

2002

Jau-Fei Chen, Chi Wei Zhang, E. Lei Zhang, E. E. Zhang v. Jau-Hwa Stewart : Brief of Appellee

Utah Supreme Court

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Mark A. Larsen; Stacy J. McNeill; Larsen & Rico; Daniel L. Berman; Stephen R. Waldron; Berman, Tomsic .

Michael R. Carlston; Richard A. VanWagoner; David L. Pinkston; P. Matthew Cox; Snow, Christensen & Martineau; Attorneys for Plaintiffs/Appellees.

Recommended Citation

Brief of Appellee, *Jau-Fei Chen, Chi Wei Zhang, E. Lei Zhang, E. E. Zhang v. Jau-Hwa Stewart*, No. 20020777.00 (Utah Supreme Court, 2002).

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IN THE UTAH SUPREME COURT

**UTAH SUPREME COURT
BRIEF**

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG,
E. LEI ZHANG, and E. E. ZHANG,
her minor children,

Plaintiffs/Appellees,

vs.

JAU-HWA STEWART, et al.,

Defendants/Appellants.

**UTAH
DOCUMENT
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DOCKET NO. 20020777-SC

Case No. 20020777-SC

**ADDENDUM TO
APPELLEE'S BRIEF IN RESPONSE TO BRIEF OF JAU-HWA AND TAIG STEWART**

Appeal from the Order of Contempt
Fourth Judicial District Court, Utah County, State of Utah
The Honorable Fred D. Howard, District Court Judge

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Defendant/Appellant
Hwan Lan Chen

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**FILED
UTAH APPELLATE COURTS**

JUN 16 2004

IN THE UTAH SUPREME COURT

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG,
E. LEI ZHANG, and E. E. ZHANG,
her minor children,

Plaintiffs/Appellees,

vs.

Case No. 20020777-SC

JAU-HWA STEWART, et al.,

Defendants/Appellants.

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APPELLEE'S BRIEF IN RESPONSE TO BRIEF OF JAU-HWA AND TAIG STEWART**

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XI. ADDENDUM

Temporary Restraining Order and Order to Show Cause dated January 10, 2001 [Exhibit 201]	A
Interim Order dated February 21, 2001 [Exhibit 202]	B
Motion to Dismiss for Lack of Appellate Jurisdiction and Standing, and Memorandum in Support	C
Utah Supreme Court Order dated November 25, 2002	D
Affidavits:	E
October 12, 2001 Affidavit of Gary Takagi [R. 2962]	
Affidavit of Karen Moosman [R. 2866]	
Affidavit of Carl Brewer [R. 2844]	
Affidavit of Mary Spencer [R. 2832] [Ex. 238; Attachment to Affidavit is Ex. 238A]	
Affidavit of Latha Heikkila [R. 2825]	
Affidavit of Wayne Kelley [R. 2822]	
Affidavit of Kitty Mao [R. 2816]	
Affidavit of Patty Jensen [R. 2811]	
Affidavit of Lynn Walker [R. 2807]	
Affidavit of Gina Lipe [R. 2798] [Attachment to Affidavit is Ex. 242A]	
Supplemental Affidavit of Gina Lipe [R. 2957]	
Affidavit of Shelli Sivert [R. 2793]	
Affidavit of Ron Hughes [R. 2790] [Ex. 237]	
Affidavit of Heather Turner [R. 2787]	
Affidavit of Kathy Hansen [R. 2783] [Attachments to Affidavit are Exs. 246A, 246B, 246C, and 246D]	
Affidavit of Belizario Martinez [R. 2838]	
Affidavit of Kaylynn Strong and Allison Chambers [R. 3670]	
Affidavit of Devon Grow [R. 3416] [Attachment to Affidavit is Ex. 260]	
Taig Stewart's inventory of returned property [Exhibit 523]	F
3 rd Affirmation of Jau-Hwa Stewart in Hong Kong action no. 2493 of 2001 [Exhibit 406]	G
4 th Affirmation of Jau-Hwa Stewart in Hong Kong action no. 2493 of 2001 [Exhibit 228]	H

Translation by Eric Cheng, translator for Jau-Fei Chen [Exhibit 276]	I
Translation by Edward Peng, translator for Jau-Hwa Stewart [Exhibit 504]	J
Side-by-side translation of Exhibits 276 and 504 [Exhibit 277]	K
Brief of Appellee E. Excel International, Inc., in the Special Master Appeal No. 20020927-SC (without addenda)	L
<i>Pettiford v. Durm</i> , 175 F.3d 1020 (7 th Cir. 1999)	M

Tab A

COPY

FILED
Fourth Judicial District Court
of Utah County, State of Utah

1/10/01 llm Deputy

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E.
LEI ZHANG, and E. E. ZHANG, her
minor children,

**TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE**

Plaintiffs,

vs.

Civil No. 010400098

JAU-HWA STEWART and DOES I
through X,

Judge Fred D. Howard

Defendants.

The Court, having reviewed the Verified Complaint, the Motion for Temporary Restraining Order and Order to Show Cause, and the Memorandum in Support of the Motion for Temporary Restraining Order and Order to Show Cause, and having considered the representations of counsel for the plaintiff, hereby rules as follows:

**PLAINTIFF'S
EXHIBIT**

201

Defendant Stewart's conduct herein has caused serious irreparable damage and, if not enjoined, will continue to cause serious irreparable damage. Stewart appears to have no authority to vote three quarters of the Company's shares--a clear majority over which she has no rights or control whatsoever. Despite such apparent lack of authority, she has purported to remove Dr. Chen as the president and as a director of the Company. She appears to have done so without following corporate formalities or Utah law. Her conduct in failing and refusing to ship ordered and confirmed product and in establishing competing territorial entities through threats of loss of business to the existing entities (extortion) and in causing such companies to violate their exclusive contracts with the Company, appears to constitute a serious violation and breach of her fiduciary duties as a Company director and, to the extent, if any, the Trusts have beneficial ownership of any stock, her conduct appears to constitute a serious violation and breach of her fiduciary duties as a trustee.

Her conduct appears to have seriously damaged and diminished the value of the Company to the owners. Reputational and good will damages alone are not subject to specific calculation or liquidation. She has diminished the value of the Company and the Territorial Ownerships by failing and refusing to ship ordered and confirmed product pursuant to the Company's exclusive contractual obligations, course of dealing and custom and practice. Her ultra vires conduct appears to have caused and is causing serious irreparable damage that should be halted immediately.

The damage to Dr. Chen and her three children, on balance, clearly outweighs any perceived or threatened injury the Court's entry of the TRO would cause Stewart.

Entry of the TRO would not be against or adverse to the public interest.

Dr. Chen is likely to prevail herein. The Verified Complaint also raises serious issues on the merits that warrant further litigation.

Finally, there is a real and immediate likelihood and threat that if defendant, who is scheduled to be in Asia later this week, is provided notice of the TRO, she will evade service of the TRO and continue her destructive conduct.

IT IS HEREBY ORDERED as follows:

That Defendant Stewart, her agents, servants, representatives, and any persons in active concert or participation with her are enjoined and restrained: (1) from acting as a trustee of The Chi Wei Zhang Trust, The E. Lei Zhang Trust, or The E. E. Zhang Trust, or any of them; (2) from directly or indirectly causing the Company to violate any of its exclusive contracts with territorial owners or to compete with territorial owners in violation of such contracts; and ~~(3) from acting as the Company president and otherwise as a spokesperson for the company.~~ The court also enjoins and directs Stewart immediately to fill, complete and ship all pending orders for products received from Territorial Owners where such Territorial Owners have complied with the terms of the exclusive contracts.


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4/16/01

IT IS FURTHER ORDERED that this restraining order is temporary and will expire ten days from the date hereof unless the Court has for good cause shown extended time for its

expiration. Nothing contained herein is determinative of any of the issues that will be heard at the hearing for a preliminary injunction which is set for Jan 19, 2001 at 1:30 p.m. Plaintiff is ordered to post a bond in ^{an} ~~the~~ amount of \$ to be determined at hearing.

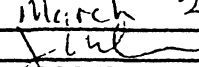
DATED this 10th day of January, 2001.

BY THE COURT:


Fourth District Court Judge



I CERTIFY THAT THIS IS A TRUE COPY OF
AN ORIGINAL DOCUMENT ON FILE IN THE
FOURTH JUDICIAL DISTRICT COURT, UTAH
COUNTY, STATE OF UTAH

DATE: 7 March 2001

DEPUTY COURT CLERK



01 JAN 10 PM 4:38

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E.
LEI ZHANG, and E. E. ZHANG, her
minor children,

Plaintiffs,

vs.

JAU-HWA STEWART and DOES I
through X,

Defendants.

TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE

Civil No. 010400098

Judge Fred D. Howard

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The damage to Dr. Chen and her three children, on balance, clearly outweighs any perceived or threatened injury the Court's entry of the TRO would cause Stewart.

Entry of the TRO would not be against or adverse to the public interest.

Dr. Chen is likely to prevail herein. The Verified Complaint also raises serious issues on the merits that warrant further litigation.

This order is entered after the Court has instructed plaintiff's counsel to advise the defendant of the Motion for TRO. Plaintiff's counsel has so advised the defendant, and the defendant has had the opportunity to be heard.

IT IS HEREBY ORDERED as follows:

That Defendant Stewart, her agents, servants, representatives, and any persons in active concert or participation with her are enjoined and restrained: (1) from acting as a trustee of The Chi Wei Zhang Trust, The E. Lei Zhang Trust, or The E. E. Zhang Trust, or any of them; (2) from directly or indirectly causing the Company to violate any of its exclusive contracts with territorial owners or to compete with territorial owners in violation of such contracts; and (3) from acting as the Company president and otherwise as a spokesperson for the company. The court also enjoins and directs Stewart immediately to fill, complete and ship all pending orders for products received from Territorial Owners where such Territorial Owners have complied with the terms of the exclusive contracts.

IT IS FURTHER ORDERED that this restraining order is temporary and will expire ten days from the date hereof unless the Court has for good cause shown extended time for its

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DATED this 10th day of January, 2001.

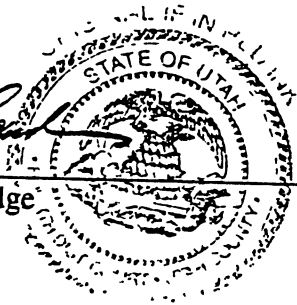
TRUE COPY OF
ORIGINAL DOCUMENT ON FILE IN THE
FOURTH JUDICIAL DISTRICT COURT, UTAH
COUNTY, STATE OF UTAH

DATE: 11 Jan 2001
Christine S. Hall
DEPUTY COURT CLERK



BY THE COURT:

David J. Gentry
Fourth District Court Judge



Tab B

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

JAU-FEI CHEN, individually and as the
natural guardian of, CHI WEI ZHANG, E.
LEI ZHANG, and E. E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART and DOES I
THROUGH X,

Defendants.

INTERIM ORDER

Civil No. 010400098

Honorable Fred D. Howard
District Court Judge

Pursuant to stipulation of the parties, the Court
hereby enters the following Interim Order. This order shall
remain in effect during the pendency of this matter or until
further order of the Court.

1. The Court will appoint an individual to act as
interim CEO/president of E. Excel International, Inc. (the
"Company") by the following process:

(a) Not later than 5:00 p.m. on February 23
2001, the Parties and their counsel will exchange lists of
not less than three and not more than five proposed

**PLAINTIFF'S
EXHIBIT**

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candidates, together with their resumes.

(b) The Parties and their counsel will promptly meet and confer to attempt to agree on one of the proposed candidates.

(c) In the event the Parties are unable to agree on a proposed candidate, the Court, after a hearing on any objections of the Parties, may select any one of the proposed candidates which the Court deems to be an independent, neutral third party.

2. There is a dispute between the Parties concerning the legitimacy of Jau-Hwa Stewart's purported appointment as president on or about September 1, 2001 as well as a dispute concerning the purported removal of Jau-Fei Chen as president on or about September 1, 2001. Neither Party shall claim to serve as CEO or president of the Company from this date forward. Neither Jau-Hwa Stewart nor Jau-Fei Chen shall be employees of the Company.

3. The board of directors of the Company as it existed prior to September 1, 2000, is reinstated effective

immediately. The board of directors is deemed to consist of Jau-Hwa Stewart, Jau-Fei Chen and Rui-Kang Zhang.

4. The stock of the Company, will be deemed to be held by Jau Hwa Stewart (25%) and by the minor children of Jau Fei Chen (75%). There is a dispute between the Parties concerning whether the 75% stock of the children is owned by the children individually or is held in trust for the children. Regardless of this dispute, throughout the course of this proceeding, the stock owned by the children or their purported trusts will be represented by a person appointed by the natural guardians of the children. No shareholders' meeting shall be held and no vote of the Company's shareholders shall be taken without prior approval of the Court. During the pendency of this Interim Order, no new stock in the Company will be issued without approval of the Court.

5. The Company's board of directors shall take no action to remove the interim CEO/President, without further order of the Court.

6. The interim CEO/President shall have full executive authority to act on behalf of the Company, and conduct its business, subject to the continuing oversight of the board of directors and the Court. If a dispute arises between the interim CEO/President and the board of directors, either may apply to the Court for relief.

7. The interim CEO/President shall provide monthly written reports to the Court and counsel on his or her activities. The interim CEO/President shall provide counsel with monthly financial statements including a balance sheet, a statement of operations, cash receipts and disbursements journals, a detailed sales journal, copies of all bank statements, bank reconciliations, a detailed report showing what invoices have not been paid, and any other reports or information reasonably requested by the Parties.

8. Hwan Lan Chen claims to have advanced 3 million dollars to the Company. There is a dispute between the Parties as to whether such monies were advanced and all issues associated with the purported advance. The Parties

reserve all rights with respect to this issue.

9. The Company shall not be required to pursue or pay for the pursuit of claims against the Parties or other persons that are of a shareholder derivative nature, and the Parties may pursue such derivative claims in their own names. Neither the Company's board of directors nor the interim CEO/President shall cause to be dismissed, settled, or otherwise compromised, any lawsuit pending purportedly on behalf of or against the Company, without prior approval of the Court. The Parties reserve the right to apply to the Court for relief requiring the Company to take or forebear specific actions with respect to any litigation to which the Company is a putative party. The interim CEO/President will promptly provide the Parties with copies of all pleadings, orders and other papers received by him or her in any litigation to which the Company is a putative party. Nothing in this paragraph is intended to waive any right of the Company with respect to purported shareholder derivative actions.

10. Pending appointment of the interim

CEO/President, all Company expenditures in excess of \$1,000 shall be submitted for joint approval to the accounting firms of RGL Gallagher, LLP and PricewaterhouseCoopers. Until appointment of the interim CEO/President and subject to the approval process set forth in this paragraph, the Company's officer manager, Beverly Warner, is authorized to sign all checks on behalf of the Company which need to be issued in the ordinary course of business. Payment for the services of the accounting firms will be made by the respective Parties. The involvement of these accounting firms in the duties described in this paragraph will not prevent them from acting as expert witnesses in this or other matters.

11. Upon selection of the interim CEO/President, he or she shall submit to the Court for its approval an acknowledgment and receipt of appointment, which shall set forth the fees and other terms of the appointment.

12. Jau Hwa Stewart shall not tortiously interfere directly or indirectly with any contract determined by the

Court at any time to exist between the Company and any distributor or any third party.


13. Jau Hwa Stewart will immediately return to the Company's headquarters any corporate assets in her custody or control including but not limited to all corporate records. A receipt shall be provided by the Company to Jau Hwa Stewart for any item so returned.

14. Nothing in this Interim Order shall be deemed a waiver of any right of any Party to seek additional relief from the Court.

15. No bond or security shall be required in connection with this Interim Order or any order issued previously in this matter.

DATED this 21st day of February, 2001.

I CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF
AN ORIGINAL DOCUMENT FILED IN THE
FOURTH JUDICIAL DISTRICT COURT, SALT LAKE
COUNTY, STATE OF UTAH
DATE: 2/21/01
[Signature]
DEPUTY COURT CLERK



BY THE COURT:

[Signature]
Honorable Fred D. Howard
District Court Judge

Approved as to Form:

[Signature]
Counsel for Plaintiff

[Signature]
Counsel for Defendant

Tab C

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Attorneys for Appellee

IN THE UTAH SUPREME COURT

JAU-FEI CHEN, individually and as the natural
guardian of CHI WEI ZHANG,
E. LEI ZHANG, and E. E. ZHANG, her minor
children,

Plaintiff/Appellee,

vs.

JAU-HWA STEWART, E. EXCEL
INTERNATIONAL, INC., a Utah
Corporation, and DOES I through X,

Defendants/Appellants.

**MOTION TO DISMISS FOR LACK
OF APPELLATE JURISDICTION
AND STANDING**

Case No. 20020777-SC

E. EXCEL INTERNATIONAL, INC.,
a Utah corporation,

Cross-Claimant,

vs.

JAU-HWA STEWART,

Cross-Defendant.

Trial Court Nos. 010400098 &
010400201

E. EXCEL INTERNATIONAL, INC.,
a Utah corporation,

Third-Party Plaintiff,

vs.

TAIG STEWART; BEVERLY WARNER;
ANGELA BARCLAY; DALE STEWART;
HWAN LAN CHEN; SAM TZU; RICHARD
HU; APOGEE, INC., a Utah corporation;
APOGEE ESSENCE INTERNATIONAL
PHILIPPINES, INC., a Philippine corporation;
EXCELLENT ESSENTIALS
INTERNATIONAL CORPORATION, a
Philippine corporation; USA APOGEE, LTD.,
a Hong Kong corporation; SHANNON RIVER,
INC., a Utah corporation; SHANNON
HEATON; SHEUE WEN SMITH; BRYAN
HYMAS; PAUL COOPER; KIM O'NEILL;
BYRON MURRAY; and JOHN DOES I
THROUGH X,

Third-Party Defendants.

JAU-HWA STEWART,

Cross-Claimant,

vs.

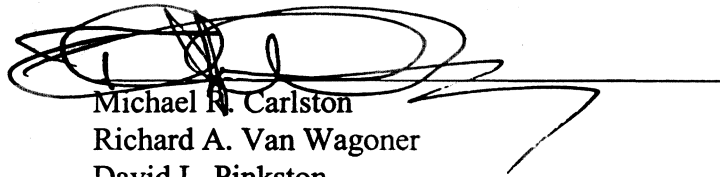
E. EXCEL INTERNATIONAL, INC., a Utah
corporation; LARRY C. HOLMAN; and GARY
TAKAGI,

Cross-Defendants.

Dr. Jau-Fei Chen moves the Court pursuant to Rule 10, Utah Rules of Appellate Procedure, to dismiss the appeals herein on the grounds that (1) the Court lacks appellate jurisdiction, and (2) the third-party defendants lack standing to appeal. This Motion is supported by an accompanying Memorandum and Exhibits thereto.

DATED this 23 day of October, 2002.

SNOW, CHRISTENSEN & MARTINEAU



Michael R. Carlston
Richard A. Van Wagoner
David L. Pinkston
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2002, I caused a true and correct copy of the foregoing **MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION** to be served on the following:

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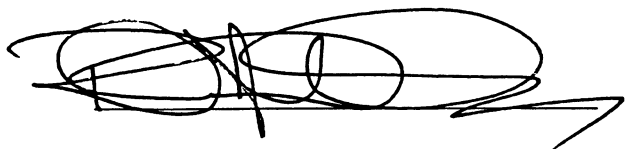
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Patrick Hoog
E. EXCEL INTERNATIONAL, INC.
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Springville, UT 84663

A handwritten signature in black ink, appearing to be a stylized name with a long horizontal stroke extending to the right.

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RICHARD A. VAN WAGONER (A4690)
DAVID L. PINKSTON (A6630)
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Attorneys for Appellee

IN THE UTAH SUPREME COURT

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Plaintiff/Appellee,

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INTERNATIONAL, INC., a Utah
Corporation, and DOES I through X,

Defendants/Appellants.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS FOR LACK
OF APPELLATE JURISDICTION
AND STANDING**

Case No. 20020777-SC

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a Utah corporation,

Cross-Claimant,

vs.

JAU-HWA STEWART,

Cross-Defendant.

Trial Court Nos. 010400098 and
010400201

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a Utah corporation,

Third-Party Plaintiff,

vs.

TAIG STEWART; BEVERLY WARNER;
ANGELA BARCLAY; DALE STEWART;
HWAN LAN CHEN; SAM TZU; RICHARD
HU; APOGEE, INC., a Utah corporation;
APOGEE ESSENCE INTERNATIONAL
PHILIPPINES, INC., a Philippine corporation;
EXCELLENT ESSENTIALS
INTERNATIONAL CORPORATION, a
Philippine corporation; USA APOGEE, LTD.,
a Hong Kong corporation; SHANNON RIVER,
INC., a Utah corporation; SHANNON
HEATON; SHEUE WEN SMITH; BRYAN
HYMAS; PAUL COOPER; KIM O'NEILL;
BYRON MURRAY; and JOHN DOES I
THROUGH X,

Third-Party Defendants.

JAU-HWA STEWART,

Cross-Claimant,

vs.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation; LARRY C. HOLMAN; and GARY
TAKAGI,

Cross-Defendants.

I. INTRODUCTION

Dr. Jau-Fei Chen (“Dr. Chen”) moves the Court to dismiss the **appeals on two grounds**. First, the order of contempt entered solely against Jau-Hwa Stewart (“Ms. Stewart”) is not final because the trial court has yet to finalize the order of sanctions against Ms. Stewart, **which is an integral part of the contempt citation**. Second, the other appellants have no standing to appeal the order against Ms. Stewart. Dr. Chen has made no claim against them and the Court has entertained no contempt motions against them. The appeal **should therefore** be summarily dismissed.

Dr. Chen sued Ms. Stewart and E. Excel International, Inc. (“Excel USA”) (“the Original Action”). Excel USA brought a Cross-Claim against Ms. Stewart and a Third-Party Complaint against Hwan Lan Chen, Taig Stewart, Beverly Warner, Angela Barclay, Dale Stewart, Sheue Wen Smith, Apogee, Inc., and others in the Original Action. Dr. Chen has not sued any of the third-party defendants. Nor has she sought relief in any form against any of the third-party defendants. In a separate action that has been consolidated herein (“Separate Action”), Ms. Stewart sued Dr. Chen and others.

Dr. Chen later brought a Motion for Order to Show Cause Why Ms. Stewart Should Not Be Held in Criminal and Civil Contempt Of Court and a Motion for Order Summarily Holding Ms. Stewart in Criminal Contempt of Court (collectively “Motions for OSC”). As part of the Motions for OSC and as a sanction for Ms. Stewart’s contumacious conduct, Dr. Chen moved the trial court to strike Ms. Stewart’s pleadings, enter a judgment against Ms. Stewart and have an evidentiary hearing on damages. After extensive evidentiary hearings on the Motions for

OSC, the trial court entered its Findings of Fact and Conclusions of Law, holding Ms. Stewart in criminal and civil contempt of court. The trial court struck Ms. Stewart's Answer and Affirmative Defenses in the original action and Affirmative Claims in the Separate Action as a sanction for her criminal and civil contempt and reserved for further proceedings the issue of damages. Pursuant to a motion by Excel USA, and as a sanction for Ms. Stewart's discovery abuses, obstruction of justice and spoliation of evidence, the trial court struck Ms. Stewart's Answer to the Cross Claim and has reserved the issue of damages. The issues as between Excel USA and the third-party defendants also remain unresolved.

