

1998

Macris & Associates v. Neways, Inc., Thomas E. Mower and Leslie D. Mower : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Macris & Associates v. Neways*, No. 980004 (Utah Court of Appeals, 1998).
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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 980004

IN THE UTAH COURT OF APPEALS

MACRIS & ASSOCIATES, INC.,	:	
	:	
Plaintiff and Appellee	:	UTAH COURT OF APPEALS
	:	
vs.	:	No. 980004
	:	
NEWAYS, INC., THOMAS E. MOWER,	:	
and LESLIE D. MOWER	:	Trial Court No. 950400093CN
	:	
Defendants and Appellants	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY, STATE OF UTAH
THE HONORABLE JUDGE HOWARD H. MAETANI, DISTRICT COURT JUDGE

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FILED
Utah Court of Appeals
JUL 14 1998
Julia D'Alesandro
Clerk of the Court

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STATEMENT OF THE CASE

I. RESPONSE STATEMENT OF FACTS FOR PURPOSE OF CROSS-APPEAL

This lawsuit and appeal arise out of the termination of an Auto-qualification Agreement (“Agreement”) between Macris & Associates (“Macris”) and Images & Attitudes (“Images”). R. 8-10, 228-29, 431-32, 507 p. 12. Macris filed his first complaint, *Macris v. Images* (“first lawsuit”), against Images for the 1991 breach of the agreement on or about April 17, 1991. R. 8, 208-214, 413. Macris filed his second complaint, *Macris v. Neways* (“second lawsuit”), against Neways on or about February 14, 1995. R. 1-12.

A. Images Sold and Transferred Some of its Assets to Neways, and Eclat Became Images’ Successor Corporation.

On or about September 1, 1992, Images sold and transferred most of its assets to Neways, Inc. (“Neways”) in order to insure a valuable multi-level marketing company without trademark problems. R. 227, 323, 351. Neways purchased many of Images’ assets and paid valuable consideration for those assets. R. 227, 323, 351. However, Neways did not purchase Images’ potential liability to Macris. R. 351. Instead, this liability was transferred to Images’ successor corporation, Eclat, Inc. (“Eclat”). R. 11, 174.

Although Neways purchased many of Images’ assets, there are significant differences between Images’ and Neways’ corporate structures. For instance, contrary to Macris’ contention, the record clearly shows that Images and Neways share only one director, the rest of the directors, shareholders, and officers are different. R. 92, 171, 352. Images and Neways do not share the “same facilities, employees, distributorships, and health and beauty care products.” R. 92, 171.

Further, many of Images' distributors did not retain their same rank and downline in Neways. R. 92, 171.

B. After Images' Transfer of Assets to Neways, Both Macris and Images Filed Pleadings in the First Lawsuit that Eventually Went to Trial.

Both Macris and Images filed pleadings, as defined in Rule 7 of the Utah Rules of Civil Procedure, after Images' sale and transfer of assets to Neways. R. 507, p. 15. Images filed an Amended Answer on September 9, 1992. R. 507 p. 15; *see* Addendum. Almost a year after the transfer of assets, Macris filed the last pleading, Answer to Amended Counterclaim and Answer to Third-Party Complaint, on August 23, 1993. R. 507 p. 15; *see* Addendum.

The trial setting in the first lawsuit was vacated on September 28, 1992, and was eventually tried two and a half years later on February 16, 1995. R. 227. During this period, the Court reopened discovery, Macris' counsel spent three days at Neways' legal counsel's office reviewing Neways' financial documentation, and Macris filed his last pleading, Answer to Amended Counterclaim and Answer to Third-Party Complaint, on August 23, 1993. R. 273-79, 507 pp. 12, 14, 15. Even though both parties filed pleadings after the transfer, Macris failed to include causes of action for fraudulent transfer, alter ego, and/or successor liability in the first lawsuit.

In the first lawsuit, the trial court held that Images breached its agreement with Macris. R. 279. Although Macris argued for future damages, the Court awarded Macris damages from the wrongful termination of the agreement in March of 1991 to August 31, 1992. R. 263, 507 p.14. The amount of the judgment was \$487,638.87 plus interest. R. 263, 507 p. 14. Macris had a full and fair opportunity to argue his future damages in the first lawsuit. R. 227-28, 507 p. 8-9.

C. After Being Denied Future Damages Past August 31, 1992 in the First Lawsuit, Macris Tried to Have a Second Bite at the Apple by Commencing the Second Lawsuit.

Two days before the first lawsuit's trial, Macris filed the second suit, *Macris & Associates v. Neways* ("second lawsuit"), against Images' privy, Neways.¹ R. 1-12. Because the trial court denied Macris' future damages past August 31, 1992 in the first lawsuit, Macris devised new legal theories (fraudulent transfer, alter ego, and successor liability) in a second effort to receive future damages resulting from the 1991 breach of the agreement. R. 227-28, 507 p. 8-9. Because Macris did not plead these causes of action in the first lawsuit, litigation between the parties is now in its seventh year. R. 227-28, 507 p. 8-9.

After Macris wasted Neways' and the judicial system's time and resources, Neways filed a Motion for Summary Judgment. R. 217-29. Neways claimed that res judicata barred the second lawsuit because Images and Neways are in privity, the second lawsuit's claims could and should have been brought in the first lawsuit, and there was a judgment in the first lawsuit. R. 217-29, 294-305.² Further, Neways argued that Macris had already received \$487,638.87 plus

¹In the Motion for Summary Judgment in the trial court, Neways admitted, only for the purpose of the motion, that Neways was Images' privy. R. 224-25, 323-24. Therefore, throughout this appeal, when Neways argues that it is Images' privy, it is only for purposes of this appeal.

²Contrary to Macris' assertions, Neways has consistently argued that res judicata bars the second lawsuit. At the commencement of the second lawsuit, Neways submitted a Motion to Dismiss arguing that the causes of action in the second lawsuit were not ripe. R. 34, 51-52. However, after comparing the facts to Utah law, it was clear that res judicata did in fact bar the second lawsuit. Therefore, Neways voluntarily withdrew its Motion to Dismiss so there was no adjudication on the matter. R. 61. Consequently, the assertions made in Neways' Motion to Dismiss are irrelevant.

interest from the 1991 breach of the agreement and the second lawsuit was an effort to use new legal theories to collect damages resulting from the breach. R. 1-12, 263.

Macris filed its own Motion for Summary Judgment arguing that Neways was Images' successor and, therefore, liable for Macris' judgment against Images. R. 286-93. To support his conclusion, Macris did not cite to any evidence in the record except Macris' allegations in the Complaint. R. 1-12, 286-93. Each of these allegations was denied by Neways in its Amended Answer. R. 166-75. Macris erroneously cited Neways' admission that Neways was in privity with Images as an admission that Neways was Images' successor. R. 286-93, 358-66.

II. SUMMARY OF ARGUMENT

On September 19, 1997, the Fourth Judicial District Court, Judge Howard Maetani presiding, issued its Memorandum Decision. R. 433. The trial court correctly held that res judicata barred Macris from claiming future damages against Neways for the 1991 termination of the agreement because Neways and Images are privies, the claims could and should have been argued in the first lawsuit, and there was a final judgment in the first proceedings. R. 422-28. The trial court realized that Macris' guise of new legal theories against Images' privy was nothing more than a second attempt to receive future damages resulting from the 1991 breach of the agreement. R. 422-25.

