

2004

Macris and Associates, Inc. v. Neways, Inc., Thomas E. Mower and Leslie D. Mower : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH
COURT OF APPEALS

MACRIS & ASSOCIATES, INC.

Plaintiff/Appellant,

v.

NEWAYS, INC., THOMAS E.
MOWER, and LESLIE D. MOWER,

Defendants/Appellees.

Civil No. 20041007-CA

BRIEF OF APPELLANT

Appeal from a Final Judgment of the Fourth Judicial District Court,
Utah County, State of Utah, Judge Gary D. Stott

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal by virtue of the provisions of Utah Code Ann. §78-2a-3(j) (Rep.Vol. 9 2002).

ISSUES PRESENTED FOR REVIEW

1. Did the Court below err in granting the defendants' motion for a protective order and denying plaintiff's motion to compel discovery? Trial court rulings on motions to compel and for protective orders are reviewed under an abuse of discretion standard. Park v. Case, 2001 UT App. 232. The issue was preserved by the parties' respective motions and memoranda. R. File #3 at 785-833.

2. Did the trial court err in granting summary judgment based upon plaintiff's failure to make a pretrial demonstration of its entitlement to relief? The grant of a motion for summary judgment is reviewed without deference to the trial court. Macris & Associates, Inc. v. Neways, Inc., 2002 UT App. 406. The issue was preserved by plaintiff's memorandum in opposition to defendants' motion. R. File #3 at 1052-1066.

STATEMENT OF CASE

The present action was commenced in 1995 when Macris & Associates, Inc. sued Neways, Inc. and Thomas and Leslie Mower in an effort to set aside a fraudulent transfer. The complaint alleged that the Mowers caused one corporation they controlled, Images & Attitudes, Inc., to transfer all its assets to another corporation

they controlled, Neways, Inc., in an effort to place such assets beyond the reach of Macris, which then had a pending breach of contract claim against Images. The Macris claim against Images ultimately resulted in a judgment for Macris that was affirmed on appeal. See Macris & Associates, Inc. v. Images & Attitudes, Inc., 941 P.2d 636 (Utah App. 1997). The complaint in this case sought to make Neways and the Mowers liable for the claim against Images under three theories: fraudulent transfer, alter ego and successor corporation.

The defendants moved for summary judgment in this action, arguing that the judgment against Images barred this action under principles of res judicata as they could and should have been litigated in the prior action. The trial court granted summary judgment to the defendants and Macris appealed.

This Court reversed the ruling of the trial court, holding that the doctrine of claim preclusion was not a bar to this action. See Macris & Associates, Inc. v. Neways, Inc., 1999 UT App. 230. Thereafter, the Supreme Court granted certiorari and affirmed in part and reversed in part. See Macris & Associates, Inc. v. Neways, Inc., 2000 UT 93. The Supreme Court held that Macris' claims in this action were not barred by claim preclusion but also held that under the doctrine of issue preclusion the contract damages to which Macris was entitled would be limited to those established in the Macris v. Images trial.

Following remand to the trial court, Neways caused the judgment entered on Macris' behalf against Images to be satisfied. The defendants in the present action then moved for summary judgment, arguing that satisfaction of the judgment against Images rendered Macris' claim in this case moot. Macris resisted the motion as it pertained to the Mowers, arguing that the Mowers' conduct required Macris to bring suit against Neways to set aside the fraudulent transfer and that Macris' attorney fees in this action represented a consequential damage for which the Mowers should be liable and provided a basis for the imposition of possible punitive damages. The court granted the defendants' motion.

On appeal, this Court reversed. See Macris & Associates, Inc. v. Neways, Inc., 2002 UT App. 406. This Court held that Macris may have an entitlement to attorney fees (and possibly punitive damages). This Court held that

in order to recover attorney fees under the third-party exception, Macris must also show that [this action] was a natural consequence of Image's breach and that it was necessary to bring this action. This is also a question of fact inappropriate for summary judgment.