In an effort to delay the ongoing proceedings in the trial court, Ms. Stewart and several other third-party defendants (collectively "Appellants") filed notices of appeal. These Appellants seek to appeal from the orders of the trial court holding Ms. Stewart in civil and criminal contempt, even though the trial court has, to date, found only Ms. Stewart in contempt, and has yet to rule on the damages issues as a sanction.

First, the orders are not appealable until the trial court has finally imposed sanctions for the contempt. The trial court has yet to fully and finally determine the sanction to be imposed upon Ms. Stewart for her contumacious acts. Second, the orders are appealable by only the contemnor, not by other litigants as against whom Dr. Chen has made no claims and as to whom the trial court has not even entertained Motions for OSC. The trial court has not held any of the other Appellants in contempt of court, and there are otherwise no final orders for them to appeal.

II. RELEVANT FACTS

Dr. Chen is married to Mr. Rui Kang Zhang (or “Mr. Zhang”). Together they are the natural parents and Dr. Chen is the legal guardian of their three minor children, Chi Wei Zhang, E. Lei Zhang, and E. E. Zhang (or the “Zhang Children”). Contempt Findings (Exhibit A), ¶¶ 3-4. At all relevant times, the Zhang Children together owned 75% (or “control shares”) of Excel USA, a closely held Utah corporation with four shareholders. Order Granting Plaintiff’s Motion For Partial Summary Judgment (Exhibit B).

Excel USA was incorporated on July 20, 1987. Exhibit A, ¶ 5. Excel USA manufactured health-related products and sold them through a multi-level network marketing system. *Id.* ¶ 6. Excel USA grew to become a successful business. Excel USA sold its products exclusively to multi-level distributors known as “Territorial Owners” that were located in countries such as Korea, Taiwan, The Phillippines, Hong Kong, Malaysia, Singapore, U.S.A. and France. Excel USA also marketed its products in Canada through a wholly-owned affiliate. *Id.* ¶ 10, 13-22.

Prior to the events that form the basis of this litigation, Excel USA was run by Dr. Chen as president, Ms. Stewart as vice-president and Mr. Zhang as secretary. Dr. Chen, her husband Mr. Zhang and Ms. Stewart also comprised Excel USA’s board of directors. Given that Dr. Chen spent large amounts of time in Asia promoting Excel USA’s’s products, Ms. Stewart became responsible for the day-to-day operations of Excel USA. *Id.* ¶¶ 7-8; Injunction Findings (Exhibit C), ¶ 2.

Dr. Chen enjoyed a good relationship with her mother Hwan Lan Chen (“Madame Chen”)

and her sister Ms. Stewart, until the spring of 2000, when the relationship began to change as a result of private family matters. Ms. Stewart and Madame Chen attempted to force Dr. Chen to divorce Mr. Zhang and leave Excel USA. Dr. Chen stayed with her husband rather than follow the demands of her mother and sister. Exhibit A, ¶¶ 37-38

To punish Dr. Chen for disobeying Madame Chen's and Ms. Stewart's demands to terminate her marriage and cease being involved in Excel USA, beginning no later than September 1, 2000 Ms. Stewart embarked upon a scheme to eliminate Dr. Chen as the leader of Excel USA, to unilaterally terminate the exclusive contractual relationships and long-term courses of dealing and performance with Territorial Owners who were loyal to Excel USA and Dr. Chen, and to establish new rogue distributors in violation of the exclusive contracts Excel USA had with Territorial Owners. *Id.* ¶ 39.

On September 1, 2000, while Dr. Chen and her husband were out of the United States, Ms. Stewart, claiming to exercise ownership control over her own shares and the control shares owned by the Zhang children (100% of the shares), through "Action by Written Consent," purported to remove Dr. Chen as a director of Excel USA, and Dr. Chen's husband Mr. Zhang as a director. Ms. Stewart purported to appoint her husband Taig Stewart and her mother Madame Chen as new directors (or, collectively "rogue board of directors"). *Id.* ¶ 40. On September 1, 2000, the rogue board of directors, through "Action by Written Consent," purported to remove Dr. Chen as president and her husband Mr. Zhang as secretary, and replace them with Ms.

Stewart as president and Ms. Stewart's husband Taig Stewart as secretary of Excel USA. *Id.* ¶ 41.¹

Having seized control of Excel USA, Ms. Stewart then proceeded to attack Excel USA's Territorial Owners in Asia. The attack consisted of two parts. First, Ms. Stewart, acting as president of Excel USA, cut off the flow of product to certain Territorial Owners. Exhibit A, ¶¶ 49-57. Second, Ms. Stewart arranged for the transfer of millions of dollars to Asia to establish new rogue distribution networks. *Id.* ¶¶ 58, 62, 64-67.

On January 10, 2001, Dr. Chen filed a Verified Complaint in the Original Case against Ms. Stewart. Also on that date, she filed a Motion for Temporary Restraining Order (or "TRO") which the Court granted as follows:

The Defendant Stewart, her agents, servants, representatives, and any persons in active concert or participation with her are enjoined and restrained: (1) from acting as a trustee of The Chi Wei Zhang Trust, The E. Lei Zhang Trust, or The E.E. Zhang Trust, or any of them; (2) from directly or indirectly causing the Company to violate any of its exclusive contracts with territorial owners or to compete with territorial owners in violation of such contracts; and (3) from acting as the Company president and otherwise as a spokesperson for the company. The Court also enjoins and directs Stewart immediately to fill, complete and ship all pending orders for products received from Territorial Owners where such Territorial Owners have complied with the terms of the exclusive contracts.

Id. ¶ 74.²

As a result of this TRO and other events, Ms. Stewart knew there was a strong possibility she would be removed as president of Excel USA. Ms. Stewart therefore decided to destroy Excel USA, rather than let it revert to Dr. Chen's control, and also to replace it with Apogee,

¹The district court later held that Ms. Stewart had no right to vote the stock of the 75% shareholders. Exhibit B.

²Dr. Chen later amended the Verified Complaint to add Excel USA as a defendant.

Inc., a new nutritional supplement manufacturing company controlled by Ms. Stewart. Exhibit C, ¶ 34.

Over the next few weeks, as the trial court held several days of hearing in order to determine whether the January 10, 2001 TRO should be converted into a preliminary injunction, Ms. Stewart and those in active concert and participation with her engaged in a course of activity designed to cripple and destroy Excel USA. After disabling the surveillance system at Excel USA's premises, Exhibit A, ¶ 112; Exhibit C, ¶ 53, Ms. Stewart and others proceeded to take and/or destroy large quantities of Excel USA's product, Exhibit A, ¶¶ 81-84, 101-07, 112; Exhibit C, ¶¶ 36, 37-38, 61-62, 63-67; take and/or destroy E. Excel's business documents and computer files, Exhibit A, ¶ 112; Exhibit C, ¶¶ 48-49, 87-90, 98-104, 110-14, 118; and to take and/or destroy Excel's equipment, Exhibit A, ¶ 112; Exhibit C, ¶¶ 86, 112, 114-15.

Many of these activities were in direct violation of the TRO entered on January 10, 2001. During the period the TRO was in effect, Ms. Stewart intentionally failed to fill confirmed orders from certain Territorial Owners despite knowing what was required, and having the ability to fill such orders. Exhibit A, at 120, ¶¶ 7-8. In addition, Ms. Stewart intentionally caused and allowed shipments of Excel USA product within her control to be shipped to new, rogue distributors loyal to her (Messrs. Hu and Tzu), despite knowing what was required and having the ability not to ship such product. *Id.* at 120-21, ¶¶ 8-11.

While the first Preliminary Injunction hearing was under way in the Original Case, on or about January 23, 2001, Ms. Stewart and Messrs. Hu and Tzu privately convened a conference telephone call. At the time the call took place, Mr. Hu was in Taiwan, and Ms. Stewart and Mr.

Tzu were in Utah in Ms. Stewart's office at Excel USA in Springville, Utah. During the telephone conversation the three of them discussed and agreed, among other things, what their testimony would be in the Preliminary Injunction proceeding then ongoing before the Court. They agreed to testify falsely concerning a number of material matters. The three of them also agreed that if they were asked questions they did not wish to answer they would say, "I cannot remember now," but agreed they could choose to thereafter "remember" whenever they wanted if it served their purposes. Exhibit A, ¶ 88.

During February 2001, a tape recording of the foregoing telephone conversation was anonymously delivered to Dr. Chen's residence in Singapore. Dr. Chen's counsel received the tape recording on February 13, 2001. Initially, Dr. Chen and her counsel were unable to obtain any information concerning who had recorded the conversation, how the recording had occurred, or where the recording had occurred. Messrs. Hu and Tzu were scheduled to testify on the same day the tape was to arrive via express mail from Singapore (February 13, 2001). Based upon the contents of the tape, Dr. Chen and her counsel believed Ms. Stewart and her witnesses likely had carried out and would further carry out a plan to commit perjury and obstruct justice. Exhibit A, ¶ 89.

Ms. Stewart called Mr. Hu as a witness for Ms. Stewart and Excel USA in the Preliminary Injunction hearing on February 13, 2001. Mr. Hu's testimony adhered to the conspiratorial agreement he, Ms. Stewart and Mr. Tzu had reached to testify falsify. In accordance with the agreements reached in the telephone conversation, after acknowledging he was under oath, was obliged to tell the truth and there could be harmful consequences if he did

not tell the truth, Mr. Hu testified: he denied he had a current business relationship with Ms. Stewart, which was false; he denied he had any association with Excellent Essentials International Corp. (the new entity in The Philippines), which was false; he denied knowing whether Paris Uy had any association with Excellent Essentials International Corp., which was false; he admitted having loaned money to Mr. Uy, but denied knowing what was the purpose of the loan, which was false; he claimed he had borrowed the money from "Mother Chen," and claimed that Ms. Stewart had played no part in his securing the loan from her mother, which was false; he denied having ever discussed with Ms. Stewart and Mr. Tzu what he would say if he were asked if he had obtained funds from Ms. Stewart and Madame Chen to give to Mr. Uy, which was false; he denied having had a conversation with Ms. Stewart concerning whether people would find out that Ms. Stewart had arranged money for him to put into a new company, which was false; he denied Ms. Stewart had told him that the money he was to receive to put into a new company was coming from Ms. Stewart's aunt, which was false; he denied that Mr. Uy was fronting him, and that the new company was really his, which was false; he denied having discussed and agreed with Ms. Stewart and Mr. Tzu that if they were asked about this money, he would simply say the money was loaned between friends from Mr. Hu to Mr. Uy for unknown purposes, which was false; he denied having discussed with Ms. Stewart and Mr. Tzu what testimony he would offer if he were called as a witness in this proceeding, which was false; he denied having discussed with Ms. Stewart and Mr. Tzu what was said in meetings at the Marriott Hotel on October 19, 2000, between a Mr. Tjandra and Dr. Chen, which was false; and, he

denied having discussed with Ms. Stewart and Mr. Tzu whether someone should go to jail, which was false. Exhibit A, ¶¶ 88-90.

Thereafter, Dr. Chen's counsel presented Mr. Hu with a translation of the above-referenced tape recording. Mr. Hu then admitted having had a conversation with Ms. Stewart. He denied recalling whether Mr. Tzu participated in the conversation, so counsel, with the court's permission, played a portion of the tape recording. Mr. Hu thereafter admitted that Mr. Tzu was a participant in the conversation. At that point, at the suggestion of counsel for Dr. Chen, the court provided instruction to Mr. Hu concerning constitutional rights, including the Fifth Amendment right against self-incrimination. The court then appointed an attorney from the Legal Defenders Association to provide assistance to Mr. Hu concerning all aspects of his remaining testimony. *Id.* ¶ 91.

Following a recess during which Mr. Hu consulted with his counsel, cross examination resumed. In response to further questions put by Dr. Chen's counsel, Mr. Hu declined to answer, and he stated he would continue to decline to answer the questions concerning the telephone conversation on Fifth Amendment grounds. *Id.* ¶ 92. Mr. Hu nonetheless answered further questions from Ms. Stewart's and Excel USA's counsel, and admitted he had been in Taiwan when the conversation took place, but said he could not remember what day or time of day it had occurred, or who had placed the call.³ *Id.* ¶ 93; Order of July 5, 2001 (Exhibit D).

³In connection with the telephone conversation, Ms. Stewart filed a motion to strike, to suppress and for sanctions against counsel and against Dr. Chen. The court denied Ms. Stewart's motion after briefing and oral argument. The court also denied the motion for sanctions on the grounds that the tape recording appeared to constitute evidence of subornation of perjury and a conspiracy to obstruct justice and defraud the court in the very case and in the proceeding in which such exhibits were used. The court explained that the issue of potential obstruction of

On February 21, 2001, the trial court entered an Interim Order to which the parties had stipulated. The Interim Order provided a mechanism for the Court to appoint a Special Master to serve as CEO of Excel USA until further Order of the Court. The Interim Order included the following:

12. Jau Hwa Stewart shall not tortuously interfere directly or indirectly with any contract determined by the Court at any time to exist between the Company and any distributor or any third party.

13. Jau Hwa Stewart will immediately return to the Company's headquarters any corporate assets in her custody or control including but not limited to all corporate records.

Exhibit A, ¶ 116.

After the issuance of the Interim Order, Ms. Stewart and her husband began preparations to vacate their offices in compliance with the court's Order. However, "the removal of Mr. and Mrs. Stewart's 'personal property' became little more than a euphemism for the wholesale conversion of critical documents and other business property at the E. Excel premises." Exhibit C, ¶ 109. The Stewarts removed paper files, computer files, intellectual property, and equipment, along with the "entire contents of the surveillance room." *Id.* ¶¶ 110-15. In addition, Ms. Stewart continued to ship product to the new distributors in violation of the Interim Order; now,

justice and the peculiarity of the tape's contents as they related to the very proceeding were such that Dr. Chen's attorneys had an obligation to advise the court concerning the tape's existence and contents. Under these circumstances, no sanctions would have been issued even if the Court had not ruled that the use of the tape and the transcripts was proper for impeachment purposes. The use and disclosure of the tape and the transcript by plaintiff's attorneys were consistent and in compliance with counsel's duties under Rules 3.3 and 3.4, Rules of Professional Conduct. In Exhibit D, the court admitted the audiotape into evidence. The court also issued a referral concerning the contents of the audiotape to the Utah County District Attorney's office. In subsequent proceedings, Ms. Stewart has offered, and the court has received, her own translation of the tape recording.

however, she did so through a separate front company, Shannon River, Inc., in order to conceal her activities from Dr. Chen and the court. Exhibit C, ¶¶ 123-29. Ms. Stewart's assistant Angela Barclay "removed all of the records relating to the Shannon River shipments from the premises of E. Excel and delivered them to Jau-Hwa Stewart." *Id.* ¶ 126. Thereafter, Ms. Barclay erased all remaining computer files pertaining to Shannon River. *Id.* See also Exhibit A, ¶¶ 99-108, 111-114.

After the issuance of the Interim Order, Ms. Stewart's preparations to compete with E. Excel through a separate entity--Apogee--continued, even though Ms. Stewart had been ordered not to interfere with any contract of Excel USA and even though Ms. Stewart remained a director (although not an officer) of Excel USA. Ms. Stewart and her mother arranged for the purchase of land for a building for the new entity, *id.* ¶¶ 142-44, hired a contractor to build the building, *id.* ¶¶ 145-49, purchased machinery and equipment for the new company, *id.* ¶¶ 166-69, and registered their new entity with the Utah Division of Corporations, *id.* ¶¶ 172-75. See also Exhibit A, ¶¶ 99, 124-186 (concerning tortious interference and competition).

Later in the year, in June 2001, Ms. Stewart openly announced her intention, formulated months earlier, to compete with Excel USA. Exhibit C, ¶ 186. Contemporaneously with that announcement, Ms. Stewart resigned as a director of Excel USA. *Id.*

On June 22, 2001, Dr. Chen filed a Motion for Order to Show Cause Why Ms. Stewart Should Not Be Held In Civil And Criminal Contempt Of Court For Her Violation Of Court Orders. (See Exhibit E.) On August 2, 2001, Dr. Chen Filed a Motion For Order Summarily Holding Ms. Stewart In Criminal Contempt Of Court. (See Exhibit F.) The Motion filed in June

2001 referenced two Orders of the Court, the TRO dated January 10, 2001 that the Court had extended without objection on January 24, 2001, and the Interim Order dated February 21, 2001. The latter Motion dealt with evidence established in part by the telephone conversation among Ms. Stewart and Messrs. Hu and Tzu, which demonstrated that Ms. Stewart had obstructed justice, suborned perjury and perjured herself during and in connection with the Preliminary Injunction hearing that began January 19, 2001, and which concluded with the entry of the Interim Order on February 21, 2001. Dr. Chen sought in the alternative an Order to Show Cause Why Ms. Stewart Should not be Held in Criminal Contempt of Court for obstructing justice and suborning perjury. Dr. Chen sought leave to address this latter Motion at the Order to Show Cause hearing. The court granted leave and such evidence was presented. Exhibit A, p. 3.

The Motions for OSC and Motion for Order Summarily Holding Ms. Stewart in Contempt of Court came before the Court for evidentiary hearing and argument commencing October 25, 2001, and were also heard on October 26, 2001; November 27 and 28, 2001; December 10, 11, 12, and 13, 2001; February 21 and 22, 2002; March 13, 15, 18 and 19, 2002; April 17, 2002 (telephonic conference with the Court and counsel); May 7, 8, 10 and 31, 2002; and June 4, 5, 7, 25 and 26, 2002. *Id.* at 4.

As a remedy for Ms. Stewart's contumacious conduct, Dr. Chen specifically asked the district court to (1) Strike Ms. Stewart's pleadings, (2) find that Dr. Chen has established the substantive allegations set forth in her verified complaint against Ms. Stewart, and (3) hold a hearing to award damages and attorneys' fees and costs. (*See* Exhibits E and F.)

During the summer of 2001, however, Ms. Stewart continued to advance her competing enterprise. She caused promotional materials to be prepared and circulated throughout Asia that included pictures belonging to Excel USA. Exhibit C, ¶ 189. She also caused her enterprise to develop a line of products to be sold through her new distribution networks. *Id.* ¶ 204; Exhibit A, ¶ 180.

As it turned out, the new distributors were ready to sell product before the new enterprise's products were ready for market. To solve this problem, Ms. Stewart caused the new distributors, on behalf of the new enterprise, simply to sell stolen Excel USA product, at a discount, in the Asian markets. Exhibit C, ¶¶ 204-05. This scheme had the added advantage of allowing Ms. Stewart and her new enterprise to appropriate some of Excel USA's goodwill in the marketplace. *Id.* ¶ 206. See also Exhibit A, ¶¶ 178-79, 186.

In the fall of 2001, Excel USA filed its Cross Claim against Ms. Stewart, and Third-Party Complaints against several other third-party defendants, including the Appellants here. Excel USA sought a preliminary and permanent injunction against Ms. Stewart to prevent her from competing with Excel USA. Excel USA also moved for a preliminary injunction against those acting in active concert or participation with Ms. Stewart. Amended Answer, Crossclaim, and Third-Party Complaint (Exhibit G); Memorandum in Support of Motion for Preliminary Injunction (Exhibit H).

The trial court combined the hearing on Dr. Chen's Motions for OSC with the hearing on Excel USA's motion for a preliminary injunction. The trial court set the first hearing dates in late October 2001. Exhibit A, p. 4.

In the meantime, Excel USA proceeded to conduct discovery of its own, both written and testimonial. Excel USA deposed Ms. Stewart in early October 2001, and served subpoenas on several other potential witnesses, including the contractor Ms. Stewart had hired to build the building for the competing enterprise. Exhibit C, ¶ 216. Approximately two weeks after the contractor received the subpoena, Ms. Stewart sent an email to him instructing him to “please delete my emails to you from now on once you read it.” *Id.*

On October 31, 2001, at Excel USA’s request and after several days of hearing and argument, the court entered a temporary restraining order prohibiting Ms. Stewart from competing with Excel USA. Despite this prohibition, immediately after the entry of the TRO, Ms. Stewart sent an email to the Asian distributors loyal to her, instructing them to “carry forth” with the Apogee enterprise until she could join them again. One week later, Ms. Stewart sent an email to the contractor for Apogee, requesting a meeting with him and again instructing him to keep their communications “confidential.” *Id.* ¶ 219.

On December 14, 2001, again upon Excel USA’s motion, the court entered a new temporary restraining order against both Apogee (Ms. Stewart’s new company) and Ms. Stewart, enjoining them from competing with Excel USA. Despite these orders, Ms. Stewart and her new enterprise, Apogee, shipped product to Asia on December 10, 2001. *Id.* at ¶ 221.

Starting with the three hearing days in October 2001, and continuing through the winter and spring of 2002, the trial court heard some 24 days of combined testimony and argument on Dr. Chen’s Motions for OSC and Excel USA’s motion for preliminary injunction. On August 20, 2002, at the conclusion of the hearing, the trial court issued two separate sets of lengthy and

comprehensive Findings of Fact and Conclusions of Law. The first set, Exhibit A, concerned Dr. Chen's Motions for OSC, wherein the trial court found that Ms. Stewart had indeed disobeyed the court's Orders and had suborned and committed perjury and should be held in criminal and civil contempt. The trial court granted Dr. Chen's prayer for relief, striking Ms. Stewart's pleadings vis-à-vis Dr. Chen, entering judgment on Dr. Chen's claims, and stated that it would set a hearing on damages and attorneys' fees. *Id.* at 126-27. The damages hearing has not yet been held (or even set), and therefore the complete sanction against Ms. Stewart has not yet been imposed.

The second set, Exhibit C, concerned Excel USA's motion for preliminary injunction, wherein the trial court held that Excel USA had met its burden of proving an entitlement to the preliminary injunction against Ms. Stewart and against most of the Third-Party Defendants, including Appellants here.

Ms. Stewart and the other Appellants now attempt to appeal from the Contempt Findings in which the trial court found only Ms. Stewart in contempt in the original case.

Toward the end of the hearing, Excel USA moved separately for sanctions against Ms. Stewart, asking the trial court to use its inherent power to sanction Ms. Stewart for her egregious behavior throughout the case, including perjury, subornation of perjury, spoliation of evidence, discovery abuses and obstruction of justice. Memorandum in Support of Motion for Sanctions (Exhibit I). In late August 2002, the trial court granted Excel USA's motion, finding that Ms. Stewart had destroyed evidence, and had committed and suborned perjury. The trial court sanctioned Ms. Stewart by striking her pleadings vis-à-vis Excel USA, and entering default in favor of Excel USA on all of Excel USA's claims against Ms. Stewart. The trial court stated it

would hold a hearing at a later date to determine Excel USA's damages and attorneys' fees.

Ruling and Order Re: E. Excel's Motion for Sanctions Against Jau-Hwa Stewart (Exhibit J).

Since the trial court's findings were entered, Excel USA has filed a motion asking the trial court to hold some of the other third-party defendants, including the Appellants here, in civil contempt of court along with Ms. Stewart. Motion for Sanctions and For Order to Show Cause Why Certain Third-Party Defendants Should Not Be Held in Civil Contempt (Exhibit K). Excel USA has not asked the court to hold the third-party defendants in criminal contempt. *Id.* The motion is pending, and is set for hearing in 2003.

Finally, even though Ms. Stewart claims the Notice of Appeal divested the trial court of jurisdiction, Ms. Stewart, Madame Chen and other third party defendants are proceeding in the trial court. For example, counsel for a number of third party defendants recently moved for an enlargement of time "to file a Motion under Rule 52 of the Utah Rules of Civil Procedure to Amend the Findings and/or make additional findings relative to the Third-Party Defendants." Motion for Enlargement of Time (Exhibit L). Madame Chen has served Dr. Chen and her husband with subpoenas for deposition and production of documents (Exhibit M). And, Ms. Stewart has moved to set aside a stipulation concerning consolidation (Exhibit N).

