

2003

Mi Vida Enterprises, a Utah corporation, Plaintiff,  
Appellee and Mark A. Steen vs. Nancy Ciddio  
Steen-Adams and Charles A. Steen, III, Defendant,  
Appellant : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MI VIDA ENTERPRISES, a Utah  
corporation,

Plaintiff and Appellee,

and

MARK A. STEEN, individually  
and as personal representative of  
the Estate of M.L. Steen,

Defendant and Appellee,

vs.

NANCY CIDDIO STEEN-ADAMS  
and CHARLES A. STEEN, III,

Defendant and Appellant.

MARK  
BRI

20030896-CA  
20030022-CA

Appellate Nos.: 20030022-CA  
and 20030896-CA

ANSWER BRIEF OF APPELLEE MARK A. STEEN

ON APPEAL FROM A FINAL ORDER  
OF THE SEVENTH DISTRICT COURT  
HONORABLE LYLE ANDERSON, PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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UTAH APPELLATE COURTS

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## **I. JURISDICTION**

This Court's jurisdiction is secured by U.C.A. § 78-2a-2(3)(j), and is not disputed by any party.

## **II. STATEMENT OF ISSUES, STANDARD OF APPELLATE REVIEW, AUTHORITY AND PRESERVATION OF ISSUES IN RECORD**

Pursuant to Utah R. App. P. 24(h), Appellee Mark A. Steen ("Mark") accepts the "Statement of Issues, Standard of Appellate Review, Authority and Preservation of Issues in Record" provided by Co-Appellee Mi Vida Enterprises, Inc. ("Mi Vida"), which provides a far more thorough and accurate account of the proper standard of review applicable to the various issues presented by Appellant for review. In particular, Mark would underscore a point made by Co-Appellee Mi Vida in its Answer Brief, namely, the Appellants' failure to comply with Utah R. App. P. 24(a)(9). Appellants have failed to present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the findings the Appellants now appeal.

But worse than that, the Appellants have omitted some of the most important facts – some of which are so significant that they effectively determine the issues raised here on appeal. Salient, too, is the fact that Appellants have neglected, if that be the word, to append the trial court's more detailed "Ruling on Motion to Certify as Final" of December 3, 2002, as distinct from the "Order Certifying Summary Judgment" of the same date. While the latter is appended as Exhibit 12 of the Addendum to Brief of Appellants, the former, mysteriously, is not. This omission is

significant because the former contains much of the detail that Appellants claim is required if a proper certification is to be granted. This complaint about a lack of detail is the focus of Appellants' second issue on appeal. It can be readily resolved by simply reviewing the Ruling, as distinct from the Order, which is appended in Mark A. Steen's own Addendum filed with this Answer Brief.

Also appended in Mark A. Steen's Addendum is the trial court's initial "Ruling on Motions for Preliminary Injunction" since that ruling, issued at the very outset of this case on April 12, 2000, set the tone for all that followed.

### **III. STATUTES**

The pertinent statutes applicable in this case are as follows:

U.C.A. § 16-10a-740  
U.C.A. § 16-10a-1430  
U.C.A. § 16-10a-1431  
U.C.A. § 16-10a-1432  
U.C.A. § 16-10a-1434  
U.C.A. § 78-12-27  
U.C.A. § 78-12-56

### **IV. STATEMENT OF THE CASE**

#### **A. Response to "Procedural" History**

Mark adopts Co-Appellee Mi Vida's Response to Appellants' "Procedural" History. However, Mark would add that certain factual evidence presented in the trial phase of this case, which occurred in April and May of 2003, confirmed certain holdings made earlier in the case, back in September of 2002, in what we will call the summary judgment phase.

Recall that the substance of this case originated in the district court for Boulder County, Colorado when the Appellants and certain other putative shareholders (“the Dissidents”), holding one-sixth of the stock of Mi Vida, filed a complaint seeking the judicial dissolution of Mi Vida and the interim appointment of a receiver (“the Colorado Action”). The complaint further alleged a host of direct and derivative shareholder claims of the standard sort required in order to justify dissolution. These claims were alleged against not only Mi Vida but Mark, both individually and in his capacity as personal representative of his mother’s estate, Mark’s brother John Steen (“John”) and his father, Charles A. Steen, Sr., as well as a number of Colorado companies in which Mark held an equity interest.

Since the bulk of the shareholder claims, which provided “grounds” for dissolution, concerned transactions that occurred seven to more than twenty years prior to the filing of the suit, these claims were vulnerable to a dismissal based on a statute of limitations defense. When Mi Vida moved to dismiss them on this basis here in Utah, Appellant Nancy Ciddio Steen-Adams (“Nancy”) defended by arguing that she did not actually know about the transactions, that Mark and others were obliged to tell her about them, and they did not do so or did so inadequately.

Mi Vida replied that if Nancy did not actually know, she *should* have known, about the transactions underlying her claims, and that where she was not actually informed about these events, she was put on the “inquiry notice” years and years ago, so that the three year statute of limitations to file any claim of these ancient causes of action had long since expired.

The details of how the trial court resolved these issues back in 2002 can be found in the court's "Findings of Fact, Conclusions of Law and Final Order," dated September 16, 2002, which Appellants have appended as Exhibit 3 to their Addendum. These details are discussed extensively below. Again, this ruling on summary judgment was subsequently certified as final for purposes of appeal by the trial court's separate Ruling and its separate Order, both on December 3, 2003. (These orders are hereinafter collectively referred to as the "Summary Judgment Ruling.")

Since the trial court was obliged to take evidence on the remaining "claims" that had not been dismissed, as well as Mi Vida's and Mark's claims for fees, further evidence was adduced at trial that bore on the issue of what Nancy knew or should have known and whether there was any merit in her claims. Paradoxically, some of this evidence was introduced by Nancy herself. Since she sought to prove that one more of her remaining derivative claims had merit, she further claimed that she was thus entitled to a recoupment of some portion of her attorney fees and costs pursuant to U.C.A. § 16-10a-740. To this end, she put on evidence of her attorney's fees and related correspondence.

To make a long and rather dreary story short, this evidence suggests that Nancy was advised by her own attorneys that her claims were vulnerable to a statute of limitations defense; they also disclosed to her that she might be vulnerable to sanctions like an assessment of attorney fees and costs.

## **B. Factual History**

Pursuant to Utah R. App. P. 24(h), Mark adopts Co-Appellee Mi Vida's Factual History. Mark would further note that the Appellants' Brief continues the same pattern found in the complaint originally filed in the Colorado Action: Appellants seem utterly incapable of stating facts without personalizing them, forever imputing motives and lacing the narrative with snide remarks and gratuitous insults.

Whether the purposes of these comments is to injure and annoy, or simply to fortify Appellants' convictions with emotion where there is a dearth of facts, is hard to say. This much, however, can be safely said: none of this is a constructive contribution to the argument since these rhetorical techniques merely serve to advertise and amplify the breadth of the logical gap in the argument. Using emotively charged words in a vain effort to construct a kind of verbal bridge across this gap does not get the job that needs doing done.

## **V. SUMMARY OF ARGUMENT**

Mark would have the Court take special notice of the fact that this consolidated appeal involves two separate appeals by the Appellants. This procedural fact has added significance for both appeals, as explained below.

### **A. The First Appeal Granting Summary Judgment.**

The Summary Judgment Ruling, effectively dismissed the bulk of the shareholder derivative claims, which had grounded the claims for dissolution and receivership. This was done on the basis that the facts alleged in support of these claims, with the singular exception of the ITEC transaction, concern matters which

transpired years before, so that the statute of limitations expired long before Nancy and her son, Charles III, filed their claims with the other Dissidents.

