

2015

Weiman Ha, Muoi Ha, and Olivia Ha, Shareholders of Southeast Supermarket, Inc., Plaintiffs/Appellants, vs. Coung Si Trang, Director for Southeast Supermarket, Inc., Sylvia Trang, Secretary for Southeast Supermarket, Inc., and Southeast Supermarket, Inc., Defendants/Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEIMAN HA, MUOI HA, and,
OLIVIA HA, shareholders of
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Plaintiffs/ Appellants,

vs.

COUNG SI TRANG, director for
Southeast Supermarket, Inc.,
SYLVIA TRANG, secretary for
Southeast Supermarket, Inc., and
SOUTHEAST SUPERMARKET,
INC.,

Defendants/Appellees.

Appeal No. 20140320

District Court Case No. 110913027

APPELLEES' BRIEF

Appeal from the Third Judicial District Court, Salt Lake County, Utah
The Honorable Su J. Chon, Presiding

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UTAH APPELLATE COURTS

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LIST OF PARTIES

Plaintiff Weiman Ha

Plaintiff Muoi Ha

Plaintiff Olivia Ha

Defendant Cuong Trang

Defendant Sylvia Trang

Defendant Southeast Supermarket, Inc.

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of Third Judicial District Court, the Honorable Judge Su Chon presiding, and a supplemental memorandum decision awarding Defendants' costs, including mediation costs. The Utah Supreme Court has jurisdiction under Utah Code Ann. Section 78A-3-102. The case was transferred from the Utah Supreme Court to the Utah Court of Appeals and jurisdiction is proper in this Court pursuant to Utah Code Ann. Section 78A-4-103(2)(j). The final judgment is attached hereto as Appendix A and the supplemental Memorandum Decision is attached hereto as Appendix B.

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

The following relevant statutes and rules are set forth in full at Appendix D:

- (1) Utah Code Ann. §§ 16-10a-702, 16-10a-807, 16-10a-808, 16-10a-809 and 16-10a-1608
- (2) Utah Rule of Evidence 803
- (3) Utah Rule of Evidence 801
- (4) Utah Rule of Civil Procedure 14
- (5) Utah Rule of Civil Procedure 54

SUMMARY OF ARGUMENTS

This case involves a dispute over ownership of an Asian market, Southeast Supermarket ("the Company"), located in Salt Lake City. The Plaintiffs are

siblings Weiman Ha ("Weiman"), Muoi Ha ("Muoi"), and Olivia Ha ("Olivia") (collectively, "Plaintiffs"), who claimed to hold the majority of shares in the market and therefore are entitled to call a shareholders' meeting to take over the market's operations. The Defendants are Cuong Si Trang ("Cuong"), who is President of the market, and Sylvia Trang ("Sylvia"), Cuong's daughter and Secretary of the market. The Company was also named as a Defendant. (Cuong and Sylvia are collectively referred to as the "Trangs", and the Trangs and the Company are collectively referred to as "Defendants"). Cuong is married to Plaintiffs' sister, Pamela Trang ("Pamela") so this is also a family dispute.

After a seven-day jury trial, the trial court correctly found that Plaintiffs were not the majority shareholders of Southeast Supermarket. The trial court found the ownership to be as follows: of the 125,700 currently issued and outstanding shares, Cuong owns 65,000 (51.71%), Muoi owns 40,000 (31.82%), Weiman owns 15,700 (12.49%), and Olivia owns 5,000 (3.97%). Lavinia Ha ("Lavinia"), another Ha sibling, was found to have previously owned 20,000 shares, but to have sold all her shares back to the Company in July 2013.

Contrary to Plaintiffs' assertions, the trial court's findings are amply supported by the evidence. As an initial matter, Plaintiffs failed to sufficiently marshal the evidence such that reversal of the trial court is warranted. There was sufficient evidence to support the trial court's factual findings regarding the

number and distribution of shares. The trial court's credibility determinations were not clearly erroneous. In addition, Plaintiffs' claims of inconsistent testimony by the Trangs are flawed and do not require reversal on appeal.

Plaintiffs also argue that the trial court should be reversed because it incorrectly relied on hearsay evidence in its Findings of Fact. These arguments are flawed for several reasons. First, Plaintiffs overlook that most of this evidence was properly admitted under an exception to the hearsay rule, namely, the business records exception. Second, in some instances, Plaintiffs did not object to the purported hearsay testimony, and thus they did not preserve their arguments for appeal. Finally, the evidence Plaintiffs assert was incorrectly admitted and relied on by the trial court was not in fact hearsay because it was not offered or considered for the truth of the matter asserted.

Plaintiffs further contend that because Lavinia was not a party to the case, the trial court erred by allowing Defendants to offer evidence of her interests. Yet throughout this case, Defendants have asserted that Lavinia owned shares in the Company; notably, Plaintiffs never objected to this assertion and did not suggest she needed to be added as a party until halfway through trial. Contrary to Plaintiffs' assertions, Utah Rule of Civil Procedure 14 is inapplicable to this case because there is no claim for liability that the Defendants could seek to pass on to Lavinia.

In addition, Plaintiffs argue that the trial court erred by concluding that their demand for a shareholders' meeting did not meet the statutory requirements. Because the demand was signed by their attorney, rather than them as shareholders, contrary to the express requirements of Utah Code Ann. Section 16-10a-702, the trial court did not err in reaching this conclusion. Alternatively, any error was harmless because the trial court in fact ordered a shareholders' meeting in its final judgment.

Finally, Plaintiffs contend that the trial court erred by awarding the Trangs mediation costs in the amount of \$1,072.50. In making the award, the trial court correctly noted that Plaintiffs never objected to the Trangs' request for mediation costs; therefore, this issue was not preserved for appeal. Alternatively, even if preserved, it was within the trial court's sound discretion to award these costs.

The trial court's Findings of Fact, Conclusions of Law and Order and Judgment attached hereto as Appendix A should be affirmed in its entirety.

STATEMENT OF FACTS

1. In 1997, Cuong quit his job as a mechanical engineer and become the proprietor of an Asian food market known as "Tay Do." (R. 1538 at 123-124).
2. Cuong acquired the market from Long Xa using his own personal funds and additional money that he borrowed from his uncle. (*Id.* at 124).

3. Cuong renamed the market "New Tay Do" and operated the market as a sole proprietorship. (*Id.* at 124-125).

4. When the market was acquired in 1997, Weiman lived and worked in New York, Muoi lived in Canada, and Olivia lived in Canada. (R. 1537 at 38, 77-78; R. 1538 at 12-13, 47, 127-130; R. 1540 at 50).

5. Over the course of the next two years, Weiman and Muoi moved to Salt Lake City and went to work for the market.¹ (R. 1538 at 127-129).

6. During this period of time, Muoi and Olivia contributed some money to the operation of the market. (*Id.* at 133-134).

7. Although Weiman claims to have contributed funds to the operation of the market, no evidence supported this claim other than his own self-serving testimony, and he could not articulate a specific date the money was provided or an amount that was given. (R. 1540 at 84-87; *see also* R. 1538 at 134-135 (Weiman contributed no money)).

8. By 1999, Cuong decided to incorporate the market. (R. 1538 at 135).

9. Cuong discussed the idea with Weiman, Muoi and Olivia and with his other sister-in-law, Lavinia. (*Id.* at 138).

¹ Olivia travelled to Utah and assisted in the market on occasion, but did not move back to Salt Lake City until 2001. (R. 1537 at 46; R. 1538 at 15, 19, 48, 130, 132-133; R. 1540 at 50).

10. Weiman's grown daughter, Ellen Ha Nicoletti ("Ellen"), an accountant then living in California, assisted in forming the corporate entity. Ellen assisted in the preparation of, among other things, Articles of Incorporation and Corporate Bylaws for the Company. Ellen also assisted Cuong in terminating the business name "New Tay Do." (R. 1538 at 110-112, 137-139; R. 1539 at 6-14).²

11. The Company was officially formed on March 24, 1999. (Ex. P2).

12. The Articles of Incorporation for the Company, prepared by Ellen, identify both Cuong and Weiman as directors of the Company. (*Id.* at Art. VI).

13. Both Cuong and Weiman were aware of their assigned role as Directors of the Company, and both agreed to serve in that capacity. (R. 1538 at 139; R. 1540 at 54, 105).

14. The Articles of Incorporation for the Company authorize the issuance of 145,700 shares of stock. (Ex. P2 at Art. III).

15. On or before March 23, 1999, it was determined that shares in the Company would be issued as follows: Cuong: 65,000; Muoi: 40,000; Lavinia Ha ("Lavinia"): 35,700; Olivia: 5,000. (R. 1539 at 34-36; Ex. D5).

² Although Weiman denied Ellen's involvement, dismissing her as a "girl", Muoi and Olivia testified that they did not know whether she was involved or not. (R. 1537 at 87).

16. Cuong, Muoi, Lavinia and Olivia were the four originally identified shareholders for the Company. (R. 1539 at 34).

17. Lavinia later determined, however, that she wanted some of her anticipated shares, 15,700, to be issued to her brother, Weiman, instead. It was therefore agreed that the shares of the Company would be issued as follows: Cuong Trang: 65,000; Muoi Ha: 40,000; Lavinia Ha: 20,000; Weiman Ha: 15,700; Olivia Ha: 5,000. (*Id.* at 35-37).

