

1996

Macris & Associates Inc v. Images & Attitude Inc : Brief of Appellee

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 960218-CA

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.)	TRIAL COURT
)	NO. 910400358
<hr/>		
IMAGES & ATTITUDE, INC.,)	
)	
Third-Party Plaintiff and)	
Appellant,)	
)	
vs.)	
)	(Priority No. 15)
MIKE MACRIS,)	
)	
Third-Party Defendant and)	
Appellee.)	

BRIEF OF APPELLEE

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

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FILED

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JURISDICTION OF THE UTAH COURT OF APPEALS

On March 21, 1996, the Utah Supreme Court transferred this matter to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).¹

ISSUES PRESENTED FOR REVIEW

I. Whether Images may raise arguments and issues on appeal regarding alleged fraudulent misrepresentations which were not presented to the trial court; which were not preserved before the court below; which cannot form the basis of a fraud claim; which were decided against Images in a parallel arbitration proceeding; and which are barred by the proper application of the collateral estoppel doctrine.²

II. Whether the trial court's finding that Macris was not the agent of Macris & Associates, Inc. ("M&A") and/or that M&A was not the alter ego of Macris may be reversed when Images has failed to marshal the substantial evidence supporting the trial court's findings, and when other unchallenged findings render the agency/alter ego question moot.

III. Whether the trial court abused its discretion in excluding testimony of William Crismon when Images violated the court's order and failed to identify him as a witness for more than one month after the discovery cut-off date even though it

¹ Not § 78-2a-3(k) [sic] as alleged in Appellant's Brief.

² Not res judicata as alleged in Appellant's Brief.

knew of Mr. Crismon and could have identified him as a witness, when Images failed to proffer his testimony when the trial court subsequently allowed other previously excluded witnesses' testimony, and when William Crismon's testimony would only have been cumulative of other testimony.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES
ORDINANCES, RULES, AND REGULATIONS

The few determinative Utah Rules of Evidence, Utah Rules of Civil Procedure and Utah Rules of Appellate Procedure are set forth below.

Rule 103(a) of the Utah Rules of Evidence provides:

Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

This Rule is dispositive of the third issue on appeal since Images did not make a proffer of William Crismon's testimony.

Rule 37(b)(2)(B) of the Utah Rules of Civil Procedure provides in relevant part:

(2) **Sanctions by court in which action is pending.** If a party . . . fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

This Rule is dispositive of the issue regarding William Crismon's exclusion as a trial witness because Images failed to comply with the trial court's discovery order.

Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure provides:

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

This Rule is dispositive of most of the issues on this appeal because Images has failed to comply with this provision.

STATEMENT OF THE CASE

This appeal is yet another chapter in a series of long, multiple, tortuous proceedings undertaken by Images to avoid paying what Images repeatedly has been found liable for in at

least two separate arbitration proceedings and one trial. In each of those proceedings, it was found that Images breached the subject contracts with Affinity, Inc. ("Affinity") and Macris & Associates, Inc. ("M&A"); Images was not fraudulently induced to enter into contracts with either of those entities; and Images owes substantial damages to both Affinity and M&A.

The essential facts of this case are clearly and succinctly set out in the Findings of Facts and Conclusions of Law, a copy of which is attached to the Addendum as Exhibit 1.³ Briefly stated, in the spring of 1989, Images' President, Thomas Mower ("Mower"), entered into negotiations with Michael Macris ("Macris"), who was acting on behalf of two separate corporations, Affinity, Inc. ("Affinity") and Macris & Associates, Inc. ("M&A"): Appellant's Brief at 6-7. Images concedes that as a result of those negotiations, it entered into two related contracts: a supply contract with Affinity (the "Affinity Contract") whereby Affinity would supply nail gels and special curing lamps for artificial nails, and a distributorship contract and addendum thereto with M&A (the "M&A Contract") wherein M&A would be allowed to participate as a distributor, principally to market the nail products, in Images' multilevel marketing program and would be "auto-qualified" to receive

³ Hereinafter, references to the relevant Findings of Fact are referred to as "Finding(s)."

compensation as a "presidential" distributor without having to meet any of the usual qualifications for receiving compensation at that level. See id. at 7-8.

Within a short period of time, trouble developed between Images and both companies with which Macris was associated. Several times in 1990, Images stopped making payments to M&A as a distributor, unilaterally withdrew distributors from M&A's "downline" organization, and threatened termination of the M&A Contract. Images withdrew these attempted terminations. See Memorandum Decision copy attached to the Appendix as Exhibit 2 at ¶ 17.

The parties sparred with one another, but no resolutions of their disputes were reached. On March 7, 1991, Images advised M&A that it was discontinuing the auto-qualification status of the distributorship for lack of activity. This constituted a material breach of the M&A Contract by Images. Finding No. 37. On or about March 29, 1991, Images advised M&A that it was considering terminating the distributorship entirely, not just its auto-qualification status, citing a number of purported reasons. See Findings Nos. 41 and 42. The trial court found these reasons to be without merit, pretextual and not justifying termination. Id. Of particular significance to this appeal, none of the purported reasons for suspension of payments

or termination of the M&A Contract included any alleged fraudulent misrepresentations by Macris.

On April 17, 1991, M&A filed suit alleging that Images breached the M&A Contract. It is this action which is now on appeal. This matter is hereinafter referred to as "the M&A Litigation."

Affinity, Macris' other company supplying (a) nail gels activated by ultraviolet light and (b) lamp housings to Images, initiated an arbitration proceeding, Affinity, Inc. v. Images International, Inc. alleging breach of contract. In May, 1992, the Arbitrator found that Images breached its contract with Affinity and awarded damages of \$144,313 to Affinity. (See R. 834-35.) On June 19, 1992, this arbitration award was entered as a judgment in the Fourth Judicial District Court for Utah County, State of Utah, in the matter of Affinity, Inc. v. Images International, Inc., Civ. No. 92-9400015 (Harding, J.).⁴ (See R. 834 at ¶ 7.)

After the attempted execution on the arbitration award, Images further complicated the legal proceedings by filing a

⁴ When Affinity sought to execute on its judgment by seizing Images' assets, Images delayed such execution by producing documentation that the assets being seized were owned by a third party. Affinity subsequently proved that this document was a fabrication which was back-dated and falsely notarized by Mower's mother-in-law. (See R. 833-34 at ¶¶ 7, 12 and 14.) Based on this information, the court lifted the stay of execution. (Id. at ¶ 15.)

complaint in the Fourth Judicial District Court for Utah County, State of Utah (Images & Attitudes, Inc., et al. v. Affinity, Inc., et al., Civ. No. 92-0400474 (Park, J.), alleging that it had been fraudulently induced to enter into the Affinity Contract, and asking that the arbitration award and judgment in Affinity's favor be set aside. Judge Park subsequently stayed that action pending the completion of mandatory arbitration. Images then filed two separate arbitration proceedings which were subsequently consolidated as Eclat, Inc., f/k/a Images v. Affinity, Inc., Consolidated Nos. 81-818002693 and 81-181006092 (American Arbitration Association) (Verhaaren, Arb.) (hereinafter referred to as "the Affinity Arbitration"). See R. 834, 5152.

In the course of the Affinity Arbitration and the M&A Litigation, Images⁵ claimed that it had been fraudulently induced to enter into each of the two contracts by Macris' allegedly false statements to Mower during the negotiation of the two contracts. (R. 1190, 284-86.) See also Appellant's Brief at 7-8.⁶ In the trial court below, Images' affirmative claim of "fraudulent inducement" was first contained in its September 10, 1992 Amended Counterclaim and Third-Party Complaint against M&A

⁵ In actuality, in the M&A Litigation, Images and Mower asserted claims against M&A and Macris. For the sake of brevity, Images and Mower are referred to collectively as "Images."

⁶ Indeed, on pages 7 and 8 of its Appellant's Brief, Images continues to assert that both of the contracts were fraudulently induced.

and Macris. (R. 281-294.) Therein, Images alleged that Macris represented that a Dr. Lyman invented the nail gel system being supplied and that Macris had \$250,000 of advertising in place. (See R. 285-286.) No allegation was made, as is now asserted on appeal, that Macris represented he would recruit "big hitters."

In an October 12, 1992 Memorandum, Images contended that fraudulent representations regarding "an [sic] National Inquirer [sic] advertising campaign was forthcoming, and the misrepresentation as to the quality and composition of the newly developed" nail gel induced Images to enter into the M&A Contract. No claim was made that Macris misrepresented his ability to get "big hitters."

In a February 22, 1990 letter from Mower to Macris at Affinity, Inc. (R. 884-888), Mower confirmed that this same representation regarding advertising in the National Enquirer induced Images to enter into the Affinity Contract:

You then approached Images with a proposal to market the [nail] system through a nationwide advertising campaign beginning with the prestigious National Enquirer magazine . . . Images issued the [purchase order to Affinity] and made an enormous financial commitment. This was based on two items and two items only.

1. The systems would be ran [sic] in the Enquirer and other publications.

2. The Enquirer article was to be in October

Let me make one point crystal clear . . . Images took on the line and made that extraordinarily large

purchase because of one and ONLY ONE THING. The fact that you proposed the National Enquirer deal to us

Ten months after the filing of the Amended Counterclaim, Images responded to interrogatories which required Images to provide the details of its fraudulent misrepresentation claim. (See R. 1097-1102.) Numerous alleged representations were identified including those relating to Dr. Lyman and advertising with the National Enquirer. Notably, no contention was made that Macris represented that he would recruit "big hitters" to become distributors of Images' products.

On September 23, 1993, Mower submitted an affidavit to the trial court wherein he admitted that the alleged misrepresentations regarding Dr. Lyman's involvement with the nail system and the purported advertising worth \$2,000,000 to \$2,500,000 with the National Enquirer were made prior to entering into the Affinity contract (which preceded the M&A contract), and induced him to enter into both contracts. (See R. 794-797.) (See also R. 1009 at ¶¶ 6 and 7.) Again, no claim of fraudulent inducement was made based upon any alleged representation regarding recruitment of "big hitters."

While these proceedings were going on in the M&A Litigation, the Affinity Arbitration was also progressing. On November 8, 1993, the arbitrator dismissed with prejudice Images'

claim that Images had been fraudulently induced to enter into a contract with Affinity. The arbitrator held that:

Affinity made no misrepresentations of material facts to [Images] to induce [Images] to enter into the Agreement and [Images], in any event, did not reasonably rely on the alleged misrepresentations.

(R. 1214.)

Images then filed a Motion for Modification of Order with the arbitrator, arguing that the above-quoted language should be stricken from the arbitrator's Order of Dismissal. It made a critical admission for the purposes of the instant appeal, i.e., that the arbitrator's ruling would collaterally estop it from asserting a fraudulent inducement claim in the M&A Litigation. (See R. 1222-1223.)

The arbitrator denied Images' Motion for Modification of Order, and again held that "the Affidavits filed by the parties amply demonstrate that Affinity made no misrepresentations of material facts to [Images] to induce [Images] to enter into the agreement and that [Images] did not, in any event, reasonably rely on the alleged misrepresentations." (R. 1210.)

On December 11, 1993, M&A filed a Supplemental Memorandum in Support of Motion for Summary Judgment in the M&A Litigation advising the trial court of the arbitrator's Order of dismissal in the Affinity Arbitration and arguing that Images'

fraudulent inducement claims were barred under the doctrine of collateral estoppel. (R. 1188.) More specifically, M&A argued that Images had not asserted any facts in support of its fraudulent inducement claim in the M&A Litigation which "were not set forth or raised in its memoranda or oral argument in" the Affinity Arbitration (R. 1184), and that the issue of fraudulent inducement had been fully, fairly, and completely litigated to a final judgment in that action (R. 1183-86.) Thus, Images should be collaterally estopped from relitigating fraudulent inducement. (R. 1182.)