Appellants do not here contest the applicable statute of limitations. Rather, they make two arguments: **first**, they argue that there was, as of the date of the Summary Judgment Ruling, a factual dispute concerning whether Nancy knew or should have known about the events in question; and, **second**, they argue that since “the ITEC deal underlies all of the claims for relief, and therefore because the ITEC transaction was properly pled within the statute of limitations, none of the claims should have been dismissed.” *Appellants’ Brief at 19*.

The first thing to notice here is that Nancy does not defend her dismissed claims on the basis that they were *meritorious* if somewhat stale. Rather, the defense is that she did not know that they lacked merit at the time she made them, which is something rather different. The difference is crucial here, for the reason stated by Mi Vida in its Brief: eventually, the Summary Judgment Ruling notwithstanding, these matters were actually tried before the court below in April and May of 2003, seven months after the Summary Judgment Ruling, because Mark and Mi Vida pressed for the recovery of their fees and costs. Consequently, the issue of Nancy’s knowledge, or lack thereof, *was* actually tried on the merits, and she had every opportunity to put on her case. In short, the issue of whether she could in fact controvert the finding that she knew or should have known that her claims had no basis in fact was fully resolved and moots any objection that the trial court’s Summary Judgment Ruling and subsequent certification as “final” was premature.

For the rest, the response to Nancy's first argument is just this: to this day, no evidence, over and above Nancy's protest of actual ignorance of the underlying facts, supports the allegation that she did not know the underlying truth; indeed, all of the evidence controverts this allegation, and this evidence consists of not only hard documentary evidence providing her with notice of the events at issue, but the fact that much of this evidence was reviewed by two attorneys engaged by Nancy for just this purpose.

It is hard to know what to say with regard to the second argument; it is just absurd on its face. As explained below, the ITEC transaction, which occurred in the late 1990s, has nothing whatsoever to do with the other alleged "defalcations," even if the latter are viewed as meritorious, because they occurred many, many years before.

#### **B. The Second Appeal/Attorney Fee Assessment**

The focus of the second appeal is concentrated entirely on the issue of whether attorney fees and other costs were properly assessed against Nancy and Charles, III. This was done on multiple bases, which will be briefly recounted here. Once again, however, the first thing to notice is that Appellants do not defend themselves against the assessment on the grounds that they believed then, or even now, that their claims were meritorious. Rather, the argument is that Nancy lacked the requisite intent, manifesting bad faith or some improper purpose, when she filed her claims, because she did not know anything.

The problem for Appellants is, once again, a paucity of evidence supporting the desired inference. In fact, there is no evidence whatsoever cited from the record itself in support of Nancy's "good faith." What is rather worse, no effort is made by Appellants, in compliance with Rule 24(a)(9), to marshal the record evidence that supports the trial court's challenged finding of bad faith or improper motive.

The mootness of the first appeal is confirmed by the fact that *were* this Court to grant the appeal, the remedy would be a remand wherein the trial court would be instructed to take the evidence of the very sort it had in fact actually heard when the remaining claims were tried over a period of six (6) days in April and May of 2003. And it must be admitted that the evidence in favor of the trial court's findings of fact on this score is considerable, as the following considerations suffice to show.

All of Appellants' arguments regarding the claims made below, both in Utah and, prior to that, in Colorado, must be appraised within the larger context in which they were originally made. The original complaint filed by Nancy and her cohorts had, as its principal purpose, the removal of the existing management of Mi Vida and its replacement by a receiver, to be followed by a ruinous dissolution or partition of its assets. The remaining claims for relief, the shareholder derivative claims and the so-called "direct" claims, merely afforded the pretext for dissolution and, in turn, the interim appointment of a receiver. This otherwise hopeless hodgepodge of "claims" from the Dissidents gains unitary meaning only insofar as they afford "grounds" for dissolution under the involuntary, judicial dissolution statute. The Dissidents simply

*had* to make some such claims if they were to have any hope of wresting the control of Mi Vida away from Mark and the others.

In short, the best evidence of the Appellants' intent is the overall structure their case took from the very start; this and the fact that this intent never varied throughout and was stubbornly maintained to the very last. The principal purpose was never to realize or "recover" the full value of their shares. On the contrary, this very object was studiously avoided, much as a "greenmailer" avoids (above all else) selling his shares on a market basis since this is inconsistent with his primary objective of being bought out *at a premium*. What to do then? Wreak as much harm as possible in hopes of gaining "leverage" and, thus, preferential treatment. It is an old story, ever tiresome in the telling, and the current case is but yet another instantiation of a familiar stratagem whereby one endeavors to get more than one's due and, to that end, is prepared to traumatize everyone else to get it.

None of this was lost on the trial court, which shrewdly sensed at the very outset that things were radically amiss when it was asked to review the Dissidents' efforts to dissolve a Utah corporation in another state, even though the overwhelming bulk of its assets were located in Utah. This decision to seek the dissolution of a corporation in another jurisdiction was problematic enough, but (abstruse jurisdictional scruples, however weighty, aside) more troubling was a substantive question: why wouldn't disgruntled minority shareholders *want* to be bought out of an investment in a corporation run by such (allegedly) horrid people?

To appreciate the full force of this question, two further facts must be appreciated. First, Utah has a procedure that faithfully replicates §1434 of the Model Business Corporation Act (“MCBA”), which provides for the buyout of shareholders who make a claim for dissolution. This procedure, found at U.C.A. § 16-10a-1434, provides a mechanism, too, for the valuation of not only the stock but any other claims a shareholder might have against a corporation, like legitimate “derivative” claims. Thus, if it proves true that, say, some corporate officer “diverted” assets belonging to the corporation to himself or some third party, the full value of those assets are *deemed* fully recovered by the corporation, and the dissenting shareholders’ shares are enhanced in value accordingly. In this way, nothing is “lost” in a buyout if the disgruntled shareholders had a legitimate claim; he or she is “made whole.” This is the first fact to be appreciated.

The second fact is that, Colorado, where Nancy, *et al.*, opted to file their case, has no such procedure! Why, then, elect to proceed in Colorado? This was the initial question that the trial court posed to the Dissidents’ counsel at a hearing held on April 10, 2000 when it was asked by Mi Vida to enjoin the Dissidents from seeking dissolution outside of Utah in a state that did not give corporations the right to buyout shareholders requesting dissolution. No answer was forthcoming. Patiently, the court persisted and pressed again. In the end, no real answer was to be had.

The details are recounted below. It is fair to say, however, that this interchange informed the entire course of the proceedings that followed. Why did the

dissident shareholders resist the opportunity to be made whole? What was to be gained? Apparently, the opportunity to be made whole was not enough – more was desired, more than what they were otherwise legally entitled to receive. It was at this juncture that one got the not-so-subtle point that some improper purpose was afoot.

On a more substantive level, there were other aspects of the Dissidents' case that were no less troubling. In order to support their claim for dissolution, admittedly a drastic remedy, the dissidents asserted massive “waste” and a wide-ranging “diversion” of corporate assets – the dramatic effect of which was heightened by accusations of “self-dealing” by Mark and others. The description was cast in lurid, melodramatic prose, salted with salacious soap-operatic details, and everything was expressed in a tone of heightened urgency. While the case principally concerned events that occurred decades before, something drastic had to be done, and be done immediately.

The trouble was that all these accusations, so easily made, ran afoul of a few stubborn facts. Mi Vida's assets consisted almost entirely of real estate, and vacant land at that, with very little income. In fact, the income for the corporation was scarcely sufficient to pay the *ad valorem* property taxes assessed against the land. These facts were, and remain, undisputed.

More to the point, these plain, homely facts immediately suggest problems for anyone contending that Mi Vida's real estate assets were “diverted” or “misappropriated.” If, as alleged, there were “diversions,” then any and all such transfers would show up in the public records by way of deed or encumbrance.