18. Effective March 23, 1999, Lavinia, who lived and worked in California, executed a Revocable Proxy authorizing her brother, Weiman, to vote her shares in the Company in her absence. (Ex. D6).

19. The Revocable Proxy document was prepared by Ellen using the Trangs' home computer. Lavinia, who lived in California, signed the document and mailed it to Cuong. (R. 1541 at 126-129).

20. Weiman, Muoi and Olivia each worked as employees of the Company. (R. 1538 at 127, 129, 131).

21. Weiman had general responsibility for the financial affairs of the Company, had access to and signature authority on the Company's bank accounts, and was responsible for the Company's tax filings, including sales and income tax filings. (R. 1537 at 44-45; R. 1538 at 128; R. 1539 at 51; R. 1540 at 56, 82-83, 155).

22. Muoi and Olivia worked as sales clerks. Muoi also assisted in the ordering of inventory, and Olivia helped stock the shelves. (R. 1538 at 129, 131).

23. Cuong worked long hours to ensure the Company's continued growth and success. (R. 1538 at 125-126).

24. Cuong frequently called upon his children to help at the market and to ensure that all of the work could be done. (R. 1538 at 126-127; R. 1539 at 53, 121-122).

25. In 2004, it was discovered that Weiman had been writing checks on the Company accounts in order to pay for rent for the separate restaurant, South China House, which he had opened next door, to pay for equipment and upgrades for the restaurant, and to pay for personal expenses, including medical expenses associated with a stroke. (R. 1539 at 40-42; R. 1540 at 133-153; R. 1541 at 42-43).

26. As a result of this discovery, Cuong removed Weiman as Director and revoked his authority to write checks on the Company's accounts. (R. 1539 at 41; R. 1541 at 42-43; ; R. 1542 at 91-95; Ex. D8).

27. Letters regarding Cuong's removal as a Director were mailed to Weiman, Muoi, Olivia and Lavinia. (R. 1539 at 44-47; Exs. D9 & D10).

28. Cuong also discussed Weiman's removal as a Director with Lavinia. (R. 1539 at 48).

29. Around this same time, Lavinia signed a document revoking the proxy she had previously given to Weiman to vote her shares in the Company. (R. 1539 at 48-49; R. 1541 at 131-132; Ex. D11).

30. The proxy revocation document was prepared by Sylvia using the Trangs' home computer and mailed to Lavinia in California. Cuong received a copy of the document, signed by Lavinia, in the mail. (R. 1539 at 48; R. 1541 at 131-133).

31. In 2007, it was determined that Muoi was taking money and/or inventory from the Company. As a result of this discovery, Muoi's employment with the company was terminated. (R. 1539 at 53-54; R. 1541 at 86; *see also* R. 1541 at 86-101 & D31 (surveillance video clips and related testimony evidencing Muoi's theft cash register)).

32. On November 14, 2009, Sylvia officially became the Secretary and Treasurer of the Company but began to perform secretarial functions for the Company as early as 2008. Cuong continued to serve as the Company's President and CEO. (R. 1541 at 15-16; D24).

33. On February 26, 2010, Weiman Ha sent a letter to the Company, Attn: Cuong, demanding that a special shareholders meeting be held on March 12, 2010 at 2:00 p.m. at the corporate offices of the Company (the "February 2010 Demand"). This meeting was never held. (R. 1539 at 63-64; Ex. P11).

34. On April 18, 2010, a meeting was held between Lavinia, Weiman, Olivia and Cuong at Weiman's restaurant, the purpose of which was to discuss and resolve disputes over the ownership of the market, including obtaining a valuation of the store. (R. 1538 at 102-103; R. 1540 at 189-191).

35. This meeting was set up by Lavinia. (R. 1539 at 74-74).

36. Muoi was not invited to this meeting because she claimed, at that time, to have sold all of her shares to Weiman. (R. 1537 at 90; R. 1539 at 76).

37. The Company attempted to hold a special shareholders meeting on April 19, 2010, but Cuong was the only shareholder in attendance and thus no business was conducted. (Exs. D13, D14 & D15; R. 1539 at 68-74; R. 1541 at 110-113).

38. Muoi was not invited to this meeting because she was not believed to hld any shares, having already attempted to sell them to Weiman. (R. 1537 at 90; 1539 at 71; R. 1541 at 112).

39. In 2011, it was determined that Olivia was taking money and/or inventory from the supermarket. As a result of this discovery, Olivia's employment with the Company was terminated. (R. 1541 at 29-32, 105-107, 158).

40. Since Olivia's termination in 2011, the supermarket has been operated entirely by Cuong and his children, including Sylvia. (R. 1539 at 121-124).

41. On April 11, 2011, counsel for Plaintiffs sent the Company, Attn: Cuong and Sylvia, a letter demanding that a special shareholders meeting be convened at the corporate offices of the Company no later than July 1, 2011 (the "April 2011 Demand"). This meeting was never held. (R. 1537 at 70-71; R. 1538 at 32-33; Ex. P15).

42. On July 17, 2013, Lavinia entered into a Stock Interest Redemption Agreement pursuant to which the Company agreed to redeem her 20,000 shares for \$138,000. (Ex. D19. *See also* R. 1539 at 104-106 (Cuong testimony regarding transaction with Lavinia); R. 1541 at 36-41 (Sylvia testimony regarding negotiations with Lavinia.))

RESPONSE TO APPELLANTS' INACCURATE STATEMENTS OF FACT

Appellants set forth a statement of facts that is inaccurate and blatantly ignores contrary evidence in the record:

SOF 4: "Cuong Trang then used the money invested by Muoi Ha and Olivia Ha to pay off the loans he received from family members."	Cuong Trang testified that the loan for the purchase of the market came from his uncle. (R. 1538 at 124). His wife, Pamela Trang, testified that the loan from Cuong's uncle was never repaid because the uncle told them not to do so. (R. 1542 at 79-80). Pamela Trang also testified that there was an additional \$328,000 in inventory that they had to purchase from the prior owner of the market over time. (R. 1542 at 80).
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	<p>Although Cuong testified that the money he received from Muoi was used to pay off a loan (R. 1539 at 138), there is no testimony indicating that it was the loan from his uncle, as opposed to the loan for the inventory that had to be paid back under the terms of the acquisition from Long Xa.</p> <p>Regarding Olivia Ha, Mr. Trang testified that the money was invested into the market. (R. 1539 at 139). There is no testimony that the money from Olivia was used to pay back the loan Cuong obtained from his uncle.</p> <p>Regardless, there is no dispute that Muoi and Olivia both contributed money to the market and held shares in the market. The only dispute was whether Weiman and Lavinia were also shareholders and, if so, how many shares they each owned.</p>
<p>SOF 7: "Olivia Ha testified that Weiman Ha gave money for the market but that she did not know how much."</p>	<p>There is no such testimony at R. 1538, page 54.</p>
<p>SOF 14: "The evidence was contradictory as to whether Tax Form 2553 was filed with the IRS. Cuong Trang and Sylvia Trang stated that it had not been filed with the IRS However Sylvia Trang testified that Tax Form 2553 was filed with the IRS when the Corporation filed its taxes in 2009."</p>	<p>Sylvia never testified that Tax Form 2553 was filed with the IRS. She testified that information contained on the form was used in preparing the tax returns for certain years, and that this was done on the advice of the Company's accountants. (R. 1541 at 139). When Sylvia testified at 1541 page 141 that a document was filed with the IRS she was referring to the tax returns themselves (not the Tax</p>

	Form 2553). Indeed, Sylvia testified that she did not believe the original Tax Form 2553 had ever been filed because it was, in fact, given to her by Ellen in 2006. (R. 1541 at 125-126).
SOF 17: "Cuong Trang also testified that he revoked Weiman Ha's ability to write checks on the Corporate account."	There is no such testimony on 1538 page 44. Indeed, it is Olivia, not Cuong, who is testifying on that page. Nor does Exhibit D6 refer to this issue.
SOF 24: "Cuong Trang and Sylvia Trang testified that Muoi Ha was removed from the operation of the Corporation for stealing around September 27, 2007."	The testimony on 1539 pages 53-55 does not refer to when Muoi was removed from the Company. The cited testimony relates solely to when Exhibit D12 was prepared. The testimony on 1541 page 86 merely states that Muoi was terminated in 2007. It does not give a specific month.
SOF 43: "Defendant Sylvia Trang testified that Ellen Ha originally created these documents."	Sylvia testified that Ellen created the original version of D6, but that Sylvia herself created the original version of D11. (R. 1541 at 126-129, 132).
SOF 44: "Defendant Sylvia Trang then disposed of the old computer donating it to DI later that year."	Sylvia testified that the computer was donated to DI (R. 1541 at 131, 186), but there is no evidence that it was Sylvia that made the donation (as opposed to another member of the household).
SOF 54: "At trial, Defendant Sylvia Trang testified that the stock certificates and minute books were still missing."	Sylvia is not testifying at 1538 page 80. And what she actually testified was that some (not all) of the corporate minutes and other corporate documents were still missing. (R. 1541 at 80).