However, the trial court erred in two respects. First, the trial court did not extend the res judicata analysis to the successor liability claim. R. 422-28. Second, the trial court erroneously held that Neways was a mere continuation of Images and should be liable for Macris' judgment against Images. R. 425-28. The trial court did not receive any evidence on the successor liability issue, but based its ruling on disputed pleadings. R. 1-12, 166-75, 425-28, 431. Neways

disputed this alleged continuation in the trial court. For example, Images and Neways only shared one director, the rest of the directors, shareholders, and officers are different; Images and Neways did not use the “same facilities, employees, distributorships, and health and beauty care products;” and many of Images’ distributors would not join Neways, causing many of Images’ distributors not to retain their same rank and downline in Neways. R. 92, 171, 352. Further, the pleadings show that Macris alleged and Neways agreed that Eclat was the successor to Images. R. 11, 174. Therefore, material facts exist as to whether Neways is Images’ successor corporation.

ARGUMENT

I. RES JUDICATA BARS MACRIS’ FRAUDULENT TRANSFER, ALTER EGO AND SUCCESSOR LIABILITY CLAIMS AGAINST NEWAYS

This lawsuit arises out of a 1991 breach of an agreement between Macris and Images. R. 8, 208-14, 413. Macris prevailed in the first lawsuit concerning the breach of the agreement by receiving a judgment against Images. R. 263, 507 p. 14. Apparently, that judgment was not enough. Macris filed a second lawsuit against Images’ privy, Neways, in an effort to extend the first lawsuit’s damages award. R. 1-12. However, the doctrine of res judicata bars the claims in the second lawsuit as a matter of law.

Macris used the theories of fraudulent transfer, alter ego, and successor liability to support two separate damages claims. First, Macris claimed that these theories allowed Macris to claim damages in excess of those already awarded in the first lawsuit. These damages had already been claimed and denied in the previous action. Second, Macris claimed that Neways should be liable for those damages already awarded to Macris in the first lawsuit, notwithstanding the fact

that Neways was not a party to the previous action. The doctrine of res judicata bars both types of claims.

Res judicata “bars the litigation of a claim that previously has been fully litigated between the same parties.” *Copper State Thrift and Loan v. Bruno*, 735 P.2d 387, 389 (Utah Ct. App. 1987). The reason for which res judicata bars a second claim is:

[h]aving been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred.

Berry v. Berry, 738 P.2d 246, 248 (Utah Ct. App. 1987); *see Schaer v. Utah Dept. Of Transp.*, 657 P.2d 1337, 1340 (Utah 1983); Restatement (Second) of Judgments § 25 cmt. d (1982).

Res judicata bars a second action if:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment of the merits.

Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988); *Salt Lake City v. Silver Fork Pipeline, Inc.*, 913 P.2d 731, 733 (Utah 1995); *Schaer*, 657 P.2d at 1340; *Bruno*, 735 P.2d at 389. This doctrine is “based on the premise that the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause.” *State In the Interest of J.J.T.*, 877 P.2d 161, 162 (Utah Ct. App. 1994). Further, the doctrine has evolved to protect the public interest by “fostering reliance on the prior adjudication, preventing inconsistent judgments, relieving parties of the cost and vexation of multiple lawsuits, and conserving judicial resources.” *Id.* (quotations omitted).

In the first action, Macris had a full and fair opportunity to argue and receive all of his future damages resulting from a 1991 breach of an agreement between Macris and Images. R. 279. The trial court awarded Macris \$487,638.87 plus interest based on his arguments. R. 263, 507 p. 14. However, Macris is now trying to recover more damages from the 1991 breach of the agreement by suing Images' privy for different legal theories: fraudulent transfer, alter ego, and successor liability. R. 1-12. Res judicata bars each of these claims.

A. Neways is Images' Privy.

Due to the September sale and transfer of assets, Neways is Images' privy. Even Macris admits that Neways is Images' privy for purposes of successor liability. (Brief of Appellee at pp. 41-46). However, Macris contradicts himself by arguing that Neways is not Images' privy for purposes of res judicata. (Brief of Appellant at p. 32). Despite Macris' contradictory contentions, Neways is Images' privy.

First, contrary to Macris' assertion, Utah courts have clearly defined privity. The Utah Supreme Court defined privity as :

The legal definition of a person in privity with another is a person so identified in interest with another that he represents the same legal right. *This includes a mutual or successive relationship to rights in property.*

Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978); *see B.J.H. v. State of Utah*, 945 P.2d 158, 163 (Utah Ct. App. 1997); *Golden State Bottling Co., Inc. v. National Labor Relations Board*, 414 U.S. 168, 179 (1973); Restatement (Second) of Judgments § 44 (1982). Therefore, a party can be a privy of another and not be the successor corporation, but a successor is necessarily a privy. *See id.*

Images sold and transferred some of its assets to Neways for valuable consideration. R. 227, 323, 351. With respect to those transferred assets, Neways was identified in interest with Images. Macris must admit that Neways was Images' privy in order to be successful on his successor liability argument against Neways. R. 1-12, 286-93. (Brief of Appellee at pp. 41-46). To be Images' successor, Neways would, by definition, be Images' privy.

In addition, Macris had a full and fair opportunity to argue its claims against Neways in the first lawsuit. R. 263, 507 p. 14. Macris was the beneficiary of almost a half-million dollar judgment because of his full and fair opportunity to argue his case. R. 263, 507 p. 14. Macris now wants to increase the damages allotted to him by bringing the current lawsuit to argue substantially the same facts and evidence pertaining to the 1991 breach. Macris has already had his day in court.

However, if the Court believes that Macris did not have a full and fair opportunity to argue his claim for damages, it was only Macris' failure to plead the causes of action in the first lawsuit. Almost a year after the transfer of assets to Neways, Macris filed the last pleading in the first lawsuit, even after Macris had full knowledge of the creation of Neways and the transfer of assets. R. 1-12, 507 p. 15. If Macris did not have his day in court, it was due to his failure to plead causes of action that related to the same transaction that were existing at the time Macris filed the last pleading.

Neways is Images' privy because the two companies represent the same legal right with respect to the assets that were transferred, and Macris had an opportunity to argue his claims at trial. Consequently, the first prong of the *Madsen* test is satisfied.

B. Macris Could and Should Have Brought the Fraudulent Transfer, Alter Ego, and Successor Liability Claims against Images' Privy in the First Lawsuit.

For res judicata to bar a claim, the second element a party must demonstrate is that “the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action.” *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988); *Schaer v. Utah Dept. of Transp.*, 657 P.2d 1337, 1340 (Utah 1983); *State in the Interest of J.J.T.*, 877 P.2d 161, 163 (Utah Ct. App. 1994); *Copper State Thrift and Loan v. Bruno*, 735 P.2d 387, 389 (Utah Ct. App. 1987). Before a court can decide if a party “could have and should have” included a claim, a party “must first overcome the threshold determination of whether the claims, demands or causes of action of both cases are the same.” *Schaer*, 657 P.2d at 1340 n.2; *Searle*, 588 P.2d at 690; *Krofcheck v. Downey State Bank*, 580 P.2d 243, 244 (Utah 1978); *Bruno*, 735 P.2d 387, 389 (Utah Ct. App. 1987).