In response to that supplemental memorandum, Images filed its Memorandum in Support of Defendants' Motion to Strike and in Opposition to Supplemental Memorandum in Support of Macris & Associates, Inc.'s and Mike Macris' Motion for Summary Judgment Regarding Fraudulent Inducement. (R. 1195-1206.) Therein, Images raised three arguments before the trial court in opposition to M&A's collateral estoppel argument, only one of which it pursues on this appeal.⁷ That argument is that

⁷ Images first argued that the supplemental memorandum in which M&A raised its collateral estoppel argument was not authorized under Rule 4-501(1)(a) of the Utah Code of Judicial Administration, and that M&A's Supplemental Memorandum, together with its collateral estoppel argument, must be stricken. (R. 1203-1205.) The trial court rejected this argument, holding that striking the Supplemental Memorandum "would result in keeping relevant information from this Court that is dispositive of issues before this Court." (R. 1234.) Images does not appeal this decision.

the issue of fraudulent inducement was not fully and fairly litigated in the arbitration, thereby precluding the application of the doctrine of collateral estoppel in this matter. . . . [because Images' fraudulent inducement claim in the Affinity Arbitration had been dismissed] at the summary judgment stage, before any testimony was allowed

(R. 1200-1201.)

Images did not argue to the trial court that the fraudulent inducement issues in the Affinity Arbitration were different than the fraudulent inducement issues in the M&A Litigation as it does now on this appeal. In fact, as demonstrated above, Images had repeatedly contended that the same alleged misrepresentations by Macris had induced it to enter into both the Affinity Contract and the M&A Contract.

Based upon the record and arguments before it, the trial court rejected Images' argument against collateral estoppel, properly holding that "[c]ollateral estoppel applies to issues decided on summary judgment;" and "to issues decided in arbitration proceedings." (R. 1233.) The trial court then

Images next argued that M&A's collateral estoppel argument was premature because (as noted in the text above) Images had filed a Motion for Modification in the Affinity Arbitration, asking the arbitrator to modify his Order of Dismissal in such a way that Images would not be collaterally estopped from relitigating the issue of fraudulent inducement. (R. 1201-1203.) This argument, however, was completely mooted when the arbitrator denied Images' Motion for Modification, as discussed in the text above. Images does not pursue its "prematurity" argument on this appeal.

granted M&A's motion for summary judgment as to Images' fraudulent inducement counterclaim, finding that

the prior judgment against the Defendants on the issue of whether Mr. Macris, whether acting as an agent for Macris & Associates, Inc. or Affinity, Inc., fraudulently induced Images & Attitude, Inc. need not be re-litigated in this action. . . . The issue as to whether Mr. Macris fraudulently induced the Defendants has already been fully and fairly litigated in a prior arbitration proceeding. . . . The prior arbitration proceeding found that no fraudulent inducement had occurred.

(Id.)

The trial on the remaining issues was held from February 16, 1996 to March 27, 1996. During the trial, the lower court issued an order that William Crismon and others would not be allowed to testify because Images had failed to identify him and six other individuals as witnesses until a month after discovery had closed even though the interrogatory requesting such identification had long been previously propounded, the court had ordered such list to be supplemented, Images previously had supplemented its witness list without identifying Crismon and the other six individuals as witnesses; Images knew of Crismon's existence and intended to call him as a witness.⁸ Despite its prior ruling, the lower court later allowed two of the three

⁸ Images voluntarily dropped three witnesses when its slander claims were dismissed, and the court allowed one witness to be called.

previously excluded witnesses to provide testimony on rebuttal. Absent from the record is any indication that Images made a proffer as to what William Crismon's testimony would have been or why it was otherwise important for him to testify.

After hearing the testimony, reviewing the exhibits, and considering proposed Findings of Facts and Conclusions of Law from both parties, the trial court issued its Memorandum Opinion and subsequently entered Findings of Facts and Conclusions of Law and a Judgment⁹ in favor of M&A. The trial court held in favor of M&A in all respects that M&A performed its obligations under the M&A Contract and against Images on the counterclaim and third-party complaint holding that M&A did not breach the M&A Contract in any manner alleged by Images.

SUMMARY OF ARGUMENTS

Images has raised three principal issues on appeal. Only one of Images' arguments was properly preserved for appeal before the lower court, and none of the contentions has merit, either legally or factually.

The trial court's ruling that Images is barred from asserting fraudulent inducement claims because of collateral estoppel or issue preclusion should be affirmed for a number of reasons. First, Images never argued to the trial court that the fraudulent inducement issues in the Affinity Arbitration were

⁹ The Judgment is attached to the Appendix as Exhibit 3.

different than those in the M&A Litigation and has thus waived that objection. Second, contrary to the contentions now made on appeal, Images has repeatedly and consistently contended that the same misrepresentations induced it to enter into both the Affinity Contract and the M&A Contract; thus, Images had the opportunity to fully litigate all claims of fraudulent inducement. Third, the arbitrator decided that there were no material misrepresentations upon which Images reasonably relied. Fourth, the "big hitter" representation, which was not timely presented to the lower court, cannot even be the basis of a fraud claim. Fifth, Images does not contend that it was denied the opportunity to present affidavits or arguments to the arbitrator prior to his ruling on Affinity's motion for summary judgment on the fraudulent inducement issue. Thus, Images had a full, fair and complete opportunity to present its arguments regarding fraudulent inducement and is now collaterally estopped from raising the fraudulent inducement issue against M&A.

The trial court's findings that Macris was not acting as the agent of M&A when he started another network marketing company, Emily Rose, Inc., or engaged in other unspecified acts and/or that M&A was not the "alter ego" of Macris should be affirmed. In challenging those findings, Images fails to marshal the substantial evidence supporting the trial court's rulings. Moreover, Images' arguments ignore other unchallenged findings

which render the alter ego/agency question moot, i.e. that Images materially breached its contract with M&A and that because of that prior material breach, Macris, M&A, Emily Rose, Inc. or any other entity with which Macris may have been associated was free to compete directly with Images.

Finally, the trial court did not abuse its discretion in excluding the testimony of William Crismon. The record is clear that Crismon, as well as six other witnesses, were precluded from testifying at trial as a discovery sanction resulting from Images' failure to identify them in response to a court order until a month after the discovery cut-off date. Despite that ruling, the trial court later allowed at least three of the four remaining witnesses to testify on rebuttal. There is nothing in the record indicating that Images' proffered William Crismon's testimony to the lower court or explained why his testimony would add anything to the testimony of Thomas Crismon, his brother and business partner, who did provide testimony.

For these reasons, as more fully addressed herein, the trial court's rulings should be affirmed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO DISMISS IMAGES' FRAUDULENT INDUCEMENT COUNTERCLAIM

A The "Correctness" Standard Of Review Only Applies To Matters Properly Before This Court

Images contends that the trial court's summary judgment finding should be reviewed under "a correctness standard," and that "the facts and all reasonable inferences drawn therefrom" should be viewed "in the light most favorable to" Images. Appellant's Brief at 14. However, the "correctness standard" applies only to those issues which Images properly raised before the trial court. Images may not ask this Court to reverse the trial court on the basis of an issue raised for the first time on appeal. See Rocky Mt Thrift v Salt Lake City Corp, 887 P.2d 848, 850 (Utah 1994) (refusing to consider new negligence theories which "were not raised before the trial court and may not now be raised"), Cowen and Co v Atlas Stock Transfer Co, 695 P.2d 109, 113-14 (Utah 1984) (on an appeal from summary judgment, the appellant may not "raise issues that were not raised to the trial court and proffer facts to support those issues on appeal"). Likewise, the "all reasonable inferences" standard applies only to those facts which were properly in the record before the trial court at the time it ruled on the collateral estoppel issue. Govert Copier Painting v Van Leeuwen, 801 P 2d 163, 170 (Utah App 1990) ("We will not

consider facts on appeal when there is no record the trial judge had access to those facts when deciding the motion at issue."); Seare v. University of Utah School of Medicine, 882 P.2d 673, 676 n.4 (Utah App. 1994) ("[I]n reviewing an order granting summary judgment 'we consider only the pleadings, depositions, admissions, answers to interrogatories, and affidavits properly before the trial judge.'" (citation omitted)).

As demonstrated below, only one of Images' three arguments regarding collateral estoppel was ever raised with the trial court, and thereby properly preserved for appeal; that argument, however, lacks any legal merit. Images' remaining two arguments are raised for the first time on appeal, are predicated on facts that were not part of the record before the trial court, and ignore the law of collateral estoppel.

B. Images Is Barred From Raising Arguments On Appeal Which It Failed To Present To The Lower Court.

Images now asserts that there were two fraudulent misrepresentations inducing the M&A Contract which were different from the fraudulent inducement claims in the Affinity Arbitration: (1) the National Enquirer advertising and (2) some vague references to Macris' "ability to bring in 'big hitters.'" See, e.g., Appellant's Brief at p. 11. Thus, Images argues that the trial court erred in applying collateral estoppel. See Appellant's Brief at pp. 17-19, 21-22. Images, however, never raised this argument in any pleading, in any affidavit, or in any

interrogatory answer. Most importantly, in its opposition papers to M&A's argument that the fraudulent inducement claim was barred by collateral estoppel, Images never advised the lower court that the fraudulent inducement issues were allegedly different. Accordingly, it is not surprising that Images has violated Utah Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure by not citing where in the record this alleged error was preserved.

1. Images may not question, for the first time on this appeal, whether or not the alleged fraudulent inducement issues in the two proceedings were identical.

By failing to give the trial court the opportunity to rule on the question of whether the fraudulent inducement issues were the same in the Affinity Arbitration and the M&A Litigation, Images failed to preserve it for appeal. See Rocky Mt., 887 P.2d at 850 (issues not raised before the trial court may not be raised on appeal); Cowen, 695 P.2d 109 at 113-14 (Utah 1984) (appellant from summary judgment may not "raise issues that were not raised to the trial court and proffer facts to support those issues on appeal"); see also Aldrich and Steinberger v. Martin, 837 P.2d 1180, 1182 (Ariz. App. Div. 2 1992) (The fact that the doctrine of collateral estoppel was before the trial court "does not preserve for review any and all aspects of [that] doctrine[] that [the appellant] chooses to raise on appeal. Only the theory expressly raised, that of privity, was properly preserved for appeal."); Delisle v. Avallone, 874 P.2d 1266, 1270 (N.M. App.

1994) (Because party against whom collateral estoppel was asserted "did not claim absence of a full and fair opportunity, the issue was not preserved in the proceedings below," and could not be argued on appeal.) .

Therefore, even if there were any merit to Images' argument regarding whether or not the fraudulent inducement issues in the two proceedings were different (and as demonstrated below, there is no merit to Images' argument), Images may not seek to have the trial court reversed on the basis of such an argument raised for the first time on appeal.

2. Images may not seek to have the trial court reversed on the basis of newly asserted facts which were either absent from, or directly contradictory to, the record before the trial court.

Images also attempts to support its argument by asserting facts to this Court which were not before the lower court at the time it granted summary judgment dismissing the fraudulent inducement claims. Images attempts to create the illusion of two differences between the fraudulent inducement issues in the two proceedings. First, it asserts that the alleged "big hitter" misrepresentation was at issue in the M&A Litigation, but not in the Affinity Arbitration. However, Images' allegation that Macris had made the "big hitter" statement did not appear in the case below until long after the trial court had already ruled on M&A's collateral estoppel

summary judgment motion. "[T]here is no record the trial judge had access to [this alleged fact] when deciding the motion at issue," and Images may not ask this Court to reverse the trial court on the basis of an untimely disclosed "fact." See Govert Copier Painting, 801 P.2d at 170.