Again, what Mi Vida originally had in the way of real estate was evidenced by deeds *to* Mi Vida. Any subsequent sale or transfer by Mi Vida *out of* Mi Vida could readily be “proved up” by a review of the public records. A good start, then, in proving a case for diversion would be to pull Mi Vida’s tax records from the assessor’s office to see what parcels it still owned. Again, that’s easy and would at least give you your start. If you were also nervous about encumbrances, like mortgages and other liens, a title company could be recruited to do the rest, again in short order. And, surely, *if you were conscientious, or just mindful of your Rule 11 obligations*, this is how you *would* proceed before filing suit and *before* you started making all sorts of wild accusations.

Now there is no need to overstate matters from the other side here. A check of the public records would only give you your start. While it takes you far, it is not definitive because there are other ways in which “self-dealing” might manifest itself, even with a corporation that consists almost exclusively of unimproved real estate. Maybe there *should* have been transfers “in” that did not occur. It is presumably to cover this sort of possibility that the Dissidents further alleged a claim of “taking of corporate opportunity.” But then the mere *possibility* of this sort of thing happening does not suffice to support a genuine legal claim; you must be prepared to explain why you think some such thing *actually* occurred.

The problem that immediately and directly confronts any such suggestion is that before you can make it you have to allege, and be prepared to prove, two other things: first, that there was an opportunity that somehow “belonged” to the

corporation, and, second, that the corporation was in a position financially to avail itself of the opportunity thus provided. Both of these things are necessary if any putative plaintiff is to hope to make his case alleging a taking of corporate opportunity.

Nancy's problem here, and it is an almost insurmountable problem, is once again those stubborn facts we just alluded to, *viz.*, Mi Vida had next to no operating income. How, then, could it buy still more assets? Lest it be suggested that while this was indeed the case, Nancy, *et al.*, were not in a position to know as much, there is the added fact that she was in possession of Mi Vida's income tax returns for the years in which these multifarious "opportunities" presented themselves. A serious question is raised, therefore, about what she and her fellow dissidents *actually believed* about Mi Vida's financial-wherewithal to realize any alleged opportunities.

Before this Court decides to indulge Nancy's suspicions, seeking some credence in the barest possibility that they *might* be true, despite those plain, homely though stubborn facts enumerated above, it will want to know whether and when she was warned of these problems, even if they did not occur to her as, we contend, they should have occurred to anyone making the claims she made.

Again, an answer is readily forthcoming: Nancy and her cohorts were warned from the very outset that Mark and Mi Vida would make these very points when they moved to dismiss the Boulder Complaint (even before filing an answer and listing their defenses). While it is true that the Boulder Court denied this motion,

the Dissidents were advised from the get-go that the battle was joined on this issue, and would be fought (at least in part) on these very grounds.

More to the point, the Utah trial court raised those exact same issues in its original Ruling enjoining the Dissidents from proceeding in Colorado, at least with respect to Mi Vida's Utah real estate. *See Steen Addendum, Exhibit A, p. 7.* And yet Nancy persisted. Given the opportunity to abjure her derivative claims when the Colorado Action was dismissed, instead she renewed them. The Colorado claims, with some curious exceptions, go over essentially unchanged when she re-files her pleadings in Utah (now framed as counterclaims against Mi Vida and cross-claims against Mark). She takes care only to make them more nebulous and indefinite, perhaps in hopes of immunizing them from definite refutation.

Such hopes proved vain. The law on this score is plain: fee assessments and like penalties are awarded not only when a party files pleadings that are themselves sanctionable but also when you stubbornly persist in *maintaining* proceedings that are sanctionable. Indeed, it is arguable that the latter conduct is the more egregious.

## **VI. ARGUMENT**

### **A. WHETHER THE TRIAL COURT ERRED IN AWARDING SUMMARY JUDGMENT ON CLAIMS THAT HAD EXPIRED UNDER THE STATUTE OF LIMITATIONS**

The bulk of the Dissidents' derivative case concerned the alleged "diversion" of assets which, they claim, were owned by Mi Vida. Since none of these assets were ever actually titled in Mi Vida's name, the argument was made that they *should* have

been titled in Mi Vida's name because it was the rightful owner. These assets can be grouped together so that they fall into one of four categories:

- (1) certain Personalty;
- (2) the Cosmos Claims;
- (3) the Little and Rodgers Claims; and
- (4) the ITEC contract rights.

In its ruling granting summary judgment, the trial court dismissed all of Nancy's derivative claims with respect to those assets in categories (1) through (3), on grounds of the applicable statutes of limitation. However, it declined to dismiss any claim pertaining to the ITEC transaction on the same basis since it was more recent. *See Exhibit 3 of Appellants' Addendum.*

Appellants proceed to question in this appeal certain aspects of the Summary Judgment Ruling, through, to be sure, *only certain aspects* of that ruling. It is important to appreciate on what particular legal basis the Summary Judgment Ruling is disputed and here appealed. Nancy does **not** question the trial court's citation of the proper statute, or its calculation of the proper pertinent time period. The trial court held that U.C.A. § 78-12-27's three year period applies, and that, given that the Dissidents' complaint in the Colorado Action was signed on June 8, 1999, the question became one of whether Nancy knew, or should have known with the exercise of reasonable diligence, by June 9, 1996 that Mi Vida had no claim to the assets in question. Here the trial court cites *Stewart v. K&S Co.*, 591 P. 2d 433 (Utah 1997) in establishing June 9, 1996 as the "cut-off date."

Nancy, for her part, denies having such knowledge until “sometime” *after* July 14, 1997. Even then, as the trial court expressly noted, Nancy omits to say precisely when she did learn of these things. *See Appellants’ Addendum Exhibit 3; TCR 3052.* (This “omission,” if it can be called that, undoubtedly has an explanation that Appellants, even now, decline to give.)

Before we try to get a fix on just what Nancy knew and when she knew it, we need to be clear on just which derivative claims she is seeking to resurrect by framing an appeal on this issue. Obviously, Nancy is not trying to overcome the dismissal of the ITEC claim because, while this claim, too, was eventually dismissed, it was not dismissed by the Summary Judgment Ruling on statute of limitation grounds.

But notice further that Nancy is not looking to resurrect her claims to the Personalty originally alleged by her to have been owned by Mi Vida. This claim has apparently been abandoned for the purposes of this appeal, and then understandably so, as the trial court noted:

It appears from the allegations and uncontroverted facts that each of these claims, if legitimate, arose at or around the time of the incorporation of Mi Vida or within a few years thereafter; consequently, any claim thereto is barred by the statute of limitations on the same rationale discussed above regarding mining claims.

*Appellants’ Addendum Exhibit 3, p. 15; TCR at 3056.*

So this ground for appeal, that pertaining to the statute of limitations, concerns only Mi Vida’s alleged ownership of certain mining claims, namely, the Cosmos Claims and the Little and Rodgers Claims, or what we have called categories (3) and (4) above, and nothing else.

With that much clear, we need to focus on just why the trial court determined that Nancy knew or, with the exercise of reasonable diligence, should have known about Mi Vida's "claim" to these assets and filed before the expiration of the statute of limitations, i.e., before June 9, 1996.

Since we are dealing here exclusively with real estate, the question naturally arises as to what the real estate records might show about these mining claims. As the trial court noted, the Cosmos Claims were purchased before the 1987 Mi Vida shareholders' meeting where this purchase was discussed at length. While Nancy did not herself attend this 1987 meeting personally, she did have two attorneys (Lynn McKeever, Esq. and Anita Mosely, Esq.) there to represent her interests. As the trial court noted, after reviewing portions of a verbatim transcript of the meeting, "McKeever and Mosely participated actively in the meeting." The vicious accusations against Mark regarding the Cosmos Claims were made then by his brothers, Charles, Jr. ("Junior") and Andrew. The trial judge concluded that "No one who attended that meeting could have been unaware of the Gold Hill Venture Agreement, the dealings with the Frasers, Mark's purchase of the Cosmos Claims, or Junior's belief (supported by Andrew), that Mark was engaging in some kind of shady dealing." *Id* at 7; *TCR 3048-3049*.