The courts are expanding the definition of a claim or cause of action for res judicata preclusion. See *Manego v. Orleans Board of Trade*, 598 F.Supp. 231, 234 (D. Mass 1984). There are various tests used throughout the courts to determine if a second claim or cause of action is identical to a previous claim. These various tests are the “Same Facts and Witnesses,” “Entire Controversy,” “Same Transaction,” and “Primary Right Tests.” No matter which test this Court uses, Macris’ first and second lawsuits will be classified as the same claim.

1. Under Utah’s Same Facts and Witnesses Test, the fraudulent transfer, alter ego and successor liability claims against Neways are the same claim as the breach of contract claim against Images in the first lawsuit.

In *Schaer v. State*, 657 P.2d 1337 (Utah 1983), the Utah Supreme Court adopted the Same Facts and Witnesses Test in determining if a second claim is the same as the first for the

purpose of preclusion. In *Schaer*, the first action was a condemnation proceeding in which the plaintiff received more than \$100,000 because plaintiff's property was landlocked. In another lawsuit against a different litigant, the state claimed that a road into the plaintiff's property was a thoroughfare and residents could use it. With this new information, plaintiff, in its second lawsuit that was filed thirteen years after the first lawsuit, argued that his property was worth more money because of the thoroughfare.

The Utah Supreme Court held that the claims are different if "[t]he two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action." *Id.* at 1340. Because the claims arose thirteen years apart, the facts and evidence necessary to prove a condemnation and thoroughfare proceedings are different, and the issue of thoroughfare was not litigated in the first action, the claims are different and res judicata is not a bar to the second action. *Id.* at 1342.

In the present case, the facts and witnesses used to support the damages claim of Macris' first and second lawsuits are identical. The damages for both claims arise from the 1991 breach of the agreement between the parties. R. 8-10, 228-9, 431-32, 507 p.12. Macris used these facts, evidence, and witnesses in the first action to recover almost a half-million dollars in damages. R. 263, 507 p. 14. The court did not extend damages past August of 1992. R. 263, 507 p. 14. Therefore, unlike *Schaer*, the damages issue has been adequately litigated in the first action and there has been an adjudication on those arguments. The same facts and evidence test bars Macris' second claim for damages.

However, Macris tries to make the claims in the first and second lawsuits different by claiming a couple of different facts that would be needed to prove the second action, but would

be irrelevant to the first. R. 1-12. By so doing, Macris tries to “dress up” the old claim used to recover damages to increase the damages award. R. 1-12. Res judicata bars this deceptive practice. *See Armstrong v. Norwest Bank, Minneapolis*, 964 F.2d 797, 802 (8th Cir. 1992) (res judicata “prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different.”). Thus, where Macris has fashioned a new theory of recovery or cites a new body of law that was arguably violated by Images’ privy, Neways, res judicata still bars the second claim if it is based on the same facts and evidence as the first. *See Berry v. Berry*, 738 P.2d 246, 248 (Utah Ct. Ap. 1987). Macris’ damages in the second lawsuit is clearly based on action that took place in the first lawsuit. R. 1-12, 263, 507 p. 14. The facts of the two lawsuits are so intricately intertwined that if Macris had been unsuccessful in his first action, he would have no claims in the second. Macris’ second lawsuit is, therefore, barred by res judicata pursuant to Utah’s Same Facts and Evidence Test.

2. Macris’ second lawsuit is barred under the Entire Controversy Test.

Another test used in determining if res judicata bars later claims is the “Entire Controversy Test.” “The entire controversy doctrine requires that a person assert in one action all related claims against a particular adversary or be precluded from bringing a second action based on the omitted claims against that party.” *O’Shea v. Amoco Oil, Co.*, 886 F.2d 584, 590 (3rd Cir. 1989); *Melikian v. Corradetti*, 791 F.2d 274, 279 (3rd Cir. 1986). This doctrine is designed to prevent the “multiplicity of suits and their attendant harassment.” *O’Shea*, 886 F.2d at 590.

The Third Circuit Court of Appeals case *O’Shea v. Amoco Oil Co.* is instructive. In *O’Shea*, plaintiff and defendant entered into a franchise contract wherein plaintiff agreed to

operate defendant's franchise 24 hours a day. Plaintiff decided to close the franchise during late evening hours due to loss of business during these hours. Defendant sued plaintiff for breach of contract and prevailed. However, two months *before* trial in the first suit, defendant threatened plaintiff that plaintiff's agreement would be terminated if he did not operate the franchise 24 hours a day.

Soon after the first trial, plaintiff sued defendant under the NJFPA, New Jersey Franchise Practices Act. Plaintiff alleged that the defendant's threat to terminate the franchise agreement unless the franchise remained opened twenty-four hours a day was an unreasonable business standard. The Third Circuit Court of Appeals affirmed the trial court's ruling that the second suit was barred because of res judicata. The plaintiff did not plead "all related claims," including those that became ripe only two months before trial, in the first action. *Id.* Therefore, res judicata barred the second lawsuit.

In comparison to the present case, the entire controversy doctrine would bar Macris' second lawsuit. Both lawsuits are attempts to receive damages resulting from the 1991 breach of the agreement. R. 8-10, 208-14, 228-29, 413, 431-32, 507 p.12. The evidence demonstrates that the transfer, which is the basis for which Macris' tries to extend his damages, took place two and a half years *before* trial, and one year before Macris filed his last pleading. R. 227, 507 p. 15. Further, Macris spent at least three days reviewing Neways' financial documentation during the two and a half year period. R. 227. Macris had ample notice that these claims could have extended his damages resulting from the 1991 breach, but Macris failed to allege them at the time the last pleading was filed. R. 507 p. 15. Therefore, the entire controversy doctrine prohibits Macris from bringing his second lawsuit against Images' privy, Neways.

3. The Same Transaction Approach bars Macris from litigating the second lawsuit.

The majority of courts have adopted the Restatement's Same Transaction Approach.

"Under this approach, a valid and final judgment in the first action will extinguish subsequent claims with respect to all or any part of the transaction, or series of connected transactions out of which the action arose." *Porn v. National Grange Mutual Ins. Co.*, 93 F.3d 31, 34 (1st Cir. 1996); see *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996); *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir. 1990); *Manego v. Orleans Bd. Of Trade*, 773 F.2d 1, 5 (1st Cir. 1985); Restatement (Second) Judgments § 24 (1982). In defining a transaction, a court should analyze "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations." *Porn*, 93 F.3d at 34; see *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 7 (1st Cir. 1992); *Lane*, 899 F.2d 737, 742 (8th Cir. 1990). The three elements of this approach favor Newways.

a. Time, space, origin and motivation of the lawsuit.

The first factor a court must analyze in determining if the second lawsuit arises from the "same transaction" is the time, space, origin, and motivation of the two lawsuits. This element is satisfied if the two lawsuits "arise out of the same transaction, seek redress for essentially the same basic wrong, and rest on the same or substantially similar factual basis." *Porn*, 93 F.3d at 34. Further, a cause of action for contract and one for tort can arise from the same transaction if "they both seek redress for essentially the same basic wrong." *Id.*; see *Lane*, 899 F.2d at 743 (holding that the "Restatement (Second)'s 'transactional' approach to res judicata contemplates that there may be some variance in the proof required for claims that are nonetheless the 'same

claim’ for res judicata purposes. The operative question in each case is whether the claims arise out of the same nucleus of facts.”); Restatement (Second) of Judgments § 24 cmt. c (1982) (clarifying that because two claims depend on different shadings of the facts or emphasize different elements of the facts, a court should not color its perception of the transaction underlying them, creating multiple transactions when only one exists).