(Emphasis added.)

Following remand, Macris served discovery requests upon defendants, essentially seeking to have defendants acknowledge that in 1992 the Mowers caused Images to transfer all its assets to Neways in exchange for no consideration, thereby

rendering Images incapable of satisfying any judgment rendered against it. These requests are set forth in the addendum hereto.

Defendants responded to each discovery request with an identical objection and no other response.

Defendants object to this interrogatory as irrelevant and not likely to lead to the discovery of admissible evidence. This action has been remanded to the District Court by the Court of Appeals for the express purpose of reaching a determination as to the propriety of awarding Plaintiff attorney fees against Defendants under the third-party litigation exception to the general rule that attorney fees are not recoverable in an action for breach of contract unless expressly provided for in the contract. In order to make this determination, Plaintiff must show that this action "was a natural consequence of Image's breach and that it was necessary to bring the action." Macris & Assoc. v. Neways, Inc., 60 P.3d 1176 (Utah Ct. App. 2002). Unless and until Plaintiff can show that this action was necessary in order to collect the judgment against Images and that plaintiff incurred attorney fees in pursuing the debt against Images, the parties do not need to address successor liability, alter ego liability, and/or fraudulent conveyance. Because Plaintiff has not yet shown that attorney fees were accrued in pursuing the judgment against Images, the issues of successor and alter ego liability and fraudulent conveyance that are addressed in this interrogatory are irrelevant and not likely to lead to the discovery of admissible evidence.

R. File #3 at 829.

Following this objection, Macris moved to compel and defendants sought a protective order barring any discovery. The trial court denied Macris' motion and

granted the defendants' motion, ruling that the discovery requests were "premature and may be unnecessary." R. File #3 at 860.

Thereafter, defendants filed a motion for summary judgment, arguing that they were entitled to summary judgment because Macris had failed to come forward with affirmative evidence that this action was made necessary by the alleged fraudulent transfer.

Macris resisted the motion, arguing that the allegations of the complaint (which were un rebutted) and the history of the parties' litigation raised a reasonable inference that this action was necessary to pursue satisfaction of its claim, which inference could not be rejected on a motion for summary judgment. The trial court granted defendants' motion.

The evidence relied on by defendants in seeking summary judgment was the fact that Macris first made written demand on Images for satisfaction of the judgment on February 1, 2001 and the judgment was satisfied on February 16, 2001. R. File #3 at 885. These facts, coupled with Macris' failure to provide additional evidence in response to defendants' motion, were the basis upon which defendants argued an entitlement to judgment.

SUMMARY OF ARGUMENT

Macris' theory of why this action was necessary to recover on its claim against Images is very simple: by transferring all its assets to Neways, Images had

rendered itself unable to respond to Macris' claim and Macris needed to set aside that transfer to have Images' assets restored to it. In seeking to prove that Images fraudulently transferred all its assets, Macris propounded simple discovery requests inquiring into what was transferred, what was paid for it, and what assets were retained by Images. The defendants' argument, and the trial court's ruling, that defendants were not required to respond to such requests until Macris produced affirmative evidence, from sources other than the defendants, that this action was a necessary consequence of Images fraudulent transfer is both illogical and without support in the law.

After denying Macris the opportunity to obtain pretrial proof of its claim from the defendants, the lower court compounded its error by granting summary judgment to defendants even though defendants offered no evidence whatsoever to rebut the allegations of plaintiff's complaint. Neways presented no evidence that the transfer it received from Images wasn't fraudulent or that it had the ability to satisfy Macris' claim. Despite this failure, Neways and the Mowers were granted summary judgment on the theory that Macris had some obligation to produce evidence, prior to trial, showing a prima facie entitlement to recovery. This ruling has no support in the law of Utah or any other jurisdiction.

ARGUMENT

POINT I. The Court Below Abused Its Discretion In Denying Plaintiff's Motion to Compel Discovery.