<p>SOF 56: "Defendant Sylvia Trang testified that she saw the physical stock certificates that were issued by the Corporation in 1999"</p>	<p>What Sylvia testified was that she was sitting next to Ellen when Company stock certificates were being prepared, and that she therefore believed they were issued. (R. 1541 at 176-177). There is no evidence in the record, however, of any stock certificates ever being signed by the President or Secretary of the Company and delivered to the shareholders. Indeed, Cuong testified that stock was issued "verbally." (R. 1539 at 37).</p>
<p>SOF 59: "Defendant Cuong Trang and Defendant Sylvia Trang presented evidence that Lavinia Ha owned either 4,215, 4390, 15,700 or 20,000 shares. . . . Defendant Cuong Trang testified that Lavinia Ha gave Weiman Ha 15,700 of her shares."</p>	<p>This grossly misstates the record. The Trang testified that they did not know where the references to 4,215 and 4,390 on D6 and D11 came from, and didn't know if it was some sort of conversion that was used by Ellen. (R. 1539, 144).</p> <p>Cuong testified was that Lavinia wanted Wieman to have some of her originally anticipated shares. (R. 1539 at 35). But there was no testimony that this was all of her shares, or that this 15,700 was part of her 20,000 shares. To the contrary, Cuong testified that while Lavinia was originally granted a certain number of shares, she quickly (within a week) decided that she wanted some of those shares (15,700) to go to Weiman Ha. (R. 1539 at 35-36, 120-121).</p> <p>Cuong Trang and Sylvia Trang testified consistently that Lavinia Ha held 20,000 shares.</p>
<p>SOF 60: "At no point during the</p>	<p>Although Lavinia did not appear and</p>

litigation, did Lavinia Ha ever assert to the Court that she owned shares of the Corporation."	testify in court, she represented through the proxy documents and the Redemption Agreement, which were admitted as a business record of Southeast Supermarket, that she held shares in the Company. (Ex. D6, D11, D19). There is also other evidence in the record to establish her ownership of these shares. <i>See infra</i> at 18-20.
SOF 62: "When questioned about the accuracy of the tax returns, both Defendant Cuong Trang and Defendant Sylvia Trang pled the Fifth Amendment right against self-incrimination rather than respond to a question about the accuracy of the tax returns."	Defendants offered testimony regarding the tax returns. Sylvia specifically testified that the tax returns were prepared using the information on Tax Form 2553 even though such information was believed to be inaccurate, based on the advice of the Company's tax accountants. (R. 1541 at 81-83, 84, 139-141, 142). She also testified that the Company intended to amend the tax returns, and file the remainder of the Company's tax required returns, after a judicial determination on the ownership of the Company was made. (R. 1541 at 84-86). The Fifth Amendment privilege was asserted sparingly, and only after significant testimony on the issue had already been provided (R. 1540 at 37, 41; R. 1542 at 70).

ARGUMENT

I. THE TRIAL COURT'S FINDINGS OF FACT REGARDING THE OWNERSHIP AND DISTRIBUTION OF THE COMPANY'S SHARES SHOULD BE AFFIRMED.

In considering an insufficiency of the evidence claim, this Court reviews

"the evidence and all inferences which may reasonably be drawn from it in the

light most favorable” to the decision of the trial court. *State v. Nielsen*, 2014 UT 10 ¶ 30, 326 P.3d 645 (quoting *State v. Maestas*, 2012 UT 46, ¶ 302, 299 P.3d 892 (internal quotation marks omitted)). “So long as some evidence and reasonable inferences support the [trial court’s] findings” they should not be disturbed on appeal. *Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998).

A. **Plaintiffs Failed to Marshall the Evidence in Support of the Findings and Cannot Therefore Meet Their Burden of Persuasion on Appeal.**

As a threshold matter, Plaintiffs failed to carry their burden of persuasion on appeal because they failed to properly marshal the evidence in support of the trial court’s findings of fact.³ Although Plaintiffs acknowledge the obligation, they do nothing to actually meet the requirement.⁴ Rather, they select the evidence that is most favorable to their position, entirely ignoring the evidence supporting the trial court’s factual findings. Indeed, Plaintiffs carefully cull the record to eliminate any reference to the overwhelming evidence supporting the trial court’s decision, acting as if such evidence was never there. As a result, Plaintiffs cannot overcome the “healthy dose of deference owed to factual

³ See Utah R. App. P. 24(a)(9) (a party challenging a finding must address and explain away the record evidence that supports the challenged finding).

⁴ In 2014, the Utah Supreme Court clarified that marshalling is not a procedural requirement, the failure of which can result in dismissal of the appeal. *State v. Nielsen*, 2014 UT 10, ¶¶ 40-42. Rather, marshalling is a substantive obligation, necessary to meet the burden of persuasion under the clearly erroneous standard. *Id.* at ¶ 41.

findings” and cannot persuade this Court to reverse the Final Judgment. *See State v. Nielsen*, 2014 UT 10, ¶¶ 40-42 (“[A] party who fails to identify and deal with supportive evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues.”).

B. There Was Sufficient Evidence to Support the Trial Court’s Factual Findings Regarding the Number and Distribution of Shares.

Plaintiffs’ failure to marshal the evidence is only exacerbated by their failure to identify the specific trial court findings they claim to be erroneous. Their brief states simply that there was insufficient evidence to support the trial court’s findings “regarding the distribution of shares among the shareholders.” Br. at 29. Thus, it would appear that Plaintiffs object to Finding of Fact No. 15, which provides as follows:

On or before March 24, 1999, it was initially determined that shares in the Company would be issued as follows: Cuong: 65,000; Muoi: 40,000; Lavinia: 35,700; Olivia: 5,000. Lavinia later determined however, that she wanted 15,700 of her anticipated shares to be issued to her brother, Weiman, in recognition of the work he had been doing at the market. It was therefore agreed that the shares of the Company would be issued as follows: Cuong: 65,000; Muoi: 40,000; Lavinia: 20,000; Weiman: 15,700; Olivia: 5,000.

Specifically, Plaintiffs appear to challenge the trial court's finding that Lavinia received 20,000 shares, and that Weiman received only 15,700 shares.⁵

In so doing, Plaintiff's ignore the substantial evidence offered in support of the trial court's findings, including the following:

- Testimony from Cuong that Lavinia was part of the original discussions to incorporate the market (R. 1538 at 138);
- Corporate minutes from March 23, 1999 identifying the original shareholders as Lavinia, Olivia, Muoi and Cuong (Ex. D05),⁶ and Cuong's testimony that those were the four originally identified shareholders and that Weiman was added after the fact (R. 1539 at 34, 36);
- Cuong's testimony that Lavinia held 20,000 shares (*Id.* at 35, 103-04);
- Sylvia's testimony that she was physically present when the decisions regarding the shareholders and the number of shares were made, and that Lavinia held 20,000 shares (R. 1541 at 118);
- The Revocable Proxy document signed by Lavinia and dated March 23, 1999, identifying Lavinia as a shareholder and appointing Weiman as her proxy with respect to her shares (Ex. D06);
- The fact that Cuong discussed his intent to remove Weiman as a Director with Lavinia (R. 1539 at 48);

⁵ There was no dispute that Cuong held 65,000 shares and that Olivia held 5,000 shares. Although the Defendants argued that Muoi's 40,000 shares reverted back to the Company due to an unauthorized sale to Weiman, the trial court found that Muoi was not aware of the sale restrictions and that the shares therefore remained in her possession. Defendants have not appealed from that ruling, and thus do not dispute that Muoi owns 40,000 shares.

⁶ Plaintiffs did not appeal the admission of these minutes.

- The December 10, 2004 letter to shareholders informing them that Weiman had been removed as a director (Ex. D10), a copy of which was mailed to Lavinia as a shareholder (R. 1539 at 46-47);⁷
- The fact that this same letter was specifically discussed with Lavinia (R. 1539 at 48);
- The Revocation of Proxy document signed by Lavinia and dated December 10, 2004, identifying herself as a shareholder and revoking all previously issued proxies to Weiman (Ex. D11);
- The April 12, 2010 notice of special shareholder meeting addressed to Lavinia (Ex. D13), which was mailed to Lavinia, as a shareholder, that same day (R. 1539 at 69-70);⁸
- Olivia Ha's testimony that she asked Lavinia on numerous occasions to come to Salt Lake City for shareholder meetings. (R. 1538 at 54).
- The fact that Lavinia came to Salt Lake City to attend a meeting at South China House with Cuong, Weiman and Olivia on April 19, 2010, the purpose of which was to resolve disputes over claimed ownership of shares in the Company (R. 1538 at 102-103; R. 1540 at 189-91);
- The fact that the Company repurchased Lavinia's 20,000 shares in July 2013 for \$138,000, after obtaining an appraisal to determine the value of the company and the value of Lavinia's shares (R. 1539 at 104-06; R. 1541 at 40-41);⁹
- The Shareholder Interest Redemption Agreement dated July 17, 2013 and signed by Lavinia, stating that she is a shareholder of 20,000 shares, that Weiman was inappropriately claiming ownership of her

⁷ Plaintiffs do not appeal from the admission of this letter.

⁸ Plaintiffs do not appeal from the admission of this evidence.