No matter how Macris classifies this lawsuit, both the first and second lawsuits arise from the 1991 breach of the parties’ agreement. R. 8-10, 228-29, 431-32, 507 p. 12. The elements needed to prove damages in both cases come from the 1991 breach. All proof, witnesses, and facts that were necessary for Macris to receive a half million dollar judgment in the first lawsuit had to be proven for Macris to receive any damages in the second lawsuit. R. 1-12, 263, 507 p. 14. The facts of the two cases are so intricately intertwined that Macris had to be successful in this first action to have any claim in the second action. Therefore, the two lawsuits should be treated as one and the Court should bar the second lawsuit. *See Lane*, 899 F.2d at 744; Restatement (Second) of Judgments § 24 cmt. c (1982).

b. Trial convenience of the lawsuit.

The second element of the Same Transaction Test is trial convenience. “This factor, aimed at conserving judicial resources, provides that where the witnesses or proof needed in the second action overlap substantially with those used in the first action, the second action should ordinarily be precluded.” *Porn*, 93 F.3d at 36; *see* Restatement (Second) of Judgments § 24 cmt. b (1982). The prong best promotes the public interest of “fostering reliance on prior adjudication, preventing inconsistent judgments, relieving parties of the cost and vexation of multiple lawsuits,

and conserving judicial resources.” *State in the Interest of J.J.T.*, 877 P.2d 161, 162 (Utah Ct. App. 1994); *see Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

The trial convenience element favors Neways’ assertion that Macris should have brought all claims in the first lawsuit. Macris has already been given the opportunity to argue his full damages resulting from the 1991 breach of the agreement. R. 263, 279, 507 p. 14. Macris’ second lawsuit is an attempt to extend the first lawsuit’s damages into the future, and make Images’ privy liable for the judgment. R. 1-12. Macris knew of these potential claims to extend his damages before the filing of the last pleading in the first lawsuit. R. 227, 273-39, 507 p. 15. If Macris would have plead these claims, the same witnesses and evidence would have been available. However, because Macris did not plead them, the parties are forced into their seventh year of litigation. R. 227-28, 507 p. 8-9.

c. The parties’ expectations.

The third element of the Same Transaction Test is for the Court to determine what were the parties’ expectations. *Porn*, 93 F.3d at 34. In the present case, it is clear that both parties’ expected or should have expected the second claims to have been encompassed by the first lawsuit. For example, after Neways was created and purchased Images’ assets, Neways did nothing in the first lawsuit. Neways knew that it was in privity with Images because of the sale, but Macris did not allege any liability against Neways. Therefore, Neways did not use its staff of corporate attorneys to defeat Macris’ claims against Images. Neways was lulled into a false sense of security, believing that Macris was not looking to Neways for its damages. Neways was not given an opportunity to defend itself and is now asked to pay the damages assessed against Images, without giving Neways its day in court.

On the other hand, it is clear that Macris cannot deny that he had full knowledge of the claims against Neways. Images transferred most of its assets to Neways almost a year before Macris filed the last pleading in the first lawsuit. R. 227, 323, 351, 507 p. 15. After the transfer, the trial court vacated the first trial that was eventually held two and a half years later. R. 227. During this two and a half year period, the trial court reopened discovery and Macris spent three days reviewing Neways' documents. R. 273-79, 507 p. 12, 14, 15. Macris knew before he filed the last pleading in the first lawsuit that he had claims against Images' privy that could increase his possibility of receiving and increasing his damages. R. 507 p. 12.

Res judicata bars Macris' second lawsuit pursuant to the Same Transaction Test. The time, space, origin, and motivation, trial convenience, and parties' expectations favor Neways.

4. The Primary Right Test bars Macris' second lawsuit against Neways.

Another test used in determining if res judicata bars a second lawsuit is the Primary Right Test.

Under the primary right theory, the underlying right sought to be enforced determines the cause of action. In determining the primary right, the significant factor is the harm suffered. Only one primary right exists when two actions involve the same harm to the plaintiff, even when different legal theories and remedies are available for that particular harm. Consequently, numerous cases hold that when there is only one primary right an adverse judgment in the first suit is a bar even though the second suit is based on a different theory . . . or seeks a different remedy.

Production Supply Co., Inc. v. Fry Steel, Inc., 74 F.3d 76, 78 (5th Cir. 1996) (citations omitted).

The case *Reed v. Marketing Services, International, LTD*, 540 F.Supp. 893 (S.D. Texas 1982), is illustrative. In *Reed*, the plaintiff sued defendants for a breach of contract surrounding an escrow transaction. The first court awarded judgment for plaintiff. Soon thereafter, plaintiff

sued defendant a second time alleging fraud and other causes of action in an effort to increase its damages. Further, to support its second lawsuit, Plaintiff alleged that the fraud was not ascertainable until after the trial in the first lawsuit.

The court did not agree with the plaintiff. Following the Primary Right Test, the court held that “the thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these is the legal wrong, the existence of which, if true, they conclusively evince.” *Reed*, 540 F.Supp at 898. The court held that both the fraud and contract lawsuits were claiming ***the same damages***, but the only difference is the legal theory used. *See id.* Therefore, “one fair day in court is enough.” *Id.*

Reed is similar to the present case. As in *Reed*, there are two lawsuits, one in contract, the other in fraud, that are claiming damages that arise out of a result of a 1991 breach of an agreement. R. 1-12. Macris had his fair day in court and received substantial damages. R. 263, 507 p. 14. Macris would not have damages in the second lawsuit but for the breach in the first. Consequently, the second lawsuit shares the same facts and evidence to support the wrong and/or damages as the first lawsuit. R. 1-12, 227, 263, 507 p. 14. The only thing different between these cases is that Macris uses different legal theories, fraudulent transfer, alter ego, and successor liability, in the second lawsuit to increase his damages from the first. Res judicata bars this action because Macris already had his full and fair day in court. R. 227.

5. No matter what test this Court adopts, res judicata bars Macris' second lawsuit because Macris' first and second lawsuits are the same claims.

No matter what test this court follows, the result is the same. The first and second lawsuits are clearly the same claims seeking damages resulting from the 1991 breach of an agreement. R. 8, 208-21, 413. Therefore, Macris' second lawsuit is barred by res judicata.

C. Whether this Court Holds that Macris had a Duty to Amend, or Did Not Have a Duty to Amend, Res Judicata Bars Macris' Second Lawsuit Because the Second Lawsuit Could Have and Should Have Been Included in the First Lawsuit.

Once a court decides that two causes of action are the same claim, then the court must decide if the action could have or should have been included in the first action. Courts have held that a party has a duty to amend causes of action if they occur before trial, and other courts have held that only those actions that are in existence at the time the suit was filed or the party's last pleading therein are barred by res judicata. (Brief of Appellee at 27).

