

1 KING, HOLMES, PATERNO & BERLINER LLP
HOWARD E. KING, ESQ., STATE BAR NO. 077012
2 BRIAN JAMES BIRD, ESQ., STATE BAR NO. 081614
1900 AVENUE OF THE STARS, 25TH FLOOR
3 LOS ANGELES, CALIFORNIA 90067-4506
E-MAIL: BIRD@KHPBLAW.COM
4 TELEPHONE: (310) 282-8989
FACSIMILE: (310) 282-8903

5 Attorneys for Plaintiffs MARK HOPPUS
6 and SKYE HOPPUS

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN DIEGO - CENTRAL DIVISION

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11 MARK HOPPUS, as trustee of Mark A. Hoppus
12 and Skye L. Everly Family Trust, dated
August 8, 2000; and SKYE HOPPUS, as trustee
13 of Mark A. Hoppus and Skye L. Everly Family
Trust, dated August 8, 2000,

14 Plaintiffs,

15 vs.

16 MISSICOM LLC, a limited liability company,
17 ED MITCHELL, an individual, JEFF
MITCHELL, an individual, and DOES 1
18 through 100, inclusive,

19 Defendants.

CASE NO. 37-2008-00089455-CU-PP-CTL

DERIVATIVE ACTION AND
COMPLAINT FOR DAMAGES
(California Corporations Code,
§ 17501)

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22 Plaintiffs Mark Hoppus, Skye Hoppus and the Hoppus Family Trust allege as follows:

23 INTRODUCTION

24 As father and son, Defendants Ed Mitchell and Jeff Mitchell solicited millions of dollars
25 from prominent, well-known public figures such as members of the rock group blink-182 and
26 golfer Phil Mickelson for investment into a company called Missicom. While Missicom's stated
27 purpose was the sale of automated check-out terminals to McDonald's restaurants throughout the
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1 country, its real purpose was to serve as a conduit for the siphoning of investor funds straight into
2 the pockets of Messrs. Mitchell and Mitchell, to the tune of over \$1.5 Million.

3 Not content with having lined their own pockets, Ed and Jeff Mitchell also saw fit to
4 present to these same investors, one Philip Palumbo, Jr., who was represented to be the owner of
5 thirty-three (33) McDonald's restaurants in the County of San Diego (he was not) and a signatory
6 to a lease (the "Palumbo Lease") supposedly committing those thirty-three (33) stores to lease the
7 Missicom terminals (he was not). The Philip Palumbo who did indeed sign the supposed lease
8 was the father of the person presented to the investors as signatory to the Palumbo lease and was
9 at the time in the process of selling his franchises. The son known as Philip Palumbo, Jr., who
10 was paraded before the investors, was given an undisclosed \$400,000 "loan" using Missicom's
11 funds in connection with his masquerade, which Ed and Jeff Mitchell never intended to have
12 Missicom collect on.

13 The net result is that today, after \$3,350,000 in capitalization, Missicom's total equity as of
14 June 30, 2008 was negative \$3,797,364.94. This action is brought to compel Ed and Jeff Mitchell
15 to repay to Missicom the sums looted by each.

16 GENERAL ALLEGATIONS

17 1. Plaintiffs Mark Hoppus ("M. Hoppus") and Skye Hoppus ("S. Hoppus") are
18 individuals residing in the County of Los Angeles, California and trustees of the Hoppus Family
19 Trust known as the Mark A. Hoppus and Skye L. Everly Family Trust, dated August 8, 2000
20 ("HFT"). M. Hoppus and S. Hoppus are sometimes collectively referred to as the "Plaintiffs."

21 2. Defendant Missicom LLC ("Missicom") is, and at all times material herein has
22 been, a limited liability corporation doing business in the County of San Diego, State of
23 California.

24 3. Defendant Ed Mitchell ("E. Mitchell") is, and at all times material herein has been,
25 an individual residing in the County of San Diego, California and a managing member of
26 Missicom.

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1 4. Defendant Jeff Mitchell ("J. Mitchell") is, and at all times material herein has been,
2 an individual residing in the County of San Diego, California and a managing member of
3 Missicom.

4 5. Plaintiffs are informed and believe and thereupon allege that non-party Philip
5 Palumbo, Jr. ("Palumbo, Jr.") is, and at all times material herein has been, an individual residing
6 in the County of San Diego, California. Plaintiffs are further informed and believe and thereupon
7 allege that non-party Philip Palumbo, Sr. ("Palumbo, Sr.") is, and at all times material herein has
8 been, an individual residing in the County of San Diego, California.

9 6. The true names and capacities of defendants named herein as Does 1 through 100,
10 inclusive, are unknown to Plaintiffs at this time and therefore Plaintiffs sue said Defendants by
11 such fictitious names. Plaintiffs will ask leave of the Court to amend this complaint to show the
12 fictitiously named Defendants' true names and capacities when the same have been ascertained.
13 Plaintiffs are informed and believe and based thereon allege that Does 1 through 100, inclusive,
14 are, and at all times material herein have been, responsible in some manner for the acts and
15 transactions hereinafter alleged.

