

1996

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

Utah Court of Appeals

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UTAH
DOCUMENT

IN THE UTAH COURT OF APPEALS

50

MACRIS & ASSOCIATES, INC.,
Plaintiff and Appellee,

-vs-

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

Defendants and Appellant.

.A10
DOCKET NO. 960218-CA

COURT OF APPEALS
NO. 960218-CA

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

-vs-

MIKE MACRIS,
Third-Party Defendant and
Appellee.

TRIAL COURT NO. 910400358

BRIEF OF APPELLANT

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

PRIORITY CLASSIFICATION NO. 15

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Appellant, :
-vs- : TRIAL COURT NO. 910400358
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Third-Party Defendant and :
Appellee. :

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JURISDICTIONAL STATEMENT

This appeal is taken from a final Judgment dated September 14, 1995 and an earlier Order dated February 18, 1994 of the Fourth Judicial District Court in and for Utah County, State of Utah. This case was assigned to the Court of Appeals. The Utah Court of Appeals has jurisdiction to review this matter pursuant to Utah Code Annotated Section 78-2a-3(k) (1995 Supp.).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

I. Whether the trial court erred as a matter of law in dismissing Images' claim for fraudulent inducement on the basis of *res judicata* (R. 284-86; 732, 1017, 1251). A trial court's grant of a motion for summary judgment is a matter of law which is reviewed for correctness. White v. Deseelhorst, 879 P.2d 1371, 1374 (Utah 1994) (citing Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1039 (Utah 1991); Hunsaker v. State, 870 P.2d 893, 896 (Utah 1993)).

II. Whether the trial court erroneously found that Michael Macris' activities in supplying nail gels directly to Images distributors and in commencing the organization of a competing company to Images, while President and the sole employee of Macris & Associates, were not attributable to Macris as an agent or representative of Macris & Associates, and whether the trial court erroneously concluded that Macris & Associates was not the alter ego of Michael Macris (R. 290-92, 4668-85, 4749-74, 4845-80, 4977-5094, 5526-83, 5611-12, 5614-21, 5626-27). A trial court's

findings of fact are reviewed under the clearly erroneous standard while the court's conclusions of law are reviewed for correctness. U.R.C.P. 52(a) (1995); Consolidation Coal Co. v. Utah Div. of State Lands, 886 P.2d 514, 519 (Utah 1994) (clearly erroneous standard); Pasker, Gould, Ames & Weaver, Inc. v. Morse, 887 P.2d 872, 875 (Utah App. 1994) (conclusions of law are reviewed for correctness); Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990).

III. Whether the trial court abused its discretion by refusing to allow Images to call William Crismon, a witness listed on both Plaintiff's and Defendant's witness list in Images' case in chief (R. 2611, 4921-40). This Court reviews a trial court's decision to exclude a witness under an abuse of discretion standard. "Excluding a witness from testifying is, however, 'extreme in nature and . . . should be employed only with caution and restraint.'" Barrett v. Denver & Rio Grande W.R., 830 P.2d 291, 293 (Utah App. 1992) (quoting Plonkey v. Superior, 475 P.2d 492, 494 (Ariz. 1970)).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, AND RULES

The determinative statutes, rules and constitutional provisions are set forth in the addendum where not set forth fully in the body of this brief.

STATEMENT OF THE CASE

The Complaint in this action was filed by Macris & Associates on April 17, 1991 alleging, among other claims, breach of an Addendum to Distributor Application ("Addendum"), and breach of the Distributor Application (the "Distributorship Agreement") (R. 8). Macris & Associates filed a Second Amended Complaint on the 9th of June, 1992 which likewise included claims for breach of the Addendum and breach of the Distributorship Agreement (R. 169).

Images filed an Answer, Counterclaim and Third-Party Complaint on the 17th of June, 1991 (R. 52) and thereafter an Amended Counterclaim and Third-Party Complaint on the 9th of September, 1992 against Macris & Associates and Michael Macris which included among other claims that Macris & Associates breached the agreements with Images; Macris & Associates was the alter ego of Michael Macris; and Michael Macris fraudulently induced Images into entering into the agreement with Macris & Associates (R. 293).

Prior to trial, Macris & Associates filed a motion for summary judgment seeking dismissal of the fraudulent inducement claim supported by: (i) Macris & Associates, Inc.'s and Mike Macris' Memorandum in Support of Motion for Summary Judgment Against Images & Attitude, Inc. and Thomas Mower Re: Fraudulent Inducement, Interference with Contractual and Economic Relations, Defamation and Breach of Contract (R. 661); and (ii) Macris & Associates, Inc.'s and Mike Macris' Reply Memorandum in Support of Their Motion For Summary Judgment for Images' Breach of Contract,

and in Support of their Motions for Summary Judgment Re: Alter Ego, Fraudulent Inducement, Interference with contractual and Economic Relations, Defamation and Breach of Contract (R. 811). Images opposed the motion for summary judgment as set forth in its (i) Memorandum in Opposition to Macris & Associates, Inc.'s Motion for Summary Judgment against Images & Attitude, Inc., For Breach of Contract and in Opposition to Macris & Associates, Inc.'s and Mike Macris' Motion for Summary Judgment Against Images & Attitude, Inc. and Thomas Mower Re: Alter Ego, Fraudulent Inducement, Interference with Contractual and Economic Relations, Defamation, and Breach of Contract (R. 1017); and 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 Re: Fraudulent Inducement (R. 1206).

After oral argument had been held on the matter, Macris & Associates filed a Supplemental Memorandum in Support of Macris & Associates, Inc.'s and Mike Macris' Motion for Summary Judgment Re: Fraudulent Inducement asserting that the claim was barred by the principles of *res judicata* on the basis that the arbitrator in the matter of Eclat, Inc. f/k/a Images v. Affinity, Inc., Consolidated Arbitration Case Nos. 81-81002693 and 81-181006092, in ruling on a motion for summary judgment, held that Images was not fraudulently induced into a contract with Affinity (R. 1191). In its supplemental memorandum, Macris & Associates reasoned that since the misrepresentations Images relied on in entering into the Addendum with Macris & Associates were essentially the same as the

misrepresentations which were the basis for Images' fraudulent misrepresentation claim against Affinity, Images' claim against Macris & Associates was *res judicata* notwithstanding the fact that the two different suits involved two separate contracts with two separate entities (Affinity and Macris & Associates) (R. 1180-1191). The trial court accepted Macris & Associates' reasoning, and on the 18th of February, 1994, entered an order dismissing Images' fraudulent inducement claim (R. 1251).

The remaining claims between Macris & Associates, Michael Macris, and Images came on for trial on February 16, 17, 21, 22, 24, and 27, and March 27, 1995. At trial, the court refused to allow Images to call a material witness in its case in chief, namely William Crismon, who was listed on both Images' and Macris & Associates' witness lists (R. 4932, 4940). The court made its determination based upon the fact that William Crismon was not listed in Images' responses to interrogatories submitted prior to the discovery cut-off date even though (i) Macris & Associates was on notice of the witness and the matters to which he would testify, (ii) William Crismon was already listed on Macris & Associates' witness list, and (iii) he was listed on Images' witness list submitted to the court over a month prior to the trial (R. 4921-40).

After the trial, the trial court entered its Findings of Fact and Conclusions of Law on the 14th of September, 1995 (R. 3060). Among the trial court's findings, the court found: Macris & Associates was active in promoting Images and Images products

from August 1989 through March 1991 (R. 3056); Macris & Associates fulfilled its responsibilities under the contract with Images (R. 3052); Images wrongfully terminated the Addendum with Macris & Associates (R. 3051); and Macris' activities in forming a competing company were not imputed to Macris & Associates (R. 3048). From the Findings of Fact, the trial court entered its Conclusions of Law which included: Macris & Associates performed according to all conditions of the contract between the parties (R. 3046); Images materially breached the contract between the parties when it suspended Macris & Associates' autoqualification (R. 3047); Images materially breached the contract between the parties when it ceased paying Macris & Associates (R. 3047); Macris & Associates is not the alter ego of Michael Macris, nor is Michael Macris the alter ego of Macris & Associates (R. 3046); and Macris & Associates did not materially breach the contract with Images (R. 3046).

The trial court then entered its Judgment against Images on the 14th of September, 1995 (R. 3064). It is from this Judgment as well as the partial summary judgment order entered on the 18th of February, 1994 that Images appeals.

STATEMENT OF THE RELEVANT FACTS

In 1989, Michael Macris ("Macris") was the President of two companies: Affinity Inc. ("Affinity"), a nail system manufacturing company of which Macris was the sole shareholder, director and employee; and Macris & Associates, Inc. ("Macris & Associates"), a marketing company of which Macris and his wife, Valerie

Macris, were the only directors and shareholders at that time and Macris was the only employee (R. 4668-69, 4842, 4859, 4861). In the spring of 1989, Macris approached Images & Attitude, Inc. ("Images")--a multi-level marketing company which markets health and beauty products--through its President, Thomas Mower ("Mower"), concerning the possibility of Images marketing a nail care system manufactured by Affinity. Macris also represented to Mower that Macris was interested in participating in Images as a distributor of Images products. (R. 5154-55).

In the course of negotiating contracts between Affinity and Images, and between Macris & Associates and Images, and as an inducement to Images to enter into the contracts, Macris represented to Mower that Macris had obtained a state of the art nail gel which had been developed by a Dr. Lyman, who was a scientist with the University of Utah (R. 1047, 5176). In reliance upon this false representation and other misrepresentations by Macris, Images entered into a contract with Affinity in June of 1989 for the purchase of nail gels and lamp housings to be used in the assembly by Images of a nail care kit (R. 1046-47).