1. Macris had a duty to amend the lawsuit before trial to include similar claims.

Res judicata supports the public policy of "fostering reliance of prior adjudication, preventing inconsistent decisions, relieving parties of the cost and vexation of multiple lawsuits and conserving judicial resources." *State in the Interest of J.J.T.*, 877 P.2d 161, 162 (Utah Ct. App. 1994) (quotations omitted). These policies are undermined and irrelevant if a party does not have a duty to amend to include all claims that the party knew or should have known that arise from the same transaction. *See Feminist Women's Health Center v. Codispoti*, 63 F.3d 863, 866 (9th Cir. 1995) (holding that a RICO claim had become ripe before judgment was entered so the claim should have been argued at the trial); *Harnett v. Billman*, 800 F.2d 1308, 1315 (4th Cir. 1986) (barring all claims that had arisen after complaint was filed and the dismissal of the

action); *Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1087 (Ct. of Claims 1975) (requiring “a litigant to seek to amend a pending suit to add later accruing claims under a single contract if he is to avoid dismissal of a later suit on the ground he has split his cause of action.”).

After reviewing the facts of the instant case, an amendment rule is required. The sale and transfer of assets took place in early September of 1992. R. 227, 323, 351. After the transfer occurred, Images filed a pleading in the first lawsuit. R. 507 p. 15. The first trial was vacated and the lawsuit was eventually tried two and a half years later. R. 227. The trial court reopened discovery and Macris profited by taking three days to review Neways’ financial documentation. R. 273-279, 507 pp. 12, 14. Then, Macris filed the last pleading in the case about a year after the transfer, after Macris had knowledge of the alleged fraudulent transfer, alter ego, and successor liability causes of action that could increase his damages resulting from the 1991 breach. R. 1-12, 507 p. 15. In fact, two days before trial in the first action, Macris filed the second lawsuit demonstrating that he possessed knowledge of the alleged claims against Neways. R. 1-12. Simply, Macris knew or should have known of the second lawsuit’s claims and how they arose out of the same transaction well before trial. Macris had a duty to amend and include those claims.

Numerous courts have held that a party has a duty to amend its complaint if the party discovers additional, similar claims. The Utah Court of Appeals case *Estate of Covington v. Josephson*, 888 P.2d 675 (Utah Ct. App. 1994), is instructive. In *Josephson*, the plaintiff sued defendant over a right-of-way and to quiet title; the defendant prevailed. During the lawsuit, plaintiff was paying taxes on the property with a promise from defendant, even up until trial, that

defendant would reimburse plaintiff if defendant won. After winning, the defendant refused to reimburse plaintiff for taxes paid.

Plaintiff sued defendant for reimbursement of the taxes. The Utah Court of Appeals held that the second suit was not barred by res judicata. First, the issue of taxes was not litigated because it was not ripe for litigation in the first lawsuit. The wrong did not happen until after the first lawsuit because “before trial” defendant continued to promise that it would pay plaintiff for the taxes. *Id.* at 678. The court placed emphasis that “before trial” defendant had continued to promise to pay the taxes. Therefore, it stands to reason that the Court of Appeals would have required plaintiff to make this claim in the first lawsuit if defendant would have conveyed his intentions to not pay the taxes before the trial.

The Utah Supreme Court Case *Badger v. Badger*, 254 P. 784 (Utah 1927), does not stand for the proposition that Macris claims. (Brief of Appellee 28-29). In *Badger*, defendant twice petitioned the court for modification of a divorce decree. The court denied the second petition because there were no new relevant facts that had occurred after the first petition; all of the facts claimed in the second petition were existing at the time of the first petition. Since plaintiff knew all of the facts, the court did not allow the plaintiff to split its claims. *Id.* at 787. However, the court explicitly held that if new facts had surfaced during the first petition, plaintiff “would have been granted leave to amend.” *Id.* Therefore, Utah courts favor amending a complaint to include claims that have accrued after the filing of the last pleading and before trial.

2. In the alternative, if the Court holds that Macris did not have a duty to amend to include the later claims, res judicata still bars the second lawsuits because those claims were existing before the filing of the last pleading.

Macris spends a majority of his brief arguing that res judicata only bars claims if the party was “aware of the causes of action *at the time the first suit was commenced or the filing of the party’s last pleading therein.*” (Brief of Appellee p. 27) (emphasis in original). Macris cites extensive authority to support this proposition. See e.g., *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 915 (7th Cir. 1993); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992); *Prime Management Co., Inc. v. Steinegger*, 904 F.2d 811, 816 (2nd Cir. 1990); *Balderman v. United States Veterans Admin.*, 870 F.2d 57, 62 (2nd Cir. 1989); *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1336 (10th Cir. 1988); *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731, 739 (9th Cir. 1984), *cert denied*, 474 U.S. 919 (1985); *Green v. Illinois Dept. of Transp.*, 609 F.Supp. 1021, 1026 (N.D. Ill. 1985); *Bolte v. Aits, Inc.*, 587 P.2d 810, 812-13 (Haw. 1978); *Durrant v. Quality First Marketing, Inc.*, 903 P.2d 147, 149 (Idaho Ct. App. 1995); *Whitaker v. Bank of Newport*, 836 P.2d 695, 699 (Or. 1992) (in banc); *Ben C. Jones & Co. v. Gammel-Statesman Publishing Co.*, 99 S.W. 701, 703 (Tex. 1907); *Kaiser v. Northwest Shopping Ctr., Inc.*, 587 S.W.2d 454, 457 (Tex. App. 1979); Restatement (Second) of Judgments § 24, comment d (1982); 18 Charles A. Wright et al., Federal Practice and Procedure § 4409 (1981).

The Utah Rules of Civil Procedure define a pleading as:

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions to Rule 14; and a third party answer, if a third-party complaint is served.

Utah Rules of Civil Procedure, Rule 7(a).

In the instant case, pleadings were filed after the transfer and sale of Images to Neways. R. 507 p. 15. The transfer took place on September 1, 1992. R. 227, 323, 351. Images then filed an Amended Answer, a pleading, on September 9, 1992. R. 507 p. 15. Almost a year later, Macris filed a pleading, an Amended Counterclaim and Answer to Third-Party Complaint. R. 507 p. 15. Clearly, the causes of action alleged in the second lawsuit arose before the filing of the complaint or the last pleading filed therein.

If this Court follows the Restatement, Macris could and should have brought the causes of action alleged in the second lawsuit in the first lawsuit. However, for some reason, Macris did not, and that error has now caused the parties to enter into their seventh year of litigation. R. 227-28, 507 p. 8-9.

D. THE *MADSEN* TEST IS SATISFIED.

Res judicata bars the claims alleged in Macris' second lawsuit. Neways is Images' privy, the future damages claims could and should have been litigated in the first action, and there has been a final judgment on the merits. Therefore, Macris should be barred from collecting future damages against Neways, and Neways should not be liable for Images' judgment against Macris.

II. THE TRIAL COURT INCORRECTLY HELD THAT NEWAYS WAS IMAGES' SUCCESSOR CORPORATION BECAUSE THERE WERE MATERIAL ISSUES OF FACT AS TO IF NEWAYS IS IMAGES' SUCCESSOR.

Each of Macris' claims is barred by the doctrine of res judicata, as described above. However, even if res judicata did not bar Macris' claims, the trial court erroneously granted summary judgment against Neways, holding that Neways is the successor corporation of Images and should be liable for Images' debt to Macris. Summary judgment is only proper if there are

no genuine issues of material fact. *See Billings v. Union Bankers Ins. Co.*, 819 P.2d 803 (Utah 1991); Utah Rules of Civil Procedure, Rule 56. Further all inferences are considered in the light most favorable to the non-moving party.