Under Utah law, it is axiomatic that the discovery rules are to be interpreted liberally to permit discovery. As the Utah Supreme Court stated in State Road Comm'n v. Petty, 17 Utah 2d 382, 412 P.2d 914 (Utah 1966),

A primary purpose of the new Rules of civil Procedure was to simplify procedures and to "secure the just, speedy, and inexpensive determination of every action." One of the means of accomplishing this is to permit discovery of information which will aid in eliminating noncontroversial matters, and in identifying, narrowing and clarifying the issues on which contest may prove to be necessary. Insofar as discovery will serve this purpose it should be liberally permitted.

412 P.2d at 917.

In the instant case, Macris sought discovery from the defendants designed to establish that Images fraudulently transferred its assets to Neways, that Images and Neways were both the alter egos of the Mowers, that Neways was the successor corporation of Images and that Images retained no assets with which it could satisfy Macris' claim. For example, interrogatory number 13 asked: "What assets owned by Images & Attitudes as of August 30, 1992, were not acquired by Neways, Inc. pursuant to the Asset Purchase Agreement dated August 31, 1992?"

While acknowledging that the discovery requests were relevant to the three causes of action of plaintiff's complaint, defendants asserted that they need not respond

to such relevant inquiries "unless and until" Macris could demonstrate this action was necessary to recover on its claim against Images. This novel proposition, with which the court below agreed, was supported by no citation of authority and for good reason: there is none. Plaintiff is aware of no authority for the proposition that a plaintiff must make a prima facie showing of entitlement to relief before being permitted to conduct discovery.

Rule 26(b)(1) of the Utah Rules of Civil Procedure provides, in relevant part, that

[parties] may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, matters, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

The rule does not condition the right to discovery on some preliminary evidentiary showing of an entitlement to relief, nor has any appellate court ever so construed it. Indeed, both the Utah Supreme Court and several federal courts have held that the obligation to respond to discovery is not removed because a defendant has filed a motion to dismiss the complaint as legally insufficient to state a claim. In Schmitt v. Billings, 600 P.2d 516 (Utah 1979), the Court held that the pendency of a motion to dismiss did not relieve the defendants from their obligation to respond to discovery.

The court granted judgment to the plaintiff for the defendants' failure to timely respond to requests for admission even though they had moved to dismiss the complaint. See also, Lipsky v. Commonwealth United Corp., 551 F.2d 887 (2d Cir. 1976); Alexander v. F.B.I., 194 F.R.D. 316 (D. D.C. 2000).

If a party is entitled to discovery without even demonstrating that its complaint states a claim for relief, it can hardly be questioned that a party is entitled to discovery without first providing an evidentiary basis for its claim.

The irony the ruling of the court below is that it deprived Macris from obtaining the very species of evidence the court felt it needed to provide to support its claim. Macris' theory of why the action against Neways was necessary to recovery on its claim against Images was simple: Images transferred all its assets to Neways and had nothing left from which the claim could be satisfied. If that transfer was fraudulent (as alleged), it could be set aside and the assets looked to for recovery. However, the court refused to require the defendants to say what they paid for the assets transferred or what Images had left following the transfer. Truthful responses to such questions would have revealed exactly why this suit was made necessary by the fraudulent transfer.

The suggestion that a party should not have to respond to discovery until the court is convinced of the merits of the plaintiff's claim is inconsistent with the whole

purpose of the rules of discovery. As this Court said in Roundy v. Staley, 984 P.2d 404, 407 (Utah App. 1999), the

purpose [of Utah's discovery rules] is to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities which may have become engrafted in our law; and to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible.

984 P.2d at 407 (quoting Ellis v. Gilbert, 429 P.2d 39, 40 (Utah 1967)).

This purpose is directly inconsistent with a ruling that no discovery could be had on plaintiff's claims "unless and until" plaintiff had made an evidentiary showing sufficient to satisfy the court of its likelihood of prevailing on the merits. That is a requirement unknown to modern discovery procedure and constitutes an abuse of the court's discretion.