⁹ Although Plaintiffs appeal from the admission of the actual Shareholder Interest Redemption Agreement, they did not object to and do not appeal from the admission of Cuong's and Sylvia's testimony regarding the transaction.

shares, and that she desired to sell these shares back to the Company (D19);

- Cuong's testimony that Tax Form 2553 was never filed with the IRS because it was erroneous insofar as it identified Weiman as holding 37,500 shares when, in fact, 20,000 of those shares belonged to Lavinia (R. 1539 at 120-121);
- Sylvia's testimony that she was present when Ellen filled out Tax Form 2553, and that Weiman instructed Ellen to identify him as the owner of 35,700 shares, which included 20,000 shares actually belonging to Lavinia, because Lavinia was not there and thus he "had say" over her shares (R. 1541 at 122-124);
- Sylvia's testimony that Weiman told her it was stupid for her to go to California in July 2013 (when the Company bought back Lavinia's 20,000 shares) because Weiman would not have taken Lavinia's 20,000 shares and would have given those shares back to Lavinia. (*Id.* at 119-120).
- Weiman's admission that all of his siblings living in the United States had an interest in the market, either directly or through their spouse, and that he did not leave Lavinia out. (R. 1540 at 110-112).

Plaintiffs specifically object to the trial court's finding that Lavinia was originally granted 35,700 shares. Again, Plaintiffs ignore the actual evidence. As noted in the summary of the evidence in the immediately preceding pages, there was evidence establishing the original shareholders as Cuong, Lavinia, Muoi and Olivia. There was also evidence that Weiman was added as a shareholder a few days later, and given 15,700 of the shares originally intended for Lavinia. There is further evidence that Lavinia wanted to add Weiman to the list of shareholders, and wanted to give him some of her shares. Finally, there is evidence that Lavinia ultimately ended up with 20,000 shares. Based on all of

this evidence, it was reasonable, and not clearly erroneous, for the trial court to infer that Lavinia was originally slated to receive 35,700 shares, that she gave 15,700 of those shares to Weiman, and that she retained the remaining 20,000.¹⁰

Plaintiffs also appear to object to Finding of Fact No. 15, stating as follows:

Plaintiffs attempted to establish the allocation of shares by use of the Election of S Corporation, Tax Form 2553 (the "Election Form"). The Court does not find that this document is evidence of the proper allocation of shares in the Company. The Election Form dated on March 24, 1999 was prepared in handwriting by someone other than Cuong, Weiman, Muoi and Olivia. Those four parties testified that the Election Form was not prepared in their own handwriting. This form showed a different allocation of shares and was originally signed by the parties. This document was never filed with the IRS. Sylvia testified that while she was living with Ellen, Ellen prepared this form at Weiman's direction. In November 2006, Ellen found the Election Form in her files when she moved to Washington and mailed it to Sylvia.

But there was evidence in the record to support this finding, including:

- Sylvia's testimony that while the form identifies the Company as an S Corporation, the Company is actually a C Corporation (R. 1541 at 126);
- Cuong, Muoi, Olivia and Weiman testified that they each signed the Tax Form 2553, but that the other handwriting on the form, including the handwriting setting forth the number of shares, did not belong to them (R. 1537 at 133; R. 1538 at 56; R. 1540 at 95-96);

¹⁰ This inference is further supported by evidence that Weiman told Ellen to identify him as the holder of the 35,700 when 20,000 of those shares actually belonged to Lavinia. (R. 1541 at 122-124).

- Sylvia's testimony that she lived with Ellen for a period of time and frequently saw her writing, and that the writing on the Tax Form 2553, and in particular the writing depicting the number of shares, belonged to Ellen (R. 1541 at 120-123);
- Sylvia's testimony that she was present when Ellen prepared the Tax Form 2553, and that it was filled out based on directions from Weiman (*Id.* at 122-123);
- Sylvia's testimony that she heard Weiman tell Ellen to add Lavinia's 20,000 shares to his 15,700 shares, and to identify him as the holder of 35,700 shares (*Id.* at 123-124);
- Sylvia's testimony that when Ellen moved from Utah to Washington in 2006 she located the original Tax Form 2553 in her files and mailed it to Sylvia (*Id.* at 125); and
- Sylvia's testimony that the original Tax Form 2553 was in an envelope addressed to the IRS, but that the envelope did not contain any markings indicating that it had ever been mailed to the IRS (*Id.* at 126).

Plaintiffs ignore all of this evidence in arguing that the trial court's findings were clearly erroneous.

Plaintiffs claim that the stock breakdown set forth in Tax Form 2553 was supported by the corporate tax filings made in 2009. Again, Plaintiffs ignore evidence as to why the tax returns contained this information. Specifically, Plaintiffs ignore the unrefuted testimony from Sylvia that the tax filings were prepared using the information on Tax Form 2553 on the advice of the Company accountants, because the Company was under the gun to file overdue returns, and the form was the only documentation in their physical possession at the time purporting to identify the shareholders and the number of shares held. (R. 1541

at 81-82, 84, 141). Plaintiffs also ignore Sylvia's testimony that the accountants advised her not to amend the returns with the correct shareholder information until a judicial determination had been made regarding the actual ownership of the Company's shares, in order to avoid having repeated amendments to the filings. (R. 1541 at 84). In short, there was ample evidence from which the trial court could reasonably conclude that the tax returns did not accurately reflect the shareholders or the number of shares held because they were based entirely on the Tax Form 2553, which was itself inaccurate.

Plaintiffs claim that Tax Form 2553 was supported by the testimony of Cuong, stating that he and Muoi, Olivia and Weiman were original shareholders. But there is nothing in the cited testimony whereby Cuong states that these four individuals were the only original shareholders. Defendants asserted throughout the proceedings that Lavinia was one of the original shareholders. See Defendants' Rule 26 Initial Disclosures, App'x C hereto (identifying Lavinia as a person with information regarding "[a]cquisition and ownership of shares of Southeast Supermarket").¹¹ And there was ample evidence to establish that Lavinia indeed held 20,000 shares. See *supra* at 18-20.

¹¹ Defendants also asserted Lavinia's ownership of the shares during the first mediation, which was held in July 2012.

C. The Trial Court's Credibility Determinations Were Not Clearly Erroneous.

Plaintiffs suggest that the trial court's findings should be reversed because it determined that the Trangs were the more credible witnesses. But "[i]t is the province of the trier of fact to assess the credibility of witnesses," and this Court "will not second-guess the trial court where there is a reasonable basis to support its findings." *Woodward v. LaFranca*, 2013 UT App 147, ¶ 7, 305 P.3d 181 (quoting *Reed v. Reed*, 806 P.2d 1182, 1184 (Utah 1991)); see also *State v. Booker*, 709 P.2d 342, 345 (Utah 1985) ("It is the exclusive function of [the trier of fact] to weigh the evidence and to determine the credibility of the witnesses." (quoting *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980))). A trial court's determination of credibility will be reversed only if "its findings in support of that determination are 'clearly erroneous,'" meaning that those findings are "'against the clear weight of the evidence,'" or if the "appellate court otherwise reaches a definite and firm conviction that a mistake has been made." *Woodward*, 2013 UT App 147, ¶ 7 (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)).

There was a reasonable basis for the trial court to discredit the testimony of Plaintiffs, its findings were not clearly erroneous or against the clear weight of the evidence, and there is no basis for this court to reach a definite and firm conviction that a mistake has been made.

Regarding Muoi, there was evidence establishing that she stole money from the Company (*see supra* at 9, Appellees' Statement of Fact ¶ 31), even though she denied it on the stand. (R. 1537 at 105). Muoi also testified that it was her husband that started Global Supermarket to compete with the Company, despite prior sworn and other admissions that it was her store. (*Id.* at 111-117; R. 1539 at 62; *see also* Ex. D38 at 5; Ex P10). Finally, Muoi claimed not to know about Weiman's removal as a Director (R. 1537 at 74), despite Weiman's own testimony that she (and everyone else) was aware of his removal. (R. 1540 at 116).

Regarding Olivia, she testified that she did not discuss her concerns about the Trangs' operation of the business with Muoi in 2011, despite directly contrary statements in her Verified Complaint. (R. 1538 at 61-64; D38 at 6). Olivia also claimed not to remember when she divorced her own husband. (R. 1538 at 44-46). And like Muoi, Olivia denied knowing about Weiman's removal as a Director (*id.* at 24-25), despite Weiman's own testimony that she (and everyone else) was aware. (R. 1540 at 116).

Regarding Weiman, he testified that he changed the name of the market from Tay Do to New Tay Do, and that this was done a year after the market opened, in 1998. (*Id.* at 73-76). But records on file with the Division of Corporations confirm that the name was changed by Cuong in 1997, before Weiman even moved back to Salt Lake. (*Id.* at 77). Weiman claimed in the

Verified Complaint that he was the one that prepared Tax Form 2553,¹² but testified at trial that it was Cuong. (*Id.* at 52). In fact, the overwhelming evidence in the record supports the conclusion that it was prepared by his daughter, Ellen. (*See supra* at 21). Indeed, Weiman's testimony regarding Tax Form 2553, and Ellen's involvement therein, was evasive at best. (R. 1540 at 104-105). Weiman claimed not to know about his removal as Director (*id.* at 60), despite his own claim that his sisters and everyone else knew (*id.* at 116), and despite evidence that he was informed of such in a letter from Cuong. (*Id.* at 44-47; Ex. D9). Weiman also claimed to have been the one that negotiated the deal for the original acquisition of the market, but was unable to provide any specific details regarding the terms of the deal. (*Id.* at 115-116).¹³ Finally, Weiman told counsel to "eat shit" when pressed on certain issues during cross-examination. (R. 1540 at 78-79).

Plaintiffs claim that the trial court's credibility determinations were clearly erroneous because they were based on irrelevant evidence. There are multiple problems with this argument. First, Plaintiffs fail to identify the specific

¹² Weiman also claimed to be the author of Tax Form 2553 in the course of discovery. (R. 1540 at 91-92).