Second, Images asserts that Macris' supposed representation regarding advertising in the National Enquirer was not made until after the Affinity Contract had been executed, and that this alleged representation was not at issue in the Affinity Arbitration, but only in the M&A Litigation. Appellant's Brief at 7, 11, 15, 17, and 21. However, this assertion actually *contradicts* the record before the lower court and cited above, where Images repeatedly contended that the alleged representation regarding advertising in the National Enquirer was made prior to the execution of either contract, and was an inducement to both. Because this Court "consider[s] only the pleadings, depositions, admissions, answers to interrogatories, and affidavits properly before the trial judge" when reviewing the trial court's entry of summary judgment, see Seare, 882 P.2d at 676 n.4, Images clearly cannot argue for reversal based upon facts absent from and contradictory to the record before the trial court.

3. Images may not rely upon a newly alleged "big hitters" misrepresentation as a grounds for fraudulent inducement.

Images' "big hitter" contention should be rejected as being untimely presented. Even if it had been timely presented to the lower court, however, any such vague and indefinite claim should have been dismissed because it cannot, as a matter of law, support a claim for fraud. It is axiomatic that fraud requires a representation concerning a presently existing fact. See Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980). A claim of fraud cannot be predicated upon expressions of opinion, unfulfilled predictions or expectations or erroneous conjectures as to future events.¹⁰ See Aloha Petroglyph v. Baldwin, Inc., 619 P.2d 518, 519 (Ha. App. 1980); Hall v. Romero, 685 P.2d 757, 760 (Ariz. App. 1984).

As a matter of law, a statement that Macris intended to bring in "big hitters" is not an expression of a presently existing fact which can support Images' fraudulent inducement claims, and is simply too vague a representation upon which

¹⁰ In fact, Macris did bring in "big hitters" as he represented, including Margie Hunsaker, Glenn Tillotson and the Camerons. The Hunsaker distributorship was the biggest and most successful downline organization among Images' distributors. See Findings at 11, 12, 13, 14 & 17.

Images could reasonably have relied.¹¹ Images' "big hitter" contention should be rejected.

4. Collateral estoppel bars Images from relitigating the fraudulent inducement issue.

As noted above, Images has always contended that Macris' alleged misrepresentations regarding Dr. Lyman's involvement with the nail systems and National Enquirer advertising induced it to enter into both the Affinity Contract and the M&A Contract. It now asserts, however, that the fraudulent inducement issue litigated in the Affinity Arbitration was different from the fraudulent inducement issue below in two respects. Images argues that in the Affinity Arbitration,

the issue was whether Images was fraudulently induced by virtue of the [alleged] misrepresentation into entering into the Affinity [C]ontract In the instant case, however, the issue to be litigated was whether Images was fraudulently induced into entering the Macris & Associates [Contract].

Appellant's Brief at 18.¹²

¹¹ Although M&A's argument on this point was not made previously because of the lateness in which Images has asserted its "big hitters" argument, this Court may properly consider it. An appellate court may affirm the trial court on any proper grounds, including grounds argued for the first time on appeal. See Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988).

¹² A diligent search of the record in this matter, reveals (a) no source document which can be reviewed to determine what precise misrepresentation claims may have been alleged in any pleading in the Affinity Arbitration; (b) no amendments to any such pleadings; (c) no deposition transcripts; (d) no transcripts of arguments, etc. In short, Images presented nothing to the

This language is phrased so broadly as to gloss over the required analysis. Images' causes of action in the two proceedings were of course different, but they shared a common constituent factual issue: whether Macris made any material misrepresentation for the purpose of inducing Images' reliance. The arbitrator in the Affinity Arbitration resolved that issue against Images by ruling that Macris had "made no misrepresentations of material facts to [Images] to induce [Images] to enter into the" Affinity Agreement.¹³ (R. 1197.) The trial court correctly held that this prior judgment collaterally estopped Images from relitigating this common issue, even in the context of a different cause of action. See Searle Bros. v. Searle, 588 P.2d 689, 690 (Utah 1978) (collateral estoppel prevents relitigation of issues resolved in a previous suit even though the first suit involved "a different cause of action").

lower court which supports its current contentions that the fraudulent misrepresentation issues were actually different in the two proceedings.

¹³ On appeal, Images criticizes the arbitrator's ruling by arguing that the ruling is unclear as to whether there were any representations, whether they were false, whether they were immaterial, or to which representations the arbitrator was referring. Appellate Brief at 18. Frankly, it makes no difference. If there was no misrepresentation, or a misrepresentation was immaterial, or if Images did not reasonably rely on any alleged misrepresentation as the arbitrator so held, there is no basis for a claim of fraudulent inducement.

Even if the Court were to accept the factual premise of Images' argument (for the sake of argument only), and assume that in the Affinity Arbitration Images failed to introduce some of the misrepresentations which it now alleges against Macris, that failure would not give Images license to relitigate the issue of fraudulent inducement. This is because, as a matter of law, collateral estoppel applies to "ultimate issues" such as fraudulent inducement, and not to mere "evidentiary facts" such as the particular representations which might be alleged in an attempt to establish fraudulent inducement. Therefore, because Images "did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact." Restatement (Second) of Judgments § 27 comment c (1982).

The distinction between "ultimate issues" and "evidentiary facts" is illustrated in the Restatement (Second) of Judgments as follows:

A brings an action against B to recover for personal injuries in an automobile accident. A seeks to establish that B was negligent in driving at an excessive rate of speed. After trial, verdict and judgment are given for B. In a subsequent action by B against A for injuries in the same accident, A is precluded from setting up B's negligence as a defense, whether or not the alleged negligence is based on an assertion of excessive speed. It is reasonable to require A to bring forward all evidence in support of

the alleged negligence in the initial proceeding.

Id. illustration 4. The "ultimate issue" in this illustration is B's alleged negligence. Ultimate issues "may not be split . . . into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have neglected to urge for or against it matters which, if urged, would have produced an opposite result." 1B James W. Moore, Moore's Federal Practice ¶ 0.443[2] at III.-566 (2d ed. 1996) (quoting Price v. Sixth District, 258 P. 387 (Cal. 1927)). Thus, once an ultimate issue -- such as negligence or fraudulent inducement -- has been litigated to a final judgment, collateral estoppel precludes the losing party from relitigating the issue in a subsequent proceeding, even if there are additional evidentiary facts which might yield a different determination of the ultimate issue, but which the losing party failed to introduce in the initial proceeding.

This principle was applied in In re Transocean Tender Offer Securities Litigation, 427 F. Supp. 1211 (N.D.Ill. 1977). The plaintiffs in that case were minority shareholders who, in a prior state court action, had asserted state law claims that the majority shareholder failed to make "full disclosure" of all relevant facts surrounding a tender offer. 427 F. Supp. at 1220. The state court found that the majority shareholder had satisfied its "full disclosure" obligation, and entered final judgment

dismissing the plaintiffs' state law claims. Id. at 1214, 1220.

In the subsequent federal action in Transocean, the plaintiffs asserted additional evidentiary facts which had not been considered in the prior state court action, and on the basis of those new evidentiary facts claimed that the offering circular contained misstatements and omissions of material fact. Id. at 1218. The federal court ruled that both proceedings presented the same ultimate issue of "full disclosure," and that the plaintiffs were collaterally estopped from relitigating that issue, even on the basis of new evidentiary facts. Id. at 1222-23:

Having litigated the ultimate issue of full disclosure and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact.

Id. at 1222.

The principle was even more dramatically applied in Yamaha Corp. of America v. U.S., 961 F.2d 245 (D.C. Cir. 1992). The plaintiff in that case, "Yamaha-America," was the exclusively authorized distributor of "Yamaha" brand products within the United States, and the exclusive owner of several U.S. trademarks for Yamaha products. 961 F.2d at 248. In a prior action, Yamaha-America had brought a claim against an importer of "gray-market" Yamaha products, i.e., genuine Yamaha products which had been manufactured and sold abroad, but were then imported into

the United States without the consent of Yamaha-America. Id. Yamaha-America claimed that because these gray-market imports bore "Yamaha" trademarks, they violated section 42 of the Lanham Act, 15 U.S.C. § 1124, which prohibits the importation of goods which "copy or simulate" a U.S. trademark. Id. at 250. In the prior action, the court dismissed Yamaha-America's claim on the ground that the gray-market goods were not mere copies or simulations within the meaning of the Lanham Act, but were "genuine Yamaha items," and that Yamaha-America therefore had no cause of action under section 42. Id. at 250-51.

In a subsequent action on an unrelated matter (i.e. challenging a federal regulation) Yamaha-America argued an evidentiary fact which it had neglected to introduce in the initial proceeding. that the gray-market products were physically different in various respects from the Yamaha products sold by Yamaha-America Id. at 253 The District Court noted that this new evidentiary fact might well have compelled a judgment in Yamaha-America's favor in the subsequent action Id. at 258. However, the court held that "[O]nce an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case . Preclusion cannot be avoided simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first " Id. at 254-55 (emphasis in

original)). Therefore, because "Yamaha-America failed properly to introduce evidence of 'physical differences' in the [initial proceeding], . . . it is precluded from relitigating the issue of its rights under section 42 based on this 'new' evidence." Id. at 258. See also Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 235 (6th Cir. 1974) (ultimate issue of the lawfulness of a license agreement had been litigated in a previous action, and the plaintiff was collaterally estopped from relitigating that issue, even on the basis of new factual allegations had not been considered in the previous litigation); Temple of the Lost Sheep Inc. v. Abrams, 930 F.2d 178, 184-85 (2d Cir. 1991) (plaintiffs collaterally estopped from relitigating conspiracy issue decided against them in prior action, despite plaintiffs' contention that adverse judgment in prior action was based upon inadequate record); Jones v. United States, 466 F.2d 131, 136 (10th Cir. 1972) ("If the taxpayer's case was not effectively presented at the first trial it was their fault; affording them a second opportunity in which to litigate the matter, with the benefit of hindsight, would contravene the very principles upon which collateral estoppel is based.").

In the instant case, the ultimate "issue" which was litigated to a final judgment in the Affinity Arbitration was whether Macris had made any "misrepresentations of material fact to [Images] to induce [Images] to enter into an agreement with

Images or upon which Images reasonably relied. (R. 1197.) In accordance with the principles discussed above, Images cannot avoid the collateral estoppel effect of the arbitrator's final judgment simply by asserting that there are additional evidentiary facts (i.e., additional specific alleged representations) which bear on the ultimate issue of fraudulent inducement, but which it failed to advance in the Affinity Arbitration.

B. Images' Allegations Of Fraudulent Inducement Were Competently, Fully, And Fairly Litigated In The Affinity Arbitration.

Images argues that because its fraudulent inducement claim in the Affinity Arbitration was dismissed on Affinity's motion for summary judgment, the claim "was not afforded a competent, full and fair litigation." Appellant's Brief at 19. This is the only collateral estoppel argument which Images ever raised before the trial court, and thereby properly preserved for this appeal. Images, however, does not contend, much less does it cite to any portion of the record to show that it was prevented from filing affidavits in opposition to Affinity's summary judgment motion in the Affinity Arbitration, nor that it was not allowed to present any argument it desired, nor that there was any other particular deficiency in the presentation or argument of that summary judgment motion. Rather, Images bases its argument on the simple proposition that because summary

judgment is, by its very nature, resolved without an "evidentiary hearing," Appellant's Brief at 19-20, it is *per se* inadequate to support collateral estoppel.

This is a novel and unsound theory. The clear rule is that final judgment pursuant to a motion for summary judgment is given the same collateral estoppel effect as final judgment following a trial. See Dicken v. Ashcroft, 972 F.2d 231, 233 n. 5 (8th Cir. 1992) ("It is well established that summary judgment is a final judgment on the merits for purposes of *res judicata*"); Carpenter v. Young, 773 P.2d 561, 568 (Colo. 1989) (summary judgment accorded collateral estoppel effect); Creed Taylor, Inc. v. CBS, Inc., 718 F. Supp. 1171, 1177 (S.D.N.Y. 1989) ("Issues decided upon a motion for summary judgment may be accorded the same preclusive effect as issues decided following a trial."); Charles A. Wright et al., Federal Practice & Procedure § 4444, at 391-92 (1981) ("Both claim preclusion and issue preclusion result from summary judgments that rest on the lack of any genuine issue of material fact going to the merits of claim or defense."); Restatement (Second) of Judgments § 27 cmt. d, illus. 10 (1982) (final judgment on a motion for summary judgment in a prior proceeding is given collateral estoppel effect).¹⁴

¹⁴ See also James L. Saphier Agency, Inc. v. Green, 190 F. Supp. 713, 719 (S.D.N.Y. 1961) ("A decision by arbitrators is as binding and conclusive under the doctrine of *res judicata* and estoppel as the judgment of a court.").