16 7. Plaintiffs are informed and believe and based thereon allege that at all times
17 material herein, each of the Defendants was the agent, employee, joint venturer or alter ego of
18 each of the other Defendants, and was at all times herein mentioned acting within the scope of
19 such agency, employment or venture. Plaintiffs are further informed and believe and thereon
20 allege that at all times material herein, E. Mitchell and J. Mitchell (collectively referred to as the
21 "Mitchells") so dominated, controlled, managed and operated Missicom for their personal use,
22 caused assets of Missicom to be transferred to their respective benefits without adequate
23 consideration, withdrew funds of Missicom for their respective benefits and forgave debts owed to
24 Missicom to further their respective interests and relationship with third-parties and so completely
25 controlled, dominated, managed and operated Missicom in violation of their respective duties to
26 Missicom and to the detriment and damage of Missicom.

27 8. In mid-2003, Plaintiffs and other prospective investors in Missicom were informed
28 by the Mitchells that:

1 a. Missicom was in the business of conceptualizing, designing, marketing and
2 providing “attendant-free self check out terminals” for use in restaurants and other businesses for
3 the purpose of taking customer orders and payments (“Terminals”);

4 b. Missicom had signed contracts with Palumbo Enterprises, purportedly
5 owned by Palumbo, Jr. and supposedly one of McDonald’s largest restaurant owners in the
6 County of San Diego, California, with thirty-three (33) stores, for the installation of the Terminals
7 in each of its McDonald’s restaurants. The Mitchells caused Palumbo, Jr. to tell the members that
8 he had committed to the Palumbo Lease; and

9 c. the Mitchells had achieved fantastic success in the marketing and placement
10 of automated “attendant-free” machines in other businesses and were integral to and necessary for
11 the successful development, marketing and sale of the Terminals.

12 9. In October 2003, HFT invested \$600,000 in Missicom in exchange for a non-voting
13 membership interest in Missicom and became a member of Missicom with record holdings of 7.5
14 units of Missicom. Since October 2003, HFT has been a record holder of a membership interest in
15 Missicom.

16 10. Promptly after the \$600,000 investment by HFT, and without notice to any other
17 members of Missicom, rather than using Missicom’s assets to engage in its stated business, the
18 Mitchells caused Missicom to make the following unauthorized distributions:

19 a. \$500,000 was paid to the Mitchells as “consulting fees;” and

20 b. \$400,000 was paid to Palumbo, Jr., characterized as a “loan,” which the
21 Mitchells subsequently caused Missicom to forgive.

22 11. Plaintiffs are further informed and believe and thereon allege that:

23 a. despite being capitalized at over \$3,350,000, after almost five (5) years of
24 business operations, Missicom does not have any contracts to install the Terminals;

25 b. Missicom is not the owner of any patents, trademarks, copyrights or other
26 property rights of any value in and to the Terminals;

27 c. the Mitchells have continued to solicit investments from others, including
28 world-renowned golfer Phil Mickelson, and distributed all or portions of said investments to

1 themselves such that they have received over \$1.5 Million in distributions from the cash assets of
2 Missicom, despite the fact that not one (1) Terminal has been placed in any McDonald's restaurant
3 or any other "fast-food" facility;

4 d. the Mitchells have caused Missicom to issue promissory notes payable to
5 themselves evidencing indebtedness ostensibly owed by Missicom for which no consideration was
6 provided, said promissory notes constituting an attempt to obtain priority in any distribution of
7 monies by Missicom;

8 e. the lease for installation of the Terminals in McDonald's was executed by
9 Missicom at a time it was not in existence and was not signed by Palumbo, Jr., but was actually
10 signed by Palumbo, Sr., who was in the process of selling his 33 McDonald's stores;

11 f. Palumbo Sr. sold almost all of his McDonald's stores in 2003, rendering the
12 Palumbo Lease worthless;

13 g. the Mitchells had no intention of causing Missicom to enforce the Palumbo
14 Lease;

15 h. the Mitchells caused Missicom to forgive the \$400,000 loan made to
16 Palumbo, Jr. for no consideration, as compensation for his role in falsely representing to the
17 members of Missicom that the Palumbo Lease was his binding commitment to purchase the
18 Terminals for 33 McDonald's stores;

19 i. notwithstanding the \$3,350,000 in capitalization obtained from investors by
20 Missicom, total equity in Missicom as of June 30, 2008 was negative \$3,797,364.94; and

21 j. in 2003, Missicom suffered ordinary income loss of \$752,327, in 2004
22 Missicom lost \$1,204,794, in 2005 Missicom lost \$965,243, in 2006 Missicom lost \$364,438, and
23 in 2007 Missicom lost \$290,565.