III. ARGUMENT

A. MS. STEWART'S APPEAL IS PREMATURE

The orders are not yet appealable because the trial court is not finished imposing sanction upon Ms. Stewart. An order of criminal contempt is not appealable until the district court has completed the process of imposing sanctions upon the contemnor. That process has not been completed in this case, and therefore Ms. Stewart's appeal is premature.

The rule is that even orders of criminal contempt are not appealable “if the question of sanctions is postponed.” 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3917, at 377-78 (2d ed. 1992). Finality, in the context of contempt orders, “requires determination of both liability and sanction, just as with ordinary civil and criminal proceedings.” *Id.* at 379; *see also Forschner Group, Inc. v. Arrow Trading Co., Inc.*, 124 F.3d 402, 410 (2d Cir. 1997); *In re U.S. Abatement Corp.*, 39 F.3d 563, 567 (5th Cir. 1994).

In this case, the trial court made a finding of contempt, but has not yet finally entered sanctions against Ms. Stewart. By way of sanction, the trial court has stricken Ms. Stewart’s pleadings, and has stated that it will award Dr. Chen (1) damages on her substantive claims against Ms. Stewart, and (2) attorneys’ fees. However, the trial court has not yet held (or even set) a hearing to determine the amount of damages and/or attorneys’ fees to be awarded, and therefore has not yet completed its process of punishing Ms. Stewart.

This Court should also be aware of the current situation in this litigation, and of the possible reasons why Ms. Stewart is attempting to immediately appeal from the trial court’s order without waiting for the damages hearing. The trial court found that Ms. Stewart was the ringleader of a criminal racketeering enterprise formed for the purpose of destroying Excel USA. *See* Exhibit C. That criminal racketeering enterprise has continued in existence, and has continued to further its objectives subsequent to the trial court’s findings and subsequent to the filing of the Notice of Appeal. Recently, for example, Excel USA discovered that Apogee--Ms. Stewart’s and Madame Chen’s company--and its affiliates were still marketing products in Excel USA’s Asian markets, in defiance of the trial court’s orders, and Excel USA successfully obtained relief against one of the entities involved. Order Holding Hamida in Contempt of Court

(Exhibit O). In addition, Dr. Chen has taken action to attach certain of Ms. Stewart's assets, to prevent Ms. Stewart from disposing of those assets prior to the damages hearing.

The court has held Ms. Stewart in contempt, imposed sanctions, granted Excel USA and Dr. Chen relief against the criminal racketeering enterprise, and stated that it will hold a damages hearing to award Dr. Chen and Excel USA damages in the near future. Ms. Stewart seeks to place the trial court proceedings on hold and to prevent the trial court from taking additional action against her. Dr. Chen believes it is precisely to avoid the ongoing proceedings before the trial court that Ms. Stewart has attempted to file this premature appeal.⁴ Indeed, Ms. Stewart has noted in a letter to counsel that it is her belief that this appeal directs the trial court of jurisdiction to take any additional action against her. Letter dated September 30, 2002 (Exhibit P).

Allowing Ms. Stewart to prosecute this appeal would effect a manifest injustice. It would allow a party held in contempt of court for violating that court's orders, and found to be the ringleader of a criminal racketeering enterprise, to be able to avoid the actual sanction of the district court and to continue (without district court oversight) the criminal activities that got her into trouble in the first place. It would put Ms. Stewart in a better position than someone who had not been held in contempt, because that person would still be subject to a damages hearing and to continuing trial court oversight. It would also be harmful to Dr. Chen because Dr. Chen would not be permitted to seek relief from the trial court in the event that Ms. Stewart engages in further contumacious conduct.

⁴ Dr. Chen also notes that if Ms. Stewart waited until after the damages hearing to appeal the trial court's findings, Ms. Stewart would then be faced with a damages judgment against her, and would have to seek a stay of execution of that award pending the appeal, and to post a bond. By filing this appeal, Ms. Stewart may be hoping to avoid those requirements.

In sum, Ms. Stewart's appeal is premature. This Court is without jurisdiction to consider it, and allowing it to proceed would work a manifest injustice. Ms. Stewart's appeal should be dismissed.

B. ONLY THE CONTEMNOR MAY APPEAL AN ORDER OF CRIMINAL CONTEMPT

The other Appellants--Madame Chen, Taig Stewart, Beverly Warner, Angela Barclay, Dale Stewart, Sheue Wen Smith, and Apogee, Inc.--lack standing to appeal from the trial court's contempt findings against Ms. Stewart, even if those findings constituted a final and appealable order. It is the rule that criminal contempt proceedings are considered wholly separate from the underlying case-in-chief. *See* 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3917, at 381-82 (2d ed. 1992). Those "separate" proceedings involved only Dr. Chen, the party seeking contempt sanctions, and Ms. Stewart, the party against whom those sanctions were sought. The other Appellants were not a part of that "separate" proceeding, and therefore have no standing to appeal the contempt findings.

Moreover, only the contemnor has standing to appeal a finding of contempt, because only the contemnor is technically a party to the separate proceeding, and because only the contemnor is aggrieved by the contempt findings. *See, e.g., Second Injury Fund v. J & S Trucking*, 30 S.W.3d 112 (Ark. Ct. App. 2000); *Becker v. Becker*, 347 A.2d 911 (Md. Ct. App. 1975); *Boone v. Boone*, 218 S.E.2d 221 (N.C. Ct. App. 1975); *cf. State ex rel. H.J. v. State*, 1999 UT App 238, ¶17, 986 P.2d 115 (stating that "an appellant generally must show both that he or she was a party or privy to the action below and that he or she is aggrieved by that court's judgment"). The only contemnor is Ms. Stewart, and therefore the only person entitled to appeal from the trial court's contempt findings (once the order is final) is Ms. Stewart.

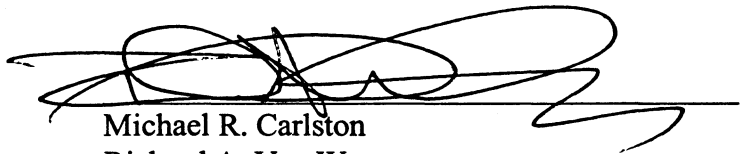
IV. CONCLUSION

The appeal should be summarily dismissed. First, the order of contempt entered solely against Jau-Hwa Stewart ("Ms. Stewart") is not final because the trial court has yet to finalize the order of sanctions against Ms. Stewart, which is an integral part of the contempt citation.

Second, the other appellants have no standing to appeal the order against Ms. Stewart. Dr. Chen has made no claim against them and the Court has entertained no contempt motions against them.

DATED this 23rd day of October, 2002.

SNOW, CHRISTENSEN & MARTINEAU

A large, stylized handwritten signature in black ink, appearing to be "Michael R. Carlston", written over a horizontal line.

Michael R. Carlston
Richard A. Van Wagoner
David L. Pinkston
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2002, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION** to be served on the following:

Via Hand Delivery:

Clark W. Sessions
Matthew A. Steward
CLYDE, SNOW, SESSIONS & SWENSEN
201 S. Main Suite 1300
Salt Lake City, Utah 84111

Mark A. Larsen
Jerome H. Mooney
David S. Hill
Jon K. Stewart
LARSEN & GRUBER
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Daniel L. Berman
Samuel O. Gaufin
Eric K. Schnibbe
BERMAN, GAUFIN, TOMSIC & SAVAGE
50 South Main Street, Suite 1250
Salt Lake City, UT 84144

Via First Class Mail:

Shannon Heaton
3312 Antigua Drive
Eugene, OR 97408

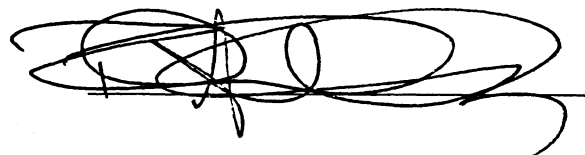
H. Thomas Stevenson
STEVENSON & SMITH
3986 Washington Blvd.
Ogden, UT 84403

Raymond Scott Berry
9 Exchange Place, #900
Salt Lake City, UT 84111

Brian Ray Hymas
115 West 300 South.
Provo, Utah 84601

Constandinos G. Himonas
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, #1500
Salt Lake City, Utah 84101

Patrick Hoog
E. EXCEL INTERNATIONAL, INC.
1198 N. Spring Creek Pl.
Springville, UT 84663

A handwritten signature in black ink, appearing to be "P. Hoog", written over a horizontal line.

Tab D

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

FILED
UTAH SUPREME COURT

NOV 25 2002

PAT BARTHOLOMEW
CLERK OF THE COURT

Jau-Fei Chen, individually and as
the natural guardian of Chi Wei
Zhang, E. Lei Zhang, and E. E. Zhang,
her minor children,

Plaintiff/Appellee,

v.

Case No. 20020777-SC

Jau-Hwa Stewart, E. Excel
International, Inc., a Utah
coproation, and Does I through X,
Defendants/Appellants.

E. Excel International, Inc., a
Utah corporation,
Cross-Claimant,

v.

Jau-Hwa Stewart,
Cross-Defendant,

E. Excel International, Inc., a
Utah corporation,
Third-Party Plaintiff,

v.

Taig Stewart; Beverly Warer; Angela
Barclay; Dale Stewart; Hwan Lan Chen;
Sam Tzu; Richard Hu; Apogee, Inc.,
A Utah corporation; Apogee Essence
International Philippines, Inc., a
Philippine corporation; Excellent
Essentials International Corporation,
a Philippine corporation; USA Apogee,
Ltd., a Hong Kong corporation;
Shannon River, Inc., a Utah
corporation; Shannon Heaton; Sheue
Wen Smith; Bryan Hymas; Paul Cooper;
Kiim O'Neill; Byron Murray; and John
Does I through X,
Third-Party Defendants.

Jau-Hwa Stewart,
Cross-Claimant,
v.

E. Excel International, Inc. a Utah
corporation; Larry C. Holman; and
Gary Takagi,
Cross-Defendants.

ORDER

The Court dismisses, sua sponte, E. Excel International's motion to dismiss on the basis that it is not a party to the criminal contempt proceedings and thus lacks standing. That dismissal moots E. Excel's motion to dismiss defendant's and third party defendants' appeals.

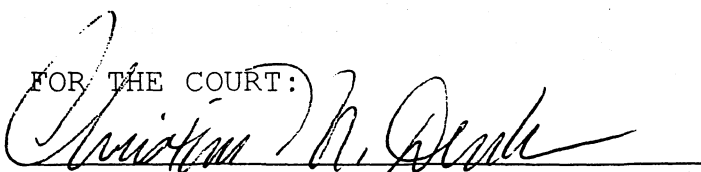
The Court denies plaintiff's motion to dismiss defendant Jau Hwa Stewart's appeal on the basis that her appeal appears at this juncture to be from a final order holding her in contempt. That order is either an order of criminal contempt or contains elements of civil and criminal contempt and will therefore be treated as a final order for purposes of appeal. Von Hake v. Thomas, 759 P. 2d 1162, 1168 (Utah 1988).

The Court defers ruling on plaintiff's motion to dismiss third party defendants Hwan Lan Chen and Taig Stewart's cross-appeals until plenary review and invites those two parties to raise the issue of their standing again in their briefs to this court.

The court dismisses, sua sponte, defendant Stewart and third party defendant Taig Stewart's issues dealing with the appointment of a special master. Those issues arose from the trial court's interlocutory order after a hearing on motion for preliminary injunction and are not appealable. The court notes that the issues have been separately raised in a petition for interlocutory appeal in case # 20020927.

Nov. 25, 2002
Date

FOR THE COURT:


Christine M. Durham
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on November 26, 2002, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

CLARK W. SESSIONS
MATTHEW A. STEWARD
CLYDE SNOW SESSIONS & SWENSON
201 S MAIN ST 13TH FLR
SALT LAKE CITY UT 84111-2216

MARK A. LARSEN
DAVID S. HILL
JON K. STEWART
LARSEN & GRUBER
50 W BROADWAY STE 100
SALT LAKE CITY UT 84101-2006

MICHAEL R. CARLSTON
RICHARD A. VANWAGONER
DAVID L. PINKSTON
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PL STE 1100
PO BOX 45000
SALT LAKE CITY UT 84145

DENO G. HIMONAS
JONES WALDO HOLBROOK & MCDONOUGH
170 S MAIN ST STE 1500
PO BOX 45444
SALT LAKE CITY UT 84145-0444

PATRICK HOOG
ATTORNEY AT LAW
1198 N SPRING CREEK PLACE
SPRINGVILLE UT 84663

SAMUEL O. GAUFIN
DANIEL L. BERMAN
ERIC K. SCHNIBBE
BERMAN GAUFIN TOMSIC & SAVAGE
50 S MAIN ST STE 1250
SALT LAKE CITY UT 84144

H. THOMAS STEVENSON
STEVENSON & SMITH PC
3986 WASHINGTON BLVD
OGDEN UT 84403

RAYMOND SCOTT BERRY
ATTORNEY AT LAW
900 BOSTON BUILDING
9 EXCHANGE PLACE
SALT LAKE CITY UT 84111

Dated this October 29, 2002.

By 
Deputy Clerk

Case No. 20020777

Tab E

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah
corporation, and JOHN DOES I THROUGH
X,

Third-Party Defendants

**OCTOBER 12, 2001 AFFIDAVIT
OF GARY TAKAGI**

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :SS.
COUNTY OF UTAH)

I, Gary Takagi, am over 18 years of age and have knowledge of the facts as set forth below, and if called to testify would testify in accordance herewith:

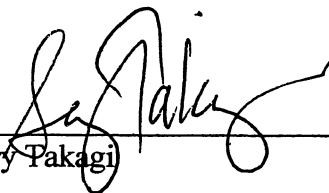
1. I am the Senior Vice President and Chief Operating Officer of E. Excel International, Inc. ("E. Excel"), having been retained by formal written agreement and my retention having been proposed by the Special Master, Larry C. Holman, and approved by the Board of Directors of E. Excel, and I am duly authorized to make this affidavit.
2. The facts set forth in this affidavit are based upon my own personal review of the business records of E. Excel prepared and maintained in the ordinary course of business of E. Excel, including but not limited to documents prepared and maintained in the ordinary course of business on behalf of E. Excel by its Certified Public Accountant, Mr. Lynn Gilbert.
3. When Jau-Hwa Stewart took control of E. Excel in September 2000, the Company enjoyed profitable distribution channels in Asia. In 1999, the Company had shipped over \$100,000,000 worth of retail product, and was on course to exceed that mark through the first nine months of 2000.
4. E. Excel shipped no product and received minimal payment from any of its existing distributors located in Asia during the period November 2000 through February 2001, a period in which Jau-Hwa Stewart controlled the Company.
5. There is no record whatsoever that E. Excel received a single payment for product

from the alternate distribution network set up by Jau-Hwa Stewart during the period of September 2000 through February 2001. Thus, between the disenfranchisement of the existing distributor to the nonfeasance of the alternate distributors, Jau-Hwa Stewart succeeded in depriving E. Excel of any income from Asia during the time she ran the Company.

6. In August 2000, Jau-Hwa Stewart and Jau-Fei Chen caused E. Excel to advance \$1,500,000 to Soldier Summit Recreation Development Co., LLC. The immediate effect of this loan was to reduce E. Excel's current operating capital. However, the ultimate effect was to leave it at significant risk of default on its own obligations if the transaction did not proceed smoothly.

7. I have also reviewed the Company's current collection of stock photographs. At least two of the photographs contained in the Apogee brochure are identical to photographs in the E. Excel collection.

DATED this 11th day of October, 2001.



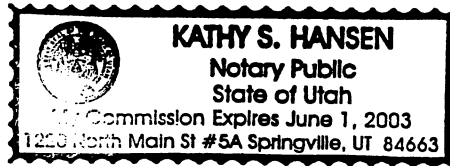
Gary Pakagi

SUBSCRIBED AND SWORN before me this 12th day of October, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville, UT

My Commission Expires:

June 1, 2003



CERTIFICATE OF MAILING

I hereby certify that the October 12th, 2001 Affidavit of Gary Takagi was mailed in the United States mail, postage prepaid, this 12th day of October, 2001, addressed

as follows:

Richard VanWagoner
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, UT 84145

Mark Larsen
Larsen & Mooney Law
50 West Broadway, First Floor
Salt Lake City, UT 84101


Secretary

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

**AFFIDAVIT OF KAREN
MOOSMAN**

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Karen Moosman, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I was employed by E. Excel International, Inc. ("E. Excel") as the accountant from June 8, 1998 to November 12, 1999.
2. In approximately 1999 Jau Hwa Stewart asked me to obtain a signed Nondisclosure and Non-Competition agreement from manufacturing and office employees.
3. I passed out and received this form from manufacturing employees and office employees. I then filed these forms.
4. From that time forth I was required to obtain the signed form from each new employee as they were hired. Attached is a copy of the Nondisclosure and Non-Competition forms.

DATED this 4 day of October, 2001.

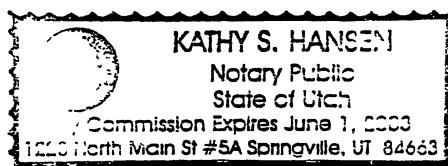
Karen Moosman
Karen Moosman

SUBSCRIBED AND SWORN before me this 4th day of October, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville UT

My Commission Expires:

June 1, 2003



EMPLOYEE NONDISCLOSURE AND NON-COMPETITION AGREEMENT

THIS AGREEMENT is entered into and effective as of the ____ day of _____, 2000, by and between E. Excel International, Inc. (hereinafter "E. Excel"), a corporation of the state of Utah having a principal business office at 1198 North Spring Creek Place, Springville, Utah 84663, and _____ (hereinafter "Employee"), an individual residing at _____.

Recitals

A. E. Excel has developed and/or acquired technology relating to nutritional immunology, health food dietary supplements and personal care products, and E. Excel is engaged in the business of further developing such technology and of manufacturing, marketing, distributing, and/or providing products and related services based upon such technology.

B. Employee desires to be employed by E. Excel and to provide assistance, as directed by E. Excel in connection with E. Excel's aforesaid business.

C. In fulfilling the duties of his/her employment with E. Excel, the parties contemplate that Employee will need to have access to certain information concerning E. Excel's technology which E. Excel regards as confidential and/or proprietary.

D. E. Excel is willing to employ Employee in connection with E. Excel's business and to provide Employee with the necessary information concerning E. Excel's technology, subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter contained, the employment and/or continued employment of Employee, and for other good and valuable consideration, the recitals and sufficiency of which are hereby acknowledged, E. Excel and Employee hereby agree, as follows:

Terms of Agreement

Section 1: Definitions

1.1 As used in this Agreement, the term E. Excel Technology shall mean the devices, systems, methods and products developed and/or acquired by E. Excel relating to nutritional immunology, health foods, diet supplements and personal care products, including, but not limited to, formulae, diagrams, blueprints, patents, applications, prototypes, and any other know-how, data, or technical information relating thereto.

1.2 As used in this Agreement, the term Confidential Information shall mean the E. Excel Technology and any and all knowledge and information regarding the E. Excel Technology and/or E. Excel's business which Employee has acquired and/or hereafter acquires on E. Excel's premises or from E. Excel or any of E. Excel's employees or representatives. Confidential Information shall specifically include all E. Excel customer and distributor listings, written and oral communications regarding the E. Excel Technology and marketing, financial, and costing information related thereto, whether in the form of lists, memoranda, letters, transcripts, sound or video recordings, computer software, printed materials, or other information storage or recording media.

Section 2: Disclosure by E. Excel

2.1 Subject to the terms and conditions of this Agreement, E. Excel will employ Employee and disclose to Employee and/or allow Employee to have access to such Confidential Information as E. Excel believes reasonably necessary to enable Employee to fulfill the duties of his/her employment with E. Excel.

Section 3: Employee's Obligation of Confidence

3.1 The parties hereto acknowledge that in furtherance of the purposes of this Agreement, Employee will have access to certain knowledge and information which is used and/or developed by E. Excel in connection with its business, which is considered by E. Excel to be proprietary, and which has been developed and/or acquired by E. Excel through considerable investment of time, money, and/or effort.

3.2 Employee acknowledges that the Confidential Information made available to Employee under this Agreement is owned and shall continue to be owned solely by E. Excel. Employee accordingly agrees not to divulge any such Confidential Information to any individual or entity without E. Excel's express consent.

3.3 Notwithstanding the provisions of paragraph 3.2 above, Employee shall have no obligation of confidence with respect to:

(a) Information which Employee reasonably demonstrates was in his/her possession in tangible form prior to any disclosure thereof by or for E. Excel;

(b) Information which Employee reasonably demonstrates was independently developed by him/her from non-confidential sources and without reference to any of the Confidential Information of E. Excel; or

(c) Information which Employee reasonably demonstrates has become generally known in the trade or public either prior to or subsequent to E. Excel's disclosure thereof through no fault of Employee.

3.4 Notwithstanding the provisions of paragraph 3.3 above, Employee will not be relieved of his/her obligations of confidence and non-use as to Confidential Information which is a combination of features merely because any or all of the individual features are included in disclosures falling within the scope of paragraph 3.3. Employee will only be relieved of his/her obligations of confidence and non-use with respect to such Confidential Information if the combination of features is included in such a disclosure.

3.5 Under no circumstances shall Employee remove from E. Excel's place of business any of E. Excel's books, records, documents, or any copies of such documents, without the express written permission of E. Excel; nor shall Employee make any copies of such books, records, or documents for use outside of E. Excel's place of business except as specifically authorized in writing by E. Excel.

Section 4: Ownership and Disclosure of Improvements

4.1 E. Excel is and shall be the owner of all rights, title, and interest in and to the following: (1) all original technical data or written materials originated and/or prepared for E. Excel by Employee, including formulae, design plans, and specifications; (2) all ideas, concepts, know-how, or techniques relating to such technical data or written materials developed during the course of Employee's employment with E. Excel; and (3) all inventions, discoveries, or improvements, including ideas, concepts, know-how, or techniques relating to the E. Excel Technology that were (a) developed by Employee or (b) conceived or originated by Employee solely or jointly with others (i) at E. Excel's request or expense, at its facilities, (ii) in the course of Employee's employment with E. Excel, or (iii) based on knowledge or information obtained from E. Excel during the course of Employee's such employment.

4.2 Employee covenants and agrees that he/she will promptly communicate and disclose to E. Excel all such data, materials, ideas, concepts, know-how, techniques, inventions, discoveries, and improvements, whether patentable or not, referred to in paragraph 4.1 above, together with any and all other enhancements, uses, modifications, and/or improvements of or to the E. Excel Technology which Employee conceives, works upon, or otherwise becomes aware of during the term of this Agreement.

4.3 Employee further agrees to irrevocably assign, transfer, and set over to E. Excel the entire right, title, and interest in and to each such idea, concept, technique, invention, discovery, improvement, enhancement, use, a modification referred to in paragraphs 4.1 and 4.2 above, including without limitation all right and title in and to a data, materials, know-how, patents, copyrights, or trade secrets which embody all or any part thereof. Employee agrees to execute, acknowledge, and deliver any and all instruments, documents, and papers and to do any and other things that may be deemed to be reasonably necessary by E. Excel to carry out the provisions of this Section 4.

Section 5: Restrictive Covenants

5.1 Employee agrees that he/she will use E. Excel's Confidential Information solely to fulfil the duties of his/her employment with E. Excel, and that he/she will not otherwise use the Confidential Information for his/her benefit or the benefit of others. Employee further agrees that he/she will not use or employ any of the Confidential Information in any way which would be harmful to or against the best interests of E. Excel.