As this Court has previously held, a court's error in failing to require discovery is presumed to have been prejudicial and mandates reversal. In Askew v. Hardman, 884 P.2d 1258 (Utah App. 1994), reversed on other grounds, 918 P.2d 469 (Utah 1996), this Court stated that

[p]rejudice is presumed because to require the requesting party to show the error was harmful would place the requesting party in the untenable position of having to demonstrate that the contents of inaccessible information would have affected the outcome of the case. Because the requesting party does not have the information, he or she will never be able to demonstrate that the trial court's erroneous denial of a discovery request was anything but

harmless. The burden of demonstrating that the erroneous denial of a discovery request was not prejudicial must therefore rest with the party resisting discovery.

884 P.2d at 1262-63.

Accordingly, the judgment rendered below must be reversed.

POINT II. The Court Below Erred in Granting Summary Judgment.

The court below erred in granting summary judgment by placing an affirmative duty upon the plaintiff to offer evidence in support of its complaint when the law does not contain such a requirement and by failing to recognize that the undisputed facts in this case give rise to competing inferences which can only be resolved by the fact finder.

The complaint alleged that Images fraudulently transferred its assets to Neways and was incapable of satisfying Macris' claim for breach of contract. The defendants have offered no evidence to the contrary. The undisputed facts are that Macris obtained judgment against Images in 1995. It was not paid, despite Macris' efforts to locate assets to execute upon. Thereafter, the court held that Neways was bound by the judgment and Macris garnished Neways' bank accounts. To obtain a release of the garnishments, Neways posted a bond pending its appeal of the trial court's ruling. This occurred in 1997. The case proceeded to this Court and then the Supreme Court. In each court Neways argued it had no liability for the judgment. In December of 2000, the court held that Neways may be liable to Macris but reversed the

trial court's decision that it was in privity with Images, holding a question of fact to be present. After Neways' argument that it couldn't be held liable for the judgment against Images was rejected, the judgment was paid by a check drawn on Bank One which showed "Neways International, Inc." as the remitter of the check. R. File #3 at 882-90.

Macris suggests that the inference to be drawn from these facts is simple: when confronted with potential liability for receiving a fraudulent transfer (a charge it has never sought to refute), Neways saw the handwriting on the wall and paid up to avoid ongoing litigation expenses.

The defendants suggest a different inference. Pointing to the evidence that counsel for Macris wrote to counsel for Images, a Neways' employee, and demanded payment of the judgment, which was satisfied within two weeks thereafter, defendants suggest it can be inferred that if Macris had simply asked Images to pay the judgment it would have done so without the need to sue Neways.

Under the undisputed facts, the court below erred in granting summary for two reasons. First, in moving for summary judgment, defendants failed to meet their burden under Rule 56 of Utah Rules of Civil Procedure to establish the lack of a genuine issue of material fact. Second, the court ignored the inference available under the evidence which was favorable to the plaintiff's position, which it was improper to do.

In reviewing defendants' motion for summary judgment it is apparent that the defendants offered no evidence that the Images judgment would have been paid without the need for the Neways litigation. Indeed, they concede that they have no such evidence. "[T]he parties will never know if the Images' judgment would have been satisfied because Macris failed to make a demand after judgment was entered." Reply Memorandum in Support of Motion for Summary Judgment at p. 5 R. File #3 1072.

Before a party moving for summary judgment can require the nonmoving party to produce evidence in support of the allegations of its complaint, the moving party must meet its burden of demonstrating the lack of a genuine issue of material fact. If it fails to do so the nonmoving party has no duty to present any evidence.