On or about the 7th of August, 1989, Macris applied for an Images Distributorship under the name, Macris & Associates (R. 4669). In the course of negotiating a distributorship for Macris, Macris indicated he had approximately two million dollars worth of advertising for the nail kits already in place, and he offered a proposal to Mower whereby the National Enquirer would run a full story on the nail care system which included nail gel developed by

Dr. Lyman and Macris would sign up the prospective distributors. In exchange, Images would automatically qualify Macris' distributorship to the level of Presidential--meaning that Images would pay bonuses to Macris as if his distributorship had reached the Presidential level even though it had not (R. 793-96).

Macris also represented that he had several "big-hitters" in multi-level marketing, including Hayden and Joanne Cameron and Margie Hunsaker, who would also be willing to sign up as distributors, if they could be "autoqualified" at the Presidential level as well (R. 5160-63). Macris suggested that by autoqualifying the three distributors at the Executive level, they would be free to pursue the thousands of leads that would come from the National Enquirer ad without the distractions of meeting monthly sales requirements (R. 5162).

In reliance upon the representations of Macris, Images agreed to enter into an Addendum to Distributor Application ("Addendum") whereby Macris & Associates would be "autoqualified" at the Executive level as long as Macris & Associates was "active in promoting Images and Images products." (R. 794, 5176, Trial Exhibit 1). The stated objective of the Addendum was for Macris & Associates to ultimately "develop each distributorship according to the width projects of the Images marketing plan." (Trial Exhibit 2). The Images marketing plan required a distributor to have twelve front-line qualified executive distributors in order to qualify at the Presidential level (R. 4675). Two identical Addenda

were negotiated by Macris and entered into by Images with the Camerons and Margie Hunsaker (Trial Exhibits 3 and 4).

At approximately the time Images entered into Addendum agreements with Macris & Associates, the Camerons, and Hunsaker, Macris signed the Cameron distributorship directly frontlined to Macris & Associates, and the Hunsaker distributorship was signed up under the Cameron distributorship (R. 5098, Trial Exhibit 3). From the time the Macris & Associates Addendum was executed until Images terminated Macris & Associates autoqualification status, Macris & Associates had not signed up a single distributorship frontlined to Macris & Associates other than the MacGregor and Cameron distributorships in August of 1989 (R. 4912, 5212).

In approximately the summer of 1990, Images distributors began experiencing irritation as a result of the nail gel (R. 5223). During this period, Hayden Cameron discovered that Dr. Lyman was not in fact the developer of the nail gel sold to Images by Affinity. At that point, Hayden Cameron refused to run an ad to market the nail care product through the National Enquirer or any other national magazines. (R. 5104-06).

In approximately the fall of 1990 and while Macris was the President and sole employee of Macris & Associates, Macris began providing other Images distributors with sample nail gels for testing purposes, which gels later became the primary product for a newly organized and competing company (R. 4681, 4683, 4774, 4845). Images repeatedly instructed Macris that he should cease testing gels on Images distributors and that such conduct consti-

tuted a breach of Images policies and procedures (R. 5051, Trial Exhibits 12, 39, 55). Not later than February of 1991 and while President and sole employee of Macris & Associates, Macris began his efforts to form a multilevel marketing company to market nail care systems in direct competition with Images (R. 5611). This company was eventually called Emily Star, Inc. d/b/a Emily Rose (R. 4752, 5110).

On or about the 7th of March, 1991, Images terminated Macris & Associates' autoqualification status for failure to remain active in building the Macris & Associates distributorship (Trial Exhibit 8, R. 4684). Thereafter, Images terminated the entire Macris & Associates distributorship for inactivity, for gel testing, and for competitive activities. Macris & Associates responded by commencing this action (R. 8).

SUMMARY OF ARGUMENTS

Appellant Images asserts that the trial court committed reversible error in no less than three instances in this litigation. First, the trial court erred when it granted Macris & Associates' Motion for Summary Judgment on the issue of *res judicata*. Next, the trial court erroneously found that the acts of Michael Macris were not attributable to Macris & Associates and that Macris & Associates was not the alter ego of Michael Macris. Finally, the trial court erred at trial when it excluded a witness from testifying in Images' case in chief.

Regarding Images' first assignment of error, Images asserts that the collateral estoppel branch of the doctrine of *res judicata* did not apply to bar Images' fraudulent inducement claim against Macris & Associates. The issue actually considered in the prior arbitration proceeding was whether Michael Macris' misrepresentations regarding the role of Dr. Lyman in developing Macris' nail gel induced Images into entering into a contract with Affinity. The issues presented in this case were whether Michael Macris' misrepresentations regarding the role of Dr. Lyman and his misrepresentations regarding advertising and Macris' ability to bring in "big-hitters" induced Images into entering into a contract with Macris & Associates. The issues were not identical. Nor was Images afforded an opportunity for competent, full, and fair litigation of the issues in the earlier arbitration proceedings.¹ Accordingly, collateral estoppel did not apply and the trial court erred in entering summary judgment against Images on that basis.

Images' second assignment of error relates to the trial court's findings of fact and conclusions of law which erroneously found and concluded that Michael Macris was not acting as an agent for Macris & Associates when he engaged in disruptive, competitive and inappropriate behavior, that the acts of Macris were not attributable to Macris & Associates, and that Macris & Associates was not the alter ego of Michael Macris. The marshaled evidence including all reasonable inferences drawn therefrom are insuffi-

¹Actually, the arbiter improperly made factual determinations on the Motion for Summary Judgment (R. 1195-98).

cient to support the trial court's findings. Instead, the evidence overwhelmingly supports Images' assertions that the acts of Macris are attributable to Macris & Associates, or alternatively, that Macris & Associates is the alter ego of Michael Macris. Additionally, to the extent that the trial court's conclusions of law are based upon its erroneous findings of fact, they too are incorrect. Had the trial court correctly concluded that the disruptive, improper, and competitive activities of Michael Macris are attributable to Macris & Associates, or alternatively that Macris & Associates was the alter ego of Michael Macris, it would have necessarily concluded that Macris & Associates first breached the agreement with Images by engaging in such disruptive, improper, and competitive conduct. Accordingly, Images has been prejudiced by the trial court's erroneous findings of fact and conclusions of law.

Concerning Images' final assignment of error, the trial court abused its discretion when it excluded William Crismon from testifying at the trial of this matter. William Crismon was added to Images' final witness list which was submitted to the Court and to opposing counsel over one month in advance of trial. Mr. Crismon was already listed on Macris & Associates' witness list and had been deposed by Images three and one-half months prior to trial. There was no judicially imposed deadline for submitting witness lists in this case. On the contrary, the trial court had earlier entered an order based upon the parties' stipulation specifically stating that the parties' witness lists could be

supplemented. The law in Utah is clear. It is an abuse of discretion for a trial court to exclude a witness from testifying at trial when no deadline for designating witnesses was imposed by the trial court.

The numerous errors of the trial court in this case mandate that its Judgment be overturned and remanded to the trial court for a new trial on the issues contained in Images' Counterclaim and Third-Party Complaint and Images' affirmative defenses against Macris & Associates' Complaint.

ARGUMENT

Images asserts that the trial court committed at least three errors which were substantial, prejudicial, and adversely effected the outcome of trial; namely, that (i) the trial court erred in granting Macris & Associates' motion for summary judgment on the issue of fraudulent inducement; (ii) the trial court erred in concluding that Macris' competitive and improper acts were not attributable to Macris & Associates, or alternatively, that Macris & Associates was not the alter ego of Michael Macris; and (iii) the trial court erroneously excluded relevant testimony of certain witnesses at trial. Based upon these errors, the Judgment should be reversed as a matter of law, or the case should be remanded for a new trial on these issues.

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING IMAGES' CLAIM FOR FRAUDULENT INDUCEMENT ON THE BASIS OF *RES JUDICATA*.

The trial court entered summary judgment on Defendant's fraudulent inducement claim based upon the doctrine of *res judicata*. "Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Cook v. Zions First Nat'l Bank, 293 Utah Adv. Rep. 8, 9 (Utah App. 1996); Larsen v. Allstate Ins. Co., 857 P.2d 263, 265 (Utah App. 1993). Since summary judgments are decided as questions of law, this Court should "accord no deference to the trial court's determinations and review the issues under a correctness standard." Id. Furthermore, where this review involves a summary judgment, this Court should "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." De Baritault v. Salt Lake City Corp. 913 P.2d 743, 744 (Utah 1996) (quoting Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993)); Malone v. Parker, 826 P.2d 132, 133 (Utah 1992).

Images' Amended Counterclaim and Third Party Complaint alleged a cause of action against Macris & Associates and Mike Macris ("Macris") for fraudulent inducement based upon several statements made by Macris to Images' President, Thomas Mower ("Mower"). These statements included the following: (i) that Macris had developed a nail gel and nail preparation for a fingernail bonding system with Dr. Donald Lyman of the University

of Utah; and (ii) that Macris had advertising already in place to promote the fingernail bonding system, which advertising was worth approximately 2.5 million dollars (R. 285, 795).²

Macris & Associates filed several motions for summary judgment in August of 1993 including a motion requesting summary judgment on Images' fraudulent inducement claim (R. 732). In support of its motion, Macris & Associates argued that neither Macris & Associates nor Mike Macris made the alleged misrepresentations, and even if they have made the misrepresentations, Images did not reasonably rely upon them in entering into the Addendum Agreement with Macris & Associates (R. 716-22). In opposition to Macris & Associates' motion and as supported by the Affidavit of Tom Mower (R. 790-97), Images established that genuine issues of material fact existed relative to whether Mike Macris made the alleged misrepresentations and whether Images relied upon the alleged misrepresentations (R. 1001-17; 1043-48).

After oral argument on the matter, Macris & Associates filed a supplemental memorandum in support of its motion for summary judgment. Macris & Associates informed the court of arbitration proceedings between Images and Affinity (the nail gel company solely owned and operated by Mike Macris). (R. 1191).