5.2 Employee further agrees that he/she will not, during the term of this Agreement, directly or indirectly perform any services for any business, profession, or other endeavor which is either directly or indirectly in competition with the business of E. Excel. Employee agrees not to perform such services either as an employee, agent, independent contractor, owner, or otherwise.

5.3 For a period of one (1) year following the termination of this Agreement for any reason, or for a period of time equal to the length of Employee's employment with E. Excel if such tenure is less than one (1) year, Employee will not directly or indirectly solicit or sell any product which is the same as or substantially equivalent to a product manufactured, marketed, and/or distributed by E. Excel to any person, company, firm or corporation who is or was a customer of E. Excel at any time within five (5) years prior to the termination of Employee's employment with E. Excel. Employee agrees not to solicit such customers on behalf of himself/herself or any other person, firm, company or corporation.

5.4 The parties have attempted to limit Employee's right to compete only to the extent necessary to protect E. Excel from unfair competition. The parties recognize, however, that reasonable people may differ in making such a determination. Consequently, the parties hereby agree, that if the scope of enforceability of the restrictive covenants of this Agreement is in any way disputed at any time, a court or other trier of fact may modify and enforce the covenant to the extent that it believes it to be reasonable under the circumstances existing at that time.

5.5 Employee further acknowledges that in the event his/her employment with E. Excel terminates for any reason, he/she will be able to earn a livelihood without violating the foregoing restrictions and that his/her ability to earn a livelihood without violating such restrictions is a material condition to his/her employment with E. Excel.

Section 6: Term and Termination

6.1 This Agreement shall remain in effect for so long as Employee continues his/her employment with E. Excel. Upon termination of Employee's employment with E. Excel for any reason, with or without cause, this Agreement shall automatically terminate.

6.2 Within two (2) weeks following termination of this Agreement for any reason, Employee shall furnish E. Excel with written notice specifying that through reasonable care and to the best of his/her knowledge, Confidential Information has been returned to E. Excel, including all originals and all copies of any documentation containing any portion of E. Excel's Confidential Information.

6.3 The obligations contained in Sections 3, 4, 5 and 6 shall survive the termination of this Agreement. In addition, the termination of this Agreement shall not affect any of the rights or obligations of either party arising prior to or at the time of the termination of this Agreement, or which may arise by any event causing the termination of this Agreement.

Section 7: Remedies

7.1 Employee acknowledges that compliance with Sections 3, 4 and 5 is necessary to protect the business and goodwill of E. Excel and that a breach of any of these provisions will irrevocably and continually damage E. Excel, for which money damages may not be adequate.

7.2 Consequently, in the event that Employee breaches or threatens to breach any of the obligations in Sections 3, 4 and/or 5 of this Agreement, E. Excel shall be entitled to a preliminary and permanent injunction prohibiting Employee from violating this Agreement in order to prevent the continuation of such harm and to obtain money damages insofar as they can be determined.

7.3 Nothing in this Agreement shall be construed to prohibit E. Excel from also pursuing any other remedies available to it, the parties having agreed that all remedies are to be cumulative.

Section 8: Miscellaneous Provisions

8.1 Titles which precede paragraphs or subsections of this Agreement are for convenience only and shall in no way affect the manner in which any provision herein is construed.

8.2 Neither party shall have the right to assign any rights or obligations under this Agreement without the prior written approval of the other party, except that E. Excel shall have the right to assign this Agreement as part of any merger, acquisition, reorganization, or sale of assets in the normal course of business.

8.3 The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, and each provision shall be enforced to the maximum extent permitted by applicable law.

8.4 This Agreement shall be binding upon and shall inure to the benefit of the parties, their successors, assigns, executors, administrators, and personal representatives.

8.5 This Agreement is the complete and exclusive statement of the agreement between the parties relating to the subject matter of this Agreement, and this Agreement supersedes all proposals, or prior agreements and understandings, whether oral or written, and all other communications relating to the subject matter of this Agreement.

8.6 This Agreement may only be amended, or any provision herein waived, by written instrument executed by each party hereto. No waiver of any provision hereof shall constitute a waiver of any other provision hereof, whether or not similar, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein.

8.7 If any party to this Agreement breaches any of the terms of this Agreement, then that party shall pay to the non-defaulting party all of the non-defaulting party's costs and expenses, including attorney's fees, incurred by that party in enforcing the terms of this Agreement.

8.8 This Agreement and its validity and interpretation shall be governed by and construed in accordance with the laws of the State of Utah, notwithstanding any choice of law rules of Utah or any other state or jurisdiction.

IN WITNESS WHEREOF, the parties have signed and entered into this Agreement as of the date first mentioned above.

E. EXCEL INTERNATIONAL, INC.

By: _____
Title: _____

EMPLOYEE

By: _____

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

AFFIDAVIT OF CARL BREWER

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Carl Brewer, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith::

1. I have been employed by E. Excel International, Inc. ("E. Excel") as information technology manager since May 9, 2001. My responsibilities include maintenance of the computer network, computers, and security system.

2. When I arrived, the security system, consisting of approximately 43 cameras, wiring, and recording equipment, was in disarray. Cables to many of the security cameras had been cut, approximately ten camera lenses were covered with a sticky film similar to that produced by a spray-on glue, and approximately 90% of the cameras had been adjusted so that they were out-of-focus. Because the cameras are located from 10' to 15' above the floor, and can only be reached by a ladder, I do not believe that any of the problems I have just described could have happened accidentally.

3. When I arrived, I also found what I believe to be an inordinate number of problems for a computer network of the size used at E. Excel. I have spoken with E. Excel's former I.T. consultant, Dave Tucker, and determined that he appears to be competent and knowledgeable with respect to the operation and maintenance of computer networks of the type used at E. Excel. Therefore, although I cannot prove that the problems in E. Excel's network were deliberately created by anyone, I would be very surprised to learn that they resulted from simple negligence on the part of Mr. Tucker.

4. Among the many problems I discovered in the E. Excel network were: (1) problems with server-network communications which caused computers to freeze on a

regular basis due to unintended mass transfers of data from one computer to every other computer on the network; (2) the granting of improper access to unauthorized users, such that every employee who had access to a computer could gain entry to the private directories of the company's senior management; and (3) the loss of an inordinate amount of configuration files within the system, making it impossible for system operators to use accessories, such as a printer or modem, until the problem was fixed. These kinds of problems are not discovered on a network that is operated according to standard industry practices.

5. Moreover, many items that should ordinarily be kept as part of a business computer network of this size were also inexplicably missing. Upon my arrival I could find no software licenses, no software or hardware documentation, no CD ROMs, and no spare hardware of any kind.

6. At the direction of E. Excel management, I prepared a list of missing hardware and software by interviewing other employees, and by reviewing promotional pamphlets, photographs, and invoices. This investigation resulted in a detailed memorandum from myself to

The replacement cost for the above software has been **\$34,530.24** so far and may need to be revised because n license issues could surface. The products listed are older versions and Microsoft pulls older versions when versions are introduced. The prices given are for the new versions because of availability from Microsoft.

See attachments for other office equipment that is missing.

Item	Count	Status	Replacement Cost
Photo Disc Stock Photography	39	Missing	\$15600.00
Photo Disc Signature Series	7	Missing	\$ 2500.00
Photo Disc Object Series	8	Missing	\$ 2700.00
Photo Disc Background Series	11	Missing	\$ 2500.00
Photo Disc Film Series	6	Missing	\$ 2400.00
PhotoAlto Stock Photography	4	Missing	\$ 1500.00

The replacement costs for the above software is based on current manufactures pricing.

In-House Artwork for all countries

Missing \$ unknown

Miscellaneous office equipment and graphics tools. – See Attachments –

Desks	3	Missing
Oversize table	1	Missing
Filing cabinet	2	Missing
Miscellaneous graphics tools		Missing

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

AFFIDAVIT MARY SPENCER

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Mary Spencer, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I was employed by E. Excel International, Inc. ("E. Excel") for approximately two years, ending in August, 2001, with responsibilities for accounting and human resources. With regard to my human resources functions, my responsibilities included the maintenance of employee files and paperwork.

2. In approximately January 2001, I was requested to provide a blank nondisclosure agreement for use with a new employee. When I realized that I had accidentally used the last blank form, I went to the employee personnel files maintained in my office to pull out an old form that I could photocopy. Even though those files are kept locked in my office at all times when I am not present (including lunch periods), I discovered that the nondisclosure agreements had been removed from the personnel file of every active employee. Besides myself, only Beverly Warner and Jau-Hwa Stewart possessed keys to my office at that time.

3. When I informed Beverly Warner that all of the signed nondisclosure agreements had been removed from my office, Beverly remarked to me that she was not concerned as those agreements were not enforceable anyway. Beverly's response indicated to me that she was the one who had removed the agreements from my office.

4. After some additional searching, I was finally able to find one signed

nondisclosure agreement in the file of a former employee of the company. A true and correct copy of the nondisclosure agreement used by E. Excel is therefore attached hereto as Exhibit A.

5. Around the same time, Beverly Warner called me at home on a Friday night and asked me if I could come in on Saturday morning to work in the office. I had never before worked a Saturday.

6. When I arrived at the office that next morning, I was asked to assist two attorneys, Mr. Orton and Mr. Mecham, to locate documents. On that day they reviewed old files from the company's certified public accountant and Dr. Jau-Fei Chen's older tax returns that were being kept in my office.

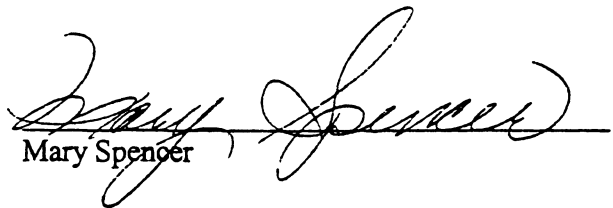
7. On a subsequent Saturday, I was asked to return to the office again. At that time, I was to assist Ms. Porter, an employee of Mr. Orton, and Mr. Roger Smith of PriceWaterhouse. Ms. Porter and the Mr. Smith removed approximately 36 boxes of documents that day, enough to make two layers in the back of a large pickup truck. Because of the large volume, I was unable to monitor everything that they took on that day, but at a minimum it included every file in Jau-Hwa Stewart's office, every expense report from the American Express and Visa files, every export/import document, copies of the Malcolm, Inc. checkbook, old financial records, and banking records from Gina Lipe's workstation. I never saw any of those documents returned.

8. In approximately February 2001, Bryan Hymas began to move graphics equipment out of the graphics department. He stated to me at that time that he was moving the graphics equipment to the new building to create a workstation there. To the best of my


knowledge, no workstation has ever been established in the new building, and none of the graphics equipment is located there.

9. Also in approximately February 2001, there came a day when many employees arrived at work to find that files were missing from their computers. Beverly Warner explained to me that the files were missing because the "server had accidentally crashed."

DATED this 24th day of September, 2001.

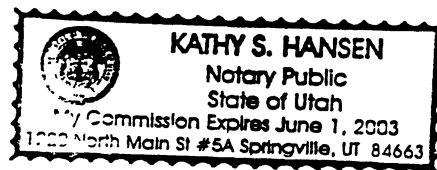

Mary Spencer

SUBSCRIBED AND SWORN before me this 24th day of September, 2001.


NOTARY PUBLIC
Residing at: Springville UT

My Commission Expires:

June 1, 2003



EMPLOYEE NONDISCLOSURE AND NON-COMPETITION AGREEMENT

THIS AGREEMENT is entered into and effective as of the ____ day of _____, ~~2001~~, by and between E. Excel International, Inc. (hereinafter "E. Excel"), a corporation of the state of Utah having a principal business office at 1198 North Spring Creek Place, Springville, Utah 84663, and _____ (hereinafter "Employee"), an individual residing at _____

Recitals

A. E. Excel has developed and/or acquired technology relating to nutritional immunology, health foods, dietary supplements and personal care products, and E. Excel is engaged in the business of further developing such technology and of manufacturing, marketing, distributing, and/or providing products and related services based upon such technology.

B. Employee desires to be employed by E. Excel and to provide assistance, as directed by E. Excel, in connection with E. Excel's aforesaid business.

C. In fulfilling the duties of his/her employment with E. Excel, the parties contemplate that Employee will need to have access to certain information concerning E. Excel's technology which E. Excel regards as confidential and/or proprietary.

D. E. Excel is willing to employ Employee in connection with E. Excel's business and to provide Employee with the necessary information concerning E. Excel's technology, subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter contained, the employment and/or continued employment of Employee, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, E. Excel and Employee hereby agree, as follows:

Terms of Agreement

Section 1: Definitions

1.1 As used in this Agreement, the term E. Excel Technology shall mean the devices, systems, methods, and products developed and/or acquired by E. Excel relating to nutritional immunology, health foods, dietary supplements and personal care products, including, but not limited to, formulae, diagrams, blueprints, patent applications, prototypes, and any other know-how, data, or technical information relating thereto.

1.2 As used in this Agreement, the term Confidential Information shall mean the E. Excel Technology and any and all knowledge and information regarding the E. Excel Technology and/or E. Excel's business which Employee has acquired and/or hereafter acquires on E. Excel's premises or from E. Excel or any of E. Excel's employees or representatives. Confidential Information shall specifically include all E. Excel customer and distributor listings, all written and oral communications regarding the E. Excel Technology and marketing, financial, and costing information related thereto, whether in the form of lists, memoranda, letters, transcripts, sound or video recordings, computer software, printed materials, or other information storage or recording media.

Section 2: Disclosure by E. Excel

2.1 Subject to the terms and conditions of this Agreement, E. Excel will employ Employee and will disclose to Employee and/or allow Employee to have access to such Confidential Information as E. Excel believes is reasonably necessary to enable Employee to fulfill the duties of his/her employment with E. Excel.

Section 3: Employee's Obligation of Confidence

3.1 The parties hereto acknowledge that in furtherance of the purposes of this Agreement, Employee will have access to certain knowledge and information which is used and/or developed by E. Excel in connection with its business, which is considered by E. Excel to be proprietary, and which has been developed and/or acquired by E. Excel through considerable investment of time, money, and/or effort.

3.2 Employee acknowledges that the Confidential Information made available to Employee under this Agreement is owned and shall continue to be owned solely by E. Excel. Employee accordingly agrees not to divulge any such Confidential Information to any individual or entity without E. Excel's express consent.

3.3 Notwithstanding the provisions of paragraph 3.2 above, Employee shall have no obligation of confidence with respect to:

(i) Information which Employee reasonably demonstrates was in his/her possession in tangible form prior to any disclosure thereof by or for E. Excel;

(ii) Information which Employee reasonably demonstrates was independently developed by or for him/her from non-confidential sources and without reference to any of the Confidential Information of E. Excel; or

(iii) Information which Employee reasonably demonstrates has become generally known in the trade or public either prior to or subsequent to E. Excel's disclosure thereof through no fault of Employee.

3.4 Notwithstanding the provisions of paragraph 3.3 above, Employee will not be relieved of his/her obligations of confidence and non-use as to Confidential Information which is a combination of features merely because any or all of the individual features are included in disclosures falling within the scope of paragraph 3.3. Employee will only be relieved of his/her obligations of confidence and non-use with respect to such Confidential Information if the combination of features is included in such a disclosure.

3.5 Under no circumstances shall Employee remove from E. Excel's place of business any of E. Excel's books, records, documents, or any copies of such documents, without the express written permission of E. Excel; nor shall Employee make any copies of such books, records, or documents for use outside of E. Excel's place of business except as specifically authorized in writing by E. Excel.

Section 4: Ownership and Disclosure of Improvements

4.1 E. Excel is and shall be the owner of all rights, title, and interest in and to the following: (1) all original technical data or written materials originated and/or prepared for E. Excel by Employee, including formulae, designs, plans, and specifications; (2) all ideas, concepts, know-how, or techniques relating to such technical data or written materials developed during the course of Employee's employment with E. Excel; and (3) all inventions, discoveries, or improvements, including ideas, concepts, know-how, or techniques relating to the E. Excel Technology that were (a) developed by Employee or (b) conceived or originated by Employee solely or jointly with others (i) at E. Excel's request or expense, at its facilities, (ii) in the course of Employee's employment with E. Excel, or (iii) based on knowledge or information obtained from E. Excel during the course of Employee's such employment.

4.2 Employee covenants and agrees that he/she will promptly communicate and disclose to E. Excel all such data, materials, ideas, concepts, know-how, techniques, inventions, discoveries, and improvements, whether patentable or not, referred to in paragraph 4.1 above, together with any and all other enhancements, uses, modifications, and/or improvements of or to the E. Excel Technology which Employee conceives, works upon, or otherwise becomes aware of during the term of this Agreement.

4.3 Employee further agrees to irrevocably assign, transfer, and set over to E. Excel the entire right, title, and interest in and to each such idea, concept, technique, invention, discovery, improvement, enhancement, use, and modification referred to in paragraphs 4.1 and 4.2 above, including without limitation all right and title in and to any data, materials, know-how, patents, copyrights, or trade secrets which embody all or any part thereof. Employee agrees to execute, acknowledge, and deliver any and all instruments, documents, and papers and to do any and all other things that may be deemed to be reasonably necessary by E. Excel to carry out the provisions of this Section 4.

Section 5: Restrictive Covenants

5.1 Employee agrees that he/she will use E. Excel's Confidential Information solely to fulfil the duties of his/her employment with E. Excel, and that he/she will not otherwise use the Confidential Information for his/her own benefit or the benefit of others. Employee further agrees that he/she will not use or employ any of the Confidential Information in any way which would be harmful to or against the best interests of E. Excel.

5.2 Employee further agrees that he/she will not, during the term of this Agreement, directly or indirectly perform any services for any business, profession, or other endeavor which is either directly or indirectly in competition with the business of E. Excel. Employee agrees not to perform such services either as an employee, agent, independent contractor, owner, or otherwise.

5.3 For a period of one (1) year following the termination of this Agreement for any reason, or for a period of time equal to the length of Employee's employment with E. Excel if such tenure is less than one (1) year, Employee will not directly or indirectly solicit or sell any product which is the same as or substantially equivalent to a product manufactured, marketed, and/or distributed by E. Excel to any person, company, firm or corporation who is or was a customer of E. Excel at any time within five (5) years prior to the termination of Employee's employment with E. Excel. Employee agrees not to solicit such customers on behalf of himself/herself or any other person, firm, company, or corporation.

5.4 The parties have attempted to limit Employee's right to compete only to the extent necessary to protect E. Excel from unfair competition. The parties recognize, however, that reasonable people may differ in making such a determination. Consequently, the parties hereby agree, that if the scope of enforceability of the restrictive covenants of this Agreement is in any way disputed at any time, a court or other trier of fact may modify and enforce the covenant to the extent that it believes it to be reasonable under the circumstances existing at that time.

5.5 Employee further acknowledges that in the event his/her employment with E. Excel terminates for any reason, he/she will be able to earn a livelihood without violating the foregoing restrictions and that his/her ability to earn a livelihood without violating such restrictions is a material condition to his/her employment with E. Excel.

Section 6: Term and Termination

6.1 This Agreement shall remain in effect for so long as Employee continues his/her employment with E. Excel. Upon termination of Employee's employment with E. Excel for any reason, with or without cause, this Agreement shall automatically terminate.

6.2 Within two (2) weeks following termination of this Agreement for any reason, Employee shall furnish E. Excel with written notice specifying that through reasonable care and to the best of his/her knowledge, all Confidential Information has been returned to E. Excel, including all originals and all copies of any documentation containing any portion of E. Excel's Confidential Information.

6.3 The obligations contained in Sections 3, 4, 5 and 6 shall survive the termination of this Agreement. In addition, the termination of this Agreement shall not affect any of the rights or obligations of either party arising prior to or at the time of the termination of this Agreement, or which may arise by any event causing the termination of this Agreement.

Section 7: Remedies

7.1 Employee acknowledges that compliance with Sections 3, 4 and 5 is necessary to protect the business and goodwill of E. Excel and that a breach of any of these provisions will irrevocably and continually damage E. Excel, for which money damages may not be adequate.

7.2 Consequently, in the event that Employee breaches or threatens to breach any of the obligations of Sections 3, 4 and/or 5 of this Agreement, E. Excel shall be entitled to a preliminary and permanent injunction prohibiting Employee from violating this Agreement in order to prevent the continuation of such harm and to obtain money damages insofar as they can be determined.

7.3 Nothing in this Agreement shall be construed to prohibit E. Excel from also pursuing any other remedy available to it, the parties having agreed that all remedies are to be cumulative.

Section 8: Miscellaneous Provisions

8.1 Titles which precede paragraphs or subsections of this Agreement are for convenience only and shall in no way affect the manner in which any provision herein is construed.

8.2 Neither party shall have the right to assign any rights or obligations under this Agreement without the prior written approval of the other party, except that E. Excel shall have the right to assign this Agreement as part of any merger, acquisition, reorganization, or sale of assets in the normal course of business.

8.3 The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, and each provision shall be enforced to the maximum extent permitted by applicable law.

8.4 This Agreement shall be binding upon and shall inure to the benefit of the parties, their successors, assigns, executors, administrators, and personal representatives.

8.5 This Agreement is the complete and exclusive statement of the agreement between the parties relating to the subject matter of this Agreement, and this Agreement supersedes all proposals, or prior agreements and understandings, whether oral or written, and all other communications relating to the subject matter of this Agreement.

8.6 This Agreement may only be amended, or any provision herein waived, by written instrument executed by each party hereto. No waiver of any provision hereof shall constitute a waiver of any other provision hereof, whether or not similar, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein.

8.7 If any party to this Agreement breaches any of the terms of this Agreement, then that party shall pay to the non-defaulting party all of the non-defaulting party's costs and expenses, including attorney's fees, incurred by that party in enforcing the terms of this Agreement.

8.8 This Agreement and its validity and interpretation shall be governed by and construed in accordance with the laws of the State of Utah, notwithstanding any choice of law rules of Utah or any other state or jurisdiction.

IN WITNESS WHEREOF, the parties have signed and entered into this Agreement as of the date first mentioned above.

E. EXCEL INTERNATIONAL, INC.

By: _____
Title: _____

EMPLOYEE

By: _____

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah
corporation, and JOHN DOES I THROUGH
X,

Third-Party Defendants

**AFFIDAVIT OF LATHA
HEIKKILA**

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :SS.
COUNTY OF UTAH)

I, Latha Heikkila, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I have been employed with E. Excel International, Inc. ("E. Excel") since December 4, 1994, first in an order entry position, then as a customer service representative and then, beginning in approximately 1997-98 time period, as a systems administrator in the operations department.
2. In the Spring or Summer of 1998, Beverly Warner, the office manager for E. Excel at that time, informed me that I, and all other members of the operations department, would be receiving a confidentiality agreement from Karen Moosman, and that I was to read and sign the confidentiality agreement.
3. That same day, Karen Moosman came to the operations department. Because of the open floor plan, I was able to observe her distribute the confidentiality agreement to every member of the operations department.
4. I signed my confidentiality agreement and returned it to Karen Moosman. I

observed the other members of the operations department do the same.

DATED this 24 day of September, 2001.

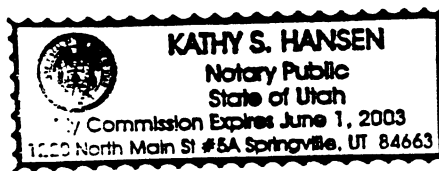
Latha Heikkila
Latha Heikkila

SUBSCRIBED AND SWORN before me this 24 day of September, 2001.