This principle was enunciated in the landmark United States Supreme Court case of Adickes v. Kress & Co., 398 U.S. 144 (1970). In Adickes, the plaintiff alleged that her civil rights had been violated as a result of a conspiracy between Kress and the city police. She alleged that she was denied service in a restaurant because she was in a racially mixed group. She alleged that when she was refused service there was a policeman in the store who subsequently arrested her outside the store for vagrancy.

The defendant moved for summary judgment on the conspiracy claim, arguing that the plaintiff had no evidence of any conspiracy. The District Court granted the motion and the Court of Appeals affirmed. The Supreme Court, however, reversed. The court held that because the defendants had failed to meet their burden as

the moving party, plaintiff was under no duty to produce anything in opposition to the motion for summary judgment.

As the moving party, respondent had the burden of showing the absence of a genuine issue of material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party.

398 U.S. at 157.

After noting that the defendants had failed to negate with any evidence the allegation that an officer was present when the refusal to serve occurred, or therefore the inference that it was at his direction, the court noted that Rule 56(e) places no affirmative duty on the nonmoving party if the moving party has not met its burden.

[B]oth the commentary and background of the 1963 amendment conclusively shows that it was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence a genuine issue concerning any material fact. The Advisory Committee note on the amendment states that the changes were not designed to "affect the ordinary standard applicable to summary judgment." And, in a comment directed specifically to a contention like respondents, the Committee stated that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

398 U.S. at 159-60. (Emphasis in original).

In the instant case, the defendants presented no evidence that Images had the capability of paying the claim of Macris. In the absence of such evidence they did not

meet their burden of negating a genuine issue of fact and Macris had no obligation to present any evidence on that point.

Additionally, on the undisputed facts before the court, the evidence was susceptible to two different inferences, as set forth above, and it was error for the court to resolve those competing inferences in favor of the defendant. As this Court noted in West v. Thomson Newspapers, 835 P.2d 179 (Utah App. 1992), reversed on other grounds, 879 P.2d 999 (Utah 1994), citing Adickes, summary judgment cannot properly be granted unless the moving party presents evidence which would "foreclose [] the possibility of the existence of certain facts" from which a jury could draw an inference in favor of the nonmoving party. 835 P.2d at 188. See also, Goodman v. Sullivan, 2002 UT 21.

In light of the defendants' failure to meet their burden under Rule 56, and the existence of competing inferences from the evidence before the court, it was error for the court to grant summary judgment.

CONCLUSION

The court below committed reversible error in failing to require defendants to respond to discovery. Such error requires that the judgment be vacated and the matter remanded with instructions to require the defendants to respond to plaintiff's discovery.

Additionally, the court erred in granting summary judgment both on the basis of the record as it exists and by requiring plaintiff to offer affirmative evidence even

though defendants did not meet their burden under Rule 56. The judgment should be vacated and the matter remanded for trial.

DATED this ~~24th~~ day of March, 2005.

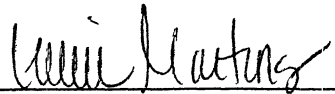
PRINCE, YEATES & GELDZAHLER

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MAILING CERTIFICATE

I hereby certify that on the 24th day of March, 2005, I caused two true and correct copies of the foregoing **Brief of Appellant** to be mailed, first-class postage prepaid thereon, to the following:

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ADDENDUM

RECEIVED

JUN 02 2003

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

MACRIS & ASSOCIATES, INC.,

Plaintiff,

vs.

NEWAYS, INC., THOMAS E. MOWER,
and LESLIE D. MOWER,

Defendants.

**DEFENDANTS' RESPONSES
TO PLAINTIFF'S FIRST SET
OF INTERROGATORIES
TO DEFENDANTS**

Civil No. 950400093CN

Honorable Anthony Schofield

Pursuant to Rule 33 of the Utah Rules of Civil Procedures, Defendants, Neways, Inc., Thomas E. Mower, and Leslie D. Mower ("Defendants"), respond to Plaintiff's First Set of Interrogatories to Defendants (the "Interrogatories"), as follows:

GENERAL OBJECTIONS

1. Defendants object to the Interrogatories on the grounds that they are overbroad, unduly burdensome, and seek information that is neither relevant to the subject matter of this action, nor likely to lead to the discovery of admissible evidence.