Genuine issues of material fact exist as to whether Neways is Images' successor. First, Neways explained in the Brief of Appellant that the trial court did not take any evidence as to whether the sale of assets included the sale of liabilities. (Brief of Appellant pp. 18-19). This is not refuted in Macris' Brief in Opposition. (Brief of Appellee p. 43). However, Macris argues that the trial court based its successor liability ruling on an exception to the general successor liability rule that if a corporation is a mere continuation of another, then successor liability applies. (Brief of Appellee at p. 43-46).

Despite the trial court's findings, there are genuine issues of material fact as to whether Neways is a mere continuation of Images. First, the trial court did not receive any evidence on the alleged continuation, but made its ruling solely on the disputed allegations contained in the pleadings. R. 1-12, 166-75, 425-28, 431. The trial court held that "Neways consists of substantially the same assets, products, officers, and employees as Images" R. 425. The pleadings refute this holding. First, Images and Neways only shared one director, the rest of the directors, shareholders, and officers are different; Images and Neways did not share the "same facilities, employees, distributorships, and health and beauty care products;" and many of Images' distributors would not join Neways, causing many former Images' distributors to not retain their same rank and downline in Neways. R. 92, 171, 352. Clearly there were disputed issues of fact concerning Neways' alleged "mere continuation" of Images in front of the trial court to preclude a grant of summary judgment. R. 92, 171, 352, 425.

Further, the pleadings show that the parties agreed that Eclat was Images' true successor. It is true as Macris states that a party may not raise a factual issue for the first time on appeal. *See Schaer v. State*, 657 P.2d 1337, 1342 (Utah 1983); (Brief of Appellee at p. 44). However, the issue as to whether Eclat is the successor is contained within the pleadings in the trial court. R. 11, 174. In his Complaint, Macris alleged that Eclat was formerly known as Images, i.e. the successor. R. 11. Neways admitted the truth to this allegation. R. 174. Macris did not make an effort through discovery to fully comprehend Eclat's successorship. Neways should not be punished for Macris' failure to properly conduct discovery.

There were issues of fact as to whether Neways was Images' successor corporation. First, no evidence was received by the trial court as to whether Neways assumed Images' debt to Macris. Second, every fact that supported the trial court's holding that Neways was a mere continuation of Images was disputed in the pleadings or by affidavit. Finally, the parties, through the pleadings, had agreed that Eclat was the successor corporation. The trial court erred in granting Macris' summary judgment holding that Neways is Images' successor.

CONCLUSION

Res judicata bars Macris' fraudulent transfer, alter ego, and successor liability claims. There is privity between Neways and Images, Macris could have and should have brought each of these claims in the first action because both lawsuits seek recovery on the same claim for damages and they were in existence before the filing of the last pleadings in the first lawsuit, and there was an undisputed final judgment on the merits of the first action. Therefore, Neways respectfully requests that this Court reverse the trial court's decision and hold that the doctrine of

res judicata bars Macris' successor liability claim, and affirm the trial court's holding that res judicata bars Macris' attempt for future damages.

In the alternative, if this Court finds that res judicata does not bar the successor liability claim, then Neways respectfully requests that this Court reverse and remand the successor liability claim to the trial court to allow the parties an opportunity to present evidence regarding the true successor to Images.

DATED this 14th day of July, 1998.



ALLEN K. DAVIS
CHRISTOPHER S. CRUMP
Attorneys for Neways/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 1998, I caused to be served two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT/BRIEF IN OPPOSITION OF CROSS-APPELLEE** in Appeal no. 980004-CA via first class mail, postage pre-paid, to the following:

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ADDENDUM

Copy

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

vs.

Defendants,

VS.

Civil No. 910400358
Judge: Christensen

MIKE MACRIS,

Third-Party Defendant

:
:
:
:

COMES NOW the Defendant, Images and Attitude, Inc., and alleges as Counter Claim against the Plaintiff and Third Party Complaint against Third Party Defendant, Mike Macris, as follows:

FIRST CAUSE OF ACTION

(ALTER-EGO)

1. Third Party Defendant is an individual residing in Salt Lake County, State of Utah.

2. That on or about the 7th day of August, 1989, Plaintiff and Defendant entered into a Distributorship agreement. A few months later the addendum referred to in the Plaintiff's Amended Complaint was incorporated therein.

3. That said agreement adopts by reference the Policies and Procedures of Images. A true and correct copy of the said Policies and Procedures is attached hereto and marked "Exhibit A."

4. The Third Party Defendant, Mike Macris, had continued and does continue to operate the corporation, Macris & Associates, as his alter-ego, and the said corporation has no separate identity or existence apart from the Third Party Defendant.

THIRD CAUSE OF ACTION

(DEFAMATION)

15. Defendants incorporate the allegations of the First and Second Cause of Action as though set forth fully herein.

16. That such conduct on the part of the Plaintiff and Third Party Defendant constitutes slanderous conduct.

17. That the defamatory comments have been published to many people, many of which are distributors of the Defendant company.

18. That said comments were made with full knowledge of the untruth of said comments.

19. That said comments were made willfully, maliciously and wantonly and with total disregard for the rights of the Defendants.

20. By reason of the forgoing the Defendants have been damaged in amounts which are yet unknown but which should be determined at trial, but which in no event should be less than \$1,000,000.00.

FOURTH CAUSE OF ACTION

(INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS)

21. The Defendants reallege the allegations set forth in the First, Second, and Third Cause of Action as though set forth fully herein.

22. Upon information and belief the Defendant alleges that the conduct complained of hereinabove was done intentionally and

maliciously and with the intent to deceive and to make defamatory statements in order to gain unfair and unlawful advantage over the Defendant in the marketplace.

23. The Plaintiff and Third Party Defendant knew, or should have known, of the importance to the Defendants of the independent contractual relations and business related good will between the Defendant and its distributors.

24. That the actions of the Plaintiff and Third Party Defendant were part of an extensive, systematic and intentional plan to discredit, injure and defame the Defendants and to gain distributors to work for the Plaintiff's and Third Party Defendant's new company.

25. In so doing, the Plaintiff and Third Party Defendant have maliciously and intentionally attempted to induce independent distributors of the Defendant to breach their contractual relations with the Defendants.

26. That such conduct as set forth hereinabove was in direct violation of the Policies and Procedures Agreement.

27. That by reason of the foregoing, the Defendant has suffered and will continue to suffer irreparable harm.

28. Unless restrained and enjoined by this Court, the Defendant will continue to suffer such harm.

29. Defendant has no adequate remedy of law because the full extent of his damages are difficult to prove with reasonable certainty and cannot, in any event, adequately compensate the Defendants for the loss of good will and distributors and its company.

FIFTH CAUSE OF ACTION

(INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS)

30. The Defendants reallege the allegations set forth in the First, Second, Third and Fourth Cause of Action as though set forth fully herein.

31. By engaging in the actions outlined above, the Plaintiff and Third Party Defendants have interfered with the Defendant's prospective economic relations with its independent contractors, with potential independent contractors, with customers and with potential customers.

32. The means that the Plaintiff and Third Party Defendant are using and have used to interfere with the Defendant's prospective economic relations are improper in that they amount to deceit, misrepresentation, defamations and because they violate the established standard in the business and the Images Policies and Procedures.

33. The Plaintiff and Third Party Defendant 's actions were taken in bad faith in that they were willful and intentional.

34. The actions of Plaintiff and Third Party Defendant have injured Defendant by damaging its reputation and by causing it to lose independent contractors, prospective independent contractors, customers and prospective customers, thereby causing the Defendant damages in amounts to be proven at trial as well as other substantial and irreparable harm.