In short, Nancy was put on "inquiry notice" back in 1987 (if not before) that something might be amiss, and she should have filed any claim then, or at any rate, within three years of the date of the 1987 shareholders' meeting.

A similar situation obtains with regard to the third category of assets alleged to have been "secretly diverted" by Mark from Mi Vida, namely, the Little and Rodgers

Claims. Again, the real estate records show Mi Vida never had title to these claims, but that Mark and his brother, John, had bought these claims for themselves in 1991. Apart from whatever constructive notice the real estate records provided to Nancy, there was *actual* notice of this purchase to Nancy as well, subsequently obtained at a Mi Vida shareholders' meeting held in 1991, as the trial court expressly noted:

By that time Mark and another son of Charlie Steen ("John") had purchased the Little and Rodgers claims. They did not purchase these claims with Mi Vida funds. This purchase was disclosed at the 1991 shareholders' meeting of Mi Vida.

*Appellants' Addendum Exhibit 3; p. 9; TCR at 3049-3051.*

Again, the pertinence of these undisputed facts was not overlooked by the trial court, which concluded:

There is even less basis for assuming that the Little and Rodgers Claims were purchased for Mi Vida. There is no evidence that funds from Mi Vida purchased the Little and Rodgers Claims. No agreement, draft or signed, grants Mi Vida even a prospective interest in those claims. This court doubts that Nancy ever considered the Little and Rodgers Claims part of Mi Vida, but had she so considered them, the exercise of reasonable diligence would have led her to inquire about their conveyance to Mi Vida. In view of the rancor between shareholders, the expressed distrust of Mark by Andrew and Junior, especially the December 17, 1986 letter from Andrew to the State of Colorado, a reasonable shareholder would have been on high alert for any evidence of shady dealing.

*Id. at 13; TCR at 3054.*

What do Appellants offer against this? Not much. There is no effort whatsoever to argue that these facts about what Nancy actually knew are disputed, and that the trial court got it all wrong. Nor is there any real effort to suggest that it is

somehow unreasonable or unfair to conclude that, these facts notwithstanding, Nancy *should* have known that Mi Vida had no claim to those two sets of mining claims.

Instead, we are treated to a series of red herrings that are dragged across the trail in hopes of distracting us from the real issue of what Nancy *should* have known. Again, we are told that she didn't "become aware" of these transactions until much, much later, and we are given her personal assurance on that score. Two points here in response. First, it is just not enough to protest that she didn't know. As the trial court noted, simple protestations to the contrary don't suffice under Utah R. Civ. P. 56(e). *Thayne v. Saurini*, 874 P.2d 120 (Utah 1994). Second, even if she could show she did not know, this is insufficient; the issue is not merely one of whether she actually knew, but whether she *should* have known, and whether, with the exercise of reasonable diligence, she could have then come to know. Another important fact here that is not to be overlooked is that her attorneys knew and that is quite enough: knowledge of an agent is imputed to the principal. See *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99 (Utah 2002).

For the rest, Nancy contents herself with a thinly-disguised exercise in burden-shifting: we are told that she had no way to check, that Mark was not giving her "critical documents", etcetera, etcetera.

Of course, none of this is true. More importantly, there *was* a way to check. Do not forget: we are dealing with real estate here, and that is very difficult thing to hide – if only because it is not going anywhere, too far or too fast, without public notice.

Clearly, before making false accusations Nancy had some duty to look. And yet there is no evidence that she even tried.

In the end, the Appellants can do no better than fall back on a couple of wrong-headed presumptions. One is that Nancy was under no obligation to check the real estate records because she was not herself in the chain of title. But this is wrong. Recall that Nancy's claims are *derivative* claims made allegedly on Mi Vida's behalf. Clearly, then, there was an obligation imposed on her to check Mi Vida's chain of title before asserting claims on its behalf.

Second, it is simply false that "the ITEC deal underlies all of the claims for relief." Most of the claims concern transfers that occurred years and years before ITEC ever came into existence. Thus, quite apart from any claims to "profits" for Mi Vida or other contract rights as a result of the ITEC deal of the late 1990s, the Dissidents had claimed that Mi Vida had, or should have had, title to the Cosmos Claims and the Little and Rodgers Claims back in the 1980's and early 1990's because their ownership had been "diverted" from Mi Vida. Consequently, it was *these* claims of "diversion," quite apart from the ITEC deal, that were dismissed on a statute of limitations basis, whereas the latter was not.

One final point. The Dissidents appeared to have been warned about statute of limitations problems by their initial set of attorneys, Reiman & Bayaz, P.C., since those attorneys formally disclaimed responsibility for statute of limitations problems in their formal fee agreement. While they were on contingency, they maintained time billing records, which show they researched the statute of limitations problem. See Appellants'

Trial Exhibit 418, which contains the fee agreement; see also the time entries for April 14<sup>th</sup> and 17<sup>th</sup>, just before they filed the Colorado suit.

**B. WHETHER THE RULE 54(b) CERTIFICATION OF THE SUMMARY JUDGMENT AS FINAL WAS IN ERROR**

Appellants next complain that they were somehow prejudiced by the trial court's certification of the Summary Judgment Ruling as "final." However, they do not bother to say exactly how they themselves were so prejudiced; instead they merely contend that "the court's certification was a waste of judicial resources as the final judgment did not dispose of any single claim or party." *Appellants' Brief at 21*. While the Appellants newly-found concern for "judicial resources" is something to be encouraged, it is belated to say the least, having dragged the Appellees through the district courts of two states only to have *all* of their claims dismissed.

The fact remains that that Appellants do not even begin to explain how they would stand to benefit *were* the trial court's certification reversed by this Court. In short, they do not explain how the trial court's error (if it is an error) constitutes *reversible* error. See Utah R. Civ. P. 61. For instance, Appellants do not argue that they are *now* in possession of evidence that would tell against the trial court's finding that Nancy should have pursued (or at least checked out) her various derivative claims that the trial court had dismissed more than two years ago. Appellants do not argue either that their dismissed claims are meritorious on the basis of newly discovered evidence they did not have the opportunity to present because of the Summary Judgment Ruling.

Instead, all we get is some hyper-technical objection that somehow the trial court failed to spell out (in detail sufficient to please Appellants) how there was no “factual overlap” between the dismissed and nondismissed claims. Again, exactly how this prejudiced the Appellants is left wholly unexplained.

But it is worse than that, because it is not even true. The fact is that there are very large differences between the claims that were dismissed and those that were not. The clue, of course, is the very legal basis on which some, but not all, were dismissed. Some of the claims concerned events or transactions that occurred years and years ago, well before the causes of action, premised on those events, were filed. In other words, time, as much as anything else, suffices to distinguish what got dismissed from what did not. And the time gaps are huge and cannot have escaped the notice of Nancy and her fellow Dissidents.

However, it is not just considerations of time that come into play here. As explained at the very outset, the Dissidents’ derivative claims can be sorted out in a way that attends to the different *kinds* of assets involved. We had previously identified four classes of claims by dint of the type of assets sought to be “recovered,” and so did the trial court in its Summary Judgment Ruling.

Talk of factual overlap in this context is thus fatuous: whether Mi Vida had an interest in, say, “the Personalty” has nothing whatsoever to do with the ITEC deal, and no one can credibly suggest that it does. Noticeably, Appellants studiously avoid providing us with the requisite details of “factual overlap,” and we are left to speculate wildly about what the Appellants might have had in mind.