In the Affinity proceedings, Images had also asserted a fraudulent inducement claim against Affinity. Affinity informed

²Images' Amended Counterclaim and Third-Party Complaint contained a typographical error. Images claimed that Macris represented \$2,000,000 to \$2,500,000 in advertising, not \$250,000 as set forth in the Amended Counterclaim and Third-Party Complaint. See Mower Affidavit at R. 794.

the court that the Arbiter in the Affinity action ruled 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. 1189). Macris & Associates then urged the court to "assert the doctrine of collateral estoppel to prevent Images from relitigating the issue of fraudulent inducement insofar as that issue is based on the allegations concerning Dr. Lyman and his role in developing the gel products sold under the Affinity Agreement." (R. 1188).

After consideration of Macris & Associates' supplemental memorandum, the trial court ruled that the issue as to whether Mike Macris had fraudulently induced Images had been fully and fairly litigated in the prior arbitration proceeding and that the doctrine of collateral estoppel barred Images from asserting a fraudulent inducement claim against Macris & Associates and Mike Macris (R. 1233). Thereafter, the trial court granted Macris & Associates' motion for summary judgment relating to Images' claim for fraudulent inducement based upon the doctrine of collateral estoppel (R. 1250-51).

Collateral estoppel bars a party from relitigating an issue previously litigated where (1) the issue in the subsequent action is identical to the issue decided in the previous action; (2) the issue was decided in a final judgment on the merits; (3) the issue was competently, fully, and fairly litigated in the first action; and (4) the party against whom the doctrine was applied was a party to the first action. Sevy v. Security Title Co., 902 P.2d

629, 632 (Utah 1995); Timm v. Dewsnup, 851 P.2d 1178, 1184 (Utah 1993) *rev'd on other grounds*, 297 Utah Adv. Rep. 3 (Aug. 13, 1996); Berry v. Berry, 738 P.2d 246, 248 (Utah App. 1987).

The trial court's ruling was erroneous in many respects. First, the Affinity arbitration dealt with whether Images had been fraudulently induced into entering into the Affinity contract, not the Macris & Associates Addendum and Distributorship Agreement. Second, the issue of whether Images had been fraudulently induced into entering into the Macris & Associates Addendum was never addressed in the Affinity arbitration. Third, since the Affinity arbitration matter was decided on a motion for summary judgment, no full and fair litigation occurred of Images' fraudulent inducement claim. Finally, the issue of whether Macris misrepresented that he had advertising and "big-hitters" already in place was never addressed in the Affinity arbitration and likewise was apparently not considered by the trial court in granting Macris & Associates' motion for summary judgment.

A. Collateral Estoppel Does Not Bar Images From Claiming Fraudulent Inducement Regarding the Macris & Associates Addendum.

The first element of collateral estoppel requires that the issues in the subsequent action be identical to the issues in the former action. Timm, 851 P.2d at 1184. In the Affinity arbitration, Images specifically alleged that Mike Macris made material misrepresentations regarding the role of one Dr. Lyman, a scientist then employed at the University of Utah, in developing

the nail gel supplied by Mike Macris and to be used in the nail care kit. Images further alleged that Macris' representations were false, were intended to induce Images into entering into a contract with Affinity, and that Images did rely upon Macris' representations. (R. 1190).

The fact that Images has relied in part upon the same misrepresentation concerning Dr. Lyman for a separate contract does not create identical issues. In the Arbitration action, the issue was whether Images was fraudulently induced by virtue of the misrepresentation into entering into the Affinity contract in June of 1989 (R. 4669). In the instant case, however, the issue to be litigated was whether Images was fraudulently induced into entering the Macris & Associates Addendum and Distributorship Agreement in approximately August of 1989 (R. 4669).

Unfortunately, the Arbiter's ruling in the Arbitration is not sufficiently detailed to assist in the determination of whether identical issues were involved. The Arbiter specifically ruled:

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

(R. 1197). In fashioning this ruling, the Arbiter failed to specify whether it was his finding that either (i) Macris made no representations; (ii) the representations of Macris were not false; (iii) the representations of Macris were not material; (iv) or precisely which alleged representations the Arbiter based his decision upon.

Clearly Macris & Associates presented no evidence to the trial court to demonstrate that the issues involved in the arbitration were identical to the issues presented in this litigation. Accordingly, the trial court erred in determining that the first element of the doctrine of collateral estoppel had been met.

Similarly, there was no evidence presented to the trial court to suggest that the issue of whether Images relied upon the representations concerning Dr. Lyman's role in entering into the Macris & Associates Addendum agreement was even considered in the arbitration proceedings. Macris & Associates was not a party to the arbitration proceedings; nor was the Macris & Associates Addendum or Distributorship Agreement at issue in the arbitration proceedings. (R. 1195-98). Clearly, the trial court erred in determining that the issues contained in the arbitration proceedings and in the instant litigation were identical.

B. Summary Judgment in a Prior Arbitration Proceeding Does Not Constitute Full and Fair Litigation.

Images asserts that since Images' fraudulent inducement claims were decided on Affinity's motion for summary judgment in the Arbitration proceedings, Images was not afforded a competent, full and fair litigation of Images' claims. Accordingly, the third element of the doctrine of collateral estoppel was not satisfied.

The Utah Supreme Court has recognized that where a case is decided on a motion for summary judgment, it is possible that no

full and adequate evidentiary hearing was held. Rocky Mtn. Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989). In Rocky, the Utah Supreme Court stated, "Inasmuch as this case was decided in the trial court on a motion for summary judgment, no full and adequate evidentiary hearing was held to resolve critical facts." Id. at 464.

Likewise, Images was not afforded a full and adequate evidentiary hearing on its fraudulent inducement claims. Moreover, in the Affinity arbitration, the Arbiter overstepped his bounds by deciding very factually intensive and material issues at the summary judgment stage. Images should not be barred from litigating in the present action the question of whether Mike Macris or Macris & Associates fraudulently induced Images into entering into the Addendum and Distributorship Agreement where the earlier arbitration proceedings determined genuine issues of material fact at the summary judgment stage relative to a separate agreement with a separate entity. Images was not afforded competent, full and fair litigation of the issue of whether Macris' representations regarding Dr. Lyman fraudulently induced Images into entering into the Addendum and Distributorship Agreement with Macris & Associates. Accordingly, the third element of the doctrine of collateral estoppel was not met and the trial court erred in applying the doctrine to Images' peril.

C. The Former Arbitration Proceeding Did Not Address Macris' Representation Regarding Advertising.

As mentioned, Images' Amended Counterclaim and Third Party Complaint alleged that Mike Macris represented--at the time he negotiated the Addendum and Distributorship Agreement--that he and Macris & Associates already had advertising in place worth approximately two million dollars to promote the nail care product (R. 285). This alleged fraudulent misrepresentation was not addressed in the arbitration proceedings, nor was it even referenced in Macris & Associates' Supplemental Memorandum in Support of Macris & Associates, Inc.'s and Mike Macris' Motion for Summary Judgment Re: Fraudulent Inducement (R. 1191) or in Macris & Associates' Memorandum in Opposition to Defendants' [Images] Motion to Strike Plaintiff's Supplemental Memorandum in Support of Motion for Summary Judgment Re: Fraudulent Inducement (R. 1225).

Moreover, nothing in the arbitration order suggests that the alleged misrepresentation regarding advertising was even considered during arbitration. Clearly, the requirements of collateral estoppel were not met. The issue of whether Macris materially misrepresented his advertising capability and his ability to bring in "big-hitters" was never arbitrated. Therefore, the issues litigated in the arbitration proceeding were not identical to those raised by Images in this action, neither was there a competent, full and fair litigation of the advertising issue in the arbitration proceeding. Timm, 851 P.2d at 1184. Accordingly, the trial court clearly erred in granting Macris &

Associates' motion for summary judgment on Images' fraudulent inducement claim on the basis of collateral estoppel.

II. THE TRIAL COURT'S FINDINGS THAT THE COMPETITIVE ACTIVITIES OF MICHAEL MACRIS WERE NOT ATTRIBUTABLE TO MACRIS & ASSOCIATES CONSTITUTE CLEAR ERROR.

The evidence presented at trial did not support the trial court's findings and conclusions that the competitive activities of Michael Macris were not attributable to Macris & Associates either because Michael Macris was the agent of Macris & Associates and acted within the scope of his employment or because Macris & Associates was not the alter ego of Michael Macris. Indeed, the evidence marshalled on appeal does not support the trial court's findings and conclusions. Instead, the evidence overwhelmingly supports Images' position that (i) Michael Macris was an agent of Macris & Associates when he engaged in competitive and disruptive activities; (ii) Macris & Associates is the alter ego of Michael Macris; and (iii) Macris' competitive and disruptive conduct is attributable to Macris & Associates.

A. Images Specifically Challenges Twelve of the Trial Court's Findings of Fact.

Images challenges the trial court's findings of fact which found that Michael Macris' competitive activities were not performed as an agent or representative of Macris & Associates. Specifically, Images challenges the following twelve findings:

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 [Macris & Associates] and had its own contractual relationship with Defendant [Images] 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.³

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.⁴

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.⁵

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.

³Images does not dispute that Macris provided gels to Images' distributors or that he did so on behalf of Affinity. Rather, Images asserts that his actions are also attributable to Macris & Associates, of which he was the sole shareholder and employee.

⁴Images does not dispute that Macris supplied gels to Reynolds and Hunsaker, but rather that Macris was an agent for both Affinity and Macris & Associates when he supplied gels to Reynolds and Hunsaker.

⁵Images contends that the letter was addressed to Macris at Affinity and that Mower requested that Macris, not merely Affinity, not supply gels to Images distributors.

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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 [sic] policies and procedures or the contract.

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

52. Macris' 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.⁶

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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.

(R. 3047-60).

⁶Images agrees that Macris conducted activities on behalf of Emily Rose, but disputes the trial court's finding that he was not an agent or representative of Macris & Associates when he conducted those activities.

