images. Therefore, American Polymer was in competition with Images, and Michael Macris, acting as an agent for American Polymer, furthered such competition.

<sup>5</sup>The Code of Ethics contained in the Images Policies and Procedures also forbade the "use of the company name, information, literature, gatherings, people, or other Images resources to further other business interests." (Trial Exhibit 83 at 7) (emphasis added).

ing that Images breached the Agreement with Macris & Associates first. However, separating Michael Macris' actions in dealing with distributors of Images from Macris' role as President of the upline Images' distributorship simply makes no sense and is absolutely contrary to the evidence presented at trial. (See Brief of Appellant at 25-30).

A president of a corporate distributorship, working within the scope of his employment as president of the corporate distributorship is an agent of that corporate distributorship whether the president claims he is or not. Horrocks v. Westfalia, 892 P.2d 14 (Utah App. 1995) (quoting Vicksburg & M. R. Co. v. O'Brien, 119 U.S. 99, 104, 7 S.Ct. 118, 121 (1886) ("The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal . . . ."))). "Even when the agent is acting adversely to the principal's interest, the knowledge of the agent may still be imputed to the principal." Horrocks, 892 P.2d 14 (Utah App. 1995).

Clearly, when Michael Macris was providing unendorsed gels to Images distributors, his actions should be imputed to his employer Macris & Associates, even if he was ostensibly supplying those gels for testing for a competing company he owned. It was error for the trial court to find otherwise, especially in light of the substantial evidence presented at trial.

Even though Images specifically objects to twelve of the factual findings, those factual findings impacted the entire out-

come of the litigation. For instance, if the trial court had correctly found that Michael Macris was acting as an agent of Macris & Associates when he supplied unendorsed nail gels to Images distributors for testing, then the trial court would have properly found that such conduct constituted a material breach of the Agreement between Images and Macris & Associates. Images, accordingly, would have had no further obligation under the Agreement.

Furthermore, if the trial court had properly found that Macris & Associates was the alter ego of Michael Macris, then Michael Macris' improper conduct would likewise constituted the first material breach of the Agreement.

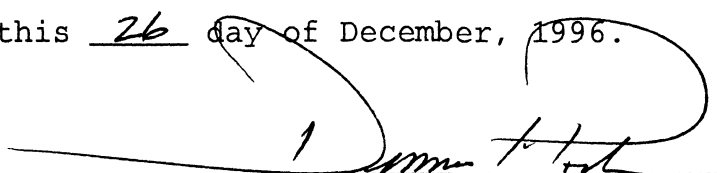
Ample evidence was presented to the trial court and to this Court (See Brief of Appellant) of Macris' improper conduct. This evidence, taken together, overwhelmingly established that Michael Macris used the shell of Macris & Associates to shield himself from the consequences of his improper conduct in creating competing companies while contractually obligated to Images. The trial court's observance of the form of Macris & Associates did indeed "sanction a fraud, promote injustice and result in inequity. Envirotech Corp. v. Callahan, 872 P.2d 487, 499 (Utah App. 1994). These findings were clearly erroneous and should be overturned.

#### CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Order and Judgment entered by the Third District Court and remand the case to the Third District

Court for entry of an Order in favor of Images, no cause of action, or in the alternative for a new trial on the issues of fraudulent inducement, breach of contract and alter ego as asserted in Images' affirmative defenses contained in Images' Amended Counterclaim.

DATED this 26 day of December, 1996.



DENNIS K. POOLE  
ANDREA NUFFER GODFREY  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Appellant

#### CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT in Appeal No. 960218-CA were mailed, U.S. Mail, postage pre-paid to the following:

STEPHEN T. HARD  
ROGER D. SANDACK  
STEVEN E. McCOWIN  
GIAUQUE, CROCKETT, BENDINGER & PETERSON  
Attorneys for Plaintiff and Appellee  
170 South Main Street, Suite 400  
Salt Lake City, Utah 84101

this 27 day of December, 1996.