¹³ Indeed, Weiman referred to the selling party as "Tay Do", when in fact that was the name of the business. (R. 1540 at 48). The selling party was named Long Xa. (R. 1538 at 124).

allegedly irrelevant evidence that was improperly considered by the trial court in making its credibility determinations.¹⁴ Thus, this Court has no way to assess whether the evidence in question was relevant or not. Second, Plaintiffs cite to nothing in the record to suggest that they objected to the allegedly irrelevant evidence when it was offered below. Because they failed to establish that they preserved the relevance issue below, the issue cannot be considered on appeal. *Brady v. Park*, 2013 UT App 97, ¶ 38, 302 P.3d 1220 (to be preserved for appeal, an issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue (quotations and citations omitted)). Third, Plaintiffs believe that that relevance may be determined only with respect to their own theories of the case. In fact, relevance must be determined considering the case as a whole, based not only on the plaintiff's claims but also on the defenses asserted in the defendant's answer.¹⁵

¹⁴ Plaintiffs likely object to evidence of their theft and embezzlement. But it was the Plaintiffs who put this misconduct at issue by alleging they were fired, and forced out of the business, without cause. (R. at 207-209). Having opened this door, they cannot complain that such evidence was admitted and considered by the trial court.

¹⁵ Plaintiffs note that Defendants did not file any counterclaims. They did, however, file an answer setting forth a number of affirmative defenses. (R. 276-286)

D. Plaintiffs' Claims of Inconsistent Testimony by the Trangs Are Flawed and Do Not Require Reversal on Appeal.

Plaintiffs claim that the Trangs' testimony should be discredited because their testimony was "inconsistent."¹⁶ But their claims of inconsistency do not withstand scrutiny.

1. The Trangs Did Not Offer Inconsistent Testimony Regarding the Existence of Stock Certificates.

Plaintiffs suggest that there was an inconsistency with respect to the existence of stock certificates. Specifically, they assert that Cuong testified there were no physical stock certificates, while Sylvia claimed that such certificates were issued. Plaintiffs misconstrue Sylvia's testimony in order to create an inconsistency that does not exist. What Sylvia testified was that she was sitting next to Ellen when she was preparing stock certificates (R. 1541 at 176-177). Sylvia never testified that such certificates were ever actually signed or delivered to Plaintiffs (or other shareholders).¹⁷ This testimony is consistent with the testimony of Cuong that he believed certificates were prepared, but that they were never signed (R. 1539 at 37), and that shares were only issued "verbally." (*Id.*).

¹⁶ Insofar as Plaintiffs are attempting to establish such inconsistencies through their statement of facts, those inconsistencies have been addressed in above. See *supra* at 11-15.

¹⁷ When asked if the certificates were issued, Sylvia stated she "believed so" because she was there when they were prepared. (R. 1541 at 176-177).

2. The Trangs Did Not Offer Inconsistent Testimony Regarding the Number of Shares Held by Lavinia.

Plaintiffs note that the Trangs could not explain the discrepancy between the stock figures set forth on D6 and D11 (the proxy documents), which identify Lavinia's holdings as 4,215 and 4,390, and the Trangs' testimony that she owned 20,000. The evidence is undisputed, however, that the original proxy document (D6) was created by Ellen, and that the Trangs did not know where Ellen obtained the share numbers contained on those proxy documents. (R. 1539 at 139). The Trangs were consistent in testifying that Lavinia invested \$20,000 and held 20,000 shares. (R. 1539 at 35; R. 1541 at 118). And this number is confirmed through the representations and warranties set forth in the Redemption Agreement that was signed by Lavinia in July 2013. (D19). While the evidence may have been conflicting, there was ample evidence for the trial court to conclude that the correct figure was 20,000 (rather than either of the figures set forth on Exhibits D6 and D11).

3. The Defendants Did Not Offer Inconsistent Testimony Regarding Weiman Ha's Possession of Corporate Records.

Plaintiffs claim that the Trangs lied when they suggested, in response to Plaintiffs' demands for a meeting, that Plaintiffs (and Weiman in particular) had corporate records and stock certificates in his possession. But the evidence supported the Trangs' belief that such documents existed and were in the

possession of Weiman. Cuong and Sylvia both testified that Weiman delivered boxes of documents to them after they requested such information in order to complete the tax filings. (R. 1541 at 49-62). And there are contemporaneously created business records to support these claims. (D23). Finally, Sylvia provided extensive testimony regarding the discovery of corporate documents in the Weiman's "little room," as follows:

- Weiman built the little room in a back corner of the warehouse at the back of the market (R. 1541 at 65, 68);
- Weiman had a bed in the room and was the only one that used the room (*Id.* at 66, 68);
- Weiman had the only key, which he threw away when he was fired from the Company (R. 1539 at 176-177; R. 1540 at 83-84; R. 1541 at 65-66; *see also* R. 1540 at 82 (Weiman had a key but was "not sure about the others"));
- Sylvia hired Glen's Key Lock and Safe to open the door to Weiman's little room because Weiman was not cooperating in the production of documents needed to complete the Company's tax returns (R. 1541 at 63-66);¹⁸
- Sylvia and her cousin, Jonathan Trang (Olivia's son), entered the room after it was unlocked (*Id.* at 66-67);
- There were boxes of documents scattered throughout the room, and there were also documents strewn about on the bed and elsewhere (*Id.* at 68-69, 73-74);

¹⁸ Plaintiffs criticized Sylvia for not having the room unlocked earlier. But Sylvia testified that Chinese culture is hierarchical, that it is not customary for family members to question the patriarch (i.e., Weiman), and that she waited as long as she could out of respect for his position in the family. (R. 1541 at 173-74).

- Some of the boxes contained invoices, bank statements, cleared checks, and other Company financial records (*Id.* at 68-69, 72-74);
- Other corporate documents, including corporate minutes, articles of incorporation and bylaws, were also found inside the room (*Id.* at 72-74);
- Not all of the documents Sylvia was attempting to find were located in the little room (*Id.* at 174-176; *see also* R. 1540 at 25); and
- Some of the still missing documents included sales tax records, daily sales receipts, and additional corporate minutes (R. 1541 at 80).

As discussed above, there was also evidence that Sylvia had a reason to believe that Ellen had prepared stock certificates, and that those draft certificates, even if unsigned and unissued, may have been in the possession of Weiman.¹⁹ (*Supra* at 27-28).

4. Defendants Did Not Offer Fabricated Proxy Documents.

Plaintiffs claim that the Trangs fabricated evidence. Specifically, Plaintiffs refer to Exhibits D6 and D11 – the Revocable Proxy and Revocation of Proxy. But Sylvia offered extensive testimony regarding how those documents were created, and why they were mere duplicate copies of the originals rather than fabrications:

¹⁹ Defendants produced a series of unsigned stock certificates during the course of discovery. (SM000018-20). While these documents were not offered or received into evidence, it is disingenuous for Plaintiffs to suggest that the Trangs had no reason to believe there might be additional certificates, even draft and unsigned, in the possession of Weiman.

- Sylvia was present when Ellen prepared D6 (the Revocable Proxy) on a computer at the Trang home in 1999, and was also present when that document was signed by Lavinia (R. 1541 at 126-129);
- Lavinia mailed the signed document to Cuong (R. 1539 at 37-38);
- Sylvia prepared D11 (the Revocation of Proxy) on a computer at the Trang home and sent the document to Lavinia for signing (R. 1541 at 132);
- Cuong received the document, signed by Lavinia, in the mail (R. 1540, 22-23);
- Sylvia knew that the signed documents existed but could not locate them in Weiman's little room (or elsewhere) (R. 1541 at 129, 133);
- Sylvia found the original version of these documents on the computers located at the Trang home (*Id.* at 129);
- The computers were outdated and the original forms could not therefore be emailed or printed (*Id.* at 130, 134);
- Sylvia retyped the original forms on her own computer and emailed them to Lavinia to be resigned (R. 1541 at 130-131, 135-136, 185-186);
- Sylvia received the documents, resigned by Lavinia, in the mail (R. 1541 at 131, 136); and
- Sylvia did not disclose them as "reconstructions" or "re-creations" when they were produced and initially offered into evidence because she viewed them as mere copies of documents that she knew to already exist (*Id.* at 179; R. 1542 at 55-56).

Plaintiffs claim that Sylvia cannot be trusted based on Cuong's testimony that it was actually Lavinia that prepared D6 and D11. But it was within the discretion of the trial court to conclude that it was, in fact, Ellen who prepared the original Revocable Proxy (Ex. D6), and Sylvia who prepared the original Revocation of Proxy (Ex. D11), that those original documents were then sent to Lavinia for

signing, and to infer that Cuong incorrectly assumed it was Lavinia that drafted them after he received them in the mail from her.

Ultimately, it was for the trial court to consider the evidence presented and determine whether or not the actions associated with these documents rendered the Trangs' testimony not credible. The trial court determined that it did not, and there was nothing clearly erroneous about this determination.

5. Defendants Did Not Offer Inconsistent Testimony Regarding Sylvia Witnessing the Preparation of Tax Form 2553 or the Execution of the Revocable Proxy by Lavinia.