There is no factual dispute (i) that Michael Macris supplied gels to Images distributors for sampling and testing (R. 4681, 4773, 4845-46); (ii) that Images sent Macris a letter dated August 31, 1990 requesting Macris to stop supplying gels to Images distributors for sampling (Trial Exhibit 55); or (iii) that Macris created a new company, Emily Rose (R. 5611; Trial Exhibits 93, 94). Images contends that all of these competitive actions were done by Michael Macris himself, and that since he was the sole shareholder and employee of Macris & Associates, these actions were attributable to Macris & Associates thereby constituting a breach of its agreement with Images.

B. The Evidence Marshalled On Appeal Is Insufficient to Support the Trial Court's Findings.

Images recognizes its burden on appeal. "To show clear error, the appellant must marshal all of the evidence in support of the trial court's finding and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack." State v. Higginbotham, 917 P.2d 545 (Utah 1996); State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990); Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989). While at first appearance, such marshaling seems an arduous task, a review of the trial record indicates that the evidence supporting the trial court's findings of fact consists mainly of the self-serving testimony of Michael Macris.

Michael Macris testified that he personally supplied gels to Images distributors for testing purposes, however, Macris & Associates did not test gels on anyone (R. 4681, 4845). Macris also testified that Affinity gave nail gels to Images distributors (R. 4682, 4851). Macris further testified that American Polymer also gave gels to distributors (R. 4683, 4856). American Polymer was another gel manufacturing company controlled and operated by Michael Macris (R. 4853-55). Significantly, American Polymer had no contract to supply gels to Images. Thus, Macris, the sole employee of Macris & Associates, was supplying the nail gel of a competing company, American Polymer, to Images distributors and later to Emily Rose.

With respect to the other competitive actions of Macris, namely, forming a competing multi-level marketing company, again the only testimony supporting the trial court's findings consist of the self-serving testimony of Michael Macris. Macris claimed that (i) Macris & Associates never presented other opportunities to any Images distributors (R. 4685); (ii) Macris was actually attempting to recruit an individual by the name of David Floor into Images in February 1991, not into Macris' new competing company (R. 4823); (iii) Macris did not resign from Macris & Associates on March 12, 1991 in order to create his competing company, Emily Rose (R. 5503); and (iv) Macris did not begin to organize Emily Rose until the middle to end of March, 1991 (R. 5547-48).

All of this evidence, taken together, is insufficient to support the trial court's findings. Moosman, 794 P.2d at 475-76.

Macris' self-serving testimony fails to demonstrate that his disruptive gel testing and competitive activities in creating Emily Rose were not also committed while Macris was acting as an agent for Macris & Associates.

The record is replete with evidence to support a finding that even though Macris may have been acting on behalf of Affinity, American Polymer or Emily Rose when engaging in disruptive and competitive activities, he was also the sole agent and representative of Macris & Associates. The distributors only dealt with Michael Macris. (R. 4732, 4734, 4749, 4774, 5591, 5614). Macris did not distinguish on whose behalf or in which capacity he was acting when he engaged in the disruptive or competitive activities.

For instance, the record shows that Glen Tillotson never understood the difference between Macris and Macris & Associates. Tillotson dealt with Michael Macris and then later found out it was Macris & Associates.⁷ (R. 4732, 4734). Tillotson also believed that Affinity was a company that Macris was affiliated with (R. 4733).

Margie Aliprandi⁸ also testified concerning her knowledge of the relationship between Michael Macris and his various companies. Aliprandi testified that she understood that Michael Macris supplied the nail gels to Images (R. 4749). At some point,

⁷Mr. Tillotson's testimony is significant because he was a witness for Macris & Associates and he worked closely with Michael Macris in developing the Hunsaker downline from the beginning.

⁸Margie Aliprandi was formerly known as Margie Hunsaker. The names Aliprandi and Hunsaker have been used interchangeably throughout the record.

Macris explained that the gels were supplied through his company, but initially she did not understand that to be the case. To Aliprandi, Macris was doing it all. Aliprandi even told other Images distributors that Michael Macris supplied the nail gel. (R. 4749). Furthermore, when Macris gave nail gels to Aliprandi to sample, Aliprandi understood that they were coming from Macris. She did not know on behalf of which entity Macris was acting (R. 4774).

Similarly, Kathrine Duffy, an Images distributor to whom Macris had supplied gels for testing purposes, knew that Macris was in Margie Aliprandi's upline, but had never heard of Macris & Associates (R. 5591). Jim Tate met Macris several months after becoming an Images distributor. Tate was also an Images distributor to whom Macris supplied nail gels for testing purposes. Tate had learned in early 1991 that Michael Macris was no longer supplying gels to Images (significantly, Tate referred to Macris and not to Affinity). Tate had never heard of Macris & Associates (R. 5594).

Likewise, Randall Johnston, who met Michael Macris in the summer of 1989, understood that Michael Macris was Margie Aliprandi's sponsor, believed that Macris was in Johnston's upline in Images, and had never heard of Macris & Associates (R. 5596). Finally, Janiell Reynolds--yet another Images distributor to whom Macris supplied gels for testing purposes--testified that she knew Michael Macris was in her Images upline. Although Reynolds had a lot of dealings with Macris, she did not really know what Macris &

Associates was and had felt that Affinity was a predecessor to Images. (R. 5614-15, 5618).

With regard to Macris' other competitive activities, individuals contacted by Macris knew that Macris was an Images distributor, not that he was merely an employee of the corporate distributor Macris & Associates and that he was not acting as an agent for Macris & Associates when he attempted to negotiate contracts for competing business. Susan Franceschi met Macris in December of 1990 when Macris was attempting to negotiate a contract for American Polymer to supply nail gel to Lume, the company by which Franceschi was employed. Macris represented that he, not Macris & Associates, was an Images distributor and intimated that women in his downline who liked the nail gel Macris proposed to supply to Lume might become Lume distributors instead. (R. 5625-27).

With respect to Macris' new company, Emily Rose, David Floor, an initial investor in Emily Rose, testified that Macris approached him in January or February of 1991 to raise money for Macris' new company.⁹ Floor knew Macris because Macris had approached him one year earlier about the prospect of becoming an Images distributor. (R. 5611).

While Macris was engaging in disruptive and competitive activities, he was the sole shareholder, officer, director, agent

⁹Of course, Macris claims he did not contact Floor until the middle to end of March, 1991. However, the proformas prepared by Macris for Emily Rose appear to be dated March 1, 1991 which is more consistent with the unbiased testimony of Floor. (Trial Exhibits 93, 94).

and employee of Affinity, a company manufacturing nail gel for use in a home nail care kit (R. 4669, 4842-43). Macris also created another nail gel manufacturing company, American Polymer in approximately November of 1990 (R. 4683, 4853). Macris was a director, officer, shareholder and employee of American Polymer. Macris also began creating Emily Rose in January or February of 1991 (R. 5611) to market the nail gel manufactured by his company, American Polymer. During these activities, Macris was also an officer, director, and the sole shareholder and employee of Macris & Associates (R. 4861, 5052).

Macris' responsibilities for all these companies was to market nail gel and related products. On behalf of all of these companies, Macris contacted individuals, including Images distributors, who did not recognize Macris' different principles. Even so, Macris' position at trial was that he was acting on behalf of American Polymer and Emily Rose, not Macris & Associates, when he was attempting to negotiate contracts for the competing business. However, Macris' position ignores the consequences of his acts as a dual or multiple agent. Even if Macris was acting on behalf of American Polymer and Emily Rose, he was still doing it while he was the sole employee, agent and shareholder of Macris & Associates.

Clearly, the evidence presented before the trial court and marshaled here, including all reasonable inferences drawn therefrom, does not support the trial court's findings and conclusions. Instead, the evidence overwhelmingly supports the finding that Macris was the agent of Macris & Associates and that

Macris & Associates was the alter ego of Michael Macris as well as the conclusion that the competitive and disruptive activities of Michael Macris are attributable to Macris & Associates.

C. The Trial Court's Conclusions of Law, To the Extent Based Upon A Tacit Finding That Macris Was Not An Agent for Macris & Associates, Are Incorrect.

The trial court's erroneous findings led the trial court to erroneously conclude that the acts of Michael Macris, as an agent of Macris & Associates, were not attributable to Macris & Associates. Images specifically disputes the following conclusions of law:

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.

(R. 3046).

Implicit in this Conclusion is a finding that at a minimum, Macris was not an agent of Macris & Associates when he engaged in the disruptive and competitive activities which constitute a breach of the Distributorship Agreement and the Images Policies and Procedures (Trial Exhibits 1, 78). In its conclusion, the trial court appeared to ignore fundamental principles of agency law.

"It is well established in the law that a principal is liable for the acts of his agent within the scope of the agent's authority, irrespective of whether the principal is disclosed or

undisclosed." Garland v. Fleischmann, 831 P.2d 107, 110 (Utah 1992). Moreover "[t]he fact that an agent acts in his own name without disclosing his principal does not preclude liability." Id.; 3 AM. JUR. 2D Agency § 320 (1986). A central focus in any agency question is whether the employee was acting in the scope of his employment with the principle at the time of the alleged wrong. Moreover, "[t]he question of whether an employee is acting within the scope of his employment at a particular time is normally a question for the fact finder unless there is only one reasonable conclusion that can be drawn from the evidence." Lane V. Messer, 731 P.2d 488, 490 (Utah 1986).

In order for the actions of Macris to be considered within the scope of his employment with Macris & Associates, Macris' conduct must "(1) 'be of the general kind the employee is employed to perform'; (2) 'occur within the hours of the employee's work and the ordinary spatial boundaries of the employment'; and (3) 'be motivated, at least in part, by the purpose of serving the employer's interest.'" Jackson v. Richter, 891 P.2d 1387, 1391 (Utah 1995) (quoting Birkner v. Salt Lake County, 771 P.2d 1053, 1056 (Utah 1989)).