Therefore, the trial court correctly held that, as a result of the final judgment dismissing Images' fraudulent inducement claim in the Affinity Arbitration, Images was collaterally estopped from relitigating that issue below.

The only authority which Images cites in support of its argument on appeal is Rocky Mountain Thrift v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989). That case, however, never mentions collateral estoppel, and does not discuss whether summary judgment is "competent, full and fair litigation" for purposes of collateral estoppel. Rather, the plaintiffs in that case claimed to have been injured by Salt Lake City Corporation's flood-control activities. 784 P.2d at 459. The trial court granted summary judgment to the city on the ground that all of the city's flood-control activities were protected by governmental immunity. 784 P.2d at 460. The Utah Supreme Court reversed in part, holding that governmental immunity extends only to the city's "policy" decisions regarding "the design, capacity, and construction of" its flood control system, but not to "the operation and maintenance" of the system. 784 P.2d at 463-64. The Utah Supreme Court then held that because the trial court decided the case "on a motion for summary judgment, no full and adequate evidentiary hearing was held to resolve critical facts" regarding whether the challenged flood-control activities were immune "policy" decisions, or actionable "operational" decisions.

784 P.2d at 464. The court remanded the case to the trial court for fact-finding on this question. Id. Thus, Rocky Mountain held only that the summary judgment hearing in that case had not "resolve[d] critical facts" necessary to determine the proper scope of governmental immunity. Id. In no way does the case support Images' assertion that summary judgment is somehow *per se* inadequate to support collateral estoppel.

Thus, as to the first issue on appeal, Images failed to demonstrate that it did not have a full and fair opportunity to address the fraudulent inducement issue in the Affinity Arbitration. Its current attack on the collateral estoppel summary judgment is "too little, too late." It failed to make appropriate and necessary arguments when it had the opportunity and obligation to do so (assuming that there were any actual grounds for making such claims). It has failed to create a proper record and has misstated the record. It relies upon matters never presented to the lower court. Finally, it relies upon a misrepresentation which, as a matter of law, cannot support a claim of fraud. For all these reasons, the lower court's dismissal of Images' fraudulent inducement claims on the grounds of collateral estoppel should be affirmed.

II. THE TRIAL COURT'S RULING THAT THE ACTIONS OF MACRIS WERE NOT ATTRIBUTABLE TO MACRIS & ASSOCIATES AND THAT MACRIS & ASSOCIATES IS NOT MACRIS' ALTER EGO SHOULD BE AFFIRMED

A. Images' Claims Should Be Rejected Because It Has Failed To Marshal All The Evidence Supporting The Trial Court's Findings.

Images has failed in its burden on appeal to marshal all of the evidence in support of the trial court's alleged erroneous findings. Images contests twelve of the trial court's fifty-eight findings of fact. To support those findings, Images provides only eight citations to the record which it concludes are mainly the self-serving testimony of Macris,¹⁵ see Appellate Brief at 26, but ignores numerous others.

The challenging party must marshal all relevant evidence presented at trial which tends to support the findings and then demonstrate why the findings are clearly erroneous. West Valley City v. Majestic Investment Co., 818 P.2d 1311 (Utah App. 1991); Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989). Where an appellant has failed to adequately marshal this evidence, the trial court's findings must be affirmed. Grahn v. Gregory, 800 P.2d 320 (Utah App. 1990); Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990).

¹⁵ Of course, the trial court was free to believe Macris' and others' "self-serving" testimony over that of Images' witnesses.

Appellants must begin by undertaking an arduous and painstaking marshalling process, and after marshalling all of the evidence supporting the trial court's findings, appellants must then demonstrate that these same findings are "so lacking in support as to be against the clear weight of the evidence," thus, making them clearly erroneous. Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah App. 1989). As explained in West Valley City v. Majestic Investment Co.:

[T]he marshalling concept does not reflect a desire to merely have pertinent excerpts from the record readily available to a reviewing court. The marshalling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshalling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's findings resting upon the evidence is clearly erroneous. (Emphasis added.)

818 P.2d at 1315.

Since one of Images' principle complaints is that the trial court had no valid evidence to find that M&A was not the alter ego of Macris, the following summary of evidence will demonstrate Images' failure to marshal evidence in support of the

trial court's findings that M&A was legally separate and distinct from Macris, Affinity, or other corporations with which Macris was affiliated:

1. Tom Mower, President of Images, Inc., in June, 1989, signed the first contract to provide a nail and gel system with Affinity, Inc., a Utah corporation, with Mike Macris acting as Affinity's president. (R. 5166.)
2. In August, 1989, Tom Mower signed the Distributorship Agreements and the auto-qualification addendum with Macris & Associates, Inc., a Utah corporation with Mike Macris signing as secretary. (Trial Exhibits 1 & 2.)
3. In order to clarify internal records of Images, Inc., Tom Mower added "Inc." to Macris & Associates in order to insure that Macris & Associates' corporate formalities were observed and to correct Images' records. (R. 5459, 4670.)
4. Tom Mower, at all relevant times in this litigation, was himself the principal officer and director of at least three separate corporations and knew of the significance of dealing with separate corporate entities. (R. 5460.)
5. Tom Mower knowingly dealt with Affinity, Inc., and Macris & Associates, Inc., and never asked to see corporate documents or never questioned the separateness of each entity. (R. 5457-58.)
6. Trial Exhibit 34 - the first downline report - came in the name of Macris & Associates, Inc., as did all ensuing monthly reports.
7. During 1990, Tom Mower sent letters related to gel testing to Affinity, Inc., attention Michael Macris, demonstrating Mower's awareness of Affinity's separateness from Macris & Associates, Inc. (R. 884-888 and Trial Ex. 55.)
8. Plaintiff demonstrated that it held corporate meetings, took minutes, filed separate tax

returns, kept separate checking accounts. (See Trial Exhs. 88, 89; R. 4668.)

9. Valerie Macris testified that she, not Mike Macris, became the sole shareholder, kept minutes, ratified contracts and kept separate accounts and filed separate tax returns for Macris & Associates, Inc. (See Trial Exhs. 40, 42; R. 5121.)
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 testimony, R. 4745.)

All of the above is more than sufficient for the Court to base its findings that M&A is legitimately a separate corporate entity whose corporate veil need not be pierced and that Macris legitimately operated other businesses without creating any undisclosed "fraud" or "inequity" upon Images.

Instead of marshalling evidence in favor of the court's findings, Images' simply re-argues allegations and innuendo in support of its position which allegations were soundly rejected by the trial court after presentation of extensive evidence.

B. Images' Assumption That Macris Engaged In "Disruptive, Competitive Activity" Is Incorrect.

Images argues that M&A somehow breached the M&A Contract because of Macris' activities on behalf of other companies. Images relies upon unsubstantiated assumptions that what Macris did as an agent for one company (Emily Rose or Affinity) should be attributable to M&A as "disruptive and

competitive" behavior, thus, supplying Images with an excuse for terminating the M&A Contract.¹⁶ That tortured, complex and irrational argument also assumes that all of the alleged competitive conduct was illegal, disruptive and created a legitimate cause for termination of the M&A Contract.

In fact, however, the trial court made the following Findings that are unchallenged by Appellants:

42. The reasons given by Defendant for terminating Plaintiff after already terminating Plaintiff's auto qualification status and failing to pay Plaintiff for the month of February 1991, were all pre-textual and without merit, and did not justify termination of Plaintiff. (R. 3051.)
47. Defendant received the benefit of its bargain and wrongfully terminated Plaintiff's addendum. (R. 3049.)
50. Following Defendant's breach of the contract, neither Plaintiff nor Third Party Defendant, Macris, was contractually restricted from competing with the Defendant. (R. 3049.)
54. There was not adequate or credible evidence to establish that any contracts or potential contracts with Defendant were breached as a result of either Plaintiff's or Macris' alleged actions. (R. 3048.)
55. There was no adequate or credible evidence to establish that either Plaintiff or Macris engaged in any activities for the purpose of wrongfully interfering with Defendant's existing or potential contractual relations. (R. 3048.)

¹⁶ Macris' relationship with Affinity was known to Images through, among other things, Affinity's separate contract to supply Images with nail gel and ultraviolet lamp housings. Macris' relationship with Emily Rose, Inc. did not commence until after Images materially breached the M&A Contract.

See also Findings 51, 52, 53, 56 & 58; and Memorandum Decision, ¶¶ 49, 50, 51, 52 & 56 wherein the trial court found that none of the so-called competitive or disruptive activities took place or were improper. Similarly, none of the alleged competitive activity has been shown in Appellant's Brief or at trial to be in any way improper.

Plaintiff does not intend to fulfill Appellants' burden of properly marshalling the evidence on each of the twelve Findings at issue. It is more than sufficient that the lower court had voluminous evidence supporting each and every one of the contested findings, including hundreds of pages of testimony, exhibits and all inferences which were drawn therefrom.

C. The Trial Court's Conclusion That Macris & Associates Is Not The Alter Ego Of Macris Is Correct.

Images relies upon Utah law allowing the court to pierce a corporate veil in order to hold a shareholder personally liable if it can be determined that the corporation is the alter ego of one or a few individuals, and if observed, the corporate form would sanction "a fraud, promote injustice, or result in an inequity." Envirotech Corp. v. Callahan, 872 P.2d 487, 499 (Utah App. 1994). Yet, once again, Images engages in assumptions and presumptions not found in this record.

Images presumes that whatever conduct Macris engaged in, either through his various legal corporate entities or

individually, constituted a "fraud or an injustice." Nowhere, however, does Images suggest what that fraud is or the nature of the injustice. Images appeals the trial court's finding that M&A is not the alter ego of Macris, individually. Images is not attempting to pierce a corporate veil in order to collect a judgment against Macris, nor does it suggest how a fraud is being perpetrated by the observance of a separate legal entity.

Corporations are generally regarded as separate and distinct from its shareholders. Dockstader v. Walker, 29 Utah 2d 370, 510 P.2d 526, 528 (Utah 1973). This is true even when the corporation only has one stockholder. Coleman v. Coleman, 743 P.2d 782 (Utah App. 1987). The corporate veil, which protects shareholders from individual liability for corporate debt will only be pierced reluctantly and cautiously. Ramsey v. Adams, 603 P.2d 1025 (Kan. App. 1979).

Images incorrectly assumes that Macris, the individual, is the alter ego of each and every one of his corporations, and, accordingly, each corporate act becomes the corporate and individual act of every other corporation with which Macris is associated. The general rule is that separate corporations are separate legal entities and this is not destroyed by simple common ownership. Institutional Laundry v. Utah State Tax Comm., 706 P.2d 1066 (Utah 1985).

Unless some conspiracy has been alleged, and none has, courts do not attribute one person's actions with every other entity in the world with which it is associated. For these reasons alone, Images' arguments must fail.

D. Images May Not Complain Of Any Alleged Competitive Activity By Macris Or M&A Because Images Materially Breached The M&A Contract.

Cutting through all of Images' painful efforts to create an applicable issue regarding Macris' agency status or the alter ego status of his companies is Finding No. 50. That unchallenged finding renders Images' alter ego/agency arguments moot. Even if Macris was the agent of Affinity and/or Emily Rose and even if he engaged in competitive conduct, he, M&A, Emily Rose or any other company with which he was associated was free to compete with Images. As stated in Finding No. 50: "Following Defendant's breach of the contract, neither Plaintiff nor Third-Party Defendant Macris was contractually restricted from competing with the Defendant."