It is not going too far to say that the only thing that could provide a conceivable basis for Appellants' argument is some erroneous belief that putative dissident shareholders are free to make some catch-all, amorphous claim for the "diversion" or "breach of fiduciary duty" which somehow covers any and all suspicions one might have about a corporate officer. Under this construction, a "legal claim" comes to little more than a hodge-podge of aimless misgivings and unarticulated fears, with every petty grievance confounded by annoyance. In this view, in the end, a "legal claim" comes to little more than name-calling, and the entire case takes a form familiar to small claims court: "Judge, the other guy is a jerk and I hate him. Make him pay me some money."

This is bad enough when laymen are involved; it surpasses the bounds of tolerance when it is sponsored and ratified by professional lawyers. The Appellants, who enjoyed three (or more) sets of lawyers, should not be indulged.

The very purpose of summary judgment proceedings is to separate the wheat from chaff so this very thing can not be done. The very point and purpose of summary judgment proceedings is to see that judicial resources are not wasted in the quixotic pursuit of imagined wrongs that find no basis in law or fact. See *Reagan Outdoor Adv., Inc. v. Lungren*, 692 P.2d 776 (Utah 1984). This is what Judge Anderson's Summary Judgment Ruling did, and he had every right to issue it. Even now, Appellants can say nothing against it other than cavil about the trial court's failure to be more articulate about the "lack" of "factual overlap." Clearly it was the *Appellant's* business to explain why, given a "deeper" appreciation of the facts than

that shown by the trial court, the dismissed claims could not be dismissed, what with their being integrally intertwined with the nondismissed claims. Instead, their job became the trial court's "job." The irony of all of this, surely, will not be lost on anyone.

But it gets even worse than this because Appellants, who cannot be troubled to explain the alleged "factual overlap," ignore the trial court's more detailed account of just why it certified the summary judgment as "final." Notice that Appellants merely append the "Order Certifying Summary Judgment as Final," that had been drafted by Mi Vida's attorney, at Exhibit 12 of Appellants' Addendum.

Reluctant to provide their own explanations of "factual overlap" between the dismissed and nondismissed claims, they might have at least confronted the trial court's misgivings about any such "overlap" in its "Ruling," drafted by the court itself and also issued on December 3, 2002. The full text is appended in Exhibit B to the Addendum to the Brief of Appellee Mark A. Steen.

In his Ruling, the trial judge states precisely why the adjudicated claims are not based on the same operative facts as the claims yet to be adjudicated. No one can be surprised to learn that the trial court pointed to the fact that huge periods of time separated the two kinds of claims. The trial judge went on to remark: "The only facts common to both claims are the identities of the litigants and that the other members of the limited liability company are the business entities Nancy unsuccessfully attempted to include in Mi Vida." *Steen Addendum Exhibit B, p. 2; TCR at 3272.*

This court may note, with further interest, that the trial judge makes reference in the closing paragraph of his Ruling to the Appellants' propensity to bolster their "claims" by citing new and additional grievances on-the-fly, so to speak. Appellants apparently believe that once the grounds for, say, a breach of fiduciary duty claim have been swept away, they remain free to resurrect that claim by casting about for new additional "grounds," thus salvaging the original "claim." The trial judge made it plain that he wasn't having it: either those "grounds" were mentioned and were but component parts of the dismissed claims, or they were not mentioned and constituted new claims regarding more recent events that then had to be added by a proper amendment to the prior pleadings. In any case, a divide of many, many years separated such new claims from the very old claims that had been dismissed.

**C. WHETHER THE DISSIDENTS' CLAIMS FOR DISSOLUTION AND RECEIVERSHIP WERE BROUGHT IN BAD FAITH, AND/OR IN VIOLATION OF RULE 11, AND/OR CONSITUTED AN ABUSE OF PROCESS**

This is not a close question. The dissolution of a corporation is an extremely drastic remedy, particularly where, as here, the Dissidents were given the opportunity to receive the full value of their shares under the court-supervised valuation process set forth in U.C.A. § 16-10a-1434. Had their derivative claims any merit in fact or law, the full value of these claims would have been added to the net worth of the corporation, so that the Dissidents would have received their pro-rated share of any enhanced value as well.

Recall that Mi Vida had, from the very start, indicated its willingness to buy out the Dissidents. (In fact, Mi Vida had stated as much in its first filings in this case. For instance, see ¶¶ 9 and 18 of the complaint and its motion for preliminary injunction at ¶¶ 2, 20 *et seq.* See *TCR at 4-7, 36-38, respectively.*) These offers were resisted, and to this end the Dissidents opposed the jurisdiction of the Utah district court. Utah law is clear that had the dissolution/receivership action been filed in Grand County, Mi Vida would be given an option to buy out the Dissidents. Significantly, this option is **not** found in Colorado's variant of the Model Business Corporation Act. The evidence is clear that the Dissidents' Colorado lawyers were acutely aware of this situation. See Appellants' Trial Exhibit 418, which contain bills from the Appellants' first set of attorneys, which show that they investigated the jurisdictional issue and reviewed Utah's statutory framework for judicial dissolution. See the time entries for August 9<sup>th</sup> and 21<sup>st</sup> of 1998 and again on April 20<sup>th</sup> of 1999. They cannot have missed the buyout provision. A reasonable inference is that the Dissidents studiously avoided Utah jurisdiction precisely because of this consequence. What is more, there is evidence that Nancy herself was fully aware of all of this since she is referenced repeatedly in the attorney bills.

First things first, however. Is the law that governs such matters clear and unequivocal? Indeed it is. (Here we can assume, *arguendo*, that there was real merit to the Dissidents' derivative claims, thus providing them with adequate legal grounds for dissolution pursuant to U.C.A. § 16-10a-1430(2) (or *C.R.S.* § 7-114-301(2) if you prefer, which is word-for-word identical).

The fact is that Mi Vida was legally incorporated in the State of Utah in 1972. It was then, and has remained since, a Utah corporation. The law is no less clear. Utah law – specifically U.C.A. § 16-10a-1431(1) – holds unequivocally that a proceeding for dissolution brought by a shareholder “*shall* be brought in the district court of the county *in this state* where the corporation’s principal office, or if it has no principal office in this state, its registered office is or was last located,” where “registered office” is defined at U.C.A. § 16-10a-102(30) to mean an office *within* the State of Utah. [Emphasis added.]

This venue provision is not unique to Utah. In fact, it embodies well established case law and is found in the Model Business Corporation Act which has been adopted not only in Utah but also in Colorado.

Considering the statutory framework alone, neither corporate code of either state authorizes the dissolution, or a receivership pursuant to dissolution, of a **Utah** corporation to occur in **Colorado**. On the contrary, Utah law clearly insists that this be done in Utah. The matter is really one of “full faith and credit” under the federal system designed by the U.S. Constitution. Less abstractly, this policy of deferring to the state of incorporation on matters pertaining to dissolution (and receiverships incidental to dissolution) is enshrined in the corporate codes of *both* Colorado and Utah.

Quite apart from the statutory regimen imposed by the States of Colorado and Utah, all of the shareholders of Mi Vida are bound by the terms of its Articles and Bylaws. The Bylaws (and Articles) provide a corporation with its governing

framework. As Henn's Treatise explains: "A few cases have recognized a contract among shareholders, which might not be amenable over the objection of any shareholder... A provision which is invalid as a bylaw might be enforced as a contract among the shareholders who approved it." *Henn, H. Law of Corporations (West Publishing Hornbook Series, Second Edition, 1970) pp. 225-226.*

In this light, it should be noticed that Mi Vida's Bylaws in pertinent part expressly provide in the opening paragraph that:

*These bylaws are based in part upon provisions of the Utah Business Corporation Act ("the Act") and provisions of the articles of incorporation of the corporation which are in effect when these bylaws are adopted. To the extent that any inconsistency exists as a result of the subsequent amendments to the Act or the Articles of incorporation or otherwise, the provisions of the Act or the Articles of incorporation shall prevail over these bylaws.*

See Exhibit B introduced at hearing of April 10, 200; *TCR at 82.*

Thus, the shareholders of Mi Vida, the Dissidents included, have through their bylaws agreed to bring their claim for dissolution in Utah where the registered office is located given U.C.A. § 16-10a-1431. This provision, therefore, had to be enforced much as any choice of jurisdiction (or venue) provision in any contract.