Kathy Hansen
NOTARY PUBLIC
Residing at: Springville UT

My Commission Expires:

June 1, 2003



Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
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Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

**AFFIDAVIT OF WAYNE
KELLEY**

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Wayne Kelley, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I have been employed with E. Excel International, Inc. ("E. Excel") for approximately ten years, first as a machine operator, and then for the last eight years as a warehouseman.
2. My responsibilities as warehouseman include: loading and unloading trucks from at the main warehouse and taking physical inventories in both of the warehouses.
3. In approximately February 2001, Dale Stewart, my superior at E. Excel, found me one day and told me that we were moving inventory from the warehouse to offsite storage. In the past when we had moved items to offsite storage, the items were obsolete, or consisted of items such as excess packaging material. This time, however, the inventory that I was told to ship to offsite storage included 18 pallets, or one truck load, of empty gel caps, which must be kept at a carefully regulated temperature and which are used regularly for packaging E. Excel product.
4. Dale Stewart made it clear to me that the gel caps needed to be moved in a hurry and were my top priority, although shipments to offsite storage had never been a rush job in the past. On the first day, we sent one truckload of gel caps to Mike Evans Storage in an unrefrigerated storage container. The next day I was instructed to move a second load over to Mike Evans Storage. Shortly after I had finished loading the second container (also

unrefrigerated), and just as it was about to leave, however, Dale Stewart returned and told me to quickly remove the gel caps already loaded on the second container and return them to the warehouse..

5. A few hours after I returned the gel caps to the warehouse, a group of lawyers that I did not recognize arrived to inspect the premises.

6. Approximately one to two days later, the first container of gel caps came back to E. Excel as well. The driver who returned the gel caps first remarked to me that it was strange that the capsules were only stored for a few days, because the container had been rented for the entire month. The driver then asked why E. Excel's name was not listed for the container given that the items stored therein came from E. Excel. I did not reply and did not ask in whose name the gel caps were being stored.

7. Approximately the following Monday, I arrived at work only to discover that 60-70 pallets of products (or approximately 6-7 truckloads) were missing from the warehouse. Initially I thought it was stolen, because I heard that Dale Stewart and Paul Cooper, another superior, did not know where the product was. When I spoke with Dale Stewart myself, however, he informed me that the product had been moved to another location because of a problem with mice in the warehouse.

8. Although we have had some problems with mice in the past, Dale Stewart's explanation did not make sense to me at that time for the following reasons: (1) on that Monday I observed no mice in the warehouse, (2) the missing product was taken from many different areas

in the warehouse and past mouse infestations had been confined to a smaller area, and (3) the product that had been taken would not have been attractive to mice, including cactus juice in glass bottles, boxes, steel and plastic drums of liquid soaps and chemicals, and a forklift. I also recall being told at that time that a large number of labels were missing, though I do not have an independent recollection of the missing labels.

9. The next day when I reported for work, there were a large number of mice inside the warehouse, many more than I had ever previously seen appear at one time. Moreover, these mice did not appear the same as the wild mice I had seen at the warehouse in the past. These mice were bigger and fatter and, unlike wild mice, would approach me without hesitation. I would estimate that there were several dozen mice in the warehouse on that day, and when we would remove them to a field outside the warehouse, they would literally follow at our heels as we walked back.

10. Later that same week, Dale Stewart approached me and told me that Bryan Hymas needed help to move things from another warehouse to this location. At the time, I found the request unusual for three reasons. First, Bryan Hymas was a graphics artist for E. Excel and had never before had any involvement, to my knowledge, in moving product to and from the warehouses. Second, Dale Stewart also instructed me not to tell my immediate supervisor, Paul Cooper, about this project. Third, I was again instructed by Dale Stewart that the product had to be moved to E. Excel on a rush basis, and that I should stay late to complete the task.

11. When Bryan Hymas and I, and two other warehousemen, went to the other

facility, I was surprised because I did not know that E. Excel owned or operated this facility. As a warehouseman for approximately eight years, I believe that I am customarily aware of the total extent of E. Excel's warehouse facilities in order to properly perform my responsibilities with respect to storage and receiving..

12. Inside the warehouse, I observed what I believed to be the inventory that had been discovered missing from the E. Excel warehouse that Monday, including, specifically, many pallets of E. Excel's cactus juice. In order to facilitate the transfer of product, we brought steel top production tables and a pallet jack from E. Excel over to this new facility. Dale Stewart instructed us to leave the production tables and the pallet jack at the new facility when we left, along with a large number of white corrugated boxes, tape dispensers, pallet wrapping film, and the forklift. I recognized the forklift as belonging to E. Excel because it was exactly the same make and model as the forklift that was missing from the E. Excel warehouse.

13. Sometime later, I do not recall exactly when, I was asked to go to the recycling center with Patty Jensen and from there we retrieved large quantities of unused E. Excel labels.

These labels were intended for use by E. Excel and I do not know how they arrived at the recycling center after they were removed from the warehouse.

DATED this 24 day of September, 2001.

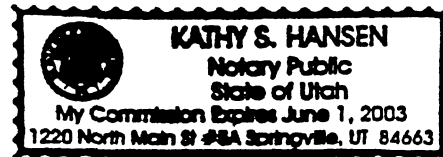
Wayne Kelley
Wayne Kelley

SUBSCRIBED AND SWORN before me this 24th day of September, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville UT

My Commission Expires:

June 1, 2003



Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
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JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah
corporation, and JOHN DOES I THROUGH
X,

Third-Party Defendants

AFFIDAVIT OF KITTY MAO

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Kitty Mao, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I have been employed with E. Excel International, Inc. ("E. Excel") since approximately July 1999, first as a customer service supervisor and then, beginning in approximately March 2001, as the export/import coordinator.

2. In my role as export/import coordinator, I have reviewed E. Excel's records and determined that there are incomplete export/import records for October 2000, and a total absence of any export/import documentation from November 2000 until the arrival of Special Master Larry C. Holman.

3. I have reviewed all documents returned to this office by Jau-Hwa Stewart and determined that none of the missing export/import records were contained therein.

4. I am also aware, however, that there should have been export/import documents created by E. Excel after October 2000. For instance, I am informed by Mr. Sean Hoover, the ocean export manager for Expeditors Salt Lake City, that around Thanksgiving 2000 a shipment of E. Excel product was sent to Kuala Lumpur, Malaysia, but was later rerouted at the instruction of Angela Barclay, who was responsible for E. Excel's foreign shipments at that time.

5. The Malaysian shipment, and the rerouting of the shipment, should be reflected in E. Excel's export/import records, yet I can find no documentation for it in E. Excel's files.

6. Attached as Exhibits A to my affidavit is a true and correct list of documents that should be contained in each import file, but that are not present for approximately 95% of E. Excel's import files from 1997 to 2000. This list was prepared by me from a review of company records for which I am responsible.

7. Attached as Exhibit B to my affidavit is a true and correct list of import/export documents missing from E. Excel's files. This list was also prepared by me from a review of company records for which I am responsible.

DATED this 24 day of September, 2001.

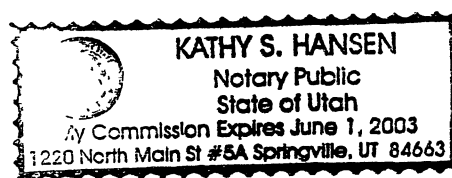
Kitty Mao
Kitty Mao

SUBSCRIBED AND SWORN before me this 24th day of September, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville UT

My Commission Expires:

June 1, 2003



We are missing approximately 95% of the import files from 1997 to 2000.
The following corporations operated with E. Excel International to clear shipments through U. S. Customs for 98% of all imports.

Malcolm, Inc.

Kormak, Inc.

Shannon River, Inc.

E. Excel International cleared approximately 2% of the imports that were received.

Import files contain the following documents:

- 1- A fax transmission from the import broker with information concerning the shipment they were helping to clear.
- 2- A copy of the import brokers invoice for miscellaneous fees.
- 3- A copy of the Entry Summary submitted to U. S. Customs for customs clearance.
- 4- A copy of the product invoice.
- 5- A copy of the bill of lading for the product.
- 6- A copy of the arrival notice from the shipping company.
- 7- The original product invoice from the foreign manufacture.
- 8- The original product packing list from the foreign manufacture.
- 9- The original product bill of lading from the foreign manufacture.
- 10- The original invoice from the import broker for miscellaneous fees.
- 11- An original copy of the Entry Summary for U. S. Customs
- 12- A copy of the product invoice.
- 13- A copy of the product packing list.
- 14- A copy of the bill of lading.
- 15- A copy of the arrival notice.
- 16- A fax transmission from the import broker with information on the arrival of the shipment.
- 17- A copy of the import broker invoice for trucking fees.
- 18- A copy of the bill of lading for the product.
- 19- A copy of the packing list for the product.
- 20- The original invoice from the import broker for the trucking fees.
- 21- A copy of the pick up/delivery order.

List of Exporting/Importing Document We Are Missing:

- Exporting invoices, packing lists, fax communication record, and wire payment receivable records from December 1st, 2000 to March 31st, 2001.
- Importing records from Jan. 2000 to March 31st, 2001.
- Expeditors bill payable records from Jan. 2000 to March 31st, 2001.
- All the communication faxes and letters regarding our product registration, lab testing, etc. with foreign country Consulate Generals.
- All the disks that recorded the previous export/import clerks' communication with our territory offices.
- Philippines and Hong Kong exporting invoices and packing lists from Oct. 31st, 2000 to March 31st, 2001.

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
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1500 Wells Fargo Plaza
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Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

AFFIDAVIT OF PATTY JENSEN

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Patty Jensen, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I have been employed with E. Excel International, Inc. ("E. Excel") since approximately 1994, serving first as a warehouse worker and then, for the last year and a half, as the warehouse manager.

2. As the warehouse supervisor, I am responsible for overseeing the work of the warehousemen and assigning projects to them.

3. In approximately February 2001, I arrived at work one Monday morning to discover that inventory was missing from the warehouse, including large quantities of E. Excel's Millenium product, product labels, and two forklifts. When I asked Dale Stewart about the missing product, he said it had been removed because of problems with mouse infestation. I did not observe any mice in the warehouse on that day.

4. At the close of business that day, I noticed that Beverly Warner did not set the alarms for the facility as was her ordinary practice.

5. When I arrived at work the next day, there were approximately 75 mice present in the warehouse building. It is my opinion that these mice were planted at E. Excel because they behaved like pet mice, and not like the wild mice that on prior occasions had been found at E. Excel.

6. Later that week, Dale Stewart approached me and said that he needed warehouse workers, who could be trusted to be discreet, to move product from another warehouse back to E. Excel under the supervision of Bryan Hymas. Bryan Hymas worked in the graphics department for E. Excel and, to the best of my knowledge, had never before performed any warehouse work.

7. Dale Stewart also said to me at this time that if Paul Cooper, my immediate supervisor, asked any questions about the assignment, I was to say something to the effect of "its none of his damn business" and to tell Paul that he needed to speak with Dale. Dale Stewart also indicated to me that this project needed to be completed on a rush basis.

8. The warehousemen who went with Bryan Hymas brought back large quantities of Millenium and additional things, but nevertheless left property of E. Excel at the other warehouse, including loading tables, tape, and boxes.

9. E. Excel keeps its cactus inventory in a row of 75 freezers. During this same period of time, I discovered that 10 to 15 of the freezers had been unplugged. After I plugged them back in, I discovered the next day that they had been unplugged again.

10. Also around this time, lawyers, whose names I do not recall, came to talk to me both about the presence of mice at the plant and the fact that the cactus freezers were being unplugged. Although Dale Stewart had instructed me to speak with these attorneys on prior occasions, at this time he instructed me not to tell them anything.

11. Also around this time, the machine used to package Guei Hwa balm was stolen. We built a replacement machine from parts within a few days, but the day after we completed the

task, the new machine was stolen as well.

DATED this 24 day of September, 2001.

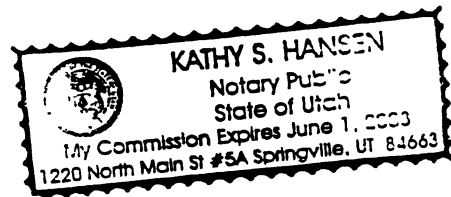
Patty Jensen
Patty Jensen

SUBSCRIBED AND SWORN before me this 24th day of September, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville UT

My Commission Expires:

June 1, 2003



Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

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INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
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Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

**AFFIDAVIT OF LYNN
WALKER**

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Lynn Walker, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith::

1. I have been employed with E. Excel International, Inc. ("E. Excel") in the graphics department since June 2000.

2. In approximately February 2001, I left work one evening at 5:00 p.m., and when I left the blinds on the windows in the office areas were raised. When I returned the following morning, the blinds had been lowered and foam core or other materials had been used to cover those portions of the windows that the blinds did not reach. This process was repeated several times over the course of that same week, during which time a large number of items were removed from the graphics department. A true and correct list of the items taken from the graphics department is attached hereto as Exhibit A (with the exception of the software items listed in Carl Brewer's June 28, 2001, memorandum, as to which I have no personal knowledge). No one with managerial responsibility at the company, including Jau-Hwa Stewart, Taig Stewart, and Beverly Warner, ever asked me if I knew the whereabouts of the missing items.

3. Also during this time period, Bryan Hymas, who worked both as a graphics designer and as Taig Stewart's personal assistant, was working in Taig Stewart's office. Although the door to Taig Stewart's office was always closed, I could hear Bryan operating a tape gun, and saw him place piles of unmade boxes outside the door to the office.

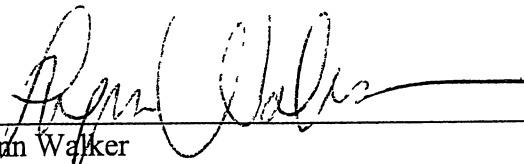
4. Also during this time, Bryan informed me that he had placed E. Excel's large format printers in the back of his truck pursuant to authorization from Taig Stewart, and that he intended to move these printers, and other items, to a new workstation in a warehouse known as Building B. No workstation was ever established in Building B, however. These printers were later returned to E. Excel by Bryan Hymas, but they were significantly damaged while they were outside of E. Excel's control.

5. When Taig Stewart vacated his office, his entire office was empty. Among the missing items from Taig Stewart's office were: company artwork for use on product labels, stock photography, computer hardware and accessories, computers, monitors, desks and bookcases. Also taken around that same time were a large format printer and its accompanying PC, and a filing cabinet with miscellaneous graphics files.

6. Bryan Hymas also informed me, when I spoke with him about the missing Imacon flextight scanner, that it had been taken by Taig Stewart, but that it would be returned. The

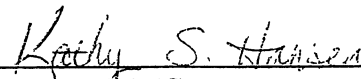
flextight scanner has never been returned.

DATED this 24 day of September, 2001.



Lynn Walker

SUBSCRIBED AND SWORN before me this 24th day of September, 2001.



NOTARY PUBLIC
Residing at: Springville UT

My Commission Expires:

June 1, 2003



Memo

To: Gary Takagi
From: Carl Brewer
CC: Pat Hoog
Date: 06/28/01
Re: Graphics department equipment and Microsoft software inventory listing.

Following is a list of equipment that was in the graphics printing area. This list has been developed by checking with current employees that were here when the equipment was here. The employees interviewed indicated they saw equipment in the graphics department on a permanent basis. They were able to identify items by remembering model number or manufacture or type of product. I have contacted the respective manufactures and obtained technical information and replacement costs.

Item	Status	Replacement Cost
Epson 9000 Printer	Damaged beyond repair	\$ 7000.00
Epson 9000 Printer	Damaged beyond repair	\$ 7000.00
Ledco DL42 Laminator	Missing	\$ 9000.00
FlexTight Precision II Scanner	Missing	\$15000.00
Raster Imaging Processor (RIP)	Missing	\$ 5000.00
LinoType Scanner	Missing	\$ 6000.00
Xante Accel-a-Writer Printer	Missing	\$ 3200.00
3 Apple G4 computers	Missing	\$ 7500.00
2 Apple G3 computers	Missing	\$ 5000.00
3 Graphics monitors	Missing	\$ 4000.00
1 PC computer	Missing	\$ 2000.00

The following list of Microsoft software was obtained by an internal software audit. However, I was unable to locate necessary software media and corresponding licenses.

Item	Count	Status
Windows 95/98	40	Missing
Windows NT40 Server	2	Missing
Windows 2000 Server	1	Missing
MS Office 97/2000	40	Missing
MS Exchange 5.5 Server	1	Missing
MS Exchange 5.5 CAL	40	Missing
MS NT40 Workstation	4	Missing

The replacement cost for the above software has been **\$34,530.24** so far and may need to be revised because more license issues could surface. The products listed are older versions and Microsoft pulls older versions when new versions are introduced. The prices given are for the new versions because of availability from Microsoft.

See attachments for other office equipment that is missing.

Item	Count	Status	Replacement Cost
Photo Disc Stock Photography	39	Missing	\$15600.00
Photo Disc Signature Series	7	Missing	\$ 2500.00
Photo Disc Object Series	8	Missing	\$ 2700.00
Photo Disc Background Series	11	Missing	\$ 2500.00
Photo Disc Film Series	6	Missing	\$ 2400.00
PhotoAlto Stock Photography	4	Missing	\$ 1500.00

The replacement costs for the above software is based on current manufacturers pricing.

In-House Artwork for all countries

Missing \$ unknown

Miscellaneous office equipment and graphics tools. – See Attachments –

Desks	3	Missing
Oversize table	1	Missing
Filing cabinet	2	Missing
Miscellaneous graphics tools		Missing

Graphics

Disks:

Magazines

Handbooks

PhotoDisc Stock Photography cd-roms

Photodisc Volumes 1-10, 12, 13, 15, 18, 19, 21, 26 (2 copies), 28, 29, 31, 33, 35-36, 38, 40, 42, 43, 45, 46, 48-50, 54, 59, 60, 63, 65, 67, 72 Current retail price: \$399 *per cd*

The Signature Series 1, 3, 4, 6, 8, 20, 30 Current retail price: \$329 *per cd*

The Object Series 1, 2, 10, 11, 22, 27, 35, 38

The Background Series 7, 11, 12, 13, 15, 17-19, 21, 22, 23, 25 Current retail price: \$219 *per cd*

The Film Series 1-6 Current retail price: \$399 *per cd*

PhotoAlto Stock Photography cd-roms

Volumes 1, 5, 9, 21 Current retail price: \$375 *per cd*

Artwork (all countries):

Herba box

Herba film

Li-Dan box

Li-Dan film

Triflora box

Nutnall box

Nutnall film

Enjoy box

Enjoy film

Millennium box

Millennium labels

(Millennium Red box)

(Millennium Red labels)

Duet box

Duet labels

Refresh box

Refresh film

Nutrifresh Original

Nutrifresh Chocolate

Nutrifresh Coffee

Nutrifresh Mixed Fruit

Nutrifresh Peach

Nutrifresh Strawberry

EverNew

Vision

Concenergy

ST

Stresgon

DI

Digeston

Noco

WL

WeiLo

Dong-Quai

Ginseng

ART

Circle

ACT

Pearl

Stevia

Dewdrops

DNP box

DNP film

DTP box

DTP film

Gwei-Hua Balm

Ginseng & Pearl Cream

Vegiwash

Handygel

Cactus Milk

Video boxes (Nutritional Immunology, generic)
Plant Foods & Nutritional Immunology book
Nutritional Immunology book
Product Handbook
Elemente Catalog
Elemente Brochure
Modern Developments in Skin Care Technology
Revitalizing Facial Cleanser Dry box
Revitalizing Facial Cleanser Dry tube
All-Day Hydrating Nourisher Dry box
All-Day Hydrating Nourisher Dry pump
Intensive Night Repair Dry box
Intensive Night Repair Dry jar
Replenishing Masque Dry box
Replenishing Masque Dry tube
Hydrating Exfoliant Dry box
Hydrating Exfoliant Dry tube
All-Day Hydrating Nourisher Normal box
All-Day Hydrating Nourisher Normal pump
Intensive Night Repair Normal box
Intensive Night Repair Normal jar
Replenishing Masque Normal box
Replenishing Masque Normal tube
Hydrating Exfoliant Normal box
Hydrating Exfoliant Normal tube
Hydrating Oil-Free Nourisher Oily box
Hydrating Oil-Free Nourisher Oily pump
Intensive Night Repair Oily box
Intensive Night Repair Oily jar
Deep Purifying Clay Masque Oily box
Deep Purifying Clay Masque Masque Oily tube
Clarifying Exfoliating Gel Oily box
Clarifying Exfoliating Gel Oily tube
Cactus Ginseng Essence Box
Cactus Ginseng Essence jar
Pure Cactus Ginseng Masque box
Pure Cactus Ginseng Masque tube
Replenishing Hand Cream Box
Replenishing Hand Cream tube
Whitening Essence for Day box
Whitening Essence for Day jar
Intensive Whitening Essence for night box
Intensive Whitening Essence for night jar
Hydrating Tinted Nourisher box
Hydrating Tinted Nourisher pump
Oil-Free Tinted Nourisher box
Oil-Free Tinted Nourisher pump
Gentle Makeup remover box
Gentle Makeup remover jar
Advanced Spot Control box
Advanced Spot Control tube
Intensive Day Defense box
Intensive Day Defense tube
Protective Body Sunscreen box
Protective Body Sunscreen tube
Body Nourisher label
Body Wash label
Moisturizing Bath label
Cactus Ginseng Berry Cleanser box
Cactus Ginseng Berry Cleanser soap seal
Sere Deodorant labels
Brushing Bubbles Tube
Glisten Toothpaste tube
Arctic Whisper labels
Anti-Dandruff shampoo label

Multi-Action Shampoo label
Shampoo for Kids label
Moisturizing Conditioner label
Intensive Hair Treatment label
Celesta box
Celesta bottle
Eterne box
Eterne bottle
Distinction box
Distinction bottle
Time Elements box
Time Elements film
TruLips box
TruLips tube

HARDWARE / graphics area

Oversize table
Laminator ✓
FlexTight Scanner ✓
Linotype scanner ✓
Three desks ✓
Two Apple computers 2 G4s (2x450/128/30), 2G3s ✓
One PC ✓
At least Three oversize monitors At least one is a 22" Electron Blue LaCie monitor (\$1,299), at least one is a
Sony GDM F-500 ✓
Printer Xanté Accel-a-Writer 3G (\$3,145)
One filing cabinet (locking) ✓
One small cabinet (locking) ✓
12' ruler
four clamps
two knives
two pair Fiskars scissors

Miscellaneous Tools

Deno Himonas (USB #5483)
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Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

AFFIDAVIT OF GINA LIPE

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Gina Lipe, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I have been employed with E. Excel International, Inc. ("E. Excel") for approximately 18 months, serving first as assistant to the President and Vice-President, and then, since approximately March 2001, as the accounts payable clerk.

2. In my role as assistant to Jau-Hwa Stewart, I was responsible for maintaining bank records for E. Excel (which included making company checks for Malcolm, Inc., Kormak, Inc. and Shannon River, Inc.), recording wire transfers, and preparing balance sheets on a daily basis. Moreover, in this role, I was instructed by Jau-Hwa Stewart to periodically wire money from E. Excel to Shannon River, Inc., and to maintain the bank accounts for Shannon River, Inc.

3. I am not now, and have never been an employee of Shannon River, Inc.

4. In approximately February 2001, Jau-Hwa Stewart asked me to remove two to three boxes of documents from her office and place them in her car. I did not see exactly what documents had been placed in these boxes by Jau-Hwa Stewart, but I am aware that she obtained the documents from files in her office.