Plaintiffs challenge Sylvia's testimony that she was in the backroom of the market when Ellen prepared Tax Form 2553, claiming that this testimony conflicts with her claim that she was with Lavinia when she signed Exhibit D6 – the proxy document. It was reasonable for the court to infer, however, that while the proxy document is dated March 23, 1999, Lavinia did not actually sign the document until Ellen and Sylvia to California returned and gave it to her to sign. This inference is particularly reasonable given that the date on the proxy document was typed, rather than handwritten. All that Sylvia testified at trial was that she saw the document being signed by Lavinia in 1999 (R. 1541 at 127). Although the document itself is dated and effective March 23, 1999, Sylvia never testified that she saw Lavinia sign the document on that specific date, as opposed to some date shortly thereafter.

6. Defendants Did Not Offer Inconsistent Testimony Regarding the Removal of Weiman as a Director.

Plaintiffs claim that Cuong's testimony regarding the removal of Weiman was inconsistent. Specifically, they claim that he could not have been removed as a Director on December 10, 2004, because he signed two checks thereafter – on December 24, 2004 and December 31, 2004, and because he was not removed as a Director with the Division of Corporations until March 8, 2010. Once again, Plaintiffs pick and choose the evidence in the record to create an inconsistency that does not actually exist.

The fact that Weiman continued to sign checks after December 10, 2004, does not mean that he was authorized to do so, or that he did so in the capacity of a Director of the Company. Indeed, the evidence establishes that even after Weiman was removed as a Director, he continued to work at the market as an employee. (R. 1541 at 173). The evidence further established that the checkbook was kept in a location where it could be easily accessed by Weiman during this period of time, and that Weiman had previously written checks outside of the presence of Cuong. (R. 1541 at 46-47). Thus, the fact that he continued to sign

checks even after he had been removed and told not to sign anymore does not mean that he was not removed and stripped of his check writing authority.²⁰

Likewise, the fact that the Company did not take steps to formally remove Weiman as a director with the Division of Corporations does not mean that they did not take internal steps to remove him from his position. Sylvia testified that the only reason he was not removed from the State records sooner was because she didn't realize it was something that needed to be done until she was using the online renewal service for the first time in 2010. (R. 1541 at 43-45). It was not unreasonable for the trial court to accept this testimony and conclude that Weiman had been removed from his position back in 2004, and that the Company simply failed to take the steps necessary to remove his name from the Division of Corporation records at that time.²¹

²⁰ Plaintiffs suggest that Weiman had the authority to sign the checks because he was a signatory on the account and there is no evidence that Cuong went to the bank to remove his name. While these facts may justify a bank's actions in cashing the check, they would not excuse Weiman's unauthorized use of Company funds to pay for personal expenses and/or the expenses of his restaurant. Such use of the Company funds would be improper even by an authorized signatory on the account, and would therefore justify termination.

²¹ Weiman could have taken steps to remove himself from the Division of Corporation records. See Utah Code Ann. § 16-10a-1608; see also *id.* § 16-10a-807(3); *id.* § -808(5); *id.* § -809(4).

II. THE TRIAL COURT DID NOT IMPROPERLY ADMIT HEARSAY OR RELY ON HEARSAY STATEMENTS IN ITS FINDINGS.

Plaintiffs incorrectly assert that the trial court should be reversed because it erroneously admitted hearsay testimony and then relied on the erroneously admitted testimony in its Findings of Fact and Conclusions of Law. The trial court's decision on admissibility is reviewed for an abuse of discretion. *State v. Workman*, 2005 UT 66, ¶ 10, 122 P.3d 639 (citing *Eggert v. Wasatch Energy Corp.*, 2004 UT 28, ¶10, 94 P.3d 193). The trial court did not abuse its discretion in admitting any evidence.

Plaintiffs ask this Court to strike five paragraphs from the trial court's Findings of Fact—18, 29, 32, 33, and 47—for purported improper reliance on hearsay statements. All of these paragraphs support the trial court's Conclusion of Law that Lavinia held shares in the corporation.

Plaintiffs' arguments with respect to these paragraphs are flawed for several reasons, as explained in detail herein. First, the Has overlook that the fact that the evidence was properly admitted under the business records exception to the hearsay rule. Second, in some instances, Plaintiffs failed to even object to the purported hearsay testimony in the trial court, and thus they did not preserve their arguments for appeal. Finally, the evidence Plaintiffs assert was incorrectly admitted and relied on by the trial court was not in fact hearsay because it was

not offered for the truth of the matter asserted. Each paragraph to which Plaintiffs object is addressed in turn below.

A. Paragraph 18 of the Findings of Fact is Not Based on Improperly Admitted Hearsay.

Paragraph 18 of the trial court's Findings of Fact states:

On March 23, 1999, Lavinia, who lived and worked in California, executed a proxy authorizing her brother, Weiman, to vote her shares in the Company in her absence. Unlike the other Ha family members, Lavinia was not involved in the day-to-day running of the market. Sylvia testified that she was also living with Lavinia at the time, and Lavinia showed her the document and explained it to her. Cuong also testified that he received the signed proxy mailed from Lavinia around that time.

App'x A at 4. Plaintiffs objected to the admission of the Revocable Proxy document (Exhibit D6) demonstrating that Lavinia authorized Weiman to vote her shares in the company in her absence. However, the document was properly admitted as a business record. (R. 1539 at 38-39). Utah Rule of Evidence 803(6) provides that records of regularly conducted activity of a business is not excluded by the hearsay rule if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the ordinary course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness

. . . and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Utah R. Evid. 803(6). All of these requirements are satisfied here, as Cuong, the Company president and one of its records custodian, testified that the proxy documents were kept by the market in the regular and ordinary course of business, and keeping such records was the Company's regular practice. (R. 1539 at 38-39). The testimony also demonstrated that the Revocable Proxy was signed by Lavinia near the time it was created. (R. 1539 at 37-38, 40; R. 1541 at 126-129); *see also* Section I(D)(4) *supra*. Nor is there anything in the record to indicate a lack of trustworthiness such that it was an abuse of discretion for the trial court to admit the document under the exception.²²

Even if in error, the admission of the Revocable Proxy (Ex. D6) would be harmless given that there was ample non-hearsay evidence demonstrating the fact that Lavinia owned shares in the Company. *See* Section I(B) *supra*; *see also In re J.C.*, 808 P.2d 1131, 1136 (Utah Ct. App. 1991) (concluding that harmless error

²² Plaintiffs argue that the Revocable Proxy (D6) and Revocation of Proxy (D11) documents are not trustworthy because they were "fabricated" by Sylvia. However, Sylvia testified extensively about the original creation of these documents and the need to re-create the originals, which were known to exist but could not be located in Weiman's little room (or elsewhere), for proper recordkeeping purposes. The trial court, in the exercise of its discretion, found this testimony credible, and that decision should be affirmed. *See* Section I(D)(4) *supra*.

doctrine applied to appellant's claim that juvenile court improperly admitted hearsay evidence when other non-hearsay evidence supported the juvenile court's conclusions).

B. Paragraph 29 of the Findings of Fact is Not Based on Improperly Admitted Hearsay.

Paragraph 29 of the trial court's Findings of Fact states:

Around this same time, Lavinia revoked the proxy she had given to Weiman to vote her shares in the company. The proxy revocation was mailed to and received by Cuong [Trang].

App'x A at 6. Like the Revocable Proxy document discussed above, this Revocation of Proxy Document (Ex. D11) was properly admitted by the trial court as a business record. (R. 1539 at 50). Proper foundation was laid by Cuong about this document being regularly kept in the course of business. (R. 1539 at 48-50). Cuong also testified that he recognized Lavinia's signature on the document, that Lavinia mailed the document to him, and that the revocation of proxy was the type of document that the market keeps and maintains in the regular and ordinary course of business. (*Id.*; see also Section I(D)(4) *supra*). Moreover, there is no indication that the document lacks trustworthiness such that it was an abuse of the trial court's discretion to admit the document into evidence. (See note 17, *supra*). Finally, like the Revocable Proxy document discussed above, the admission of this Revocation of Proxy document, even if it

was erroneous (though it was not), is subject to the harmless error doctrine given that ample non-hearsay evidence supported the finding that Lavinia Ha owned shares in the Company. *See* Section I(B) *supra*.

C. Paragraphs 32 and 33 of the Findings of Fact are Not Based on Improperly Admitted Hearsay.

Paragraphs 32 and 33 of the trial court's Findings of Fact state:

32. In May 2009, Cuong and Sylvia discovered that the tax filings had not been filed with the federal government and state.

33. The Company later filed several tax returns based on the incomplete corporate records, including the Election form, and incorrectly stated the stock shareholders [held] in the Company. The Court finds the testimony credible that the Company was waiting, on the advice of the accounting professionals, for the Court's determination of ownership.

App'x A at 7. Plaintiffs argue that the court erroneously allowed in hearsay evidence about what the letters from the taxing authorities stated and also about the advice of the accounting professionals. (Br. at 27-28).