It is also worth pointing out that none of the Dissidents resided in Colorado, so that the standard venue provisions for tort actions could play no role here.

In defense of the notion that the Dissidents were free to file in Colorado, Appellants can apparently do no better than cite some ALR Annotation and a case from New York in an effort to suggest that if a corporation has significant "contacts" with a state, that alone somehow negates the venue statute found at U.C.A. § 16-10a-1431(1).

Clearly, it does not. The cases obliquely alluded to, but not analyzed by Appellants, actually uphold the general rule that the place to dissolve a corporation is the state of its incorporation, and merely allow an exception in those cases where there is a “pseudo-foreign” corporation, where a corporation is a Utah corporation “in name only,” having all of its assets and operations in, say, Colorado.

But Mid Vida is clearly not a pseudo-foreign corporation. Indeed, the bulk of its assets are located in Utah, considered in terms of value. The Utah trial court found that “more than 90% of Mi Vida’s assets are in Utah.” *Appellee Steen’s Addendum Exhibit 1, p. 5; TCR at 46*. This finding was based on the court’s receipt of evidence, including deeds, tax assessors’ records, and oral testimony.

Mi Vida is not without assets. It owns property in Grand County, Utah, valued by the county assessor at \$1.5 million. Mark, who is vice president and treasurer of Mi Vida, places the value of the Utah property at \$6.4 million. Mi Vida also owns patented mining claims in Boulder County, Colorado valued by the county assessor at \$92,000. Mark places the value of the Colorado property at \$750,000.

The Utah property generates gross rental income of \$46,000 per year, from which property taxes of about \$23,000 per year must be paid. The Colorado property generates no income. Very little of the real estate has been sold over the years, and Mi Vida has never had significant cash assets. Proceeds of a sale in 1994 have been deposited with the court and delinquent Utah property taxes have been paid.

*Id. at 4; TCR at 45.*

In short, it is clear by any standard that there is no way that Mi Vida can be characterized as a pseudo-foreign corporation so long as the overwhelming bulk of its assets and income are located in Utah. Consequently, there is no reason for any court to

ignore the familiar statutory regimen which obliges any shareholder seeking dissolution of a Utah corporation to file his or her complaint in compliance with U.C.A. § 16-10a-1431.

Finally, there is the aimless suggestion that the claim for the receivership can be separated, logically, from the claim for dissolution, so that the Dissidents were somehow free to request a receiver in Colorado for, say, just the Colorado property owned by Mi Vida. This is misleading for two reasons. First of all, the Dissidents asked, quite expressly in the Colorado Action, for a Colorado court to appoint a receiver under *that* court's jurisdiction for *all* of Mi Vida's property, including the bulk of its property which is found in Utah. *See TCR at 8.* Secondly, their efforts to get a receiver appointed were tied entirely to the statute for judicial dissolution. *Id.* If there was no justification for dissolution, there was no justification for the appointment of a receiver.

In short, there was no reasonable basis, in law or in fact, for the Dissidents to seek dissolution and receivership in a Colorado courtroom. That much is clear: the Colorado filing lacked merit. So why, in spite of all this, did the Dissidents elect to sue in Colorado? And was any improper purpose revealed in doing so?

Several reasons suggest themselves, but none more than that Utah has a mandatory buyout provision (*viz.*, U.C.A. § 16-10a-1434), whereas Colorado most decidedly does not. Evidence was produced which showed that the Dissidents did not want to be simply bought out; they wanted to be bought out at a premium. In particular, they wanted a minority of the shareholders to be given all of the land in Utah, with Mark, John and the others left with only the land in Colorado. *See Appellee Steen's*

*Addendum, Exhibit A at 4; TCR at 96.* Furthermore, they wanted the whole of Mi Vida to be liquidated so that it would cease to function altogether, and the non-dissenting shareholders, too, would be obliged to suffer taxation on their liquidating distributions. This maneuver was spiteful and malicious.

Mark and Mi Vida believe that the Dissidents formulated their pleadings, not with a mind to articulating a *bona fide* complaint, but rather with a view of wreaking the greatest possible trauma on the majority. The Dissidents' derivative claims (save for the most recent ITEC transaction) had to be known by them to be stale, and yet they filed them. The motive for this was they needed to find *some* grounds for seeking a dissolution, and these are the very sort of grounds the statute specifies as necessary. See U.C.A. § 16-10a-1432(2). In short, the Dissidents' pleadings were reverse-engineered: their goal fixed, they then cast about for the requisite means.

And, of course, for awhile, it worked. While Mark and Mi Vida moved immediately to dismiss the Dissidents' complaint, the Boulder Court, as the trial court noted in its initial Ruling, "declined to do so, noting it was required to accept the pleadings at face value." *Id. at 5; TCR at 46.* Hence, the subsequent ensuing trauma. And to what real purpose?

#### **D. DID NANCY AND CHARLES, III HAVE REASONABLE CAUSE TO ASSERT THEIR DERIVATIVE CLAIMS?**

U.C.A. § 16-10a-740, authorizes a trial court to assess fees against parties if they bring derivative claims that are "commenced or maintained: (i) without reasonable cause, *or* (ii) for an improper purpose" [emphasis added].

Apart from fussing for a few pages of their Brief about whether the standard to be applied is one of subjective or objective intent, Appellants simply leave the matter at that. They do not bother to argue that Nancy should not be held to answer under *either* standard. There is certainly no effort to marshal the evidence in support of the trial court's determination, let alone refute it with a mind to the applicable standard of review.

Faced with an absolute dearth of argument by Appellants, counsel for Mi Vida endeavors to "reconstruct" an argument for Appellants, by reasoning backwards to what they would *have* to say if they were to have any argument at all, and then undertakes to refute that. Pursuant to Utah R. App. 24(h), Mark adopts that reconstruction and subsequent refutation. In addition, he would underscore the following four points.

**First**, the question is posed by Appellants about whether it was reasonable to assert derivative claims against Mi Vida *in Colorado*, and yet there is no discussion of why special mention is made of Colorado. The Appellees' position is just this: there was no reasonable basis for filing these claims in *any* jurisdiction because they were groundless, frivolous and vexatious, but there was even less reason to file them in Colorado because (as explained at length elsewhere in this brief) they were conjoined with a claims for dissolution, which meant that "the whole action," as Appellants like to call it, triggered a buyout option in Mi Vida, which in turn triggered a stay of all other proceedings outside of Utah, including those derivative claims filed in Colorado. You simply must appreciate the full force and effect of U.C.A. § 16-10a-1434 or you will understand *nothing* in this case.

**Second**, Nancy conceded in her response to the summary judgment motion that she did not have any evidence to support her derivative claim that Mi Vida owned the Personality. *See TCR at 2727.*

**Third**, the derivative claims pertaining to the Cosmos Claims and Little and Rodgers Claims were dismissed on statute of limitations grounds since these transactions occurred back in the 1980's and in 1991, respectively, and Nancy had notice of this. It is simply unreasonable to persist in filing these claims when you know they are stale, and after you have been advised by your attorneys of this fact. Certainly, there was no question about whether Mi Vida and Mark would assert this defense.

**Fourth**, while the ITEC claim could not be readily dismissed on statute of limitations grounds, that does not mean it was a reasonable claim to make. In fact, Mark is persuaded that, with all due respect to the trial court, it was unduly generous to the Dissidents. The trial court has assumed that the Dissidents were looking to the ITEC deal as a way of *increasing* the value of their shares, by having Mi Vida's participation added as an asset to Mi Vida's books.