SIXTH CAUSE OF ACTION

(FRAUD IN THE INDUCEMENT)

35. Defendant incorporates the allegations of the First, Second, Third, Fourth and Fifth Cause of Action as though set forth fully herein.

36. Prior to entering into the auto-qualification agreement which is the subject of this litigation, Plaintiff and Third Party Defendant represented he had a grant and had developed with Dr. Donald Lyman of the University of Utah a gel and nail preparation for a fingernail bonding system.

37. Defendants had experienced difficulties with a prior system containing Methylacrylic Acid, a skin irritant, and Plaintiff and Third Party Defendant further represented that said products did not contain Methylacrylic Acid.

38. Plaintiff and Third Party Defendant further represented that they possessed and would provide Material Safety Data Sheets confirming that said products did not contain Methylacrylic Acid.

39. Plaintiff and Third Party Defendant further represented that said products were produced exclusively by them and not available from any other source.

40. Plaintiff and Third Party Defendant further represented that they had \$250,000.00 of advertising already in place to promote said product.

41. Plaintiff and Third Party Defendant further represented that they intended to develop their own distributorship in accordance with the requirements of Defendant Images for qualification at the Presidential level.

42. All of the foregoing representations of Plaintiff and Third Party Defendant were false.

43. Plaintiff and Third Party Defendant altered or caused to be altered Material Safety Data Sheets to exclude the information showing that their products contained dangerous quantities of Methylacrylic Acid.

44. Plaintiff and Third Party Defendant contracted with the third parties to develop other distributorships to the exclusion and detriment of their own.

45. Plaintiff and Third Party Defendant knew at the time that said representation were false, material to the agreement between the parties, and made for the purpose of inducing Defendants into executing said agreement.

46. Defendants reasonably relied on said fraudulent misrepresentations and entered into the agreement auto-qualifying Plaintiff and Third Party Defendant at the Presidential level based thereon.

47. Defendants have been damaged by said misrepresentations in that they have paid monies to Plaintiff and Third Party Defendant based thereon, have purchased large and unnecessary quantities of said nail care systems and its accompanying equipment, have been sued by various parties damaged by the Methylacrylic Acid in said products, lost productive Distributors and suffered extensive damage to their goodwill and reputation as a result thereof.

48. Defendants are entitled to a judgment of the Court, rescinding the subject contract between the parties and awarding Defendants compensatory damages in an amount to be proven at trial and including all monies previously paid to Plaintiff and Third Party Defendant, the cost of all said nail care systems and equipment unnecessarily purchased, all costs and amounts related to suit filed against Defendants related to said systems including the suit involving Affinity, Inc., and all damages related to the loss of Distributors, goodwill and reputation. Defendants are further entitled to punitive damages in an amount to be proven at trial plus costs of Court and attorney's fees.

SEVENTH CAUSE OF ACTION

(PUNITIVE DAMAGES)

49. Defendant incorporates the allegations of the First, Second, Third, Fourth, Fifth and Sixth Cause of Action as though fully set forth herein.

50. By reason of the willful, wanton and malicious conduct of Plaintiff and Third Party Defendant set forth hereinabove, the Defendant is entitled to punitive or exemplary damages in the sum of one million dollars.

WHEREFORE, Defendant pray for judgment as follows:

1. For an injunction prohibiting the Plaintiff and Third Party Defendant from:

(a) Using false or misleading statements or statements that have a tendency to deceive when contacting or advertising their other products or commercial activities to the public and to independent contractors of Images.

(b) Making false or misleading statements concerning Defendant Images and Thomas Mower.

2. For judgment in such amounts as shall be proven at trial but which should in no event shall be less than \$1,000,000.00.

3. For rescission of the auto-qualification agreement and an award of all damages to Defendants related thereto.

4. For punitive or exemplary damages in the sum of \$1,000,000.00.

5. For reasonable attorney's fees and Court costs incurred herein.

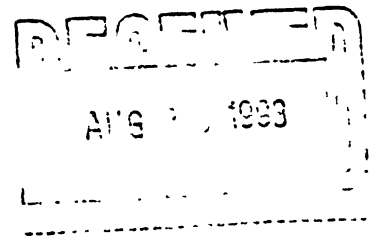
6. For such other and further relief as the Court deems just and proper in the premises.

DATED this 7th day of September, 1992.

BROWN, LARSON, JENKINS & HALLIDAY

By: 

Richard L. Halliday
Attorney for Defendants



Jon V. Harper (#1378)
1059 First Avenue
Salt Lake City, UT 84103
(801) 581-4032

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ANDERSON & KARRENBERG
700 Bank One Tower
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**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.

MACRIS & ASSOCIATES, INC.'S
REPLY TO AMENDED COUNTERCLAIM
AND MIKE MACRIS'S ANSWER TO
THIRD-PARTY COMPLAINT

Civil No. 910400358

Judge Guy R. Burningham

Macris & Associates, Inc. and Mike Macris hereby reply to the Amended Counterclaim and answer the Third-Party Complaint as follows:

1. Admit the averments contained in paragraph 1 of the Amended Counterclaim and Third-Party Complaint (hereinafter "Amended Counterclaim").

2. Admit the averments contained in paragraph 2 of the Amended Counterclaim, except deny that the addendum referred to in Plaintiff's Amended Counterclaim was incorporated "a few months later."

3. Deny each and every averment contained in paragraph 3 of the Amended Counterclaim.

4. Deny each and every averment contained in paragraph 4 of the Amended Counterclaim.

5. Deny each and every averment contained in paragraph 5 of the Amended Counterclaim.

6. Deny each and every averment contained in paragraph 6 of the Amended Counterclaim.

7. Deny each and every averment contained in paragraph 7 of the Amended Counterclaim.

8. Deny each and every averment contained in paragraph 8 of the Amended Counterclaim.

9. Deny each and every averment contained in paragraph 9 of the Amended Counterclaim.

10. As an answer and reply to paragraph 10 to the Amended Counterclaim, Macris & Associates, Inc. and Mike Macris repeat and incorporate herein by reference each and every averment, admission and denial set forth in paragraphs 1 through 9 above and deny each and every other averment contained in paragraph 10 of the Amended Counterclaim.

11. Deny each and every averment contained in paragraph 11 of the Amended Counterclaim.

12. Deny each and every averment contained in paragraph 12 of the Amended Counterclaim.

13. Deny each and every averment contained in paragraph 13 of the Amended Counterclaim.

14. Deny each and every averment contained in paragraph 14 of the Amended Counterclaim.

15. As an answer and reply to paragraph 15 of the Amended Counterclaim, Macris & Associates, Inc. and Mike Macris repeat and incorporate herein by reference each and every averment, admission and denial contained in paragraphs 1 through 14 above.

16. Deny each and every averment contained in paragraph 16 of the Amended Counterclaim.

17. Deny each and every averment contained in paragraph 17 of the Amended Counterclaim.

18. Deny each and every averment contained in paragraph 18 of the Amended Counterclaim.

19. Deny each and every averment contained in paragraph 19 of the Amended Counterclaim.

20. Deny each and every averment contained in paragraph 20 of the Amended Counterclaim.

21. As an answer and reply to paragraph 21 of the Amended Counterclaim, Macris & Associates, Inc. and Mike Macris hereby repeat and incorporate herein by reference each and every averment, admission and denial set forth in paragraphs 1 through 20 above.