With respect to paragraph 32, Plaintiffs failed to object to this evidence and their argument is therefore not preserved. *Brady v. Park*, 2013 UT App 97, ¶ 38, 302 P.3d 1220 (to be preserved for appeal, an issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue (quotations and citations omitted)). The following exchange took place at trial

when counsel for the Trangs was conducting the direct examination of Sylvia Trang:

Q. Did there come a time when you learned that tax returns had not been filed on behalf of Southeast Supermarket?

A. Yes.

Q. When did you learn this?

A. That was May 2009?

Q. And how did you learn this?

A. We learned about it through a letter through—that was sent to Southeast by the Utah State Tax Commission.

(R. 1541 at 49.) Counsel for Plaintiffs did not object until later, after counsel for the Trangs asked what the letter from the Utah State Tax Commission actually stated. *Id.* at 49-50. Paragraph 32, which merely addresses the fact that the lack of tax filings was discovered, is therefore fully supported by the testimony quoted above to which no objection was lodged.

The findings articulated by the trial court in Paragraph 32 are also supported by the corporate minutes in Exhibit D23, which contain statements about the company receiving notice from the taxing authorities that taxes had not been filed by Southeast. The minutes were properly admitted by the trial court as business records. (R. 1541 at 53-55). Again, the admission of these records under Utah Rule of Evidence 803(6) was proper because foundation was laid that the

minutes were created by Sylvia on the same day that the meeting was held, that the record was kept in the ordinary course of a regularly conducted activity of the business, that making the record was a regular practice of that activity. (R. 1541 at 50-54). In addition, there is no evidence indicating that the corporate minutes in Exhibit D23 suffer from a lack of trustworthiness. The trial court did not, therefore, err in making its findings in paragraph 32.

Regarding Paragraph 33, Plaintiffs argue that this finding is based on hearsay because it relies on out-of-court statements of accountants who advised the company not to file amended tax returns listing Lavinia as a shareholder until ownership of the Company was determined in court. For several reasons, Plaintiffs' argument with respect to Paragraph 33 fails.

First, counsel for Plaintiffs failed to object to the introduction of this testimony. The following exchange took place when Defendants' counsel was conducting the examination of Sylvia:

Q. Did you believe that Lavinia was a shareholder at the time that the tax returns were prepared?

A. Yes, I did.

Q. So why does she not appear in the tax returns?

A. Because this was the only document and the best document that I could find at that time to prepare the tax returns. . . . And I was advised to file it as soon as I can, just to file it so it's there and that—and that we

could amend the records when we find the correct information.

Q. So why haven't you amended your tax filings?

A. Because of—of the missing minutes, the paperwork along the lines, and because where I was advised by accountants to—that we should wait because of this litigation, because of this lawsuit, and because we're waiting for a judicial ruling before we could actually re-file so we wouldn't have to constantly amend our tax filings.

(R. 1541 at 84-86). No objection to this testimony was made by Plaintiffs' counsel.

Indeed, Plaintiffs' counsel actually elicited further testimony about the advice of accountants from Sylvia. (R. 1542 at 66). Plaintiffs cannot now take advantage of this supposed error when it was their counsel who helped elicit the purportedly objectionable testimony. *See State v. Dunn*, 850 P.2d 1202, 1220 (Utah 1993) (discussing invited error doctrine).

Plaintiffs contend that a continuing objection preserves their argument with respect to Paragraph 33. However, a review of the record demonstrates that the continuing objection was not intended to cover all supposed hearsay statements in the course of the seven-day trial, but rather was limited to matters having to do with the allegedly hearsay statements of Ellen, a third-party not present at trial. (*See* R. 1538 at 135-136, 139-140). Thus, Plaintiffs did not properly preserve their objection to the testimony now claimed to be hearsay, and this Court should decline to consider it on appeal.

In addition and alternatively, the findings in Paragraph 33 are not based on hearsay because the statements by Sylvia regarding the advice of the company's accountants were not offered for the truth of the matter asserted. It is fundamental that hearsay is defined as a statement that "a party offers in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c)(2). The testimony about the advice of accountants was not presented to prove that what the accountants stated to Sylvia was true, but rather that it was said and that Sylvia acted on the statement in electing not to file amended Company tax returns listing Lavinia as a shareholder. This evidence therefore falls outside of the hearsay rule, and there was no error in the trial court admitting it and using it to support its Findings of Fact.

D. Paragraph 47 of the Findings of Fact is Not Based on Improperly Admitted Hearsay.

Paragraph 47 of the trial court's findings states:

On July 17, 2013, Lavinia entered into a Stock Interest Redemption Agreement pursuant to which the Company agreed to redeem her 20,000 shares for \$138,000.

App'x A at 9. Plaintiffs objected to the admission of the Stock Interest Redemption Agreement (Ex. D19), but the trial court admitted it holding that it was a business record. (R. 1539 at 111-116). Like the other documents discussed herein, proper foundation was laid for the admission of this document as a

business record by Cuong, the Company's president. (R. 1539 at 104-108). Also, like the other documents discussed herein, even if the Redemption Agreement itself was admitted in error, the admission would be harmless because there was ample non-hearsay evidence to support the finding. Namely, there was unobjected to testimony from Cuong and Sylvia regarding the stock transaction that is separate and apart from the allegedly hearsay agreement. (R. 1539 at 104-106; R. 1541 at 36-41). The admission of the Redemption Agreement, even if erroneous (which it was not), was also harmless because the fact that Lavinia owned 20,000 shares in the Company was established by ample evidence. *See* Section I(B).

In sum, all of Plaintiffs' arguments regarding the trial court's Findings of Fact being based on hearsay are unavailing, the trial court did not commit error, and the trial court's challenged findings should be affirmed.

III. DEFENDANTS WERE NOT REQUIRED TO MAKE LAVINIA HA A PARTY TO THE CASE BEFORE INTRODUCING EVIDENCE ABOUT HER SHARES IN THE COMPANY.

In its ruling, and based on evidence submitted by Defendants, the trial court found that Lavinia contributed money to the market, was to initially receive 35,700 shares, but gave 15,700 of those shares to Weiman, leaving her with 20,000 shares. The trial court also found that on July 17, 2013, Lavinia entered into a Stock Interest Redemption Agreement pursuant to which the

Company agreed to redeem her 20,000 shares for \$138,000. (Findings of Fact, App'x A, at ¶¶ 9, 16, 47.)

Plaintiffs argue that the trial court should be reversed because Defendants should not have been able to introduce evidence about Lavinia's shares in the Company and the agreement by which the Company purchased those shares because she was not a party to the case. Plaintiffs cite Utah Rule of Civil Procedure 14, which states: "At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to him for all or part of the Plaintiff's claim against him." They argue that Defendants were required to join Lavinia as a party before any evidence could have been admitted regarding Lavinia's interest in Southeast Supermarket. (Br. at 39).

This argument fails. As a threshold matter, the rule is permissive. See Utah R. Civ. P. 14 (setting forth when a party "may" join a third-party). It does not require that a third-party be added to the case before evidence about that party can be offered to the court.²³

²³ Compulsory joinder is addressed in Rule 19 of the Utah Rules of Civil Procedure. But Plaintiffs did not cite or analyze that rule anywhere in their brief, and have therefore waived any error allegedly relating thereto. See *Pixton v. State Farm Mut. Automobile Ins. Co.*, 809 P.2d 746, 751 (Utah Ct. App. 1991) ("Generally, where an appellant fails to brief an issue on appeal, the point is waived."). Even if they had timely raised the issue, however, it would not require reversal. The

Moreover, Rule 14 relates solely to the addition of a party that might be liable on the Plaintiffs' claims. The rule does not apply in a case, such as this, that does not assert liability and seeks only equitable relief—namely, the calling of a shareholders' meeting. (*See Verified Complaint*, R. 7-11.)

As noted by Plaintiffs, a third-party claim may be asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim, or when the third-party is secondarily liable to defendant. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 960 n.8 (Utah Ct. App. 1989). There is no imaginable scenario under which Lavinia (the third-party) would be liable to them if Plaintiffs were successful on their cause of action seeking a shareholders' meeting. Thus, a request to bring Lavinia in as a party would have been futile and wholly improper under Rule 14(a).

Plaintiffs suggest that the Trangs had a fiduciary duty to Lavinia to protect Lavinia's interests in the corporation. *See Br.* at 40. They hypothesize that if there had been an adverse ruling against Defendants, any stock claimed by Lavinia could be negatively impacted, meaning that the Trangs could be liable to Lavinia.

whole point of the doctrine is to ensure that the parties in the case are not unfairly exposed to conflicting or multiple liabilities due to the absence of the third party. But the absence of Lavinia in this case did not expose Plaintiffs to any such potential exposure. Nor do they claim it did. At the end of the day, Plaintiff simply disliked that they could not examine Lavinia directly regarding her shares. But if Plaintiffs felt such examination critical to their case they should have taken a trial preservation or attempted themselves to bring her to court.

Id. There are multiple problems with this argument. First, Plaintiff fails to articulate exactly how an adverse ruling would harm Lavinia. Second, Plaintiffs fail to explain how they themselves have standing to assert the issue.²⁴ And third, and most importantly, this is simply not a scenario which Rule 14(a) applies. As noted, Rule 14(a) is for circumstances where a defendant brings in someone who may have liability to them for the claims of the plaintiff. It does not apply where the defendant itself may be potentially liable to the third-party. *See Amica Mut. Ins. Co.*, 768 P.2d at 960 n.8 (noting that 14(a) typically deals with situations involving indemnity, subrogation, contribution, express or implied warranty and the like, which are properly brought in a third-party complaint).