Now, in a way, that is true. But that is only because the Dissidents had alleged that Mi Vida had previously "deeded out" a portion of its properties to another entity, and it must now "reclaim" that value and, so to speak, "add back in" those properties stripped from Mi Vida's prior inventory.

Notice that in ¶ 26 of their Utah pleadings, the Dissidents talk of property being "transferred to Golden Tontine, L.L.C., Gold Reef Mining Company and/or Southern Cross Prospecting Company." *TCR at 10-11.* Later in ¶ 33, the Dissidents again make it

plain that they think certain parcels of real estate, *which had been owned by Mi Vida*, were then deeded over to other third parties – all, of course, to benefit Mark. *TCR at 12*. But none of this is true. There are no such deeds transferring real estate out of Mi Vida's name.

Niceties aside, the transaction with ITEC was a “grubstake deal” of a kind familiar in mining operations wherein no underlying real estate is ever conveyed. What needs to be “accounted for,” then, is any realized profits (or losses). But this is not what the Dissidents asked for. What they asked for was to have the underlying real property, deeded into one or another company, deeded back to Mi Vida. Again, *this* claim is entirely without any basis in law or fact, and it was unreasonable to suggest otherwise when a simple check of the real estate records would have been made. Instead, we got groundless accusations.

Needless to say, these accusations were never vindicated. As the trial court ultimately found, there was no evidence that Mi Vida was either damaged by the transaction or that it had profited thereby: “I didn’t hear enough evidence to persuade me that the ITEC claim is of any value to the corporation. The claim is dismissed.” *See Appellants’ Addendum, Exhibit 4, p. 14; TCR at 3702*.

The trial court was again too generous: there was affirmative evidence, uncontroverted by any other evidence, that there was no value to Mi Vida to be accounted for. The relevant citations to the record can be found in Mi Vida’s Answer Brief at 30-31.

### **E. DID THE TRIAL COURT ERR IN APPLYING UTAH LAW RATHER THAN COLORADO LAW?**

This portion of the Appellants' Brief is arguably the most incoherent. Appellants appear to be re-arguing the issue of whether the claim for dissolution, and the associated claim for receivership, should have been tried in Colorado. Here Appellants appear to indorse the sort of venue analysis given by the lower court in Boulder County, which is basically a *forum non conveniens* venue test: in deciding which venue is appropriate, one looks to the parties generally and decides which forum has the more significant contacts. Somehow these considerations are viewed as trumping U.C.A. § 16-10a-1431(1)'s specification of the proper jurisdiction for dissolving Utah corporations. In fact, this whole approach views the dissolution claim (together with the associated receivership claim) as but one claim among others that a shareholder might make, and certainly no more important than any other.

But, with all due respect to the Boulder court, this is completely wrong-headed. Dissolution is not simply one claim among others because it seeks the destruction of a legal entity which is a statutory creation of a particular state. It is the other claims, which function as grounds for dissolution, that are subsidiary. Somehow Appellants have managed to get matters *precisely backwards*: it is because they had sought dissolution that the entire case **had** to be transferred to Utah. Again, the key to grasping this point lies in appreciating the full force and effect of § 1434. Thus, the trial court is chastised by Appellants for naively believing that all "internal affairs" of Mi Vida had to be tried in Utah. The suggestion is made that it would have been prudent to have all

of the “nondissolution” claims tried first in Colorado. Only then, with that done and done successfully, the business of actually dissolving Mi Vida could be safely left to the Utah courts.

This suggestion makes no sense whatsoever. In fact, it is an act of desperation born of the failure to come to terms with the overall structure of that part of the corporate code dealing with judicial dissolutions and the express terms of the jurisdictional provision in particular. This Court will not fail to notice that Appellants never really confront the jurisdictional issue or explain how this business of “contacts” trumps the plain wording of the statute.

Part of the problem, of course, is that Appellants have gone and confused venue with subject matter jurisdiction. It is not as though Boulder is just a bad place to try some, if not all, of these claims; it is the entirely wrong place. That is because Utah provides that if a shareholder petitions to dissolve a Utah corporation, that triggers a buyout right by the corporation, and if the corporation exercises that right, all related claims by the petitioning shareholders are *stayed*, and these same claims are adjudicated by the Utah court handling the dissolution. If there is any merit to these other claims, the value of those claims is rolled back into the value of the stock, and the petitioning shareholder is benefited on a *pro rata* basis. (He or she may also be compensated for any outlay of fees and costs required to secure this added benefit for the corporation.)

Again, Mi Vida exercised its buyout rights, and § 1434 being what it is, that meant that these could be no proceedings in Colorado or elsewhere – PERIOD. So it is not as though we could have a case in Colorado and another in Utah. This was a *legal*

*impossibility*, and this is why it was unreasonable for Nancy, *et al.*, to proceed in Colorado. They had no legal basis to do so, and, what is rather worse, they knew it.

It is this last point that requires emphasis: the Dissidents, none of whom resided in Colorado, filed there rather than in Utah in order to frustrate Mi Vida's buyout rights. Again, Colorado does not recognize such rights in a corporation, and by the Appellants' brand of "choice of law" analysis, Mi Vida should not have been given these rights, the Utah Corporate Code notwithstanding.

This is why the trial court found bad faith in the Dissidents' actions, and, in particular, in their opposition to Utah's jurisdiction; it seemed they were trying to prevent Mi Vida from exercising its buyout rights. Again, the trial judge could not suppress the question that would occur to any reasonable person: why didn't these disgruntled shareholders was to be bought out on a fair basis provided by § 1434? What were they trying to accomplish? Apparently, they wanted to dissolve Mi Vida, but they didn't want to dissolve it in Utah because Utah, unlike Colorado, allowed a less drastic remedy by way of a buyout. This, apparently, was a result to be avoided at all costs. As the trial judge wryly noted when first confronted with this situation:

Utah law provides that shareholders seeking involuntary dissolution of a corporation can be bought out at a price determined by the court. Utah law provides a relatively quick process for determining this price. **It is not clear whether the Dissident Shareholders are willing to be bought out.** Counsel for Charles, Jr. conceded, arguendo, that dissolution can only be pursued in Utah, and then noted that the Dissident Shareholders cannot be forced to file such an action in Utah.

*Appellee Steen's Addendum, Exhibit A, pp. 5-6; TCR at 96-97 [emphasis added].*

The Appellants now resurrect this suggestion that litigation should have proceeded in both Colorado and Utah, and that this was a reasonable position to take. But it is not; it is a ploy, and a transparently insincere ploy that. The dissolution of corporations is not some isolated aspect of corporate governance; on the contrary, it is absolutely essential to the whole statutory regimen. As most clearly stated in *Friedman v. Revenue Management of N.Y., Inc.*, 38 F. 3d 668 (2d. Cir. 1994), it is “difficult to conceive of an issue more important to the state than a continuation or *dissolution* of a corporation that was created and exists through the operation of its laws.” A state has a “strong interest in the creation *and dissolution* of its corporations and in the uniform development and interpretation of the statutory scheme regarding its corporations.” *Id.* [Emphasis added.]

Again, Utah law, quite unlike Colorado law, has that special option which gives its corporations the right to buy out disgruntled shareholders. This special provision, U.C.A. § 16-10a-1434, has a purpose. According to the Official Comment to § 14.34 of the Model Business Corporation Act (from which Utah’s buyout provision is derived), the section was designed to prevent minority shareholder’s strategic abuse of dissolution petitions by making the petitioner’s shares subject to a “call.” Attempting to circumvent the “call” by filing in another state is itself a strategic abuse of the process.