The evidence presented at trial unquestionably set forth that Macris was the employee of Macris & Associates and was acting within the scope of his employment with Macris & Associates when he engaged in disruptive and competitive activities. Macris & Associates had a contract with Images to market Images and Images' products (Trial Exhibits 1, 2). Macris' duties with respect to

marketing Images and Images' products--specifically Images' nail gel and care product which was the only product Macris ever marketed on behalf of Images--included working directly with other Images distributors, attending distributor meetings, and meeting with the public for the purpose of promoting Images to members of the public (R. 4685-91).

At the same time Macris was supposedly promoting Images' nail care product, including the nail gel, on behalf of Macris & Associates, he was testing nail gels on Images distributors for the benefit of his companies Affinity and American Polymer and was also creating a new marketing company, Emily Rose, to market American Polymer's gel. All of this evidence points to one inescapable conclusion: Macris was directing the activities of four companies owned and controlled by Macris, without distinguishing which activities were attributable to which company. Thus, when Macris dealt with Images distributors and marketed a nail care product, he was acting in the scope of his employment with Macris & Associates. Likewise, when Macris engaged in the disruptive and competitive activities on behalf of his other companies for the purpose of marketing a nail care product, he was also acting in the scope of his employment with Macris & Associates. As a matter of law, Macris was acting as the agent of Macris & Associates when he engaged in the activity which Images alleged constituted a breach of the Addendum Agreement. Consequently, Macris' competitive activities are imputed to Macris & Associates.

The irony of the trial court's findings and conclusions underscores the trial court's errors. On one hand, the trial court determined that the conduct of and the statements made by Michael Macris, on behalf of Affinity, were also attributable to Macris & Associates for purposes of collateral estoppel. (See Section I). However, for purposes of Images' affirmative defenses, Counterclaim and Third Party Complaint, the conduct of and the statements made by Michael Macris were attributable only to the entity he ascribed them to during his self-serving testimony. No other witness was able to segregate his conduct; so, how could the trial court? The current result is fundamentally unjust and inequitable and dictates that this Court overturn the trial court's judgment with respect to Images' affirmative defenses to Macris & Associates' Complaint and Images' Counterclaim and Third Party Complaint.

D. The Trial Court's Conclusion That Macris & Associates Is Not The Alter Ego of Macris Is Erroneous.

Images also asserts that the evidence presented at trial overwhelmingly supports a conclusion that Macris & Associate was in fact the alter ego of Michael Macris, its controlling shareholder, and constituted a facade used to promote fraud and injustice by Macris.

Macris' position at trial--apparently adopted by the trial court--ignored the principle of alter ego. Clearly, the evidence presented at trial overwhelmingly supports a conclusion that Macris & Associates has no separate identity or existence

apart from Michael Macris. Notwithstanding the compelling evidence, the trial court concluded:

6. Plaintiff [Macris & Associates] is not the alter ego of Third-Party Defendant [Macris] 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.

(R. 3046).

Utah courts will pierce the corporate veil of a corporation and hold a shareholder personally liable if

two circumstances [are] present: '(1) Such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals; and (2) 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)

(citing Colman v. Colman, 743 P.2d 782, 786 (Utah App. 1987)).

While not an exhaustive list, factors Utah courts consider in determining whether to pierce the corporate veil include:

(1) undercapitalization of a one man corporation; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant shareholders; (5) nonfunctioning of the other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud.

Colman, 743 P.2d at 786.

At trial, the evidence overwhelmingly preponderated the fact that Macris used his corporate entities as a facade for the

operations of Macris to promote injustice and fraud. Other evidence presented at trial also supported Images' alter ego claim.

Such evidence included the fact that Michael Macris was never certain about which office he held at Macris & Associates at a particular time. Macris often represented himself as President of Macris & Associates when he was actually the Secretary, and *vice versa* (R. 5531, 5540). Macris represented on 1989 tax returns that he was the sole shareholder in Macris & Associates even though his wife, Valerie Macris, testified that his shares had been transferred to her in 1987 (R. 5534-36). Macris & Associates funds were used to pay for Affinity's legal fees (R. 5539). Macris and his wife were the only employees of Macris & Associates (R. 5040). Additionally, Valerie Macris acknowledged that corporate formalities were not always met at Macris & Associates (R. 5125).

Essentially the only evidence presented by Macris to counter Images' alter ego claim was Macris' testimony and that of his wife, Valerie Macris, that Macris & Associates was incorporated in November of 1985 (Trial Exhibit 72), Macris & Associates held board of directors' meetings and Macris & Associates appointed officers (R. 4864-69).

The evidence presented at trial overwhelmingly established that (i) Macris & Associates failed to observe many corporate formalities; (ii) Valerie Macris' role within Macris & Associates was minimal at best--for the most part Macris & Associates was controlled by Michael Macris; (iii) many corporate records for Macris & Associates were absent; (iv) Macris &

Associates was used as facade for the operation of its dominant stockholder, Michael Macris; and (v) the use of the corporate entity promoted injustice or fraud by allowing Macris to reap the rewards of the marketing efforts of distributors in Macris & Associates' downline while shielding Macris from the consequences of his disruptive and competitive activities while an agent for Macris & Associates. Surely, Macris & Associates was the alter ego of Michael Macris.

The trial court erred in finding that Macris & Associates was not the alter ego of Michael Macris, that the actions of Macris are not attributable to Macris & Associates, and that Macris & Associates did not breach the contract by engaging in disruptive and competitive activities. Accordingly, the conclusions of law based upon these erroneous findings are incorrect.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO ALLOW IMAGES TO CALL WILLIAM CRISMON, A WITNESS LISTED ON BOTH PLAINTIFF'S AND DEFENDANT'S WITNESS LIST.

Over one month in advance of the trial of this matter, Images filed Defendant Images' Supplemental Response to Plaintiff's Third Set of Interrogatories to Defendant¹⁰ (herein "Images' Supplemental Response") wherein Images essentially supplemented its witness list to include among other individuals, one William Crismon (R. 2337-40). Macris & Associates thereafter filed a

¹⁰Defendant Images's Supplemental Response to Plaintiff's Third Set of Interrogatories to Defendant was filed in the Fourth District Court on January 13, 1995.

Motion to Exclude Witnesses seeking to exclude as witnesses for Images all of the newly added individuals including William Crismon (R. 2609-11). Macris & Associates argued essentially that since Images did not disclose the additional witnesses prior to the discovery cutoff date of December 1, 1994, Images should be precluded from calling those additional individuals as witnesses at trial (R. 2676-82).

In opposition to Macris & Associates' Motion to Exclude Witnesses, Images asserted that (i) William Crismon was already listed on Macris & Associates' witness list; (ii) there was a stipulation and order in place allowing the parties to supplement their witness list; (iii) there was no court imposed deadline for designating witnesses; and (iv) Images' witness list was submitted over one month in advance of trial (R. 2716-25). The trial court heard oral arguments on the motion on the third day of trial and ruled that the additional witnesses would be excluded with the exception of David Floor.¹¹ (R. 4940).

A. The Trial Court Abused Its Discretion By Excluding William Crismon From Testifying.

"Excluding a witness from testifying is . . . 'extreme in nature and . . . should be employed only with caution and restraint.'" Barrett v. Denver & Rio Grande W.R., 830 P.2d 291, 293

¹¹The trial court made the exception for Mr. Floor since Mr. Floor's deposition was taken on the December 1, 1994 discovery cutoff date, which deposition clearly disclosed Macris' involvement with William Crismon regarding the competitive activities. (R. 4938).

(Utah App. 1992) (citations omitted). The trial court abused its discretion by excluding William Crismon from testifying in Images' case in chief. In Barrett, the Utah Court of Appeals reversed the trial court's exclusion of a witness who had been designated only four days before trial, holding that "absent an order creating a judicially imposed deadline, a trial court may not sanction a party by excluding its witnesses under rule 37(b)(2)." 830 P.2d 291, 296 (Utah App. 1992).

In the instant case, there was no judicially imposed deadline for designating witnesses. In fact, the trial court had issued an Order allowing the subsequent supplementation of either parties' witness list (R. 1462). Where there was no judicially imposed deadline for designating witnesses, it constituted an abuse of discretion for the trial court to excluded a witness who had been designated over a month in advance of trial and who was listed on the opposing parties' witness list.

B. Macris & Associates Would Not Have Been Prejudiced Had William Crismon Been Allowed To Testify.

Clearly, Macris & Associates would not have suffered prejudice had William Crismon been allowed to testify. Images stipulated at trial that William Crismon would testify only concerning matters which were discussed at Crismon's deposition taken on October 20, 1994 and at which counsel for Macris & Associates were in attendance. (R. 4935). Moreover, William

Crismon was listed on Macris & Associates' own witness list. (R. 4932).

Images, rather, was prejudiced by the exclusion of William Crismon in its case in chief. The Utah Court of Appeals addressed the matter of prejudice to the parties in Barrett, stating:

Some indication of the importance of the error with which we are here concerned is to be found in the fact that counsel thought the matter of sufficient consequence that he objected to [the admission of the evidence]. If it is so plain that it would not have helped plaintiff's case, one is led to wonder why counsel made the objection and insisted that it not be used. The obvious answer seems to be that defendant's counsel was actually apprehensive that it may have a substantial effect against his client. Of course, he could not be sure, nor can we.

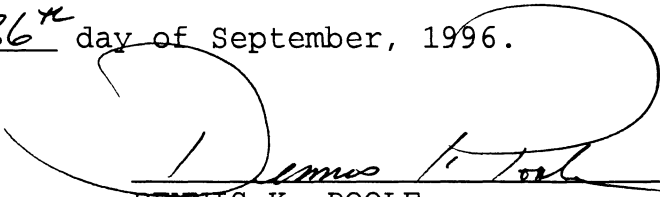
830 P.2d at 297. Likewise, Macris & Associates obviously was apprehensive about that the testimony of William Crismon--as set forth in his deposition--might have a substantial effect against Macris & Associates. The deposition testimony of William Crismon significantly supported Images' breach of contract claim as contained in Images' Amended Counterclaim and Third-Party Complaint. It was prejudicial to Images to exclude William Crismon. Accordingly, the trial court abused its discretion in excluding William Crismon's testimony at trial.