Plaintiffs argument regarding the absence of Lavinia also fails because it was not timely asserted and has therefore been waived. Prior to trial, Plaintiffs not once suggested that Lavinia was a necessary party in the action, or should have been brought in as a party by Defendants. This is despite the fact that Defendants asserted throughout the proceedings that Lavinia was one of the original shareholders. *See* Defendants' Rule 26 Initial Disclosures, App'x C hereto (identifying Lavinia Ha as a person with information regarding

²⁴ Whether the Trangs could be held liable to Lavinia is no business at all. But even if one assumes for the sake of argument that some fiduciary duty was owed, the Trangs exercised that duty by taking steps to ensure that Lavinia was compensated for her shares in the Company before any adverse decision potentially invalidating those shares had been made.

“[a]cquisition and ownership of shares of Southeast Supermarket”).²⁵ Had Plaintiffs believed it was a problem not having her in the case they should have and could have either moved to join her themselves, or moved to require Defendants to do so. They did not.

Finally, and perhaps most importantly, Plaintiffs have not cited any authority for the proposition that a third-party *must* be brought in as a party to a case before evidence regarding the interests of that party may be introduced.²⁶ In sum, the trial court properly considered the Stock Purchase and Redemption Agreement, as well as other evidence regarding Lavinia’s shares in its Findings of Fact, Conclusions of Law, Order and Judgment. The trial court did not err in concluding that Lavinia had to be a party before evidence of her interests could be received, and that decision should therefore be affirmed.

²⁵ Defendants also asserted Lavinia’s ownership of the shares during the first mediation, which was held in July 2012.

²⁶ Indeed, no such authority exists. The issue in this case was what Plaintiffs held and what Coung held. The involvement of Lavinia as a shareholder, and the subsequent redemption of her shares, was relevant evidence in answer these questions. And there was no need to have her there as a party in order for such evidence to be submitted to the trial court.

IV. THE TRIAL COURT PROPERLY DETERMINED THAT PLAINTIFFS' REQUEST FOR A SPECIAL SHAREHOLDERS MEETING WAS DEFICIENT; EVEN IF THAT DETERMINATION WAS IN ERROR, IT WAS HARMLESS BECAUSE THE COURT IN FACT ORDERED A SHAREHOLDERS' MEETING.

Plaintiffs assert that the trial court erred by determining that their April 2011 letter did not constitute a proper demand for a shareholders' meeting. Pursuant to Utah Code Ann. Section 16-10a-702(1)(b), however, a proper demand for a special shareholders' meeting must be *signed and dated by a shareholder or shareholders* holding at least a 10 percent interest in the company, and must be delivered to the company's secretary. Utah Code Ann. § 16-10a-701(1)(b) (emphasis added).

In its Findings of Fact, the trial court found that "[o]n April 11, 2011, counsel for Plaintiffs sent the Company, Attn: Cuong and Sylvia, a letter demanding that a special shareholders meeting be convened at the corporate offices of the Company no later than July 1, 2011 (the "April 2011 Demand")." In its Conclusions of Law, the trial court determined that the "April 2011 Demand did not comply with Utah law because it was signed and sent by Plaintiffs' counsel, and was not signed and dated by any of the shareholders in the company." (Conclusion of Law ¶ 9, App'x A hereto.)

Plaintiffs argue that the demand was proper even though it was signed by their attorney because of two principles of agency law: that "Utah courts have

long recognized that a client may be bound by the actions of their attorneys when the attorney is acting within the confines of their authority” and “the knowledge of an agent concerning the business which he is transacting for his principal is to be imputed to his principal.” Br. of Appellant at 42.

Defendants do not dispute that the case law cited by Plaintiffs stands for the propositions that Plaintiffs’ attorney can bind them by his actions and that knowledge of the attorney’s actions can likewise bind Plaintiffs. The Trangs do dispute the relevancy of this case law. The question here, however, is not whether Plaintiffs were in fact bound to go through with the meeting by virtue of their attorney’s actions had Defendants elected to accept the demand, but rather whether the demand for a special shareholders’ meeting met the detailed yet unambiguous requirements of the statute, which the trial court correctly concluded was not the case. The shareholder demand was not something that statutorily could be delegated to an attorney, and thus it was deficient and did not need to be accepted by Defendants.²⁷

Alternatively, even if the trial court somehow erred in concluding that Plaintiffs’ demand was not proper due to failure to comply with the statute, such

²⁷ Defendants asserted the deficiency in the notice in June 2011 (R. at 70-99). Plaintiffs could have easily corrected the error by sending a new demand that was signed directly by Plaintiffs. They did not.

conclusion was harmless error given that the court determined that a shareholders' meeting should in fact be held. The court ordered:

An annual meeting of the Company's shareholders shall be called by Defendants, and such meeting shall be held within the next seventy-five (75) days. The date, time, location, and agenda for this meeting shall be established by Defendants, and the meeting shall be noticed by Sylvia, as the Company's secretary, in accordance with the requirements of Utah law. Votes at the meeting shall be taken in accordance with the shareholder percentages set forth in paragraph 1, above.

(Order and Judgment ¶ 3, App'x A hereto.) The Company held the meeting as ordered by the trial court on January 17, 2014 (though Plaintiffs declined to attend (R. at 1488)). Thus, the trial court's conclusion that the 2011 Demand did not comply with the requirements of Utah statute did not impact the ultimate outcome of the proceedings on that question because the court ordered a meeting to be held, and a meeting was in fact held.²⁸ *In re A.M.*, 2009 UT App 118, ¶ 21, 208 P.3d 1058 ("Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." (quotations omitted)). The trial court's decision should therefore be upheld.

²⁸ Plaintiffs have alleged no harm as a result of the delay in the meeting. And any harm that could be alleged was caused by Plaintiff. *See supra* note 27.

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO AWARD COSTS FOR MEDIATION.

Plaintiffs contend that the trial court erred in awarding \$1,072.50 in mediation costs to Defendants because costs for mediation were not expressly authorized by statute. The trial court awarded these mediation costs after noting, however, that "Plaintiffs did not make any objection as to the mediation fees, and they therefore shall be awarded." (Mem. Decision Regarding Defendants' Mem. of Costs, and Plaintiffs' Mot. for Clarification and Stay at 3, R. 1519, attached hereto as App'x B). Because Plaintiffs did not object to Defendants' request for mediation fees in the trial court, they failed to preserve the issue and this Court should not consider it on appeal. *Brady*, 2013 UT App 97, ¶ 38.

Even if this Court decides to consider this issue, it should determine that the trial court did not abuse its discretion in awarding mediation costs. Rule 54(d) of the Utah Rules of Civil Procedure states that "costs shall be allowable as of course to the prevailing party unless the court otherwise directs." The Utah Supreme Court "has taken the position that the trial court can exercise reasonable discretion in regard to the allowance of costs" while exercising a "duty to guard against any excesses or abuses in the taxing thereof." *Hatanaka v. Struhs*, 738 P.2d 1052, 1055 (Utah Ct. App. 1987) (quoting *Frampton v. Wilson*, 605 P.2d 771, 773-74 (Utah 1980)).

Although there is no statute specifically allowing a prevailing party to recover its mediation expenses as a recoverable cost under Rule 54(d), the trial court in this case correctly noted that it had discretion to allow the recovery of such costs. See Mem. Decision Regarding Defendants' Mem. of Costs, and Plaintiffs' Motion for Clarification and Stay ("Decision"), App'x B hereto, at 2.

In its Decision, the trial court cited *Stevenett v. Wal-Mart Stores, Inc.*, 1999 UT App 80, 977 P.2d 508, which held:

Defendant has failed to present any evidence persuading us that the trial court abused its discretion in awarding mediation expenses to plaintiff. At most, defendant argues that the court erred in awarding mediation expenses because such expenses are not statutorily authorized costs. This argument misses the mark. In many cases we have allowed the taxing of costs despite the fact that no statute specifically authorized such costs (e.g. deposition costs). . . . Because defendant has not convinced us that the expenses incurred during mediation were unreasonable or were not 'necessarily incurred' . . . we hold that the court did not exceed its permitted range of discretion in making such an award.

Id. ¶ 39. The *Stevenett* court reasoned that it is good public policy to "encourage exploitation of alternative dispute resolution methods by allowing the prevailing party to recover costs so incurred." *Id.* ¶ 38 (citing cases outside Utah allowing awards of mediation costs); see also *Long v. Stutesman*, 2011 UT App 438, ¶ 31, 269 P.3d 178 (declining to address a trial court's award of costs for mediation in light of inadequate briefing on why an award of costs for mediation was

inappropriate). If the Court determines to consider this issue, it should hold that the trial court did not abuse its discretion in awarding the mediation costs.²⁹

CONCLUSION

For all of the foregoing reasons, the Appellees respectfully request that the trial court's decision be affirmed in all respects.

DATED this 9th day of January, 2015.



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²⁹ Defendants asserted below that the mediation costs were appropriately awarded as a sanction for Plaintiffs' failure to participate in the court ordered mediation in good faith. (R. at 1434-1439). This provides an alternative basis for affirmance on appeal. *See Bailey v. Bayles*, 2002 UT 58, ¶ 20 ("[A]n appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record.").

CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with Rule 24(f)(1) of the Utah Rules of Appellate Procedure, this brief contains 13,799 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with Rule 27(b) of the Utah Rules of Appellate Procedure, this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.


DATED this 9th day of January, 2015.


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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2015, I caused to be served by hand delivery, two true and correct copies of the foregoing APPELLEES' BRIEF to:

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Appendix A