Providing for the corporate buyout “guarantees that the sale of the petitioner’s shares will be in a manner that is least disruptive to control or other arrangement previously negotiated by the parties.” See *MCBA § 14.34 (1984) Official comment (emphasis added)*; see generally, *The Shareholder’s Cause of Action, Business Lawyer*;

*Vol. 48 at 719 (Feb. 1993)*. Mi Vida made it plain that it wished to avail itself of the Utah buy-out provision, and Mi Vida would have been severely prejudiced if not allowed to take advantage of this provision. Prejudiced not only because it would have been denied its buyout rights, but because the Utah statute, in order to retain control in the corporation, provides that the buyout election triggers a stay of all other proceedings against the corporation. See U.C.A. § 16-10a-1434(4).

U.C.A. § 16-10a-1434(6) provides that, upon entry of the order approving a buy-out, the court “shall dismiss the petition to dissolve the corporation,” and the “petitioning shareholder shall no longer have *any rights or status as a shareholder* of the corporation, except the right to receive the amounts awarded to him by the court.” [Emphasis added.] Thus, every claim, whether designated as a derivative claim or as a direct shareholder claim brought by the Dissidents in Colorado would have been stayed upon the entry of the order of buy-out.

Thus, under Utah law, a stay of other proceedings is integral to the buyout provisions: the value of the shares is preserved and not wasted on lengthy, costly and potentially vexatious litigation. Indeed, in this way, Utah law, quire unlike Colorado law, provides special protections for its corporations and the majority shareholders by discouraging “strike suits.” See MBCA § 14.34 (1984), Official Comment (“makes strategic use of [dissolution proceedings] a high risk proposition for the petitioning shareholder because his shares are, in effect, subject to a call....”)

By filing in Colorado, the Dissidents clearly sought to deprive Mi Vida (and the remaining shareholders as well) of these specially created rights granted by Utah

corporate code. Mi Vida must be given its rights. *See Matter of Tosca Brick Oven Bread, Inc.*, 243 A.D. 2d 416, \_\_ N.Y.S. 2d \_\_ (N.Y. App. 1997) (error for court to order dissolution without honoring election rights); *Matter of Importance*, 128 A.D. 2d 707, 312 N.Y.S. 2d 904 (N.Y. App. 1987) (“...before any dissolution may be accomplished the majority shareholders **must** be given the opportunity to purchase the petitioner’s shares at their fair value.”) [emphasis added]; *Matter of Julius M. Gerzof v. Coons*, 168 A.D. 2d 619, 563 N.Y.S. 2d 458 (1990) (in proceeding where the majority shareholder elected to buy out the plaintiff, information concerning the majority shareholder’s alleged misconduct may be considered to determine if such conduct adversely impacted on the corporation’s fair value.)

The fact that the Dissenting Shareholders reference the Utah dissolution statute in their first pleadings in the Colorado Action showed their awareness and intent to deprive Mi Vida of these rights. Initially, Mi Vida’s Colorado attorneys were slow to pick up on the motive, intent and effect, precisely because they were unaware of Utah law; but the manner in which William Jennings, Esq., counsel for Charles, Jr., flaunted the damage to Mi Vida (“But they don’t get buyout rights”) at the April 10, 2002 hearing showed the disdain for the exclusive jurisdiction of the Utah court regarding Mi Vida and its rights (both for a buyout and for a stay) upon the commencement of a dissolution proceeding. U.C.A. § 16-10a-1431(1) was thus violated and violated in bad faith and for an improper purpose.

Again, while the Dissidents original counsel in the case, Rieman & Bayaz, P.C. worked on a contingency basis (50% of the proceeds gained), the firm maintained

billing records which showed that they researched Utah law and the jurisdictional issues in particular. See Appellants' Trial Exhibit 418, *passim*, especially time entries for 8/19/98, 8/21/98, 2/22/98, 3/05/99 and 4/20/99. A review of those invoices further reveals that Nancy was involved early on in these proceedings and then throughout. She was, as the trial court observed, no passive spectator.

**F. DID THE TRIAL COURT ERR WHEN IT FAILED TO FIND THAT MARK STEEN BREACHED HIS FIDUCIARY DUTIES OWED TO MI VIDA AND NANCY STEEN-ADAMS**

The last twelve pages of the Appellants' Brief is devoted to suggesting that quite apart from the larger claims concerning the four types of property discussed above, there were a host of other "claims" that the trial court dismissed improperly and these "claims," if nothing else, bar any award of fees and costs in favor of Mark and Mi Vida. We are then treated to a litany of trivialities that, somehow, cobbled together constitute a "breach of fiduciary duty" by Mark, and one that, somehow, vindicates Nancy's improperly filed claims and vexatious litigation strategy.

Since Mi Vida's Answer Brief deals with each of these issues in full, there is no reason to repeat its refutation here. What we have here, of course, is a variant of what in rhetoric is sometimes called "the-ten-leaky-buckets tactic." While none of the individual points made "hold any water" – not at least if you expect to go any distance – it is hoped that, taken together, they might come to something, and that, at any rate, beats nothing.

But they are worse than nothing, if only because they afford a real measure of the Appellants' intent, demonstrated time and time again in this case. Outrageous

allegations are made. Evidence is produced to show that they are false. No genuine concessions are forthcoming, but the Dissidents retreat and retrench. Not long thereafter, new accusations would be made, and these too would be rebuffed.

It is the same even now. As Mi Vida explains in its Brief, the latest “parade of horrors” consist of previously abandoned claims (e.g., the request for an accounting), a lapse in Mi Vida’s registration (long since cured) and, finally, and best of all, “claims” which arose *after* the buyout date and thus after Nancy lost her status as a shareholder with standing to complain about such things.

To appreciate how delicious this is, you have to recall that Dissidents were never ones to stick at standing: three of the Dissidents claimed shareholder status, though no stock was ever issued to them (leaving their “interest” inchoate at best); and four of them filed for bankruptcy protection without going to the bother of listing their equity interests in Mi Vida as assets to be liquidated in payment of their creditors.

No one can pretend to be surprised that people who do such things, or closely associate themselves with people who do such things, have not a care about what kind of accusations they make: they want what they want and any means to that end suffices.

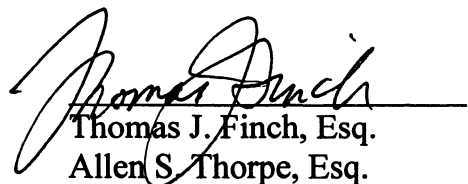
## VII. CONCLUSION

In a Brief that is already too long, there is no need for an extended conclusion. An appeal is not a second bite at the apple, where you try to persuade another tribunal, having failed to persuade the first. Distilled to its essence, the Appellants’ Brief comes to little more than this: what we did wasn’t that bad, please find some way to reduce the assessment of fees against us.

But Appellants have not given this Court a way. To this day, they do not understand the consequences of what they did. Even now, they shrug off the fact that they pressed for nothing less than the wholesale dissolution of Mi Vida with all of the resultant trauma that would entail. And then they did this, knowingly, in the wrong state in an effort to deprive Mi Vida of important rights it had as a Utah corporation.

Furthermore, in an effort to get this done, they “ginned up” a collage of claims that they had to know would, in the end, come to nothing. Undeterred, they manufactured new and additional claims on-the-fly. In this appeal they are still doing this, while studiously avoiding the real task at hand, which is showing how the trial court abused its discretion in assessing fees in (partial) compensation of what the Appellants and their cohorts put Mark and Mi Vida through. What was arbitrary, capricious or manifestly unfair about this? Again, Appellants never really say. For this reason, Mark would request his fees and costs on appeal pursuant to Utah R. App. P.33.

Respectfully submitted this 17<sup>th</sup> day of November, 2004.

  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of November, 2004, a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE MARK A. STEEN and ADDENDUM** was placed in the United States Mail, postage prepaid, properly addressed to the following:

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