Because Images fails to marshal the evidence supporting the trial court's findings regarding Macris agency/alter ego questions, fails to show any improper activity and fails to appeal the trial court's Finding No. 50 which renders such questions moot, the trial court's Findings, Conclusions and Judgment should be affirmed.

III. THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A MOTION IN LIMINE REGARDING WILLIAM CRISMON

M&A filed a Motion in Limine to exclude seven witnesses from testifying at trial who had not been named as witnesses by the discovery cut off date, December 1, 1994, as ordered by the trial court. M&A relied upon Rule 37(b)(2)(B) of the Utah Rules of Civil Procedure which provides that a court may make such orders in regard to a party's failure to abide by discovery orders, including a refusal to allow the disobedient party to support or oppose designated claims or prohibiting him from introducing designated matters into evidence.

Images relies upon Berrett v. Denver & Rio Grande Western Railroad, 830 P.2d 291 (Utah App. 1992) for the proposition that absent an order compelling responses to discovery, the trial court abuses its discretion in granting a motion to exclude witnesses from testifying at trial. The procedural facts are clearly distinguishable in this matter from Berrett, because the court had issued a discovery order and also because the trial judge changed its original ruling.

On June 2, 1993, M&A served its Third Set of Interrogatories on Defendants requesting an identification of witnesses to be called at trial. Images responded that it had not yet determined who would be called at trial. On August 10, 1994, in preparation for a September 6, 1994 trial, Images

supplemented its answer to the Third Set of Interrogatories to include their trial witness list.

Due to a conflict with the lower court's schedule, trial was continued and discovery was re-opened by order of the court until December 1, 1994. (See Court Order, R. 2621-2622, copy attached to the Addendum as Exhibit 4.) Thereafter, on September 13, 1994, Images' witness list was again supplemented, but failed to identify William Crismon as a trial witness.

On January 11, 1994, more than one month after the Court ordered discovery cut-off, Images served a new supplemented response which added seven new fact witnesses to be called at trial.

A. Defendants' Supplemental Witness List Violated The Court Order.

Plaintiff had experienced significant difficulty in obtaining answers to legitimate discovery requests.¹⁷ Previous motions to compel discovery had been filed, argued and subsequently granted. Aware of this history, the trial court issued its Order dated September 16, 1994 that Images supply a witness list by that date and that additional discovery would be cut-off as of December 1, 1994. (R. at 2621.)

¹⁷ See Motion to Compel dated December 14, 1991 (R. 2562-2564); Motion for Sanctions for Failure to Comply with Order Compelling Discovery dated July 8, 1992, Motion in Limine dated August 26, 1994 and Motion in Limine dated February 1, 1995 (R. at 2608).

Of the seven new witnesses, Images voluntarily withdrew three names. After full argument, the trial court granted M&A's motion as to Tom and William Crismon and Susan Franceschi, but denied the motion as to David Floor. (R. 4940.)

Clearly, the trial court retains broad discretion in the management of its trials, and proceedings. Shepherd v. Shepherd, 876 P.2d 429, 432 (Utah App. 1994). While the exclusion of evidence and witnesses is a harsh remedy, it is one that, under proper circumstances, can be used to sanction non-complying parties and control case management. The trial court premised its rulings upon Images' admission that Images knew of the existence of some witnesses well before the discovery cut-off date, had taken their depositions (see R. 4939), and yet failed to timely inform M&A of its intention to use these witnesses at trial.

B. Any Exclusion Of William Crismon's Testimony Was Not Error.

Images stipulated that it did not intend to use those witnesses for any purpose other than as already disclosed in discovery depositions (R. at 4935). Images did not, however, proffer the nature or need for such evidence to the trial judge who could have exercised an opportunity to weigh the nature and necessity of the testimony. This is in stark contrast to other occasions in which proffers had been made to the trial court. (See, e.g., R. 5591-96.)

Between the trial court's ruling on February 21, 1995 and the last day of trial, March 27, 1995, the trial court apparently changed its rulings and allowed rebuttal testimony from two of the three witnesses it had earlier excluded: Susan Franceschi and Tom Crismon (R. 5623-5628), the latter, through his deposition testimony taken on March 23, 1995.

Impliedly, the testimony of William Crismon would have been cumulative and no different than that of his brother, Tom Crismon, with whom he purportedly entered into a pre-incorporation agreement with Macris on April 9, 1991, one month after M&A's auto-qualification agreement was terminated. (R. at 5624.) During cross-examination, Mr. Tom Crismon testified that even though he tried to determine a specific date of his meeting with Macris prior to signing the pre-incorporation agreement, he could not. The only purpose of this testimony was to argue that Macris, operating on behalf of the Emily Rose Company, began "competing" in a marketing company before the termination of M&A's auto-qualification agreement on or about March 11, 1991. The evidence, however, did not support Images' theory.

Even assuming the trial court abused its discretion by limiting this same testimony from Tom Crismon's brother, William Crismon, the error is harmless since the Court found, and appellant does not contest, the following findings:

Macris & Associates' agreement with Images were materially breached on March 11, 1991. See Finding No. 37.

Mike Macris, his associated entities and Macris & Associates, Inc., were under no legal duty or restraint not to compete. See Finding No. 50.

There was no credible evidence that Macris & Associates competed or interfered with any of Images' economic opportunities. See Finding No. 53.

The trial court having modified its prior exclusionary rulings concerning the testimony of Susan Franceschi, Thomas Crismon and William Crismon from this trial, Images then had a duty to preserve its record under Rule 103(a)(2) of the Utah Rules of Evidence, and to at least proffer to the trial judge how the addition of William Crismon's testimony would have altered or materially advanced this trial, if at all.

Rule 103 of the Utah Rules of Evidence provides:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (2) in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Rulings on evidence are not as critical when the trial is to the court rather than a jury because it can be assumed that the court has, and will use, its superior knowledge as to competency and evidentiary effect. Super Tire Market, Inc. v. Rollins, 417 P.2d 132 (Utah 1966). Images can show no

prejudicial error resulting from the exclusion of William Crismon's testimony.

CONCLUSION

The trial court properly granted summary judgment on the fraudulent inducement claims on the grounds of collateral estoppel. Images is not permitted to split basic common facts between two separate proceedings and then contend it should be allowed to assert claims which it argues were not asserted in one of the proceedings. It is also not permitted to raise arguments which it had the opportunity to present to the trial court, but simply failed to do.

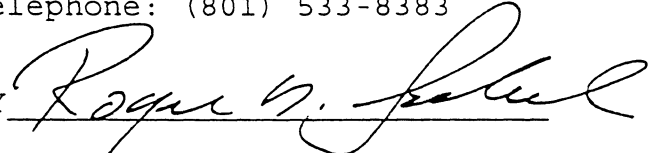
Images should not be allowed to challenge the trial court's alter ego/agency findings when it fundamentally failed to marshal the evidence and when the trial court specifically found Images materially breached the M&A Contract which findings renders the alter ego/agency questions irrelevant.

Finally, Images should not be allowed to challenge the trial court's decision to exclude certain testimony when it directly violated the lower court's discovery order in an attempt to "surprise" M&A, and even then, when the lower court relented during the course of trial, Images made no proffer as to what William Crismon's testimony would have been or why it was even necessary in light of Tom Crismon's testimony.

For all these reasons, the Findings of Fact and Conclusions of Law and Judgment at the lower court should be affirmed and Respondents awarded their costs herein.

DATED this 27th day of November, 1996.


GIAUQUE, CROCKETT,
BENDINGER & PETERSON
170 S. Main Street, Ste. 400
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

BY 
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day November, 1996, two copies of BRIEF OF APPELLEE was served upon the person named below, at the address set out below their name, either by mailing postage prepaid, hand-delivery, Federal Express, or by telecopying to them a true and correct copy of said document.

Dennis K. Poole	<input checked="" type="checkbox"/> U.S. Mail
Andrea Nuffer	<input type="checkbox"/> Federal Express
DENNIS K. POOLE & ASSOCIATES	<input type="checkbox"/> Hand-Delivery
4543 South 700 East, Ste. 200	<input type="checkbox"/> Telefacsimile
Salt Lake City, UT 84107	<input type="checkbox"/> Other:

By: 

Tab 1

9-14-95

Attorneys for Plaintiff Macris & Associates, Inc. and Third-Party Defendant Mike Macris

STATE OF UTAH

Civil No. 910400358
Judge Guy R. Burningham

This matter came on regularly for trial before the Court on February 16, 17, 21, 22, 24, and 27, 1995, and March 27, 1995. Plaintiff Macris & Associates, Inc. ("Plaintiff") and Third-Party Defendant Michael Macris ("Macris") appeared and were represented by counsel Thomas R. Karrenberg, Jon V. Harper, and Nathan B. Wilcox. The Defendant and Third-Party Plaintiff Images & Attitude, Inc. ("Defendant") appeared and was represented by Dennis K. Poole, Andrea Nuffer, and Nancy Mismash. The Court thereupon heard evidence by the parties and witnesses in support of their respective positions, reviewed the file and exhibits and upon being advised in the premises now finds and concludes as follows:

FINDINGS OF FACT

1. Plaintiff Macris & Associates, Inc. is a Utah corporation which has been in existence since November 1985.
2. Defendant and Third-Party Plaintiff Images & Attitude, Inc., is a Utah Corporation with its principal place of business located in Utah County, State of Utah.
3. Third-Party Defendant Macris is an individual residing in Salt Lake County, State of Utah.
4. Defendant operated a multilevel marketing business out of Salem, Utah, until August 31, 1992, at which time Defendant ceased to operate the multilevel marketing operation and transferred it to Neways, Inc.
5. Plaintiff was a corporate distributor for Defendant.
6. Thomas E. Mower ("Mower") founded Defendant and served as its President at least through August 31, 1992. Mower is also President of Neways.

7. Multilevel marketing is promoted as an opportunity to bring other people into a business by "sponsoring" them and share in the profits that those people bring in by sponsoring other people creating what is called a "downline." More people create a greater volume of sales upon which the earlier sponsors receive a percentage as compensation. There is an incentive to build an organization (downline) so that future income will be at a much greater amount because of the volume created by the organization. Encouragement to build "width" is usually a part of the contract with sponsors, requiring "break away" organizations to be built, thus creating "executive" levels for the original or early sponsors, so that the company will also continue to grow. One incentive is to "sacrifice" in the beginning, working hard, while the money eventually grows through the duplicating efforts of "building the business."

8. Plaintiff and Defendant entered into an agreement which waived the normal requirements for ordinary distributors. Plaintiff was considered to have special expertise and connections that would benefit Defendant, thereby justifying the waiver of certain requirements. As an incentive and consideration to Plaintiff to join Defendant's organization and sponsor some of Plaintiff's connections, Defendant waived all qualifications under its marketing plan, pursuant to an "Addendum to Distributor Application," with hand printed language noting, "Ultimate objective is to develop each distributorship according to the width projects of the marketing plan" and "as long as the distributors are active in promoting Images and Images products." The language was proposed by the Defendant and was inserted by Macris on the Plaintiff's Addendum at Mower's request, changing the wording of the second hand-printed phrase as follows: "As long as Distributor is active in promoting Images and Images products."

9. No time frame was established to meet the "ultimate objective," but progress was being made during the time the parties were working together. Similarly, no criteria were established to determine what was meant by being "active in promoting Images and Images products."

10. The Distributor Application and the Addendum to Distributor Application together became the contract between Plaintiff and Defendant.

11. Plaintiff recruited Margie Hunsaker Aliprandi ("Hunsaker") into Defendant and assisted her in building her organization in depth and width, which was contemplated in the parties' contract.