CONCLUSION

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

Court for a new trial on the issues of fraudulent inducement, breach of contract and alter ego as asserted in Images' affirmative defenses contained in Images' Amended Counterclaim.

DATED this 26th day of September, 1996.



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

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT in Appeal No. 960218-CA were mailed, U.S. Mail, postage pre-paid to the following:

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

this 26th day of September, 1996.

ADDENDUM

FILED
Fourth Judicial District Court of
Utah County, State of Utah.
2/2/24
CARMA B. SMITH, Clerk
BMS Deputy

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

MACRIS & ASSOCIATES, INC.,

Plaintiff,

vs.

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

Defendants.

RULING

CASE NO. 910400358

(Judge Guy R. Burningham)

This matter comes before the Court, under Rule 4-501 on Defendants' Motion to Strike Macris & Associates, Inc.'s and Mike Macris's Supplemental Memorandum in Support of Motion for Summary Judgment Re Fraudulent Inducement, and on Plaintiff's Motion for Summary Judgment Re Defendants' Claim of Fraudulent Inducement. The Court has reviewed the file, considered the memoranda of counsel, oral argument having been heard, and upon being advised in the premises, now makes the following:

RULING

1. The Court finds that Defendants' Motion to Strike Macris & Associates, Inc.'s and Mike Macris's Supplemental Memorandum in Support of Motion for Summary Judgment Re Fraudulent Inducement ("Motion to Strike") would result in keeping relevant information from this Court that is dispositive of issues before this Court.

2. The Court therefore denies Defendants' Motion to Strike.

3. The Court further finds 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. This is based upon the following:

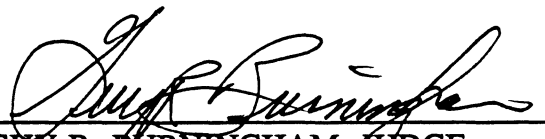
- a) Collateral estoppel applies to issues decided on summary judgment;
- b) Collateral estoppel applies to issues decided in arbitration proceedings;
- c) The issue as to whether Mr. Macris fraudulently induced the Defendants has already been fully and fairly litigated in a prior arbitration proceeding; and
- d) The prior arbitration proceeding found that no fraudulent inducement had occurred.

4. The Court therefore grants Plaintiff Macris & Associates, Inc.'s and Third-Party Defendant Mike Macris' Motion for Summary Judgment Re Defendants' Claim of Fraudulent Inducement.

Counsel for Plaintiff is to prepare an order consistent with the terms of this ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature.

Dated this 7 day of February, 1994.

BY THE COURT:



GUY R. BURNINGHAM, JUDGE

cc: Jon V. Harper, Esq.
Thomas R. Karrenberg, Esq.
Dennis K. Poole, Esq.

SEP 15 AM 9:23

3

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.,)	
)	
Plaintiff,)	STIPULATION
)	
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)	

Plaintiff, Defendants, and Third-Party Defendants, by and through their respective counsel, hereby stipulate and agree as follows:

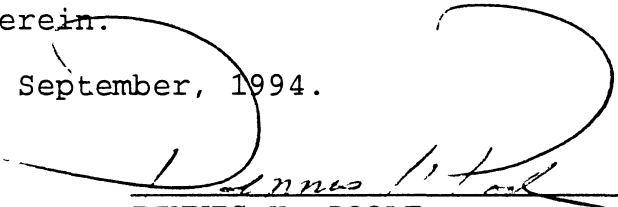
1. That the discovery cut off in this matter shall be extended through December 1, 1994.


2. That Defendants Images & Attitude, Inc. and Thomas Mower shall provide the Plaintiff with an up-dated witness list not later than September 16, 1994, which witness list may be supplemented thereafter.

3. That the Plaintiff withdraws its Motion in Limine, without prejudice.

4. That the parties respectfully request the Court to adopt the stipulations set forth herein.

DATED this 9 day of September, 1994.


DENNIS K. POOLE
DENNIS K. POOLE & ASSOCIATES
Attorneys for Defendants and
Third-Party Plaintiffs


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

FILED
Fourth Judicial District Court of
Utah County, State of Utah
CASSIN B. CARRUT, Clerk
2/19/84
Deputy

DENNIS K. POOLE (2625)
ANDREA NUFFER (6623)
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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:

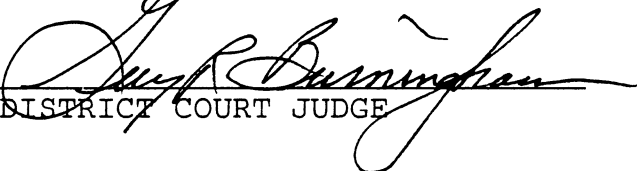
1. That the discovery cut off in this matter be and is hereby extended through December 1, 1994.

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 19 day of September, 1994.

BY THE COURT:


DISTRICT COURT JUDGE

APPROVED AS TO FORM:

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



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

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

MACRIS & ASSOCIATES, INC., :
Plaintiff, :
-vs- :
IMAGES & ATTITUDE, INC., :
a Utah corporation, and :
THOMAS MOWER, an individual, :
Defendants. :

IMAGES & ATTITUDE, INC., : CASE NO. 910400358
Third-Party Plaintiff, :
-vs- : JUDGE GUY R. BURNINGHAM
MIKE MACRIS, :
Third-Party Defendant. :

DEFENDANT IMAGES, by and through its attorneys, hereby
supplements its response to Plaintiff's Third Set of Interrogato-
ries to Defendants as follows:

INTERROGATORY NO. 15: Identify all persons whom you intend to call as a witness at the trial of this matter.

ANSWER:

Defendant Images intends to call the following individuals as witnesses at the trial of this matter:

Thomas E. Mower

Margie Aliprandi

Michael D'Avolio

Janielle Reynolds

Jon Harper

Randall Johnston

Haydon Cameron

Michael Macris

Valerie Macris

Jim Tate

William Crismon

Thomas Crismon

Kathryn Duffy

Susan Franceschi

Georgette Kaloudis

John E. Clark

David Floor

Defendant Images may call the following:

Glenn Tillotson

Genevieve Toutaine

Elizabeth Webber

Connie Valley

Sharon Young

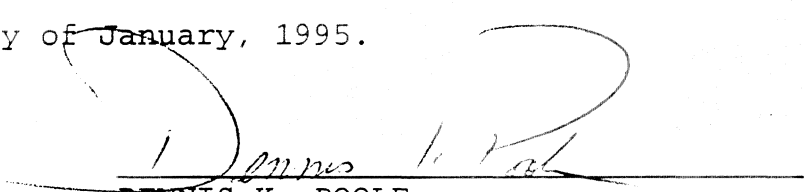
Craig Davis

Brett Mower

Barry Mower

Additionally, Defendant Images may use any of the depositions taken in this or related actions.

DATED this 11 day of January, 1995.


DENNIS K. POOLE
ANDREA NUFFER
DENNIS K. POOLE & ASSOCIATES, P.C.
Attorneys for Defendant Images

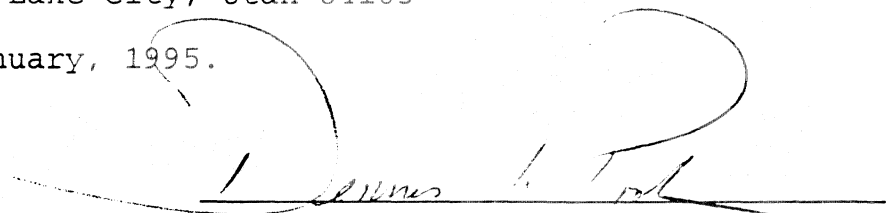
MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing
DEFENDANT IMAGE'S SUPPLEMENTAL RESPONSE TO PLAINTIFF'S THIRD SET OF
INTERROGATORIES in Civil No. 910400358 were mailed, U.S. Mail,
postage pre-paid to the following:

Thomas R. Karrenberg, Esq.
Nathan B. Wilcox, Esq.
ANDERSON & KARRENBERG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

Jon V. Harper, Esq.
1059 First Avenue
Salt Lake City, Utah 84103

this 11 day of January, 1995.



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

FILED
Judicial District Court of
Utah County, State of Utah
6-6-95
CARITA B. SMITH, Clerk
72 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.

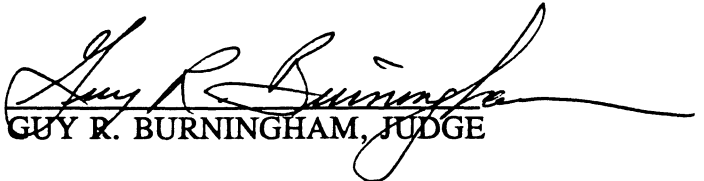
57. Neither Plaintiff nor Third Party Defendant acted maliciously, intentionally, recklessly, or fraudulently. Punitive damages would not be appropriate.

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.

Jon V. Harper (#1378)
1349 Bryan Avenue
Salt Lake City, UT 84105
(801) 597-5022

ANDERSON & KARRENBURG
Thomas R. Karrenberg (#3726)
Nathan B. Wilcox (#6685)
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2006
(801) 534-1700

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

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

MACRIS & ASSOCIATES, INC.,

Plaintiff,

vs.

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

Defendants.

IMAGES & ATTITUDE, INC.,

Third-Party Plaintiff,

vs.

MIKE MACRIS,

Third-Party Defendant.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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 *IN RED INK*


Judge Guy R. Burningham

APPROVED BY:

DENNIS K. POOLE & ASSOCIATES

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

9-15-75
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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.

Salt Lake Times, Inc.