22. Deny each and every averment contained in paragraph 22 of the Amended Counterclaim.

23. Deny each and every averment contained in paragraph 23 of the Amended Counterclaim.

24. Deny each and every averment contained in paragraph 24 of the Amended Counterclaim.

25. Deny each and every averment contained in paragraph 25 of the Amended Counterclaim.

26. Deny each and every averment contained in paragraph 26 of the Amended Counterclaim.

27. Deny each and every averment contained in paragraph 27 of the Amended Counterclaim.

28. Deny each and every averment contained in paragraph 28 of the Amended Counterclaim.

29. Deny each and every averment contained in paragraph 29 of the Amended Counterclaim.

30. As an answer and reply to paragraph 30 of the Amended Counterclaim, Macris & Associates, Inc. and Mike Macris repeat and incorporate herein by reference each and every averment, admission and denial set forth in paragraphs 1 through 29 above.

31. Deny each and every averment contained in paragraph 31 of the Amended Counterclaim.

32. Deny each and every averment contained in paragraph 32 of the Amended Counterclaim.

33. Deny each and every averment contained in paragraph 33 of the Amended Counterclaim.

34. Deny each and every averment contained in paragraph 34 of the Amended Counterclaim.

35. As an answer and reply to paragraph 35 of the Amended Counterclaim, Macris & Associates, Inc. and Mike Macris repeat and incorporate herein by reference each and every averment, admission and denial set forth in paragraphs 1 through 34 above.

36. Deny each and every averment contained in paragraph 36 of the Amended Counterclaim.

37. Deny each and every averment contained in paragraph 37 of the Amended Counterclaim.

38. Deny each and every averment contained in paragraph 38 of the Amended Counterclaim.

39. Deny each and every averment contained in paragraph 39 of the Amended Counterclaim.

40. Deny each and every averment contained in paragraph 40 of the Amended Counterclaim.

41. Deny each and every averment contained in paragraph 41 of the Amended Counterclaim.

42. Deny each and every averment contained in paragraph 42 of the Amended Counterclaim.

43. Deny each and every averment contained in paragraph 43 of the Amended Counterclaim.

44. Deny each and every averment contained in paragraph 44 of the Amended Counterclaim.

45. Deny each and every averment contained in paragraph 45 of the Amended Counterclaim.

46. Deny each and every averment contained in paragraph 46 of the Amended Counterclaim.

47. Deny each and every averment contained in paragraph 47 of the Amended Counterclaim.

48. Deny each and every averment contained in paragraph 48 of the Amended Counterclaim.

49. As an answer and reply to paragraph 49 of the Amended Counterclaim, Macris & Associates, Inc. and Mike Macris repeat and incorporate herein by reference each and every averment, admission and denial set forth in paragraphs 1 through 48 above.

50. Deny each and every averment contained in paragraph 50 of the Amended Counterclaim.

FIRST AFFIRMATIVE DEFENSE

51. Defendant's Amended Counterclaim and Third-Party Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

52. Defendant has failed to plead fraud with particularity as required by Rule 9 of the Utah Rules of Civil Procedure and, therefore, is precluded from obtaining any relief on its claim for fraud.

THIRD AFFIRMATIVE DEFENSE

53. The Amended Counterclaim and Third-Party Complaint must be dismissed for failure to join indispensable parties.

FOURTH AFFIRMATIVE DEFENSE

54. Defendant may not recover on any of the claims for relief contained in its Amended Counterclaim and Third-Party Complaint on the grounds of estoppel, waiver and ratification.

FIFTH AFFIRMATIVE DEFENSE

55. Defendant may not recover on any of the claims for relief contained in its Amended Counterclaim and Third-Party Complaint by reason of Defendant's breach of the contract with Macris & Associates, Inc. and by reason for failure of consideration.

SIXTH AFFIRMATIVE DEFENSE

56. Defendant is precluded from recovering on any of the claims for relief contained in its Amended Counterclaim and Third-Party Complaint by the doctrine of unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

57. Plaintiff and Third-Party Defendant are entitled to recover their attorneys' fees incurred in defending against the Amended Counterclaim and Third-Party Complaint pursuant to Utah Code Ann. § 78-27-56.

EIGHTH AFFIRMATIVE DEFENSE

58. Defendant has not suffered any special harm or specific damage as a result of the allegedly slanderous statements or

injurious falsehoods set forth in the Amended Counterclaim and Third-Party Complaint.

NINTH AFFIRMATIVE DEFENSE

59. The allegedly slanderous statements and injurious falsehoods set forth in the Amended Counterclaim and Third-Party Complaint are true, at least in substance, which is a complete defense to the defamation and injurious falsehood actions.

TENTH AFFIRMATIVE DEFENSE

60. Even if plaintiff and third-party defendant made the allegedly defamatory statements as alleged in the Amended Counterclaim and Third-Party Complaint and the statements were not true, the alleged statements concerned a public figure and were made without malice, and plaintiff and third-party defendant had a constitutionally protected privilege to make the alleged statements.

ELEVENTH AFFIRMATIVE DEFENSE

61. Even if plaintiff and third-party defendant made the allegedly defamatory statements or injurious falsehoods as alleged in the Amended Counterclaim and Third-Party Complaint and the statements were not true, any such statements were made for the

protection of their own respective interests, the interests of third persons or certain interests of the public, and plaintiff and third-party defendant therefore had a qualified privilege to make the alleged statements.

TWELFTH AFFIRMATIVE DEFENSE

62. Third-party defendant is not a party to the agreement which defendant alleges in its Amended Counterclaim and Third-Party Complaint has been breached and therefore cannot be liable for breach of that contract.

THIRTEENTH AFFIRMATIVE DEFENSE

63. Defendant's claims raised in the Amended Counterclaim and Third-Party Complaint are barred by the doctrine of laches.

FOURTEENTH AFFIRMATIVE DEFENSE

64. Any allegedly defamatory statement or injurious falsehood in defendant's claims were simply statements of opinion and are not actionable.

WHEREFORE Macris & Associates, Inc. and Mike Macris pray for relief as follows:

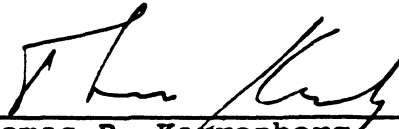
A. The Amended Counterclaim and Third-Party Complaint be dismissed with prejudice and that Defendant takes nothing by its Amended Counterclaim and Third-Party Complaint;

B. Plaintiff and Third-Party Defendant be awarded their costs of suit incurred herein including reasonable attorneys' fees;

C. For such and other relief as the Court deems proper.

DATED: August 23, 1993.

ANDERSON & KARRENBERG

A handwritten signature in dark ink, appearing to read 'Thomas R. Karrenberg', is written over a horizontal line.

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

CERTIFICATE OF SERVICE

On this 23rd day of August, 1993, I hereby caused to be mailed via U.S. first-class mail, postage prepaid, a true and correct copy of the foregoing Macris & Associates, Inc.'s Answer to Amended Counterclaim and Mike Macris's Answer to Third-Party Complaint to the following:

Shawn Turner, Esq.
BROWN, LARSON, JENKINS & HALLIDAY
660 South 200 East, Suite #301
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Attorney for Defendant

Allen K. Young, Esq.
YOUNG & KESTER
101 East 200 South
Springville, UT 84663
Attorneys for Defendant and Third-party Plaintiff

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Salt Lake City, UT 84103