12. Plaintiff and Hunsaker agreed verbally at the time they executed the Addendums that they would work together to build the width of the Hunsaker distributorship to the Presidential level of Defendant's marketing plan before building out Plaintiff's organizational width. Images was aware of the agreement to build out Hunsaker's distributorship first. Defendant was also aware that Plaintiff placed distributors under the Hunsaker distributorship rather than directly under its own distributorship. Defendant was aware of this procedure by its review of the monthly reports of Plaintiff and never complained until 1991.

13. Plaintiff introduced Glenn Tillotson ("Tillotson") to Defendant. Tillotson had significant experience in building a large multilevel marketing organization. Tillotson assisted in building the Hunsaker organization, which benefitted Defendant.

14. Plaintiff also recruited Haydon and Joanne Cameron (the "Camerons") into Defendant. Haydon Cameron had significant experience in multilevel marketing and in placing

articles and advertisements in the national media concerning multilevel marketing opportunities and products.

15. Plaintiff presented adequate and credible evidence of its activity from August 1989 through March 1991, in "promoting Images and Images products." The evidence shows that Plaintiff was active in promoting Defendant and Defendant's products by attending meetings, recruiting individuals, promoting Defendant's products, developing marketing strategies, training and motivating other distributors for Defendant, consulting with Defendant on ways to improve its marketing plan, and travelling for Defendant. Plaintiff expended money, including financial support to a down line distributor for travel expenses, to accomplish these activities.

16. At all times relevant to this action, Plaintiff was "active in promoting Images and Images products." In addition, Plaintiff complied with the terms and conditions of its contract with Defendant which entitled Plaintiff to be paid at the highest level of Defendant's marketing plan and to maintain its status as distributor for Defendant. Throughout the period from August 1989 until March 1991, Defendant paid Plaintiff at the highest level of Defendant's marketing plan, according to the Addendum.

17. In or about February 1991, through the assistance of Plaintiff and the hard work of Hunsaker and Tillotson, the Hunsaker distributorship became the first distributorship in Defendant's organization to achieve the presidential level in Defendant's marketing plan of 12 front-line qualified executives. This was Defendant's most successful distributorship during the period from August 1989 through August 1992, at which time Neways took over the multilevel marketing operation.

18. In spite of Plaintiff's activity level in the first half of 1990, Defendant notified Plaintiff in an undated letter received on April 27, 1990, that its autoqualification status under the Addendum to Distributor Application was being terminated. This termination notice was sent at a time when Plaintiff's earnings from its distributorship were increasing significantly (as was anticipated in the bargain) and meant that Plaintiff's April 1990 check was several thousand dollars less than it should have been under the Addendum.

19. Plaintiff immediately contacted Mower in his hotel room in California and complained about the termination of Plaintiff's autoqualification status under the Addendum. Defendant ultimately withdrew the attempted termination.

20. In the summer of 1990, several users of Defendant's nail care system began to experience irritation problems. Many of those users became sensitized to Defendant's nail gel.

21. In the attempt to develop or locate a suitable nail gel, Macris, on behalf of Affinity, Inc. ("Affinity") -- a company in which Macris was involved but which was separate and distinct from Plaintiff and had its own contractual relationship with Defendant as a supplier - - had individuals sample various gels to determine whether they could use the gels without irritation and to determine whether other characteristics of the gels were appropriate.

22. Affinity, Inc. provided gel samples to Hunsaker, who had tried various gel samples for Affinity even before becoming a distributor for Defendant. Affinity also provided various gel samples to Ms. Reynolds, who had become sensitized to Defendant's gel. Affinity also provided gel samples to Defendant to allow Defendant's personnel and various distributors to try the samples.

23. In a letter dated August 31, 1990, addressed to "Mike Macris Affinity," Mower, on behalf of Defendant, noted that Affinity had provided new gels to distributors to test before Defendant had seen the new gels. Mower explained that he had not seen Affinity's new gel but had heard about it from distributors. Mower requested that Affinity not supply any gels to Defendant's distributors to sample unless Defendant was also given the gels.

24. Following the August 31, 1990 letter, Macris, on behalf of Affinity, always provided Defendant with any new gel before any distributor sampled the gel.

25. Defendant also began testing its own new gels on its distributors, including on Hunsaker and Ms. Reynolds -- the two distributors who tried Affinity's new gels. Hunsaker reported to Mower her impressions of any new gel she tried for Affinity. Mower never instructed her not to test or sample Affinity's gels.

26. Plaintiff never tested or otherwise provided gels to any of Defendant's distributors.

27. In June 1990, Defendant hired Macris to serve as National Sales Director. As part of his compensation, Macris was to receive a commission of 1/4% of Defendant's gross sales.

28. Mower told Macris that, because he was the principal person operating Plaintiff's distributorship, while he served as National Sales Director, Plaintiff would be deemed to be active in promoting Defendant and Defendant's products under the Addendum, stating "it's all the same."

29. In early August 1990, Macris voluntarily resigned from his position with Defendant as National Sales Director due to disputes with Defendant over the promised commission and business practices of Defendant.

30. In response, Defendant sent Macris a letter dated August 9, 1990, terminating him effective September 1, 1990. Defendant stated that it would not pay Macris the promised commission on all of its sales -- only on sales in the United States.

31. In Plaintiff's downline activity report generated in September 1990 for the month of August 1990, Defendant deleted the Jorita McGregor line from Plaintiff's downline. Plaintiff sent a letter to Defendant dated October 11, 1990, complaining about the intentional deletion of this distributor from the downline. Defendant returned the distributor to the downline.

32. Delays in payment of checks owing to Plaintiff by Defendant caused additional difficulties between the parties including the need for attorney involvement demanding payment and delivery of monies due.

33. On November 7, 1990 a meeting was held in Salem, Utah at Defendant's headquarters with Mower, Plaintiff and Plaintiff's attorney, in part to persuade Defendant to release a check being held by Defendant payable to Plaintiff.

34. In the November 7, 1990 meeting, several matters were discussed in addition to the above matter, including a request by Mower for a new addendum with Plaintiff. The new agreement called for Plaintiff to reach the presidential level (12 qualified executives front-line to Plaintiff) within two years. Plaintiff indicated that it would consider the proposal, which

Mower was to memorialize in writing. The check in question was ultimately delivered to Plaintiff.

35. The parties continued to have difficulties and discussed new agreements into January 1991. The parties were never able to agree to new terms. Defendant insisted upon imposing a time limitation of two years from January 1991, for Plaintiff to achieve presidential status, and imposing a higher standard of "active" which would allow Defendant to terminate Plaintiff's distributorship prior to the end of the two years for lack of requisite activity at the higher level. Plaintiff was willing to agree to a two-year term, even though no new consideration was offered by Defendant to Plaintiff for such agreement. Plaintiff was unwilling to agree to the higher standard of "active" and the termination terms being proposed.

36. At the time Plaintiff and Defendant were unable to reach a new agreement to replace the Addendum, both parties were aware that Plaintiff's earnings were going to increase dramatically, as had been anticipated since the inception of the original agreement.

37. In a letter to Plaintiff dated March 7, 1991, and received by Plaintiff on March 11, 1991, Defendant informed Plaintiff that it was discontinuing the autoqualification status of the distributorship for lack of activity. There was no mention of any other basis for Defendant's action in that letter. Based upon the level of activity of Plaintiff, this act constituted a material breach of the contract between the parties, by the Defendant.

38. Plaintiff fulfilled its responsibilities under the contract and had been "active in promoting Images and Images products."

39. At the time of the March 7, 1991 letter, Plaintiff's earnings were increasing dramatically.

40. Defendant warned Plaintiff in March 1991, after already terminating Plaintiff's autoqualification status, not to supply gels to Defendant's distributors, or it may be grounds for terminating Plaintiff. Plaintiff never tested or otherwise provided gels to Defendant's distributors.

41. In a letter dated March 29, 1991, after already terminating Plaintiff's autoqualification status and failing to pay Plaintiff for the month of February 1991, Defendant gave Plaintiff "formal" notice that it was considering termination of its distributorship. The reasons given were testing gels after warnings not to do so, lack of activity under the Addendum, and damaging activity against Defendant and its distributor force. The evidence did not support the stated reasons for termination, all of which were without merit. Plaintiff had not engaged in conduct which violated Plaintiff's policies and procedures or the contract.

42. The reasons given by Defendant for terminating Plaintiff after already terminating Plaintiff's autoqualification status and failing to pay Plaintiff for the month of February 1991, were all pretextual and without merit, and did not justify termination of Plaintiff.

43. After demand by Plaintiff's attorney, Defendant failed and refused to pay Plaintiff for the month of February 1991, or thereafter.

44. The money not paid by Defendant was retained by Defendant and benefitted Defendant, to the detriment, injury and damage to the Plaintiff.

45. As a direct and proximate result of Defendant's wrongful and material breach of its contract with Plaintiff, Plaintiff has suffered damages in the amount of \$9,638.96 for the month of February 1991, which amount the Court has already entered partial summary judgment in favor of the Plaintiff.

46. Also as a direct and proximate result of Defendant's wrongful and material breach of its contract with Plaintiff, Plaintiff has suffered damages for amounts which Defendant should have paid to Plaintiff for subsequent months, from March 1991 through August 1992, when Neways took over the multilevel marketing operation. Defendant has stipulated to the following amounts for those months:

March 1991	15,112.33
April 1991	22,221.57
May 1991	24,865.61
June 1991	22,905.35
July 1991	27,227.69
August 1991	23,913.41
September 1991	27,063.79
October 1991	28,627.10
November 1991	20,890.65
December 1991	15,974.44
January 1992	18,928.07
February 1992	17,854.18

March 1992	18,122.16
April 1992	15,911.97
May 1992	13,364.27
June 1992	12,692.71
July 1992	12,103.22
August 1992	13,263.72

47. Defendant received the benefit of its bargain and wrongfully terminated the Plaintiff's Addendum.

48. Had Defendant continued to honor the bargain, Plaintiff would have received payments of \$360,681.20 through August 31, 1992. This amount constitutes Plaintiff's damages through August 31, 1992 as a result of Defendant's breach.

49. The damages above are a liquidated amount and could be calculated as they came due. Plaintiff is entitled to pre-Judgment interest in the amount of \$116,087.49, as of February 16, 1995. After February 16, 1995, per diem prejudgment interest is \$98.82 and interest on the judgment at the rate of 9.22 % after the date judgment is entered.

50. Following Defendant's breach of the contract, neither Plaintiff nor Third-Party Defendant Macris was contractually restricted from competing with the Defendant.

51. There was not adequate or credible evidence to establish that Plaintiff breached its contract with Defendant.

52. Macris's activities on behalf of the new company Emily Rose were not done either as an agent or representative for the Plaintiff. Plaintiff never had any contractual relationship with Emily Rose.

53. There was not adequate or credible evidence to establish that either Plaintiff or Macris interfered with Defendant's contractual relations or potential contractual relations, or that either Plaintiff or Macris interfered with Defendant's existing or potential economic relations. There was not adequate or credible evidence to establish that Defendant was injured or damaged by any alleged acts of interference by either Plaintiff or Macris.

54. There was not adequate or credible evidence to establish that any contracts or potential contracts with Defendant were breached as a result of either Plaintiff's or Macris's alleged actions.

55. There was not adequate or credible evidence to establish that either Plaintiff or Macris engaged in any activities for the purpose of wrongfully interfering with Defendant's existing or potential contractual relations.

56. There was not adequate or credible evidence to establish that either Plaintiff or Macris intentionally interfered with Defendant's existing or potential economic relations for an improper purpose which predominated over any other purpose, or that either Plaintiff or Macris used improper means to intentionally interfere with Defendant's existing or potential economic relations.

57. There was not adequate or credible evidence to establish that Macris & Associates, Inc. is the alter ego of Michael Macris, or that Michael Macris is the alter ego of

Macris & Associates, Inc. There was ample evidence that adequate corporate formalities were met and that each maintained their separate legal personalities.