2. Defendants object to the Interrogatories to the extent that they call for the production of information that is protected by the attorney-client privilege and the work-product doctrine.

3. Defendants object to the Interrogatories to the extent that they purport to impose any obligations upon Defendants that exceed the obligations imposed by Rules 26, 33, and 34 of the Utah Rules of Civil Procedure.

4. Defendants object to the Interrogatories to the extent that they seek information for time periods other than those periods relevant to the determination of the issues in this dispute.

Subject to the foregoing general objections and qualifications, and to any specific objection made below, Defendants responds as follows:

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1: Identify the shareholders of Neways, Inc. from September 1, 1992 to the present, indicating amounts of shares owned by each shareholder identified.

RESPONSE: Defendants object to this interrogatory as irrelevant and not likely to lead to the discovery of admissible evidence. This action has been remanded to the District

Court by the Court of Appeals for the express purpose of reaching a determination as to the propriety of awarding Plaintiff attorney fees against Defendants under the third-party litigation exception to the general rule that attorney fees are not recoverable in an action for breach of contract unless expressly provided for in the contract. In order to make this determination, Plaintiff must show that this action “was a natural consequence of Image’s breach and that it was necessary to bring the action.” *Macric & Assoc. v. Neways, Inc.*, 60 P.3d 1176, 1181 (Utah Ct. App. 2002). Unless and until Plaintiff can show that this action was necessary in order to collect the judgment against Images and that Plaintiff incurred attorney fees in pursuing the debt against Images, the parties do not need to address successor liability, alter ego liability, and/or fraudulent conveyance. Because Plaintiff has not yet shown that this action was necessary in order to collect the judgment against Images, which judgment was paid in full on February 16, 2001, and because Plaintiff has not yet shown that attorney fees were accrued in pursuing the judgment against Images, the issues of successor and alter ego liability and fraudulent conveyance that are addressed in this interrogatory are irrelevant and not likely to lead to the discovery of admissible evidence.

INTERROGATORY NO. 2: What consideration was paid by Neways, Inc. to Images & Attitudes, Inc. for the acquisition of the assets of Images & Attitudes, Inc.?

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 3: When was such consideration paid?

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 4: How was such consideration paid?

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 5: *Who negotiated with Images & Attitudes, Inc. on behalf of Neways, Inc. in connection with Neways, Inc.'s acquisition of the assets of Images & Attitudes, Inc.?*

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 6: Who negotiated with Neways, Inc. on behalf of Images & Attitudes, Inc., in connection with Neways, Inc.'s acquisition of the assets of Images & Attitudes, Inc.?

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 7: Indicate what liabilities of Images & Attitudes, Inc., Neways, Inc. did not intend to assume pursuant to the Asset Purchase Agreement dated August 31, 1992.

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 8: Indicate all amounts paid by Neways, Inc. on the long term debts listed on the balance sheet of Images & Attitudes dated 8/31/92.

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 9: Indicate to whom each of the notes payable listed on the *Images & Attitudes, Inc. balance sheet of 8/31/92* were owed and when such obligations were due.

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 10: Identify the Board of Directors of Neways, Inc. as of August 31, 1992.

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 11: Identify the Board of Directors of Images & Attitudes, Inc. as of August 31, 1992.

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 12: What was the total value of the assets owned by Neways, Inc. as of August 30, 1992.

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 13: What assets owned by Images & Attitudes, Inc. as of August 30, 1992, were not acquired by Neways, Inc. pursuant to the Asset Purchase Agreement dated August 31, 1992.

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 14: Did Neways, Inc. pay any legal expenses of Images & Attitudes, Inc. which were incurred after September 1, 1992?