5. Also, in approximately February 2001, Jau-Hwa Stewart asked me to stay late to pull the original wire payments and corresponding invoices going back to 1996 for the following companies, each of which is a significant supplier of raw materials to E. Excel: Visionwise

(tubes, jars, film, aluminum); Amajeta (tubes/jars/film), Ningbo Techstar (rice powder), Guangdong Foodstuffs (triflora), and Guangdong Hwadu (triflora). Jau-Hwa Stewart explained to me that she needed these documents for legal purposes, and that she must have them in a hurry. Initially, I made copies of these documents, but because of the large volume, I stopped making copies and simply gave the originals to Jau-Hwa Stewart. When I left the office at 9:00 p.m. that evening, Jau-Hwa Stewart was still working in her office, and all of the invoices and wire payments that I had pulled for her were sitting on her desk.. Those documents were not on her desk the following morning and I have not seen them since then.

6. In my role as personal assistant to Jau-Hwa Stewart, I know that Jau-Hwa Stewart always kept the door to her office locked when she was not in there, and that only Jau-Hwa Stewart and her husband, Taig Stewart, had a key to that office. Moreover, I am aware that Jau-Hwa Stewart kept a variety of business documents in her office, including tax files for E. Excel, copies of invoices, Jau-Hwa Stewart's personal copies of wire payments, and a variety of documents relating to the operations of Shannon River, Inc.

7. When Jau-Hwa Stewart vacated her office following the Court's order, I observed that all of the files that had previously been located there were missing.

8. In approximately April, 2001, I was working late one night when a former employee of E. Excel, Bryan Hymas appeared at the door. Mr. Hymas then returned the high-quality graphics printers that had been taken from the office. Both printers were in obvious disrepair at the time that he returned them.

9. Exhibit A to this affidavit is a true and correct list of accounts payable invoices missing from E. Excel's files, prepared by me from a review of company records for which I am responsible.

DATED this 24 day of September, 2001.

Gina Lipe
Gina Lipe

SUBSCRIBED AND SWORN before me this 24th day of September, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville, UT

My Commission Expires:

June 1, 2003



Missing Accounts Payable Invoices for 2000

Binary Systems

PC Connection

Computec

Shamrock Consulting

Hudson Printing

US Expeditors

UPS

American Express

Central Bank Visa Card

DST Distributors (January through November)

Missing Accounts Payable Invoices for 2001

American Express

Binary Systems (before March)

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

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children,

Plaintiffs,

vs.

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Defendants.

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Third-Party Plaintiff

vs.

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WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
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Third-Party Defendants

SUPPLEMENTAL AFFIDAVIT
OF GINA LIPE

Civil No. 010400098

Judge Fred D. Howard

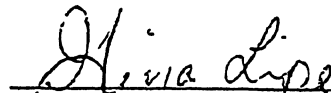
STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Gina Lipe, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I have been employed with E. Excel International, Inc. ("E. Excel") for approximately 18 months, serving first as assistant to the President and Vice-President, and then, since approximately March 2001, as the accounts payable clerk.

2. In approximately February of 2001, I asked Beverly Warner what happened to our files. Beverly was standing in front of our desks. She responded that "our files were removed for our protection so that we would not have to testify in court and after the court proceedings were over, the files would be returned. They do not want Jau-Fei's Lawyers to have access to our files."

DATED this 12th day of October, 2001.



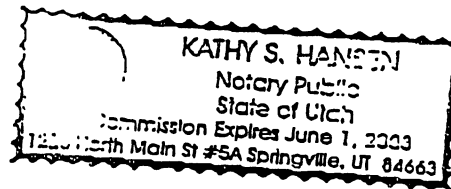
Gina Lipe

SUBSCRIBED AND SWORN before me this 12th day of October, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville, UT

My Commission Expires:

June 1, 2003



Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
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Salt Lake City, Utah 84145-0444
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ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

AFFIDAVIT SHELLI SIVERT

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Shelli Sivert, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith::

1. I was employed by E. Excel International, Inc. ("E. Excel") as a writer/editor for approximately 13 months. As the writer/editor for the company, all email for the company came in the first instance to me. I would then either answer such correspondence as it was received, or forward it to an appropriate person for response. I also saved this email in folders on my computer. My computer was password-protected and I turned my computer off every evening as part of my ordinary business practice.

2. Because of my position, I was privy to communications between distributors in Asia and Jau-Hwa Stewart or Taig Stewart, on behalf of E. Excel, during the winter of 2000-2001, although I did not understand the significance of these communications at the time.

3. In approximately February or March 2001, I arrived at work one morning to discover that all of the emails in my computer had been erased.

4. Around the same time, I came in to work one morning and a large number of items were missing from my work station. When I informed Beverly Warner by telephone that a large number of items had been taken from my work station, she was very unconcerned in her response.

5. One of the specific items that was taken from my desk was a computer disk that

had been given to me by Taig Stewart for editing, and which contained promotional material expressly critical of Dr. Jau-Fei Chen

DATED this 24th day of September, 2001.

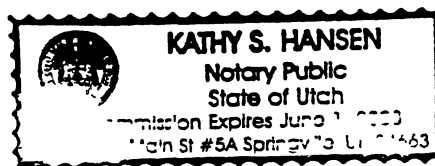
Shelli Sivert
Shelli Sivert

SUBSCRIBED AND SWORN before me this 24th day of September, 2001.

Kathy S. Hansen
NOTARY PUBLIC.
Residing at: Springville, UT

My Commission Expires:

June 1, 2003



Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

AFFIDAVIT OF RON HUGHES

Civil No. 010400098

Judge Fred D. Howard

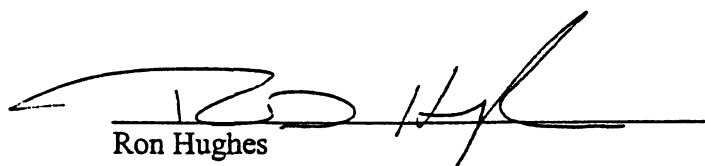
STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Ron Hughes, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith::

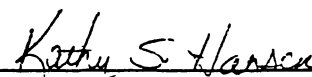
1. I have been the shipping supervisor for E. Excel International, Inc. ("E. Excel") since June 2000.
2. When there were a large number of mice apparently planted in the E. Excel warehouse one night, I suggested to Beverly Warner that we should check the tape from the security cameras to see who had done it. Beverly Warner stated to me that the security cameras had been turned off on that evening and therefore had not recorded any activity. When I asked her why the cameras had been turned off, she changed the subject.
3. According to Beverly Warner, she and Taig Stewart were the only people with keys to access the room with the surveillance and recording equipment.
4. In approximately March 2001, I received a phone call from Beverly Warner. She informed me that some boxes of documents had been returned to the company by Jau-Hwa Stewart's lawyers and that she needed me to load them immediately into Taig Stewart's truck. Pursuant to her instructions, I loaded approximately 25 boxes of documents into Taig Stewart's

truck. I did not see the boxes of documents again.

DATED this 24 day of September, 2001.

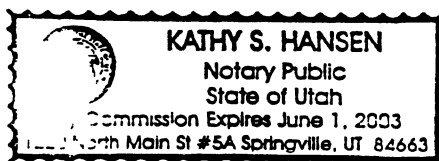

Ron Hughes

SUBSCRIBED AND SWORN before me this 24th day of September, 2001.


NOTARY PUBLIC
Residing at: Springville, UT

My Commission Expires:

June 1, 2003



Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JAU-FEI CHEN, individually and as the
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E. EXCEL INTERNATIONAL, INC., a Utah
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Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

**AFFIDAVIT OF HEATHER
TURNER**

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :SS.
COUNTY OF UTAH)

I, Heather Turner, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I have been employed by E. Excel International, Inc. ("E. Excel") as purchasing agent since April 2000.

2. In order to perform my duties as purchasing agent, I maintain on my computer word processing documents that track purchases, dates, and suppliers for such items as chemicals, packaging, boxes, office supplies, labels, and jars. I also keep emails from supervisory personnel informing me of what items need to be ordered. My computer is protected by password and I turn my computer off every evening as part of my routine business practice.

3. In approximately February or early March, 2001, I arrived at work to find that all email and word processing files had been erased from my computer. My workstation chair and label writer machine were also missing from the office when I arrived that day. On or around that time, I also discovered that 1 case of letterhead paper and 15 cases of copier paper were missing from the office.

4. At the end of February 2001, right after the departure of Jau-Hwa Stewart, I was using the internet to look at various job opportunities, because business at E. Excel was very slow. Beverly Warner observed me and asked whether I was looking for a new job. I told her that I was considering it, but that I had not really searched in earnest.

5. A few weeks later, in mid-March, I received a telephone call from Jau-Hwa Stewart, who asked me if I could meet her at her mother's house during lunch.

6. When I went to meet Jau-Hwa Stewart, she offered me a job as her personal assistant to be performed at her mother's house. When I told her that I wanted a job that was closer to American Fork, she told me that I would be working at her mother's house for only a few months, and then we would move back to Springville. I asked her if she was starting a new business. She paused and smiled, and then replied "Let's just say it will be a long-term position." She also explained to me that even though I would be working for her, I would be paid by her sister, who, to the best of my current recollection, she identified as Shue Wen Smith.

7. Jau Hwa Stewart also told me that if I came to work for her, I would have to cut all ties with E. Excel and its other employees. When we finished the conversation, she asked me not to discuss with anyone at E. Excel that fact that she and I had met to discuss a work opportunity.

8. I called Jau-Hwa Stewart approximately two days later and informed her that I wished to remain at E. Excel.

DATED this 03 day of October, 2001.

Heather Turner
Heather Turner

SUBSCRIBED AND SWORN before me this 3rd day of October, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville, UT

My Commission Expires:

June 1, 2003



Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

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Defendants.

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corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah
corporation, and JOHN DOES I THROUGH
X,

Third-Party Defendants

**AFFIDAVIT OF KATHY
HANSEN**

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Kathy Hansen, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I have been employed with E. Excel International, Inc. ("E. Excel") since February 2000, first as an administrative assistant, and then, beginning in August 2001, as the human resources manager as well.

2. In approximately the middle of 2000, I observed Beverly Warner's husband, Larry Warner, install security cameras at the E. Excel facility. These cameras covered the offices, the hallways, the product manufacturing rooms, the entrances to the facility, and all, or virtually all, of the other interior spaces of E. Excel.

3. At the outset, it was my impression that Beverly Warner was quite concerned about catching employee misconduct on videotape. For instance on one occasion I observed Beverly get quite upset about finding dirty dishes in the sink; she stated at that time that she wanted video surveillance installed in the kitchen to catch the perpetrator.

4. Beginning at approximately this time, Jau-Hwa Stewart hired Taig Stewart's friend, Kevin, an off-duty police officer, to watch the security monitors for approximately eight hours each Friday, and to review the videotapes made by the security system for other days when asked to do so. On one such Friday, I went in to talk to Kevin at Jau-Hwa Stewart's instruction; Jau-Hwa expressed concern to me that Kevin was not reporting on employee misconduct, such

as talking or wasting time. For the most part, the conversation with Kevin consisted of him complaining to me about his assignments. He explained, for instance, that Beverly Warner called him at home and asked him to review the security videotapes to determine who had gone into the kitchen and left dirty dishes in the kitchen sink. He also complained that Beverly had asked him to review the videotapes to determine who had stolen one bar of display soap off the shelves in the reception area. In the course of this discussion, Kevin also explained me to the functioning of the security systems, the scope of its coverage, and the workings of the videotape recording system.

5. At the time of my discussion with Kevin, in approximately November or December of 2000, I personally observed that there were between 30 and 50 archived videotapes generated by the security system, and stored on shelves in the security room. Those videotapes were not present when I went into security room in approximately March 2001 to look for missing items, and I cannot account for what happened to them.

6. At the time that mice were apparently introduced into the E. Excel warehouse, in approximately February 2001, I suggested to Beverly Warner that we review the surveillance videotapes to determine who had done it. She replied to me that the security cameras had been turned off for a while. When I suggested that we turn them on again, she just smiled at me. The cameras were still off when the Special Master arrived at the company in mid-March 2001.

7. To the best of my knowledge, Beverly Warner is the only person who possessed a key to the security room before March 2001.

8. In approximately February 2001, there came a day when many employees arrived at work to find that their computer files had been erased. A group of employees, including myself, went to speak with Beverly Warner about the missing files. Beverly stated that the files were deliberately removed from the computers and that it was done for the employees' protection in the event that other management came in to the company.

9. Shortly after Jau-Hwa Stewart left E. Excel, at least six computers and six telephones were taken, after hours, from desks not then in use.

10. In June 2001, Jau-Hwa Stewart's lawyers allowed E. Excel to copy documents that Jau-Hwa Stewart had removed from E. Excel's offices. Jau-Hwa Stewart's attorneys insisted that any such copying be done at E. Excel's sole expense. Exhibit A to my affidavit is a true and correct copy of the charges incurred by E. Excel in the process of copying these documents.

11. Exhibit B is a true and correct list of miscellaneous items missing from E. Excel's offices after Jau-Hwa Stewart's departure. I prepared this list based upon personal knowledge and direct interviews of other E. Excel employees in the course of my business responsibilities.

12. Exhibit C to my affidavit is a true and correct copy of the nondisclosure agreement used by E. Excel. It has been the customary practice of E. Excel to require each employee to sign such an agreement, at least since mid-1998.

13. On February 28, 2001, a few days after Jau-Hwa Stewart was removed from her position with E. Excel by Court order, I received a telephone call from Dr. Kim O'Neill, a

consultant to E. Excel. Dr. O'Neill asked me if I had received a fax transmission from him, and I informed him that I had not.

14. Dr. O'Neill said that when I did receive his fax I was not to worry about what it contained. He said that even as we spoke Jau-Hwa Stewart was not sitting still and was busy doing things, that things were happening. Dr. O'Neill did not explain himself any further.

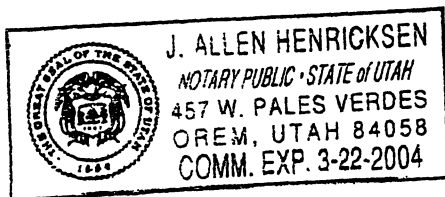
15. Within the hour, I received a fax from Dr. O'Neill that contained resignation letters from himself and from his colleague, Dr. Murray.

16. The file for Shamrock Consulting, which contained Dr. O'Neill's resignation letter, is missing from E. Excel. Attached as Exhibit D hereto is a true and correct copy of Dr. Murray's letter, which accompanied Dr. O'Neill's letter.

DATED this 3rd day of October, 2001.

Kathy Hansen
Kathy Hansen

SUBSCRIBED AND SWORN before me this 3rd day of October, 2001.



My Commission Expires:

March 22, 2004

J. Allen Henricksen
NOTARY PUBLIC
Residing at: 457 W. Pales Verdes
Orem, Utah 84058

SEARCH - PROVO

Xinco's

ID : 0154

06/26/01

9:01 AM

Page: 1

ELECTRONIC JOURNAL

Register Number	Date	Time	Number	CoWorker Number	Total	Discount	Tax	Amount
--------------------	------	------	--------	--------------------	-------	----------	-----	--------

Quantity	Item Number	Description	Price	Discount	Amount
47341	0001	F31 82W S/S F WHITE LTR/LGLSHOLE	0.07	0.00	3313.87
3457	0159	E/S 82W S/S FULL WHITE LTR/LGLSHOL	0.07	0.00	241.99
50798	0737	CPS OUTSOURCE OTHER	6.08	0.00	4063.34
05/21/01 10:43 AM	981351	53	7619.70	0.00	476.23
8095.93	Paid by Check				

Grand Total	Total Discount	Total Tax	Total Amount
7619.70	0.00	476.23	8095.93

Missing Misc. Items

- 6 Display Booths and accompanying Posters and supplies
 - 27" Color TV, VCR, and Marble TV Stand
 - Betacam Player/Duplicator
 - 6? Work area Computers (there used to be a working computer on every desk)
 - Fax Machine
 - Paper cutter
 - Small Office supplies (staplers, tape holders, pens, phones, 13 cases paper, 1 case of Letterhead, Chairs, paperclip dispensers, PO Books, etc.)
 - Gwei Hua Balm Machine
 - Forklift
 - Pallet Jack
 - 10 tables (heavy production tables)
 - Pallets of new Packing Boxes
(Jau Hwa's Office)
 - 4 file cabinets (4 drawer, locking)
 - Lap Top Computer and regular desk computer
 - Printer & Stand
 - Lexmark Fax Machine
 - Paper Shredder
 - Couch & Love seat (possibly purchased by In-laws as gift)
 - Marble coffee table
 - Desk Chair
 - 2 Side Chairs
(Rui-Kang's office)
 - Cherrywood Desk (Mike Shang witnessed Beverly, & family members take it)
 - Cherrywood credenza
 - File cabinets
 - Fax machine
 - Computer (Thin screen)
 - Printer
 - 2 VCD projectors-older and brand new, one possibly with Jau Fei
 - Boom box
 - Bookshelf
 - Small 13" Color TV
(Jau-Fei's Office)
 - Desk chair
 - Marble Pillar w/chinese vase
 - Small file cabinet
 - Fax Machine
 - Computer
 - Printer
- E. Excel purchased a \$5,000 Lap Top computer for Sam Tzu (February 2001)

EMPLOYEE NONDISCLOSURE AND NON-COMPETITION AGREEMENT

THIS AGREEMENT is entered into and effective as of the _____ day of _____, 2001, by and between E. Excel International, Inc. (hereinafter "E. Excel"), a corporation of the state of Utah having a principal business office at 1198 North Spring Creek Place, Springville, Utah 84663, and _____ (hereinafter "Employee"), an individual residing at _____.

Recitals

A. E. Excel has developed and/or acquired technology relating to nutritional immunology, health foods dietary supplements and personal care products, and E. Excel is engaged in the business of further developing such technology and of manufacturing, marketing, distributing, and/or providing products and related services based upon such technology.

B. Employee desires to be employed by E. Excel and to provide assistance, as directed by E. Excel, in connection with E. Excel's aforesaid business.

C. In fulfilling the duties of his/her employment with E. Excel, the parties contemplate that Employee will need to have access to certain information concerning E. Excel's technology which E. Excel regards as confidential and/or proprietary.

D. E. Excel is willing to employ Employee in connection with E. Excel's business and to provide Employee with the necessary information concerning E. Excel's technology, subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter contained, the employment and/or continued employment of Employee, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, E. Excel and Employee hereby agree, as follows:

Terms of Agreement

Section 1: Definitions

1.1 As used in this Agreement, the term E. Excel Technology shall mean the devices, systems, methods and products developed and/or acquired by E. Excel relating to nutritional immunology, health foods, dietary supplements and personal care products, including, but not limited to, formulae, diagrams, blueprints, patents, applications, prototypes, and any other know-how, data, or technical information relating thereto.

1.2 As used in this Agreement, the term Confidential Information shall mean the E. Excel Technology and any and all knowledge and information regarding the E. Excel Technology and/or E. Excel's business which Employee has acquired and/or hereafter acquires on E. Excel's premises or from E. Excel or any of E. Excel's employees or representatives. Confidential Information shall specifically include all E. Excel customer and distributor listings, written and oral communications regarding the E. Excel Technology and marketing, financial, and costing information related thereto, whether in the form of lists, memoranda, letters, transcripts, sound or video recordings, computer software, printed materials, or other information storage or recording media.

Section 2: Disclosure by E. Excel

2.1 Subject to the terms and conditions of this Agreement, E. Excel will employ Employee and will disclose to Employee and/or allow Employee to have access to such Confidential Information as E. Excel believes reasonably necessary to enable Employee to fulfill the duties of his/her employment with E. Excel.

Section 3: Employee's Obligation of Confidence

3.1 The parties hereto acknowledge that in furtherance of the purposes of this Agreement, Employee will have access to certain knowledge and information which is used and/or developed by E. Excel in connection with its business, which is considered by E. Excel to be proprietary, and which has been developed and/or acquired by E. Excel through considerable investment of time, money, and/or effort.

3.2 Employee acknowledges that the Confidential Information made available to Employee under this Agreement is owned and shall continue to be owned solely by E. Excel. Employee accordingly agrees not to divulge any such Confidential Information to any individual or entity without E. Excel's express consent.

3.3 Notwithstanding the provisions of paragraph 3.2 above, Employee shall have no obligation of confidence with respect to:

(a) Information which Employee reasonably demonstrates was in his/her possession in tangible form prior to any disclosure thereof by or for E. Excel;

(b) Information which Employee reasonably demonstrates was independently developed by or for him/her from non-confidential sources and without reference to any of the Confidential Information of E. Excel; or

(c) Information which Employee reasonably demonstrates has become generally known in the trade or public either prior to or subsequent to E. Excel's disclosure thereof through no fault of Employee.

3.4 Notwithstanding the provisions of paragraph 3.3 above, Employee will not be relieved of his/her obligations of confidence and non-use as to Confidential Information which is a combination of features merely because any or all of the individual features are included in disclosures falling within the scope of paragraph 3.3. Employee will only be relieved of his/her obligations of confidence and non-use with respect to such Confidential Information if the combination of features is included in such a disclosure.

3.5 Under no circumstances shall Employee remove from E. Excel's place of business any of E. Excel's books, records, documents, or any copies of such documents, without the express written permission of E. Excel; nor shall Employee make any copies of such books, records, or documents for use outside of E. Excel's place of business except as specifically authorized in writing by E. Excel.

Section 4: Ownership and Disclosure of Improvements

4.1 E. Excel is and shall be the owner of all rights, title, and interest in and to the following: (1) all original technical data or written materials originated and/or prepared for E. Excel by Employee, including formulae, designs, plans, and specifications; (2) all ideas, concepts, know-how, or techniques relating to such technical data or written materials developed during the course of Employee's employment with E. Excel; and (3) all inventions, discoveries, or improvements, including ideas, concepts, know-how, or techniques relating to the E. Excel Technology that were (a) developed by Employee or (b) conceived or originated by Employee solely or jointly with others (i) at E. Excel's request or expense, at its facilities, (ii) in the course of Employee's employment with E. Excel, or (iii) based on knowledge or information obtained from E. Excel during the course of Employee's such employment.

4.2 Employee covenants and agrees that he/she will promptly communicate and disclose to E. Excel all such data, materials, ideas, concepts, know-how, techniques, inventions, discoveries, and improvements, whether patentable or not, referred to in paragraph 4.1 above, together with any and all other enhancements, uses, modifications, and/or improvements of or to the E. Excel Technology which Employee conceives, works upon, or otherwise becomes aware of during the term of this Agreement.

4.3 Employee further agrees to irrevocably assign, transfer, and set over to E. Excel the entire right, title, and interest in and to each such idea, concept, technique, invention, discovery, improvement, enhancement, use, and modification referred to in paragraphs 4.1 and 4.2 above, including without limitation all right and title in and to any data, materials, know-how, patents, copyrights, or trade secrets which embody all or any part thereof. Employee agrees to execute, acknowledge, and deliver any and all instruments, documents, and papers and to do any and all other things that may be deemed to be reasonably necessary by E. Excel to carry out the provisions of this Section 4.

Section 5: Restrictive Covenants

5.1 Employee agrees that he/she will use E. Excel's Confidential Information solely to fulfil the duties of his/her employment with E. Excel, and that he/she will not otherwise use the Confidential Information for his/her own benefit or the benefit of others. Employee further agrees that he/she will not use or employ any of the Confidential Information in any way which would be harmful to or against the best interests of E. Excel.

5.2 Employee further agrees that he/she will not, during the term of this Agreement, directly or indirectly perform any services for any business, profession, or other endeavor which is either directly or indirectly in competition with the business of E. Excel. Employee agrees not to perform such services either as an employee, agent, independent contractor, owner, or otherwise.