58. There was not adequate or credible evidence to establish that observance of the corporate distinction between Plaintiff and Macris sanctioned a fraud, promoted an injustice or resulted in an inequity.

CONCLUSIONS OF LAW

The following Conclusions of Law are in addition to those Findings of Fact set forth hereinabove which may be properly characterized as Conclusions of Law:

1. The Distributor Application between Plaintiff and Defendant and the Addendum thereto constituted a single integrated contract between Plaintiff and Defendant.
2. Based on Plaintiff's level of activity, Plaintiff, at all times relevant, was "active in promoting Images and Images products." Plaintiff performed according to all conditions of the contract between the parties until Defendant wrongfully breached the contract.
3. Defendant materially breached the contract between the parties when it suspended Plaintiff's autoqualification status for lack of activity, through its letter dated March 7, 1991.
4. Defendant also materially breached the contract between the parties when it ceased paying Plaintiff under the contract between the parties.
5. As a direct and proximate result of Defendant's material breach(es), Plaintiff suffered damages through August 31, 1992 in the stipulated amount of \$360,681.20, plus pre-judgment interest thereon in the amount of \$116,087.49 as of February 16, 1995. After February 16, 1995, per diem prejudgment interest is \$98.82.

6. Plaintiff is not the alter ego of Third-Party Defendant, nor is Third-Party Defendant the alter ego of Plaintiff. Each maintained their separate legal personalities and the observance of the corporate distinction between Plaintiff and Third-Party Defendant would not sanction a fraud, promote an injustice or result in an inequity. Therefore, Defendant's First Cause of Action against Plaintiff and Third-Party Defendant, based on alter ego, is without merit or legal basis and shall be dismissed with prejudice.

7. Plaintiff performed according to all of the conditions of its contract with Defendant until Defendant wrongfully breached the contract, and Plaintiff did not materially breach the contract. Therefore, Defendant's Second Cause of Action, based on breach of contract, is without merit or legal basis and shall be dismissed with prejudice.

8. Based on Defendant's stipulation during the trial of this matter, by and through their counsel, Defendant's Third Cause of Action, based on defamation, was dismissed with prejudice.

9. Defendant failed to establish that either Plaintiff or Third-Party Defendant intentionally induced any third party, including any of Defendant's distributors, to breach a contract with Defendant which, as a direct or proximate result, injured or cause damage to Defendant. As such, Defendant's Fourth Cause of Action against Plaintiff and Third-Party Defendant, based on intentional interference with contractual relations, is without merit or legal basis and shall be dismissed with prejudice.

10. Defendant failed to establish that either Plaintiff or Third-Party Defendant intentionally interfered with Defendant's existing or potential economic relations for an improper purpose or by improper means, thereby injuring or causing damage to Defendant. As such, Defendant's Fifth Cause of Action against Plaintiff and Third-Party Defendant, based on intentional interference with economic relations, is without merit or legal basis and shall be dismissed with prejudice.

11. Neither Plaintiff's nor Third-Party Defendant's acts or omissions complained of in any of Defendant's causes of action were the result of willful or malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others and, therefore, Defendants are not entitled to any punitive damages. Therefore, Defendant's Seventh Cause of Action against Plaintiff and Third-Party Defendant, based on punitive damages, is without merit or legal basis and shall be dismissed with prejudice.

12. Plaintiff's claims are not barred by (1) the statute of frauds, (2) the parol evidence rule, or (3) the doctrines of laches, waiver or estoppel as Defendants' claimed in the Answer to Second Amended Complaint.

13. Plaintiff's Fourth Cause of Action against Defendant based on declaratory relief was dismissed with prejudice at trial.

14. Plaintiff's Fifth Cause of Action against Defendant based on compression of the Joann Cameron distributorship was dismissed with prejudice at trial on Plaintiff's motion and Defendant's stipulation.

15. Plaintiff's Sixth Cause of Action against Defendant based on participation in the car fund program was dismissed with prejudice at trial on Defendant's motion and Plaintiff's stipulation.

16. Plaintiff's Seventh Cause of Action against Defendant based on unfair trade practices was dismissed with prejudice by stipulation of the parties prior to trial.

The foregoing findings and conclusions are cross-adopted to the extent a conclusion has been misidentified as a finding or a finding has been misidentified as a conclusion.

DATED this 14 day of September, 1995.

BY THE COURT


Judge Guy R. Burningham

APPROVED BY:

DENNIS K. POOLE & ASSOCIATES

Dennis K. Poole
Attorneys for Defendant and Third-Party Plaintiff

Tab 2

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

FILED
Fourth Judicial District Court of
Utah County, State of Utah
CARMELA B. SWANSON, Clerk
6-6-95
J. Deputy

MACRIS & ASSOCIATES, INC.

Plaintiff,

vs.

IMAGES & ATTITUDE, INC.,

a Utah corporation, and

THOMAS MOWER, an individual,

Defendants.

CASE NO. 910400358

DATE: JUNE 6, 1995

MEMORANDUM DECISION

IMAGES & ATTITUDE, INC.,

Third-Party Plaintiff,

vs.

MIKE MACRIS,

Third-Party Defendant.

This matter came on regularly for trial before the Court on February 16, 17, 21, 22, 24, and 27, 1995, and March 27, 1995. The Plaintiff appeared and was represented by counsel Thomas R. Karrenberg, Jon V. Harper, and Nathan B. Wilcox. The Defendant and Third-Party Plaintiff appeared and was represented by Dennis K. Poole, Andrea Nuffer, and Nancy Mismash. The Third-Party Defendant appeared and was represented by Thomas R. Karrenberg, Jon V. Harper, and Nathan B. Wilcox. The Court thereupon heard evidence by the parties and witnesses in support of their respective positions, reviewed the file and exhibits and upon being advised in the premises now finds and concludes as follows:

FINDINGS & CONCLUSIONS

1. The Plaintiff, Macris & Associates, Inc. is a Utah Corporation.

2. The Defendant and Third-Party Plaintiff, Images & Attitude, Inc. is a Utah Corporation with its principal place of business located in Utah County, State of Utah.

3. Third-Party Defendant, Mike Macris is a resident of Salt Lake County, State of Utah.

4. Plaintiff was a corporate distributor for Defendant and Third-Party Plaintiff.

5. Defendant and Third-Party Plaintiff operated a multilevel marketing business out of Salem, Utah at times pertinent to this matter.

6. Multilevel marketing is promoted as an opportunity to bring other people into a business by "sponsoring" them and share in the profits that those people bring in by sponsoring other people creating what is called a "downline." More people create a greater volume of sales upon which the earlier sponsors receive a percentage as compensation. There is an incentive to build an organization (downline) so that future income will be at a much greater amount because of the volume created by the organization. One incentive is to "sacrifice" in the beginning, working hard, while the money eventually grows through the duplicating efforts of "building the business." Encouragement to build "width" is usually a part of the contract with sponsors, requiring "break away" organizations to be built, thus creating "executive" levels for the original or early sponsors, so that the company will also continue to grow . In this action, Plaintiff was not paid very much money in the early months, when it worked the hardest on its distributorship.

7. Plaintiff and Defendant and Third-Party Plaintiff entered into an agreement which waived the normal requirements required of ordinary sponsors. Plaintiff was considered to have special expertise and connections that would benefit the Defendant and Third-Party Plaintiff, thereby justifying the waiver of certain requirements. As an incentive and consideration to Plaintiff to join Defendant organization and sponsor some of its connections, Defendant waived all qualifications under its marketing plan, pursuant to an "Addendum to Distributor Application", with hand printed language noting, "Ultimate

objective is to develop each distributorship according to the width projects of the marketing plan" and "as long as the distributors are active in promoting Images and Images products." The language was proposed by the Defendant and was inserted on the Joanne Cameron addendum by Mr. Thomas Mower and inserted on the Macris & Associates and Margie Hunsaker addendum by Mike Macris at Mr. Mower's request.

8. The arrangement seemed to have worked without major problems from August 1989 through March 7, 1991. No time frame was established to meet the "ultimate objective," but progress was being made during the time the parties were working together.

9. Plaintiff recruited Margie Hunsaker into Defendant and assisted her in building her organization in depth and width, which was contemplated in the parties contract.

10. Plaintiff used its efforts to build the Hunsaker organization, before it developed its own organizational width, which was the agreement of the parties. Defendant was aware of this procedure by its review of the monthly reports of Plaintiff and never complained until 1991.

11. Plaintiff introduced an individual named Glenn Tillotson to the Defendant organization. Mr. Tillotson had significant experience in building a large multilevel marketing organization. Although Mr. Tillotson did not personally join Defendant organization, he assisted in building the Hunsaker organization, which benefitted Defendant.

12. Haydon and Joanne Cameron are individuals Plaintiff recruited into Defendant. At the time of recruitment, Mr. Cameron had significant experience in multilevel marketing and in placing articles and advertisements in the national media regarding multilevel marketing opportunities and products.

13. Plaintiff presented adequate and credible evidence of "actively promoting" Defendant's products from August 1989 until 1991, when Defendant terminated Plaintiff. Meetings were attended, individuals were recruited, products were promoted, training, motivation, and travel were accomplished by the Plaintiff. The expenditure of money was

made by the Plaintiff to accomplish these activities. These activities were done by the Plaintiff to promote Defendant and Defendant's products.

14. At all times relevant to this action Plaintiff was "active in promoting Images and Images' products." In addition, Plaintiff complied with the terms and conditions of its contract with the Defendant, which entitled Plaintiff to be paid at the highest level of Defendant's marketing plan.

15. In or about February 1991, through the assistance of Plaintiff and the hard work of Margie Hunsaker and Glenn Tillotson, the Hunsaker distributorship became the first Images distributorship to achieve the Presidential level in Defendant's marketing plan of 12 front-line qualified executives. This was Defendant's most successful distributorship during the period from August 1989 through August 1992, at which time Neways took over the multilevel operation.

16. In an undated letter, received by the Plaintiff April 27, 1990, Defendant notified the Plaintiff that its autoqualification status under the addendum to distributor application was being terminated. This termination notice was sent at a time when the earnings of Plaintiff were increasing significantly (as was anticipated in the bargain) and Plaintiff's April 1990 check was several thousand dollars less than it should have been under the addendum agreement.

17. Plaintiff immediately contacted Thomas Mower in his hotel room in California and complained about the termination of Plaintiff's autoqualification status under the addendum. Defendant ultimately withdrew the attempted termination.

18. In the summer of 1990, several users of Defendant's nail care system began to experience irritation problems. Many of those users became sensitized to Defendant's nail gel.

19. In an attempt to develop or locate a suitable nail gel, Mike Macris, on behalf of Affinity, Inc., had individuals sample various gels to determine whether they could use the

gels without irritation and to determine whether other characteristics of the gels were appropriate.

20. Affinity, Inc. provided gel samples to Margie Hunsaker, who had tried various gel samples for Affinity even before becoming an Images distributor. Affinity also provided samples to Ms. Reynolds, who had become sensitized to Defendant's gel. Affinity also provided gel samples to the Defendant to allow Defendant's personnel and distributors to try the samples.

21. In a letter dated August 31, 1990, addressed to "Mike Macris Affinity," Thomas Mower, on behalf of Defendant, noted that Affinity had provided new gels to distributors to test before Defendant had seen the new gels. Mr. Mower explained that he had not seen Affinity's new gel but had heard about it from distributors. Mr. Mower requested that Affinity not supply any gels to Defendant's distributors to sample unless Defendant was also given the gels.

22. Following the August 31, 1990 letter, Mr. Macris, on behalf of Affinity, always provided Defendant with any new gel before any distributors sampled the gel.

23. Defendant also began testing its own gels on its distributors, including Ms. Hunsaker and Ms. Reynolds. Ms. Hunsaker reported to Mr. Mower her impressions of any new gel she tried for Affinity. Mr. Mower never instructed her not to test or sample Affinity gels.