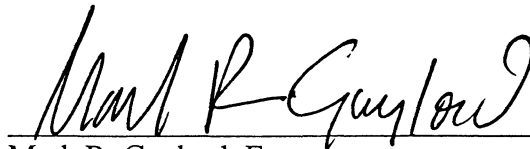
RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

INTERROGATORY NO. 15: If the answer to the preceding interrogatory is yes, state the reason such payments were made.

RESPONSE: See Response to Interrogatory 1, which is incorporated herein by reference.

DATED this 28th day of May 2003.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

A handwritten signature in cursive script, appearing to read "Mark R. Gaylord", is written over a horizontal line.

Mark R. Gaylord, Esq.
Attorneys for Defendants

JUN 5 2003

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

MACRIS & ASSOCIATES, INC.,
Plaintiff,

NEWAYS, INC., THOMAS E. MOWER,
and LESLIE D. MOWER,

Defendants.

Civil No. 950400093CN

Honorable Anthony Schofield

GENERAL OBJECTIONS

UT_DOCS_A #1131140 v1

Discovery in this case has not been completed, and as such, Defendants have not determined the witnesses they intend to call or the documents and exhibits they intend to use at the trial of this matter. As such, the Requests seek to require speculation about Defendants' future decisions, and further seek to require information immune from discovery, because it constitutes opinion work product. Defendants shall provide such information in accordance with Rule 26(a)(4) of the Utah Rules of Civil Procedure.

2. Defendants object to the Requests to the extent that they call for the production of information and documents that are protected by the attorney-client privilege and the work-product doctrine.

3. Defendants objects to the Requests to the extent that they purport to impose any obligations upon Defendants that exceed the obligations imposed by Rules 26, 33, and 34 of the Utah Rules of Civil Procedure.

4. Defendants object to the Requests on the ground that they are overbroad, unduly burdensome, and seek information that is neither relevant to the subject matter of this action, nor likely to lead to the discovery of admissible.

RESPONSES TO REQUEST FOR ADMISSIONS

REQUEST NO. 1: Admit that the long term debt listed on the Images & Attitudes, Inc. balance sheet as of 8/31/92 as "Note-pay – Australia \$699,276.55" is a false entry.

RESPONSE: Defendants object to this interrogatory as irrelevant and not likely to lead to the discovery of admissible evidence. This action has been remanded to the District Court by the Court of Appeals for the express purpose of reaching a determination as to the

propriety of awarding Plaintiff attorney fees against Defendants under the third-party litigation exception to the general rule that attorney fees are not recoverable in an action for breach of contract unless expressly provided for in the contract. In order to make this determination, Plaintiff must show that this action “was a natural consequence of Image’s breach and that it was necessary to bring the action.” *Macric & Assoc. v. Neways, Inc.*, 60 P.3d 1176, 1181 (Utah Ct. App. 2002). Unless and until Plaintiff can show that this action was necessary in order to collect the judgment against Images and that Plaintiff incurred attorney fees in pursuing the debt against Images, the parties do not need to address successor liability, alter ego liability, and/or fraudulent conveyance. Because Plaintiff has not yet shown that this action was necessary in order to collect the judgment against Images, which judgment was paid in full on February 16, 2001, and because Plaintiff has not yet shown that attorney fees were accrued in pursuing the judgment against Images, the issues of successor and alter ego liability and fraudulent conveyance that are addressed in this interrogatory are irrelevant and not likely to lead to the discovery of admissible evidence.

REQUEST NO. 2: Admit Neways, Inc. made no cash payment to Images & Attitudes, Inc. pursuant to the terms of Exhibit C to the Asset Purchase Agreement dated August 31, 1992.

RESPONSE: Defendants incorporate by this reference their response to Request No. 1 as though fully set forth herein.

DATED this 28th day of May 2003.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP



Mark R. Gaylord, Esq.
Attorneys for Defendants