ADDENDUM TO DISTRIBUTOR APPLICATION

1. As consideration received by Images the sufficiency of which is acknowledged by Images, Images agrees to waive **ALL** qualifications of applicant which are set forth in the Images marketing plan during the term of this agreement. Images agrees to pay distributor according to the Images marketing plan at the highest levels as set forth in the Images marketing plan including but not limited to the commissions, rebates, and bonuses paid at the level of ~~Manager~~ and Presidential for the term of this agreement. *EXECUTIVE MM*

Ult *ULTIMATE OBJECTIVE IS TO DEVELOP EACH DISTRIBUTORSHIP ACCORDING TO THE WIDTH PROJECTS OF THE MARKETING PLAN.*
2. Term. The term of this agreement shall commence on the date first written in on the distributor application and shall continue through out the life of Images. *AS LONG AS DISTRIBUTOR IS ACTIVE IN PROMOTING IMAGES AND IMAGES PRODUCTS.*

3. An arrangement has been made between, Macris and Associates (a Utah Corporation), Joanne Cameron, and Margie Hunsaker who are all Images distributors, whereby these distributors have agreed to aggregate their monthly checks as earned in the form of Commissions, rebates and bonuses, for the term of this agreement, and share the aggregate amount by 1/3 each. An example of this would be if Macris & Associates earned a total of \$150.00 in a calendar month and Joanne Cameron earned a total of \$100.00 in a calendar month and Margerie Hunsaker earned \$350.00 in a calendar month then Images would aggregate the amounts which would total \$600.00 and then divide by 3 and pay each of the above distributors \$200.00 which would be 1/3 each of the aggregated amount. Distributor hereby authorizes Images to perform herein as requested by distributor and as consideration given to Images for performing as requested herein distributor agrees to indemnify Images and hold it harmless from any and all liability, including judgements, attorneys fees and court cost incurred as a result of any losses Images incurs as a result of performing herein as distributor has requested.

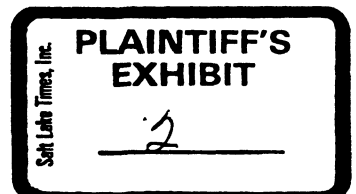
The foregoing is hereby agreed to by the parties:

Macris & Associates

Macris & Associates

Thomas Hunsaker

Images International, Inc.



"Bridging The Gap Between Science And Human Needs..."

150 E. 400 N. SALEM, UTAH 84653 (801) 423-2800 FAX (801) 423-2350



August 31, 1990

Mike Macris
Affinity
48 W. 300 S. #1805 N
Salt Lake City, UT 84101



Dear Mike

This is to inform you of the precarious position we are in because of your inability to supply the lamp housings we ordered. You have been prepaid \$64,000 with the balance to be paid on delivery for 12,000 units that were supposed to have been delivered approximately 1 month ago.

I have hired a crew that have sat idly by for 2 weeks awaiting housings for assembly. I must continue their employment if I am to retain their services. Laying them off will put us again in jeopardy when the time comes to assemble lamps because of having to hire a new crew. Are you prepared to pay the costs for retaining these employees as the fault lies with you for failing to provide the lamps we ordered and prepaid? If you cannot provide the lamps by September 6th, please return the money advanced as we will have to purchase elsewhere.

On other matters.... We left numerous messages on your answering machine and don't get a response from you. Much of it has to do with the afore mentioned situation. However we are continuing to have enormous problems associated with the use of your Flex gel, nail prep and even the Ultra gel. Since we began re-using your prep, the irritation rate has dramatically increased. Please stop passing the buck on the 10% acrylic nail being the culprit. We went to our formula originally because of the terrific amount of irritation with your gel and prep. Irritation went down with our prep, but so did bonding qualities. At your insistence we went back to your prep. Irritations have increased phenomenally since then. The downlines that we have so diligently developed are being destroyed almost as fast as they are created. The resources of the company are being taxed in handling the problems created by your defective gels and nail prep. I believe we should talk about what compensation is due to Images for these situations. I wish you could be more available. I feel that you should be directly involved with some of the distributors that have initiated lawsuits against us; as the ultimate responsibility lies in your lap.

I can't tell you how disillusioned I am with your performance in giving new gels to our distributors to test before the company has even seen them. This is hardly the type of R&D program I would expect a supplier to provide. It is also very embarrassing and erodes both your and our integrity with the field. At this date we have not yet received your latest gel and only hear about it from those who are using it.

The two most important factors we are facing besides the extreme medical irritation problems are:

1. The damage to distributors and their organizations because of the high failure rate of your system. Once lost these distributors are gone forever.
2. Images integrity and reputation is being tarnished and battered. Your systems failure is hurting old and new distributors. We are becoming the laughing stock of the industry. Our once shining reputation is gone. Through no fault of our own. That's the sad part. Rather because of the "detrimental reliance" we have placed on you and Affinity.

It is now very possible that Images may fail or not nearly reach it's potential growth because of our utilization of your system. Our backs are against the wall and the adversary we are facing is not an enemy from without or even just an aggressive competitor. It is internal. The integration of Affinity's (cancerous in nature) gel system; polluting and weakening to the point of destruction a once healthy, viable, radiant company. Our future looks very hazy and possibly quite black. To quote POGO "we have met the enemy, and it is us."

All I can say is thank God the Enquirer did not run the article on the gel system. If it had, Images would be history by now.

In conclusion let me advise you that we are to a point of desperation due to these situations. I would advise you to act quickly and appropriately. You have locked us into a corner and we are rapidly bleeding to death. Presently you have the only band aid to stop the flow. Please respond with full solutions by the date mentioned or we will have to commence major surgery and cut out the cancer to save the situation. You seem to think the business of business is business and that is all, but we feel that business without integrity has no value. Our association with Affinity is rapidly loosing value.

Sincerely,

Thomas Hower
President

cc: Dale Kent/Attorney
1200 Kennecott Blvd
Salt Lake City, UT 84133



March 7, 1991

Received
3/11/91

Mr. Mike Macris
14 Quietwood Lane
Sandy, Utah 84092

Dear Mike:

It has been some time since we have seen any activity on your distributorship. Since your agreement to become active in your distributorship and fulfill your part; you have not done anything. We have monitored your distributorship and have not seen even one new Distributor signed or any support to downline or product movement. I must, therefore, notify you that your auto-qualification is hereby temporarily discontinued.

When substantial activity is demonstrated, this matter can again be discussed. Mike, Images has acted in good faith in our Auto-qualification Agreement with you. We have always done our part. I do not feel the same in relation to your activities, in keeping with your part of the agreement.

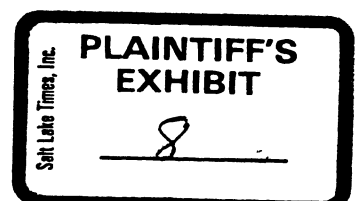
It is unfortunate that this step must be taken, but it can be rectified should you take the necessary action. Should you decide not to take the steps to boost activity on your distributorship, the auto-qualification will be terminated permanently.

I look forward to seeing you on the printouts.

Sincerely,

Thomas Mower
President

TM/bjs





March 14, 1991

Mike Macris
14 Quietwood Lane
Sandy, Ut 84092



Dear Mike:

We have been having a considerable amount of trouble with your testing of gel products on our Distributors. Your gel has not been working well. We have had to spend enormous amounts of resources in both time and money to get it to perform. You had previously passed out your aesthetically appealing version. This has caused us a great deal of difficulty. As you know, your gel doesn't bond well and it yellows; but we have spent almost \$10,000 trying to correct that. Distributors are complaining to us that we should have used your gel rather than our own. This is unbelievable. For you to have involved Distributors in your testing program with your unproven product has caused a backlash effect even against your improved version that we modified.

Now we find that you have talked to Teri Hill about testing a nail polish that you are developing for Images. Let me ask you in plain and simple terms to stop supplying products to our Distributors. I am telling you to keep out of Images' business and to leave our Distributors alone in this product evaluation. They should not be aware of what or with whom we are dealing. This is the last warning that I am going to give you. Do not violate it again or extreme action will be taken against you.

Finally, in closing, get these defective lamp housings out of here immediately and get them remanufactured. I have been waiting for your answer. We have told you two or three times, written to you twice and still no response. Now, get it done or I will take appropriate action in this matter.


I am ready to purchase the balance of the present order of lamp housings per our agreement. You may manufacture them at this time and we will pay the balance upon delivery and inspection. Make absolutely sure that they are manufactured properly and we do not get one like you sent to us in this last shipment. I am out of lamp housings because we need to have these corrected and remanufactured. I strongly suggest you get this corrected as soon as possible or I will be taking legal action to recover my losses in sales. Also, I would like to know how you intend to reimburse Images for:

- 1) All of the costs we have had to put into modifying your defective gel,

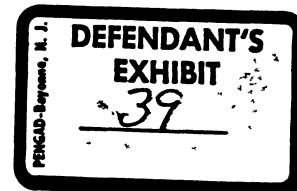
- 2) The cost and labor of modifying these improperly manufactured housings,
- 3) The Flex Gel, which we still have a lot of, which you sold us. We cannot use it because of the extreme danger it poses to the user. We want to return it and receive credit.
- 4) We have had several lawsuits going against us for the use of this gel and, as of yet, we have not informed them of your role as broker/manufacturer/agent for this product. Please indicate under what entity you want these actions referred to for handling, i.e., Macris & Associates, American Polymer, Affinity or others.

Please get on these matters as soon as possible. I would hope you can see the urgency of them. Above all, let me reiterate that you need to conduct your business operations and your Distributorship in accordance with Images' Policies and Procedures and stop interfering with our Distributor Force. Even if they are First Level to you, you may not test competitive or even future potential products upon these individuals. Your actions are causing Images and our Distributor Force a great deal of stress.