24. Plaintiff never supplied gels to any Defendant distributors.

25. In June 1990, Defendant hired Mike Macris to serve as National Sales Director. As part of his compensation, Mr. Macris was to receive a commission of 1/4% of Defendant's gross sales.

26. Mr. Mower told Mr. Macris that while he served as National Sales Director, Plaintiff would be deemed to be active in promoting Defendant's products under the addendum, stating "its all the same."

27. In early August 1990, Mr. Macris voluntarily resigned from his position with the Defendant as National Sales Director due to disputes with Defendant over the promised commission and business practices of the Defendant.

28. In response, Defendant sent Mike Macris a letter dated August 9, 1990, terminating him effective September 1, 1990. Defendant stated they would not pay Mr. Macris the commission on all sales, but would on sales in the United States.

29. In Plaintiff's downline activity report generated in September 1990 for the month of August 1990, Defendant deleted the Jorita McGregor line from Plaintiff's downline. Plaintiff sent a letter to Defendant dated October 11, 1990, complaining about the deletion of this distributor from the downline. Defendant returned the distributor to the downline.

30. Delays in payment of checks owing to Plaintiff by the Defendant caused additional difficulties between the parties including involving attorney involvement demanding payment and delivery of monies due.

31. On November 7, 1990 a meeting was held in Salem, Utah at Defendant's headquarters with Thomas Mower, the Plaintiff and Plaintiff's attorney, in part to persuade Defendant to release a check being held by Defendant payable to the Plaintiff.

32. Several matters were discussed in addition to the above matter, including a request by Thomas Mower for a new addendum agreement with the Plaintiff. The new agreement called for Plaintiff to reach presidential level (12 qualified executives front-line to Plaintiff). Plaintiff said he would consider the proposal and Mr. Mower was to memorialize it in writing. The check in question was ultimately delivered at this meeting.

33. The parties continued to have difficulties and discuss new agreements into January 1991. The parties were never able to come to new terms. Defendant unilaterally imposed a time limitation of two years from January 1991, for Plaintiff to achieve presidential status and imposed a higher standard of "active" which would allow Defendant to

terminate the distributorship prior to the end of the two years for lack of requisite "activity" at the higher level. Plaintiff was willing to agree to a two-year term, even though no new consideration was offered by Defendant to plaintiff for such agreement. Plaintiff was unwilling to agree to the higher standard of "active" and termination terms being proposed.

34. At this time Plaintiff and Defendant were unable to reach a new agreement to replace the addendum. Both parties were aware that the earnings of Plaintiff were going to increase dramatically, as had been anticipated since the inception of the original agreement.

35. In a letter to Plaintiff dated March 7, 1991, and received by the Plaintiff on March 11, 1991, Defendant informed Plaintiff that it was discontinuing the autoqualification status of the distributorship for lack of activity. Based upon the level of activity of the Plaintiff, this act constituted a material breach of the contract between the parties, by the Defendant.

36. Macris & Associates, Inc. fulfilled its responsibilities under the contract.

37. Defendant ceased making payments pursuant to the contract and suspended/terminated the Addendum for Plaintiff, thus breaching the contract.

38. At the time of the March 7, 1991 letter, Plaintiff's earnings were increasing dramatically.

39. The Defendant warned the Plaintiff in March 1991, after already terminating the autoqualification status, not to supply gels to Defendant's distributors, or it may be grounds for terminating Plaintiff. Plaintiff never tested gels or provided gels to Defendant's distributors.

40. In a letter dated March 29, 1991, after already terminating the autoqualification status and failing to pay Plaintiff for the month of February 1991, Defendant gave Plaintiff "formal" notice that it was considering termination of its distributorship. The reasons given were testing gels after warnings not to do so, lack of activity under the Addendum, and damaging activity against Defendant and its distributor force.

41. The three reasons given above were all without merit.

42. After demand by Plaintiff's attorney, Defendant failed and refused to pay Plaintiff for the month of February 1991, or thereafter.

43. The money not paid by the Defendant was retained by Defendant and benefitted the Defendant, to the detriment, injury and damage to the Plaintiff.

44. As a direct and proximate result of Defendant's wrongful and material breach of its contract with Plaintiff, Plaintiff has suffered damages in the amount of \$9,638.96 for the month of February 1991, which amount the court has already entered partial summary judgment in favor of the Plaintiff.

45. The amounts which should have been paid by Defendant to Plaintiff for subsequent months are as follows:

March 1991	\$15,112.33
April 1991	22,221.57
May 1991	24,865.61
June 1991	22,905.35
July 1991	27,227.69
August 1991	23,913.41
September 1991	27,063.79
October 1991	28,627.10
November 1991	20,890.65
December 1991	15,974.44
January 1992	18,928.07
February 1992	17,854.18
March 1992	18,122.16
April 1992	15,911.97
May 1992	13,364.27

June 1992	12,692.71
July 1992	12,103.22
August 1992	13,263.72

46. Defendant received the benefit of its bargain and wrongfully terminated the Plaintiff's Addendum.

47. Had Defendant continued to honor the bargain, the Plaintiff would have received payments, based upon the formula of \$360,681.20. This amount constitutes Plaintiff's damages as a result of Defendant's breach.

48. The damages above are a liquidated amount and could be calculated as they came due. Plaintiff is entitled to pre-judgment interest in the amount of \$116,087.49, as of February 16, 1995. After February 16, 1995, per diem prejudgment interest is \$98.82 and interest on the judgment at the rate of 9.22% after the date judgment is entered.

49. Following Defendant's breach of the contract, neither the Plaintiff nor Third Party Defendant was contractually restricted from competing with the Defendant.

50. Third Party Defendant's activities on behalf of the new company Emily Rose were not done either as agent or representative for the Plaintiff. The Plaintiff never had any contractual relationship with Emily Rose.

51. Neither Plaintiff nor Third Party Defendant interfered with Defendant's contractual relations, potential contractual relations, or existing or potential economic relations. Defendant has not been damaged by any acts of either the Plaintiff or the Third Party Defendant.

52. Plaintiff is not the alter ego of Third Party Defendant, nor is Third Party Defendant the alter ego of the Plaintiff. Each maintained their separate legal personalities.

53. The Distributor application between Plaintiff and Defendant and the addendum thereto constituted an integrated contract between the parties.

54. Plaintiff performed according to all conditions of the contract until Defendant wrongfully breached the contract.

55. Defendant failed to establish that any alleged breach of contractual relations by Plaintiff or Third Party Defendant injured or caused damage to Defendants.

56. Neither Plaintiff nor Third Party Defendant intentionally interfered with or procured any breach of any contract with any Defendant distributor or potential distributor.

57. Neither Plaintiff nor Third Party Defendant acted maliciously, intentionally, recklessly, or fraudulently. Punitive damages would not be appropriate.

58. Defendant and Third Party Plaintiff's claims against the Plaintiff and Third Party Defendant are without merit or legal basis and will be dismissed with prejudice.

Counsel for the Plaintiff is directed to prepare, serve opposing counsel and submit appropriate findings of fact, conclusions of law and Judgment consistent with this decision.

Dated this 6TH day of June, 1995.

BY THE COURT:


GUY R. BURNINGHAM, JUDGE

cc: Thomas R. Karrenberg, Esq.; Nathan B. Wilcox, Esq.
Jon V. Harper, Esq.
Dennis K. Poole, Esq.; Andrea Nuffer, Esq.; Nancy Mismash, Esq.

Tab 3

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This matter came on regularly for trial before the Court on February 16, 17, 21, 22, 24 and 27, 1995 and March 27, 1995. The Plaintiff Macris & Associates, Inc. and Third-Party Defendant Michael Macris appeared and were represented by counsel, Thomas R. Karrenberg, Jon V. Harper and Nathan B. Wilcox. The Defendant and Third-Party Plaintiff Images & Attitude, Inc. appeared and was represented by Dennis K. Poole, Andrea Nuffer, and Nancy A. Mismash. The Court thereupon heard evidence by the parties and the witnesses in support of their respective positions, reviewed the file and exhibits and upon being advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Judgment is hereby entered for Plaintiff and against Defendant in the following amounts: (a) \$360,681.20, constituting Plaintiff's damages through August 31, 1992, as a result of Defendant's breach of its contract with Plaintiff; (b) \$126,957.67 constituting pre-judgment interest on the principal amount as of June 6, 1995; and (c) per diem pre-judgment interest of \$98.82 per day from June 6, 1995 until Judgment is entered by this Court (together representing the "Judgment Amount"). Following the entry of this Judgment, interest on the Judgment Amount shall accrue at the rate of 9.22% per annum.

2. Defendant's First Cause of Action against Plaintiff and Third-Party Defendant, based on alter ego, is without merit or legal basis and is hereby dismissed with prejudice.

10. Plaintiff's Sixth Cause of Action against Defendant based on participation in the car fund program was dismissed with prejudice at trial on Defendant's motion and Plaintiff's stipulation.

11. Plaintiff's Seventh Cause of Action against Defendant based on unfair trade practices was dismissed with prejudice by stipulation of the parties prior to trial.

DATED: September 14, 1995.

BY THE COURT:


Judge Guy R. Burningham



APPROVED BY:

DENNIS K. POOLE & ASSOCIATES

Dennis K. Poole
Attorneys for Defendant and Third-Party Plaintiff

3. Defendant's Second Cause of Action against Plaintiff and Third-Party Defendant, based on breach of contract, is without merit or legal basis and is hereby dismissed with prejudice.

4. Defendant and Third-Party Plaintiff's Third Cause of Action against Plaintiff and Third-Party Defendant, based on defamation, was voluntarily dismissed by Defendant and Third-Party Plaintiff at the conclusion of Plaintiff's case at trial and is hereby dismissed with prejudice.

5. Defendant's Fourth Cause of Action against Plaintiff and Third-Party Defendant, based on intentional interference with contractual relations, is without merit or legal basis and is hereby dismissed with prejudice.

6. Defendant's Fifth Cause of Action against Plaintiff and Third-Party Defendant, based on intentional interference with economic relations, is without merit or legal basis and is hereby dismissed with prejudice.

7. Defendant's Seventh Cause of Action against Plaintiff and Third-Party Defendant, based on punitive damages, is without merit or legal basis and is hereby dismissed with prejudice.

8. Plaintiff's Fourth Cause of Action against Defendant based on declaratory relief was dismissed with prejudice at trial.

9. Plaintiff's Fifth Cause of Action against Defendant based on compression of the JoAnn Cameron distributorship was dismissed with prejudice at trial on Defendant's motion and Plaintiff's stipulation.

Tab 4

DENNIS K. POOLE (2625)
ANDREA NUFFER (6623)
DENNIS K. POOLE AND ASSOCIATES
Attorneys for Defendants
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107
(801) 263-3344

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

MACRIS & ASSOCIATES, INC.,)	
)	
)	ORDER
Plaintiff,)	
)	
vs.)	
)	
IMAGES & ATTITUDE, INC., a Utah)	
corporation; and THOMAS MOWER, an)	
individual,)	
)	
Defendants,)	
-----)	Civil No. 910400358
)	
IMAGES & ATTITUDE, INC.,)	
)	
Third Party Plaintiff)	
)	
vs.)	
)	
MIKE MACRIS,)	
)	Judge: Guy R. Burningham
Third-party Defendant)	

Based upon the Stipulation of the parties hereto, and for good
cause appearing, it is hereby

ORDERED as follows:

1. That the discovery cut off in this matter be and is hereby extended through December 1, 1994.

2. That Defendants Images & Attitude, Inc. and Thomas Mower shall provide the Plaintiff with an up-dated witness list on or before September 16, 1994, which witness list may thereafter be supplemented.


3. Plaintiff's Motion in Limine be and is hereby withdrawn, without prejudice.

ORDER DATED this 16th day of September, 1994.

BY THE COURT:

15/ by Court
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

 9-9-94
THOMAS R. KARRENBERG
ANDERSON & KARRENBERG
Attorneys for Plaintiff and
Third-Party Defendants