5.3 For a period of one (1) year following the termination of this Agreement for any reason, or for a period of time equal to the length of Employee's employment with E. Excel if such tenure is less than one (1) year, Employee will not directly or indirectly solicit or sell any product which is the same as or substantially equivalent to a product manufactured, marketed, and/or distributed by E. Excel to any person, company, firm or corporation who is or was a customer of E. Excel at any time within five (5) years prior to the termination of Employee's employment with E. Excel. Employee agrees not to solicit such customers on behalf of himself/herself or any other person, firm, company, or corporation.

5.4 The parties have attempted to limit Employee's right to compete only to the extent necessary to protect E. Excel from unfair competition. The parties recognize, however, that reasonable people may differ in making such a determination. Consequently, the parties hereby agree, that if the scope of enforceability of the restrictive covenants of this Agreement is in any way disputed at any time, a court or other trier of fact may modify and enforce the covenant to the extent that it believes it to be reasonable under the circumstances existing at that time.

5.5 Employee further acknowledges that in the event his/her employment with E. Excel terminates for any reason, he/she will be able to earn a livelihood without violating the foregoing restrictions and that his/her ability to earn a livelihood without violating such restrictions is a material condition to his/her employment with E. Excel.

Section 6: Term and Termination

6.1 This Agreement shall remain in effect for so long as Employee continues his/her employment with E. Excel. Upon termination of Employee's employment with E. Excel for any reason, with or without cause, this Agreement shall automatically terminate.

6.2 Within two (2) weeks following termination of this Agreement for any reason, Employee shall furnish E. Excel with written notice specifying that through reasonable care and to the best of his/her knowledge, all Confidential Information has been returned to E. Excel, including all originals and all copies of any documentation containing any portion of E. Excel's Confidential Information.

6.3 The obligations contained in Sections 3, 4, 5 and 6 shall survive the termination of this Agreement. In addition, the termination of this Agreement shall not affect any of the rights or obligations of either party arising prior to or at the time of the termination of this Agreement, or which may arise by any event causing the termination of this Agreement.

Section 7: Remedies

7.1 Employee acknowledges that compliance with Sections 3, 4 and 5 is necessary to protect the business and goodwill of E. Excel and that a breach of any of these provisions will irrevocably and continually damage E. Excel, for which money damages may not be adequate.

7.2 Consequently, in the event that Employee breaches or threatens to breach any of the obligations in Sections 3, 4 and/or 5 of this Agreement, E. Excel shall be entitled to a preliminary and permanent injunction prohibiting Employee from violating this Agreement in order to prevent the continuation of such harm and to obtain money damages insofar as they can be determined.

7.3 Nothing in this Agreement shall be construed to prohibit E. Excel from also pursuing any other remedies available to it, the parties having agreed that all remedies are to be cumulative.

Section 8: Miscellaneous Provisions

8.1 Titles which precede paragraphs or subsections of this Agreement are for convenience only and shall in no way affect the manner in which any provision herein is construed.

8.2 Neither party shall have the right to assign any rights or obligations under this Agreement without the prior written approval of the other party, except that E. Excel shall have the right to assign this Agreement as part of any merger, acquisition, reorganization, or sale of assets in the normal course of business.

8.3 The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, and each provision shall be enforced to the maximum extent permitted by applicable law.

8.4 This Agreement shall be binding upon and shall inure to the benefit of the parties, their successors, assigns, executors, administrators, and personal representatives.

8.5 This Agreement is the complete and exclusive statement of the agreement between the parties relating to the subject matter of this Agreement, and this Agreement supersedes all proposals, or prior agreements and understandings, whether oral or written, and all other communications relating to the subject matter of this Agreement.

8.6 This Agreement may only be amended, or any provision herein waived, by written instrument executed by each party hereto. No waiver of any provision hereof shall constitute a waiver of any other provision hereof, whether or not similar, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein.

8.7 If any party to this Agreement breaches any of the terms of this Agreement, then that party shall pay to the non-defaulting party all of the non-defaulting party's costs and expenses, including attorney's fees, incurred by that party in enforcing the terms of this Agreement.

8.8 This Agreement and its validity and interpretation shall be governed by and construed in accordance with the laws of the State of Utah, notwithstanding any choice of law rules of Utah or any other state or jurisdiction.

IN WITNESS WHEREOF, the parties have signed and entered into this Agreement as of the date first mentioned above.

E. EXCEL INTERNATIONAL, INC.

By: _____
Title: _____

EMPLOYEE

By: _____

FEB 28 2001

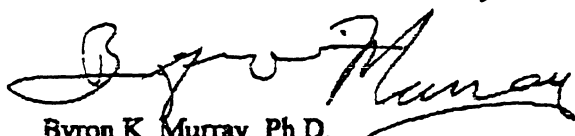
February 22, 2001

MS Jau Hwa Stewart, President
E.Excel International
1198 North Spring Creek Place
Springville, Utah 84663

Dear Jau Hwa,

I was very disturbed to learn that you will no longer be functioning as the President of E.Excel International. I have appreciated so much my association with you and E.Excel. However, under these circumstances, I would find it very difficult to continue in my present position as the Associate Research Director for E.Excel International. Therefore, I am rendering my resignation effectively immediately.

I wish the best in the future for both you and E.Excel International.

A handwritten signature in cursive script, reading "Byron K. Murray". The signature is written in dark ink and is positioned above the printed name and title.

Byron K. Murray, Ph.D.
Celtic Consulting, Inc.

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
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Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

**AFFIDAVIT OF BELIZARIO
MARTINEZ**

Civil No. 010400098

Judge Fred D. Howard

E 0281

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

I, Belizario Martinez, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith::

1. I have been employed with E. Excel International, Inc. ("E. Excel") since approximately January 2000 working in production for E. Excel's liquid products..
2. In my role in production, I have access to certain trade secrets of E. Excel.
3. On approximately Friday, June 1, 2001, I received a telephone call from Dale Stewart, the former plant manager of E. Excel. Mr. Stewart told me that he had another job for me with better pay and better conditions.
4. On the following Monday, June 4, 2001, I received another call from Mr. Stewart. This time Mr. Stewart offered me a promotion to a supervisory position for powdered products, similar to my current work with liquid products, if I would leave E. Excel. Mr. Stewart then asked me if I could obtain information concerning the relative quantity of ingredients in E. Excel's powdered drinks.
5. At 11:30 p.m. that night, Mr. Stewart called me for a third time and asked me if I could obtain the formula for an E. Excel product called "Nutrifresh." Mr. Stewart offered me \$500 if I could obtain that information for him.
6. On Wednesday, June 6, 2001, I informed Mr. Stewart that I was not interested in a position with him.

DATED this _____ day of September, 2001.

Belizario Martinez

SUBSCRIBED AND SWORN before me this _____ day of September, 2001.

NOTARY PUBLIC

Residing at: _____

My Commission Expires:

E 0285

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Teléfono: (801) 521-3200
Abogados para el Magistrado Especial Larry Holman
y para el Demandado E. Excel International, S.A.

EN EL CUARTO DISTRITO JUDICIAL DEL CONDADO DE UTAH
ESTADO DE UTAH

JAU-FEI CHEN, personalmente y como tutor
natural de sus hijos menores, CHI WEI
ZHANG, E. LEI ZHANG, y de E.E. ZHANG,
Demandantes,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, S.A. y a JOHN DOES I
a X,

Demandados.

DECLARACIÓN JURADA DE
BELIZARIO MARTINEZ

No. Civil 010400098

Juez Fred D. Howard

E. EXCEL INTERNATIONAL, S.A., una
corporación de Utah

Tercero Demandante

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, S.A., una corporación de
Utah, y JOHN DOES I a X,

Terceros Demandados

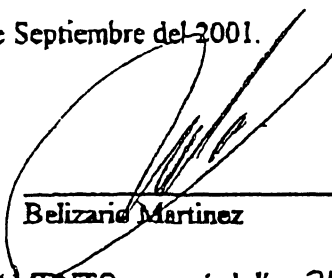
ESTADO DE UTAH)
 :ss.
CONDADO DE UTAH)

Yo, Belizario Martinez, soy mayor de 18 años de edad y tengo conocimiento personal de los hechos descritos abajo, y si fuera llamado a testificar lo haría de acuerdo con lo siguiente:

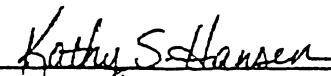
1. He sido empleado por E. Excel International, S.A. ("E. Excel") aproximadamente desde Enero del 2000, trabajando en la producción de productos líquidos de E. Excel.
2. En mi posición en producción tengo acceso a ciertos secretos de fabricación sobre procesos industriales de E. Excel.
3. El Viernes, Junio 1 del 2001 aproximadamente, recibí una llamada telefónica de Dale Stewart, el gerente previo de la planta de E. Excel. El Sr. Stewart me dijo que tenía otro trabajo para mí mejor pagado y con mejores condiciones.
4. El siguiente Lunes, Junio 4 del 2001, recibí otra llamada telefónica del Sr. Stewart. En esta ocasión el Sr. Stewart me ofreció un ascenso para la posición de supervisor para productos en polvo, un trabajo similar a mi trabajo actual con los productos líquidos si me hubiera ido de E. Excel. Entonces el Sr. Stewart me preguntó si podía obtener información relacionada con las cantidades relativas de los ingredientes en las bebidas en polvo de E. Excel.
5. Esa noche a las 11:30 p.m., el Sr. Stewart me llamó por tercera vez y me preguntó si podía obtener la formula de un producto de E. Excel llamado "Nutrifresh". El Sr. Stewart me ofreció \$500 si podía obtener esta información para él.
6. El Miércoles 6 de Junio del 2001 le informé al Sr. Stewart que no estaba

interesado en tener un puesto con él.

FECHADO el día 26 del mes de Septiembre del 2001.

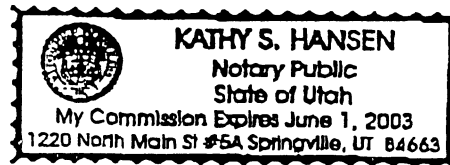

Belizario Martinez

SUSCRITO Y DECLARADO BAJO JURAMENTO ante mi el día 26th del mes de
Septiembre del 2001.


NOTARIO PUBLICO
Reside en: Springville, UT

Mi Comisión Se Vence el:

June 1, 2003



Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
Defendant E. Excel International, Inc.

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

JAU-FEI CHEN, individually and as the
natural guardian of CHI WEI ZHANG, E. LEI
ZHANG, and E.E. ZHANG, her minor
children,

Plaintiffs,

vs.

JAU-HWA STEWART, E.EXCEL
INTERNATIONAL, INC. and JOHN DOES I
THROUGH X,

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah corpor-
ation, and JOHN DOES I THROUGH X,

Third-Party Defendants

**AFFIDAVIT OF KAYLYNN
STRONG and ALLISON
CHAMBERS**

Civil No. 010400098

Judge Fred D. Howard

STATE OF UTAH)
 :ss.
COUNTY OF UTAH)

Kaylynn Strong and Allison Chambers, are each over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. Kaylynn Strong has been employed with E. Excel International, Inc. (“E. Excel”) as an Order Entry Operator since August of 2000. Allison Chambers has been employed with E. Excel International, Inc. (“E. Excel”) as an Order Entry Operator since July of 2000.

2. In the month of February 2001, Beverly Warner requested a large order at approximately 4:45pm. She wanted it done very quickly, so she asked both Melissa Mitchell and Allison Chambers to place the order. Allison read the product codes and quantity to Melissa as Melissa typed it into the computer. They were instructed to invoice five of every E. Excel herbal and Elemente product. They were told that this order was going to China. The balance of the order is estimated at \$5000.00.

3. Beverly Warner instructed Ron Hughes, the shipping manager, and his staff to box the entire order and bring it to the office fax and copy area. It was customary practice for orders requested by Angela Barkley to be brought to this area.

4. Kaylynn Strong’s job in the order entry department was specifically to take all orders printed on the invoice printer, separate and distribute for warehouses. She was

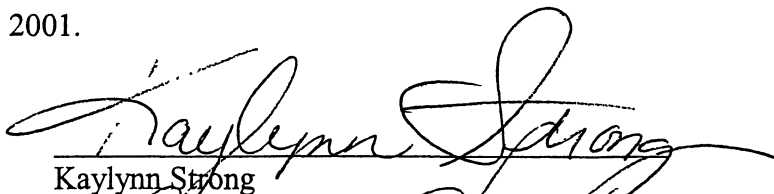

specifically responsible for staying at her post at the end of the day until all invoices of the day had been distributed. Beverly Warner told Kaylynn that she could leave before this invoice was finished printing and that she, Beverly, would take care of this for Kaylynn. Beverly had never offered to do this work for Kaylynn before or after this time.

5. After work hours the next evening, Allison Chambers and Kaylynn Strong were visiting in the parking lot when they observed Angela Barkley load these boxes into a light silverblue Mercedes in several loads.

6. We have searched company records and the original invoice cannot be located. With the aid of Carl Brewer, E. Excel's IT Manager, Kaylynn Strong was logged into the Server and searched for a copy of the invoice and found that it was also deleted from the computer system.

7. On February 20, 2001, Beverly Warner instructed Jeanette Betts to place a large order as a gift for Jau-Hwa Stewart and was not to be shipped. The order was put on the company account with a payment of only .18 cents towards the balance of \$1758.00. See attachment

DATED this 24th day of October, 2001.

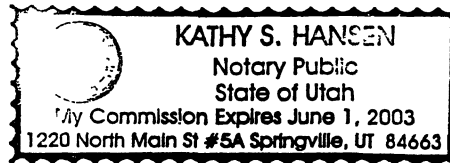

Kaylynn Strong

Allison Chambers

SUBSCRIBED AND SWORN before me this 24th day of October, 2001.

Kathy S. Hansen
NOTARY PUBLIC
Residing at: Springville, UT

My Commission Expires:

June 1, 2003



=Distributor's Address=====

Misc/Employee Tree
1198 N. Spring Creek Place

Springville, UT 84663
USA

=Ship-To Address=====

Employee and Misc.
1198 N. Spring Creek Place
PICK UP SPRINGVILLE
Springville, UT 84663
USA

Distributor ID====Vol Period=====Ship Via====Warehouse===Currency===Entry Init=====Date=====Time===Ship Verify Init=
5 2001/02 Will Call 1 USD JB 2/20/2001 14:04 AH

Quantity Shipped	Pkg#	Item Code	Item Description	Qty Ordered	Item Volume	Total Volume	Item Price	Total Price
3		202	Night Repair-NORM	3	36.00	108.00	36.00	108.00
3		400	Cactus Ginseng Essence	3	48.00	144.00	48.00	144.00
3		700	Gentle Makeup Remover	3	16.00	48.00	16.00	48.00
3		702	Day Defense SPF 15	3	20.00	60.00	20.00	60.00
3		705	Body Wash	3	15.00	45.00	15.00	45.00
3		704	Body Nourisher	3	22.00	66.00	22.00	66.00
3		804	Intens Hair Treatment	3	16.00	48.00	16.00	48.00
3		803	Moist Conditinoner	3	14.00	42.00	14.00	42.00
3		801	Muti-Action Shampoo	3	12.00	36.00	12.00	36.00
3		802	Shampoo For Kids	3	12.00	36.00	12.00	36.00
3		701	Advancd Spot Control	3	12.00	36.00	12.00	36.00
3		201	All-Day Nourisher-NORM	3	24.00	72.00	24.00	72.00
3		500	Whiten Essence for DAY	3	25.00	75.00	25.00	75.00
3		708	Sere Deodorant	3	11.00	33.00	11.00	33.00
3		707	Cact Gin Berry Cleanser	3	11.00	33.00	11.00	33.00
3		401	Cactus Ginseng Masque	3	36.00	108.00	36.00	108.00
3		203	Masque-Normal	3	24.00	72.00	24.00	72.00
3		100	Facial Cleanser-DRY	3	14.00	42.00	14.00	42.00
3		402	Replenishing Hand Cream	3	20.00	60.00	20.00	60.00
3		600	Hydrating Tinted	3	22.00	66.00	22.00	66.00
3		706	Moistuizing Bath	3	18.00	54.00	18.00	54.00
3		204	Exfoliant-Normal	3	16.00	48.00	16.00	48.00
3		711	Artic Whisper	3	9.00	27.00	9.00	27.00
3		710	Glisten Toothpaste	3	9.00	27.00	9.00	27.00
3		709	Brshng Bubb Toothpaste	3	9.00	27.00	9.00	27.00
3		900	Celesta	3	35.00	105.00	35.00	105.00
3		901	Eterne	3	35.00	105.00	35.00	105.00
3		1003	Valentine Red	3	15.00	45.00	15.00	45.00
3		1001	Misty Mauve	3	15.00	45.00	15.00	45.00
3		1004	Deep Cocoa	3	15.00	45.00	15.00	45.00

Comments: DO NOT SHIP---DO NOT SHIP--- DO NOT SHIP

Total Volume	1758.00	Total	1758.00
Tax Percent	.00000	Tax	0.00

Gift for Jau-Hwa

DO NOT SHIP---

Shipping	0.00
Misc	0.00
Invoice Amount	0.18

=Shipment=====Package=====Tracking Number=====Ship Date=====

COPY

Deno Himonas (USB #5483)
Adam B. Price (USB #7769)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Special Master Larry Holman and
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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
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corporation

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vs.

TAIG STEWART, BEVERLY WARNER,
ANGELA BARCLAY, DALE STEWART,
BRYAN HYMAS, PAUL COOPER, SHUE
WEN SMITH, SHANNON HEATON,
SHANNON RIVER, INC., a Utah
corporation, and JOHN DOES I THROUGH
X,

Third-Party Defendants

AFFIDAVIT OF DEVON GROW

Civil No. 010400098

Judge Fred D. Howard

101

STATE OF OREGON)
) ss.
COUNTY OF WASHINGTON)

I, Devon Grow, am over 18 years of age and have personal knowledge of the facts set forth below, and if called to testify would testify in accordance herewith:

1. I was employed with E. Excel International, Inc. ("E. Excel") from February 1999, as an assistant to Jau-Hwa Stewart, the Printing and Purchasing Supervisor, and the Trademark and Patent coordinator.

2. In approximately February of 2001, I arrived at work to find that my computer files had been deleted. Gina Lipe, whom I sat next to, asked Beverly Warner what happened to our files. Beverly was standing in front of our desks. She responded that “our files were removed for our protection so that we would not have to testify in court and after the court proceedings were over, the files would be returned. They do not want Jau-Fei’s Lawyers to have access to our files.”

3. In approximately February of 2001, Jau-Hwa Stewart told me that we were in a “race” with Jau-Fei to get the Philippine trademark ownership names changed. Jau-Hwa wanted me to apply to have all the trademark ownership names changed into her name personally. She asked me to do the same for all of the US trademarks. She told me that Taiwan and Malaysia trademarks had already been lost to Jau-Fei.

4. In approximately February of 2001, Jau-Hwa Stewart told me to stop printing of all Korean labels. She stated that Mr. Han (Korean General Manager) who had at first been loyal was now untrustworthy and we would not be doing business with him.

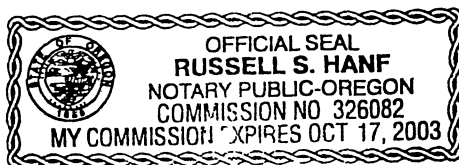
5. In approximately March of 2001, Paul Cooper told me that he had received an e-mail from me asking him to discard Millennium front labels. I told him that this was not correct. I printed and handed him the e-mail I had sent him which stated he was to discard the Back labels. He took the e-mail copy and walked away. (E-mail files were deleted and a copy no longer exists)


6 In approximately March of 2001 after Jau-Hwa Stewart was removed as President of E. Excel, I received a Trademark document in the mail. As I proceeded to file the document I opened the drawers I found all of the files were missing. Attached are copies of lists I compiled of missing documents and other missing items which are true and correct based upon my personal knowledge.

DATED this 15 day of October, 2001.


Devon Grow

SUBSCRIBED AND SWORN before me this 15th day of October, 2001.




NOTARY PUBLIC
Residing at: Portland, Oregon

My Commission Expires:

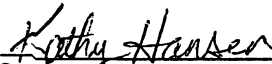
10/17/03

CERTIFICATE OF MAILING

I hereby certify that the Affidavit of Devon Grow was mailed in the United States mail, postage prepaid, this 17th day of October, 2001, addressed as follows:

Richard Van Wagoner
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, UT 84145

Mark Larsen
Larsen & Mooney Law
50 West Broadway, First Floor
Salt Lake City, UT 84101


Secretary

Missing Analytical Reports*

ACT
ART
Circle
Cercle
Concenergy
D-I
Digeston
Dong-Quai
Ji-Lin Ginseng
Heimdall
Noco
Pearl
Pearlin
S-T
Stresgon
Vision
W-L
Wei-Lo
DNP
DTP
Duet
Enjoi
Evernew
Ginseng & Pearl Cream
Gwei-Hua Balm
Handygel
Herba
Li-Dan
Millennium
Millennium Red
Nutriall
Nutriall 2
Nutrifresh Original
Nutrifresh Peach
Nutrifresh Strawberry
Nutrifresh Chocolate
Nutrifresh Mixed Fruit
Refresh
Triflora
Vegiwash
Intensive Night Repair Dry
Replenishing Masque Dry
Hydrating Exfoliant Dry
All-Day Hydrating Nourisher Normal

Intensive Night Repair Normal
Replenishing Masque Normal
Hydrating Exfoliant Normal
Hydrating Oil-Free Nourisher Oily
Intensive Night Repair Oily
Deep Purifying Clay Masque Oily
Clarifying Exfoliating Gel Oily
Cactus Ginseng Essence
Pure Cactus Ginseng Masque
Replenishing Hand Cream
Whitening Essence for Day
Intensive Whitening Essence for night
Hydrating Tinted Nourisher
Oil-Free Tinted Nourisher
Gentle Makeup remover
Advanced Spot Control
Intensive Day Defense
Protective Body Sunscreen box
Body Nourisher
Body Wash
Moisturizing Bath
Cactus Ginseng Berry Cleanser
Sere Deodorant
Brushing Bubbles
Glisten Toothpaste
Arctic Whisper labels
Anti-Dandruff shampoo
Multi-Action Shampoo
Shampoo for Kids
Moisturizing Conditioner
Intensive Hair Treatment
Celesta
Eterne
Distinction
Time Elements
TruLips

*Necessary for foreign product import. We are missing original copies signed by both Jau-Hwa and Jau-Fei.

Missing Processing Reports*

ACT
ART
Circle
Cercle
Concenergy
D-I
Digeston
Dong-Quai
Ji-Lin Ginseng
Heimdall
Noco
Pearl
Pearlin
S-T
Stresgon
Vision
W-L
Wei-Lo
DNP
DTP
Duet
Enjoi
Evernew
Ginseng & Pearl Cream
Gwei-Hua Balm
Handygel
Herba
Li-Dan
Millennium
Millennium Red
Nutriall
Nutriall 2
Nutrifresh Original
Nutrifresh Peach
Nutrifresh Strawberry
Nutrifresh Chocolate
Nutrifresh Mixed Fruit
Refresh
Triflora
Vegiwash

*Necessary for foreign product import. We are missing original copies signed by Jau-Fei.

Missing Toxicology Reports*

ACT
ART
Circle
Cercle
Concenergy
D-I
Digeston
Dong-Quai
Ji-Lin Ginseng
Heimdall
Noco
Pearl
Pearlin
S-T
Stresgon
Vision
W-L
Wei-Lo
DNP
DTP
Duet
Enjoi
Evernew
Ginseng & Pearl Cream
Gwei-Hua Balm
Handygel
Herba
Li-Dan
Millennium
Millennium Red
Nutriall
Nutriall 2
Nutrifresh Original
Nutrifresh Peach
Nutrifresh Strawberry
Nutrifresh Chocolate
Nutrifresh Mixed Fruit
Refresh
Triflora
Vegiwash

*Necessary for foreign product import. We are missing original copies signed by Jau-Fei.