Sincerely,



THOMAS MOWER
President



March 19, 1991
Via Telefacsimile Transmission

Tom Mower, President
Images International
150 East 400 North
Salem, Utah 84653

Re: Letter to Mike Macris dated March 14, 1991

Dear Tom:

Since your letter of March 14, 1991, to Mike Macris contains threats of litigation, Mike has asked me to respond.

With respect to the gel sold to you by American Polymer, the gel--as sold to Images--is not "defective," and you might be well-advised to avoid disparaging American Polymer's product. Prior to placing an order for the gel, you indicated that Images had tested the gel, was aware that the gel did not contain an adhesion promoter, and was pleased with the gel. You specifically indicated that Images would add an adhesion promoter to the gel but declined American Polymer's offer to evaluate the adhesion promoter for compatability with the gel and declined to provide American Polymer with a sample of the adhesion promoter for such evaluation. American Polymer has no responsibility for any costs Images might have incurred in modifying the gel to fit Images' specific desires. If Images is not satisfied with American Polymer's gel, or for any other reason, Images may simply stop ordering the gel, just as American Polymer may elect to stop supplying the gel to Images. (In the future, I would appreciate it if you would direct any communication concerning American Polymer and its gel to me personally rather than to Mike Macris in the context of complaints you might have concerning Affinity (lamps) or Macris & Associates (Images distributorship).)

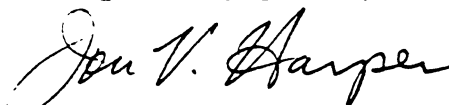
With respect to your resurrection of the issues concerning the lamp housings and Flex Gel sold under the old agreement between Affinity and Images, I would remind you that all of the issues, disputes and controversies between the two companies prior to January 25, 1991, have been compromised and settled. A review of the settlement agreement dated and executed on January 25, 1991, might refresh your recollection on that point. Affinity simply has no obligation to take back any Flex Gel or lamp housings sold under the old agreement. Any legal action on the part of Images, as threatened in your letter, would be considered a breach of the settlement agreement and would be responded to appropriately. (Images can either use the heat gun to straighten any problem lamp housings or grind and reshoot the housings. Affinity will

cooperate with Images in the latter option by providing its mold for reshooting the housings, and by obtaining a cost estimate for that. Please let Mike know if you would like Affinity's assistance on that.)

With respect to having distributors who are closely associated with Mike testing gel, Mike has only provided gels to Janielle and Margie. If you do not want any such testing to be performed by current Images distributors, regardless of their close association with Mike, we will honor that desire.

Finally, you have asked Affinity to manufacture and deliver the lamp housings ordered under the January 25, 1991 agreement. Upon receipt of the March 1st payment in the amount of \$19,400, Affinity will do so.

Very truly yours,

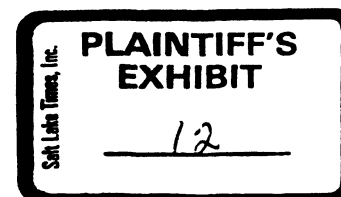


Jon V. Harper



March 29, 1991

Mike Macris and Associates
14 Quietwood Lane
Sandy, Ut 84092



Dear Mike:

The purpose of this letter is to clearly state the matters, between you and Images International, which need to be resolved.

As you know, Images has temporarily suspended/terminated your distributorship and is considering the permanent termination of your Distributorship. This is in process because:

- a. You have violated your agreement with Images as stated in our Policies and Procedures. You have involved Images Distributors in the testing of your products, even after you were given formal written and verbal instruction not to do so.
- b. There has not been sufficient activity on your Distributorship, either through product volume or recruiting to warrant the continuation of your auto-qualification of your Distributorship. You are well aware of our original agreement on this matter. Images has kept it's part of the bargain, you have not.
- c. Damaging activity against Images and its distributor force.

We are willing, Mike, because of our past association, to allow you to respond to these matters. This letter then will be official notice to you that you have thirty (30) days from the date of this letter to bring these matters to resolution and present a proposal for doing so. It must be explicit and specific with commitments, goals and measurable levels to be met.

You must never again approach any Images Distributor with the purpose of having the Distributor test or market your products. Should it come to our attention that this has happened, your Distributorship will be immediately cancelled.


You may need to make a decision as to whether your Distributorship or other business ventures will become of primary importance to you. Images will need to see a significant increase in activity with your Distributorship, both in Product and Group Volume; as well as first level active distributorships being formed, growing and remaining actively qualified.

If at the end of thirty days, (April 29, 1991), you have not met the requirements stated above to the satisfaction of the Images Board of Directors, your Distributorship will be terminated.

On another matter, I feel I must restate that we must receive the twelve thousand lamp housings from Affinity within the next two to three weeks. They must be delivered to Images in perfect condition; that is, free from any and all manufacturing defects.

This is our final word on these matters, Mike. It is up to you to perform.

Sincerely,

A handwritten signature in cursive script, reading "Thomas Mower". The signature is fluid and extends across the width of the page.

Thomas Mower
President

TM/bjs

A	1. Mar. '91	B	C												O	P
			Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12	YEAR 91	% of sales
1	PROJECTIONS NOT QUANTIFIED	ASSUMPTIONS														
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DEFENDANT'S
EXHIBIT

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
1.3	FICA	% of Payroll - 7%	\$239	\$239	\$318	\$318	\$318	\$318	\$318	\$318	\$318	\$318	\$318	\$318	\$7,252	0.05%
1.4	Fed & State emp. tax	% of Payroll - 2%	\$14	\$14	\$148	\$148	\$148	\$148	\$148	\$148	\$148	\$296	\$296	\$296	\$2,072	0.02%
1.5	Fed. Unempl. Insurance	% of Payroll - 2%	\$14	\$14	\$148	\$148	\$148	\$148	\$148	\$148	\$148	\$296	\$296	\$296	\$2,072	0.02%
1.6	Data processing	% of Sales - 2%	\$251	\$799	\$2,107	\$3,518	\$6,064	\$9,473	\$14,370	\$21,814	\$31,414	\$40,039	\$48,664	\$57,289	\$235,199	2.00%
1.7	Utilities	% of Sales - 1%mo 4.12	\$500	\$500	\$500	\$500	\$500	\$500	\$7,185	\$10,907	\$15,702	\$20,019	\$24,332	\$28,644	\$108,124	0.93%
1.8	Office Supplies	% of Sales - 0.3%mo 4.12	\$500	\$500	\$500	\$528	\$910	\$1,421	\$2,158	\$3,272	\$4,712	\$6,008	\$7,307	\$8,593	\$36,396	0.31%
1.9	Shipping/Postage	% of Sales - 4%	\$501	\$1,508	\$4,214	\$7,035	\$12,128	\$18,845	\$28,740	\$43,828	\$62,828	\$80,078	\$97,328	\$114,578	\$471,597	4.00%
2.0	Warehousing	500/mo, 5% of Sales	\$563	\$700	\$1,027	\$1,378	\$2,016	\$2,668	\$4,093	\$5,953	\$8,553	\$10,510	\$12,666	\$14,822	\$64,950	0.55%
2.1	Travel/Entertainment	% of Sales - 2%+\$5000	\$0	\$0	\$0	\$500	\$500	\$500	\$14,370	\$21,814	\$31,414	\$40,039	\$48,664	\$57,289	\$215,089	1.82%
2.2	Promotion															0.00%
2.3	Advertising															0.00%
2.4	Tires shoes															0.00%
2.5	Inventories															0.00%
2.6	Bank charges	% of Sales - 0.1%	\$25	\$78	\$209	\$348	\$600	\$939	\$1,423	\$2,160	\$3,110	\$3,964	\$4,818	\$5,672	\$23,344	0.20%
2.7	Via/MC															0.00%
2.8	Serv Chrgs															0.00%
2.9	Equipment/Lease fees	% of Sales - 1%	\$125	\$399	\$1,053	\$1,759	\$3,032	\$4,736	\$7,185	\$10,907	\$15,702	\$20,019	\$24,332	\$28,644	\$117,828	1.03%
3.0	Office furn/equip.		\$0	\$350	\$350	\$350	\$350	\$350	\$350	\$350	\$350	\$350	\$350	\$350	\$3,850	0.03%
3.1	warehouse equip.					\$0										0.00%
3.2	computer															0.00%
3.3	Equip Maint & Svc fees	% of Sales - 0.2%	\$25	\$80	\$211	\$352	\$606	\$947	\$1,437	\$2,161	\$3,141	\$4,004	\$4,866	\$5,729	\$23,580	0.20%
3.4	Research & Development	% of Sales - 2%	\$251	\$799	\$2,107	\$3,518	\$6,064	\$9,473	\$14,370	\$21,814	\$31,414	\$40,039	\$48,664	\$57,289	\$235,199	2.00%
3.5	Bad Debt Expense	% of Sales - 0.1%	\$13	\$40	\$105	\$176	\$303	\$474	\$719	\$1,091	\$1,571	\$2,002	\$2,433	\$2,864	\$11,780	0.10%
3.6	Total expenses		\$82,330	\$28,876	\$38,494	\$51,065	\$65,331	\$83,223	\$129,485	\$179,723	\$244,513	\$310,789	\$369,000	\$427,210	\$1,990,039	18.88%
3.7	Net income before taxes				\$8,543	\$24,610	\$66,057	\$119,102	\$175,215	\$262,165	\$414,874	\$509,848	\$612,886	\$715,926	\$2,664,566	24.30%
3.8	Net income															0.00%
3.9	Starting Cash		\$150,000	\$93,795	\$65,356	\$93,800	\$118,508	\$184,566	\$303,668	\$478,083	\$761,048	\$1,175,922	\$1,685,770	\$2,298,656	\$3,014,566	
3.10	Change in Cash															
3.11	Ending Cash		\$33,795	\$65,356	\$93,900	\$118,508	\$184,566	\$303,668	\$478,083	\$761,048	\$1,175,922	\$1,685,770	\$2,298,656	\$3,014,566		