24 12. By reason of the above, the Mitchells, as de jure or de facto managing members of
25 Missicom, have breached their fiduciary duty to Missicom and have engaged in fraudulent
26 self-dealing and dissipation of company assets by wrongfully siphoning Missicom's only assets,
27 cash investments, and placing same in their pockets, thereby rendering Missicom "broke" and
28 damaging Missicom in an amount according to proof. The Mitchells, as de jure or de facto

1 managing members of Missicom, are further liable to Missicom for gross negligence and
2 mismanagement in that they have taken no steps or such steps as are necessary to cause the
3 Terminals to be approved by and placed in McDonald's restaurants nor have they taken any steps
4 to enter into a valid, enforceable lease with Palumbo, Sr. for the lease of Terminals in McDonald's
5 restaurants. The Mitchells are further liable to Missicom for permitting Palumbo, Jr. to receive a
6 windfall through the forgiveness of the above-referenced debt, set forth in Paragraph 10,
7 hereinabove, thereby damaging Missicom in an amount according to proof.

8 13. Plaintiffs did not make any effort to secure action from the managing members of
9 Missicom in prosecuting this action since any such effort would have been futile in that the
10 Mitchells, as managing members of Missicom, themselves conspired and engaged in the activity
11 which damaged Missicom and which inured to their respective benefits and therefore had and have
12 no independent business judgment or incentive to rescind or unwind the payments of monies to
13 themselves, to seek to enforce the lease for the Terminals or to unwind the forgiveness of
14 Palumbo, Jr.'s debt. On August 5, 2008, Plaintiffs informed Missicom in writing of the ultimate
15 facts of each cause of action herein alleged against each Defendant by delivery to Missicom of a
16 copy of this Complaint which Plaintiffs then proposed to file.

17 14. If Plaintiffs are successful in this action, a substantial benefit will result to
18 Missicom on whose behalf this action is prosecuted and Plaintiffs are entitled to attorney's fees
19 incurred herein.

20 **FIRST CAUSE OF ACTION**

21 **(BREACH OF FIDUCIARY DUTY)**

22 15. Plaintiffs reallege and incorporate by reference each allegation set forth in
23 paragraphs 1 through 14 inclusive, hereinabove alleged, as though fully set forth.

24 16. At all times material herein, the Mitchells owed Missicom a fiduciary duty which
25 required them, inter alia, to administer the affairs of Missicom with candor, personal honesty and
26 integrity; to refrain from advancing their own personal or business interests, or those of others, at
27 the expense of Missicom; and to refrain from self-dealing or to otherwise engage in dishonest
28 conduct or approve or condone abusive transactions with insiders of Missicom.

1 17. The Mitchells violated their fiduciary duties to Missicom by engaging in the
2 conduct alleged hereinabove.

3 18. As a direct and proximate result of the Mitchells' wrongful acts, Missicom has
4 suffered and will suffer substantial monetary damages in an amount to be proven at trial, but
5 which Plaintiffs are informed and believe will exceed \$2 Million.

6 19. The Mitchells acted with willful and conscious disregard of Missicom's rights and
7 interests, with the intent to benefit themselves, and with the intent to deprive Missicom of its
8 assets and business value, thereby entitling Missicom to an award of punitive damages against the
9 Mitchells and each of them, in order to punish the Mitchells and to deter similar misconduct in the
10 future.

11 **SECOND CAUSE OF ACTION**

12 **(GROSS NEGLIGENCE)**

13 20. Plaintiffs reallege and incorporate by reference each allegation set forth in
14 paragraphs 1 through 19 inclusive, hereinabove set forth.

15 21. The Mitchells had a duty to Missicom to use due care in managing Missicom's
16 business and financial affairs and to act as prudent and diligent business persons in conducting the
17 affairs of Missicom.

18 22. The Mitchells breached their duty by the conduct alleged hereinabove.

19 23. As a direct and proximate result of the Mitchells' gross negligence, Missicom has
20 suffered and will suffer substantial monetary damages in an amount to be proven at trial, but
21 which Plaintiffs are informed and believe will exceed \$2 Million.

22 **PRAYER**

23 WHEREFORE, Plaintiffs pray for judgment against the Mitchells and Palumbo, Jr.

24 1. For damages according to proof;

25 2. For reasonable attorney's fees;

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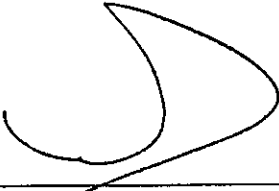
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- 3. For costs of suit incurred herein; and
- 4. For such other and further relief as the Court may deem just and proper;

DATED: August 8, 2008



BRIAN JAMES BIRD
ATTORNEY FOR PLAINTIFFS
MARK HOPPUS AND SKYE HOPPUS
ON BEHALF OF AND BY AND IN THE RIGHT OF
MISSICOM LLC