Missing Stability Studies*

ACT
ART
Circle
Cercle
Concenergy
D-I
Digeston
Dong-Quai
Ji-Lin Ginseng
Heimdall
Noco
Pearl
Pearlin
S-T
Stresgon
Vision
W-L
Wei-Lo
DNP
DTP
Duet
Enjoi
Evernew
Ginseng & Pearl Cream
Gwei-Hua Balm
Handygel
Herba
Li-Dan
Millennium
Millennium Red
Nutriall
Nutriall 2
Nutrifresh Original
Nutrifresh Peach
Nutrifresh Strawberry
Nutrifresh Chocolate
Nutrifresh Mixed Fruit
Refresh
Triflora
Vegiwash

*Necessary for foreign product import. We are missing original copies signed by Jau-Fei.

Nutrition Fact Analysis Reports*

Silliker Labs

Nutrifresh Coffee
Report 35669
DATE: 7/14/97

Nutrifresh Chocolate
Report 35669
DATE: 7/14/97

Nutrifresh Strawberry
Report 356676
DATE: 7/14/97

Nutrifresh Strawberry
Report 356673
DATE: 7/25/97

Evernew
Report 356675
DATE: 7/15/97

Herba
Report 356675
DATE: 7/15/97

Li-Dan
Report 356675
DATE: 7/15/97

Nutrial
Report 374230
DATE: 11/07/97

Refresh
Report 424953
DATE: 9/22/98

Herba Health Drink
Report 424953
DATE: 9/22/98

Enjoi Health Drink
Report 424953
DATE: 9/22/98

Li-Dan Health Drink
Report 424953
DATE: 9/22/98

Triflora E. Excel International
Report 424953
DATE: 9/22/98

W.L. Conc. Herbs in Gel Capsules
Report 424953
DATE: 9/22/98

Dong-Quai (Angelica Root) Herbal Conc.
Report 424953
DATE: 9/22/98

Vision
Report 424953
DATE: 9/22/98

Ji-Lin Ginseng Herbal Concentrate
Report 424953
DATE: 9/22/98

ACT Concentrated Powder Herbs in Gelatin
Capsules
Report 424953
DATE: 9/22/98

Pearl Concentrated Herbs
Report 424953
DATE: 9/22/98

Concenergy Concentrated Herbs in Gelatin
Capsules
Report 424953
DATE: 9/22/98

S.T. Concentrated Herbs in Gelatin Capsules
Report 424953
DATE: 9/22/98

D.I. Concentrated Herbs in Gelatin Capsules Report 424953 DATE: 9/22/98	Chemistry Report 422248 Date: 09/09/98
Circle Concentrated Herbs in Gelatin Capsules Report 424953 DATE: 9/22/98	Chemistry Report 422248 Date: 09/09/98
Noco Concentrated Herbs in Gelatin Capsules Report 424953 DATE: 9/22/98	Millennium Red (Maroon Label) Serving size 50ml Report 430216 DATE: 10/28/98
ART Concentrated Herbs in Gelatin Capsules Report 424953 DATE: 9/22/98	Millennium (Green Label) Serving size 100g Report 430216 DATE: 10/28/98
Nutrial I Report 424249 DATE: 9/22/98	Millennium (Green Label) Serving size 50 ml Report 430216 DATE: 10/28/98
Stevia Report ? (Invoice 7917502) Date: 08/31/99	Antioxidant Test (4723 Vitamin C [HPLC]) Report ? (Incoive 7818302) Date: 07/15/1999
Microbiology Report 381257 DATE: 12/16/97	Microbiology Report 379860 Date: 12/15/97
Nutrial II Report 424249 DATE: 9/22/98	Microbiology Report 380431 Date: 12/15/97
Millennium Red (Maroon Label) Serving size 100g Report 430216 DATE: 10/28/98	Chemistry Report 3773073 Date: 11/19/97
Chemistry Report 422248 Date: 09/09/98	Chemistry Report 348352 Date: 05/08/97
	Chemistry Report 348871 Date: 5/13/97

Chemistry
Report 349017
Date: 05/15/97

Chemistry
Report 390012
Date: 02/12/98

Chemistry
Report 413206
Date: 07/16/98

Chemistry
Report 390013
Date: 02/12/1998

*We are required by the FDA to provide Nutrition Fact information on all of our products. Silliker Labs was contracted to perform these tests so that we could use the results in accordance with packaging laws (CFR Title 21). The Philippine BFAD authority also requires that we provide original copies of Nutrition Fact testing information to them when we register our products. Much of this information was gleaned through investigating invoices.

Silliker Labs
(310) 637-7121
Juvy Tan
1139 East Dominguez
Suite 1
Carson, CA 90746

Laboratory Reports Eurofins Scientific*

Caffeine Content Test Sunrider Calli Tea	Enjoi
Caffeine Content Test E. Excel Triflora Tea	Report 03080904
Caffeine Content Test Sunrider Fortune	Date: 09/22/1999
Delight Powder	
Report ?	Millennium
04/29/1999	Report 03080905
	Date: 09/22/1999
Bee Pollen	
Report 03090392	Sample #1
Date: 09/22/1999	Report 03100841
	Date: 11/12/1999
Plum Beverage	
Report 03090393	Sample #2
Date: 09/22/1999	Report 03100842
	Date: 11/12/1999
Herba	
Report 03080897	Sample #3
Date: 09/22/1999	Report 03100843
	Date: 11/12/1999
Li-Dan	
Report 03080898	Sample #4
Date: 09/22/1999	Report 03100844
	Date: 11/12/1999
Refresh	
Report 03080899	Sample #5
Date: 09/22/1999	Report 03100845
	Date: 11/12/1999
Concenergy	
Report 03080900	Dong-Quai
Date: 09/22/1999	Report 03100846
	Date: 11/12/1999
Circle	
Report 03080901	Concenergy
Date: 09/22/1999	Report 03100847
	Date: 11/12/1999
DNP II Morning Pack	
Report 03080902	ACT
Date: 09/22/1999	Report 03100848
	Date: 11/12/1999
DNP II Evening Pack	
Report 09080903	Ji-Lin Ginseng
Date: 09/22/1999	Report 03100849
	Date: 11/12/199

Missing labels*

133,000	Millennium (Green) large front
25,000	Millennium (Green) large neck
10,000	Millennium Red large front
1,000	Millennium Red large neck
10,000	Millennium (green) small front
20,000	Millennium Red small front
50,000	Duet large front
10,000	Duet small front
114,000	Gwei-Hua Balm small front
41,800	Vegiwash front (large)
59,000	HandyGel front (large)
63,300	HandyGel small front with directions
15,500	HandyGel small front without directions
13,000	Malaysia Millennium large back labels
12,000	Malaysia large Duet labels
16,000	Malaysia Duet price stickers
14,000	Malaysia Vision labels
25,000	Malaysia Concenergy labels
10,000	Malaysia Stresgon labels
8,000	Malaysia Digeston labels
16,000	Malaysia Wei-Lo labels
8,000	Malaysia ART labels
25,000	Malaysia Circle labels
25,000	Malaysia ACT labels
23,406	Malaysia Pearlin labels
20,500	Stevia labels
15,000	Malaysia small balm back
5,723	Korea Concenergy labels
4,000	Korea Stresgon labels
8,218	Korea Digeston labels
6,500	Korea Noco labels
8,550	Korea Wei-Lo labels
5,960	Korea ART labels
8,292	Korea Circle labels
5,668	Korea ACT labels
6,921	Korea Pearlin labels
5,000	Korea Vegiwash back labels
5,000	Hong Kong Herba box labels
4,000	Hong Kong Li-Dan box labels
3,080	Hong Kong Triflora box labels
696	Hong Kong Nutriall box labels
9,246	Hong Kong Enjoi box labels
7,320	Hong Kong Refresh box labels
4,350	Hong Kong Vision labels

4,280	Hong Kong Concenergy Labels
5,890	Hong Kong Stresgon labels
2,590	Hong Kong Digeston labels
690	Hong Kong Noco labels
4,000	Hong Kong Wei-Lo labels
3,690	Hong Kong Dong-Quai labels
7,390	Hong Kong Ji-Lin Ginseng labels
6,000	Hong Kong ART labels
2,890	Hong Kong Circle labels
1,690	Hong Kong ACT labels
3,850	Hong Kong Pearlin labels
4,440	Hong Kong Vegiwash back labels
660	Hong Kong Handygel back labels
4,000	Hong Kong Soap Stickers
19,000	Taiwan Herba box stickers
12,000	Taiwan Li-Dan box stickers
10,000	Taiwan Triflora box sticker
13,000	Taiwan Nutriall box sticker
10,000	Taiwan Enjoi box sticker
22,000	Taiwan Refresh box sticker
20,000	Taiwan Millennium large back sticker
4,000	Taiwan Millennium box label
20,000	Taiwan Millennium Red large back sticker
21,000	Taiwan Millennium Red box label
25,000	Taiwan Millennium small back label
2,000	Taiwan Millennium Red small back label
3,000	Taiwan Duet large back label
3,000	USA Millennium Small back label with directions
5,000	USA Millennium Red Small back label with directions
1,000	USA Duet small back label with directions
10,000	USA Duet Small back labels with supplement facts
5,000	USA Duet box label
2,000	USA Duet back label (large)

*The labels were noted missing between 13 Feb. and 19 Feb., 2001.

Laboratory Certificates
Michelson Lab*

Duet
Report 02169-564234
Date: 02/16/1999

Millennium
Report 03269-565409
Date: 03/26/1999

Millennium Red
Report 03269-565410
Date: 03/26/1999

Noco
Report 05149-566949
Date: 05/14/1999

Nutrifresh Chocolate
Report 06177-544995
Date: 06/17/1997

Nutrifresh Mixed Fruit
Report 12159-573427
Date: 12/20/1999

Nutrifresh Peach
Report 06177-544997
Date: 06/17/1997

Nutrifresh Strawberry
Report 12159-573426
Date: 12/20/1999

Pearlin
Report 06029-567562
Date: 06/02/1999

Sunrider Sunergy
Report 06038-555914
Date: 06/03/1998

Sample # 1 White Powder
Report 06089-567707
Date: 06/08/1999

Sample # 2 Orange Powder
Report 06089-567708
Date: 06/08/1999

Duet
Report 03269-565408
Date: 03/26/1999

Noco
Report 05149-566949*566952
Date: 05/19/1999

Millennium/Duet for Korea
Report 02059-563942
02059-564152*564153
Date: 02/10/1999

Cactus Nectar Millennium
Report 12167-550436-01
Date: 12/30/1997

Cactur Nectar Drink
Report 11247-549694-01
Date: 12/02/1997

Sodium Benzoate (Millennium)
Report 12148-562436
Date: 12/23/1998

Disintegration Time
Report 03208-553480
Date: 03/24/1998

Millennium 1/22,#4
Report 01268-551656-01
Date: 01/30/1998

Circle	Raw Material IV #9903
Report 03100850	Report 03100833
Date: 11/12/1999	Date: 11/12/1999
S-T	Ginseng Leaves 99EC07-165
Report 03100851	Report 03100683
Date: 11/12/1999	Date: 10/29/1999
W-L	Jasmine Flower 99EC07-165
Report 03100852	Report 03100684
Date: 11/12/1999	Date: 10/29/1999
Noco	Raw Material 9903AE-9903B
Report 03100853	Report 03120081
Date: 11/12/1999	Date: 12/14/1999
D-I	Raw Material 206901069E, 11-15-99
Report 03100854	Report 03110694
Date: 11/12/1999	Date: 12/14/1999
ART	Rice SD02992427
Report 03100855	Report 03130556
Date: 11/12/1999	Date: 02/09/2000
Vision	#6 DCE99240
Report 03100856	Report 03130557
Date: 11/12/1999	Date: 02/09/2000
Refresh	Plum Beverage
Report 03100857	Report 03130560
Date: 11/12/1999	Date: 02/09/2000
Triflora	Tea Sample #1
Report 03100858	Report 03140030
Date: 11/12/1999	Date: 02/09/2000
Pearl	Berry Green Powder
Report 03100859	Report 03130613
Date: 11/12/1999	Date: 02/10/2000
Raw Material from USA #3301 9910	Berry Green Powder
Report 031008352	Report 03
Date: 11/12/1999	03130614
	Date: 02/10/2000

*These miscellaneous reports range from heavy metal testing to preservative testing and even Nutrition Fact analyses. This information was gleaned by going through the invoices from 1997-2000 for this lab. All reports are missing.

Nutrifresh
Report 03120087
Date: 12/29/1999

Evernew
Report 03120088
Date: 12/29/1999

99-1-3
Report 03160354
Date: 04/28/2000

99-1-6
Report 03160355
Date: 04/28/2000

99-1-5
Report 03160356
Date: 04/28/2000

99-1-9
Report 03160357
Date: 04/28/2000

00-1-2, 6-29-00
Report 03190223
Date: 07/31/2000

Young Barley Leaves Powder
Report 03170908
Date: 06/23/2000

99-1-9
Report 03171026
Date: 06/23/2000

99-1-3
Report 03171027
Date: 06/23/2000

99-1-5
Report 03171028
Date: 06/23/2000

99-1-6
Report 03171029
Date: 06/23/2000

Rice Powder
Report 03190457
Date: 08/31/2000

Plum Beverage
Report 03200206
Date: 08/31/2000

Food Powder
Report 03200207
Date: 08/31/2000

Sample #1
Report 03210551
Date: 09/29/2000

Sample #2
Report 03210552
Date: 09/29/2000

Sample #3
Report 03210553
Date: 09/29/2000

99-1-3
Report 03200717
Date: 09/19/2000

99-1-5
Report 03200718
Date: 09/19/2000

99-1-6
Report 03200719
Date: 09/19/2000

99-1-9
Report 03200720
Date: 09/19/2000

Mushroom
Report 03210001
Date: 09/19/2000

Young Green Powder
Report 03210275
Date: 09/19/2000

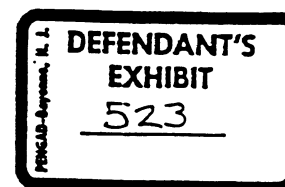
Young Green Powder
Report 03210276
Date: 09/19/2000

Mushroom Powder
Report 03210277
Date: 09/19/2000

Mushroom Powder
Report 03210278
Date: 09/19/2000

*We do not have any copies of these reports in the building. This information comes from the invoices for tests done. Most of them appear to be heavy metal testing or mineral content tests.

Tab F



I. Hardware removed and returned

Items E. Excel claims were removed

Epson 9000 Printer
 Epson 9000 Printer
 Ledco Laminator
 Imacon Flextight Scanner
 Linotype Saphir Scanner
 Xante 3G Accel-A-Writer
 (3) Apple G4 computers
 (2) Apple G3 computers
 (3) "graphics monitors"
 (1) PC computers

Items actually removed and returned

Returned in unusable condition
 Returned with some damage
 Returned in excellent condition
 Returned in excellent condition
 Returned in excellent condition
 Returned in excellent condition
 Returned (2) in excellent condition
 Returned (4) in excellent condition
 Returned (10) in excellent condition
 Returned (3) in excellent condition

Items E. Excel did not claim were removed, but which were returned on Oct. 11, 2001

Apple Macintosh G3 (Yosemite) computer
 Apple Macintosh G3 computer
 Apple Macintosh PowerMac 7200 computer
 Agfa Duo-Scan HiD scanner
 Agfa Arcus II scanner
 Radius Thundercolor graphics adapter
 Radius Pro-Sense accessories
 Epson 900N printer
 Epson 900G printer
 Apple Macintosh G3 Keyboard
 (5) PC keyboards
 (2) Macally G3 keyboards
 Macally iSweetnet mouse
 (3) Apple Macintosh mice
 (5) PS2 mice
 Hewlett Packard 8100N printer w/additional laser toner cartridge
 Hewlett Packard 5000N printer
 (2) Hewlett Packard 5MP printers
 PC power supply
 UPS (SPT-250)
 (2) Iomega external Jazz Drives w/adapters
 Iomega internal Jazz Drive
 Iomega external Zip Drive w/adaptor
 (2) Imation Superdisk drives
 APC CD-ROM drive w/power supply
 US Robotics modem w/adaptor
 Keyspan USB to serial adapter
 OnStream 50 GB tape backup drive
 TelePort USB modem

Pantone color chart
 LabelWriter label printer
 (2) Transformer plugs
 Macally USB four-way hub
 Adaptec 2910 SCSI adapter (unopened, new in box)
 Numerous cables and misc. adapters, transformers, and connectors

II. Misc. equipment removed and returned

<u>Items E. Excel claims were removed</u>	<u>Items actually removed and returned</u>
Oversize table	I did not remove, nor do I know of this item
(3) desks	I did not remove, nor do I know of these items
Filing, and small cabinets (locking)	I did not remove, nor do I know of these items
12' ruler	I did not remove, nor do I know of this item
(4) clamps	I did not remove, nor do I know of these items
(2) knives	I did not remove, nor do I know of these items
(2) pair of Fiskars scissors	I did not remove, nor do I know of these items
Misc. tools	I did not remove, nor do I know of these items

III. Software packages removed and returned

Adobe Photoshop 6.0 (inclusive of versions. 3, 4, and 5)
 Adobe InDesign 1.5
 FileMaker Pro (3.0)
 FileMaker Pro (4.1)
 Microsoft Office 98
 Microsoft Word
 Symantec Suitcase
 Xaos Tools
 FreeHand Graphic Studio 7
 MacroMedia Software Collection
 Apple Internet Connection Kit
 Stuff-It Deluxe 3.5
 Speed Doubler 8
 Norton Utilities 4.0
 Macintosh 8.5 OS
 Macintosh 9 OS
 Macintosh Sherlock 2
 Extensis Portfolio
 Extensis Photoframe
 Extensis Phototools
 Extensis Photographics
 Adobe Fetch

Microsoft Windows 95
 Adobe Super ATM
 (2) FWB Hard Disk Toolkit PE
 Alsoft Disk Warrior
 Font Bank w/Border Bank

IV. Software (PhotoDisk and other royalty-free stock photography collections)

Items E. Excel claims were removed

(71) PhotoDisk CDs
 (4) PhotoAlto and misc. stock photo CDs

Items actually removed and returned

(75) PhotoDisk CDs
 (17) PhotoAlto and misc. stock photo CDs
 Complete Corel Stock-photo library

V. Graphics & Work which Mr. Stewart created during his time at E. Excel

Complete *Excellent Word* magazine archive CDs (all volumes, including extra graphics)
 All E. Excel catalogs, handbooks, brochures, and other publication or graphics archives
 All ancillary and support files for purposes of printing with outside vendors
 All graphic work for various slide presentations (well over 200 images)
 All ancillary graphics work which I produced, but which was never used or published

Tab G

E. Excel 406

HCA 2493 of 2001

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2493 OF 2001

BETWEEN

JAU-HWA STEWART

Plaintiff

and

E. EXCEL LIMITED

1st Defendant

ZHANG RUI-KANG

2nd Defendant

ZHANG SHENG-MEI

3rd Defendant

ZHANG MEI-FENG

4th Defendant

CHEN JAU-FEI

5th Defendant

3RD AFFIRMATION OF JAU-HWA STEWART

I, Jau-Hwa Stewart, businesswoman, of 1198 North Spring Creek Place, Springville, Utah 84663, U.S.A. do solemnly, sincerely and truly affirm as follows:-

1. I am the same Jau-Hwa Stewart who had affirmed the Affirmation of Jau-Hwa Stewart dated 3rd June 2001. Save as otherwise stated, the matters deposed to herein are within my personal knowledge or are gleaned from documents in my possession and are true to the best of my knowledge.
2. I have read the Affirmation of Chen Jau-Fei ("Jau-Fei's Affirmation"), the Affirmation of Lau Pak Heng ("Ms. Lau's Affirmation") and the Affirmation of Zhang Sheng Mei ("3rd Defendant's Affirmation") and the 1st, 2nd and 3rd Affirmations of George Anthony Ribeiro ("Mr. Ribeiro's Affirmations").

3. With the exception of Mr. Ribeiro's 1st and 2nd Affirmations, all of these documents were served on the Plaintiff's solicitors only on Thursday afternoon, 19th July 2001 and Saturday morning, 21st July 2001. As such, I shall only deal with the most pressing points raised in these Affirmations for the purposes of the hearing before the Honourable Mr. Justice Waung on 25th July 2001, and the fact I do not deal with a particular matter should not be taken to indicate any acceptance of such matters. In addition, I shall recap some of the evidence which I had given in HCA 558/2001, since I understand that Counsel for the Defendants have referred to some of Defendants' allegations against me in that action.
4. Most importantly, I respectfully reserve the right to produce further evidence to this Honourable Court in reply to the Affirmations filed by the Defendants.
- A. Circumstances of 3rd June 2001 Application
5. First, I wish to explain to the Court that the application for the Mareva Order granted by Mr. Justice Waung on 3rd June 2001 was prepared as a matter of great urgency. The application by the Special Master to the Utah Court to discontinue High Court Action 558/2001 was heard on 1st June 2001, Utah time. By the time the Court had made its order, it was already in the early hours of 2nd June 2001 in Hong Kong.
6. Upon the order of the Utah Court to discontinue, I believed at the time that all had been lost. The Hong Kong action would inevitably be discontinued on Monday morning, 4th July 2001, and I verily believe that once the injunction is lifted, the funds held in the bank accounts of the 1st Defendant would immediately be removed from the jurisdiction and beyond the reach of the courts in Hong Kong or Utah. As such, even if I were to succeed in the personal action which I had instituted against the Defendants in Utah on similar causes of action, I would be left with an empty judgment, as I verily believe that the assets of the Defendants in the United States are grossly insufficient to meet any eventual judgment.

24-JUL-2001 20:36

VIVIAN CHAN & CO.

BS2 28459168+ P.04/31

7. Later on that day, being Saturday morning in Hong Kong, I was able to speak to Clement Tang of Messrs. Fok & Johnson, when I informed him of the Utah Court's decision. I was then told by Mr. Tang that he had already received instructions from Mr. Holman to discontinue HCA 558/2001 on Monday morning, which meant that the Mareva Order granted by Mr. Justice Yeung on 9th February 2001 would also immediately fall away. I asked him for advice on what remedies were available to me at that stage, and he informed me that he can no longer advise me on this matter, as he would be placed in a position of conflict with the Company. It was made quite clear to him by Mr. Holman that the HCA 558/2001 should be discontinued as soon as possible, and the funds secured by the Order of the Honourable Mr. Justice Yeung be released.
8. Mr. Tang then advised me to obtain independent legal advice, and recommended to me a new firm of solicitors, Messrs. Chui & Lau. Immediately, I contacted Mr. Robert Chan, a partner of Messrs. Chui & Lau, and explained to him briefly the entire situation. The background of the matter was very complicated, and after some discussion of the possible options open to me, it was decided that I should institute a fresh action in my personal capacity against the Defendants. However, a fresh Mareva injunction must also be sought and granted before the action was discontinued on Monday morning.
9. It was already late in the afternoon before my legal advisers were able to commence work on the new action and preparing the Mareva injunction application. Moreover, without the assistance of Messrs. Fok & Johnson, my new firm of solicitors was severely handicapped as we had to reconstruct the entire factual background of the action in a very short period of time. Further, I was advised by my legal advisers that the documents and materials belonging to HCA 558/2001 belonged to the Company, and as such, I was neither able nor entitled to access the materials held by Messrs. Fok & Johnson, and I was almost certain that Mr. Holman would not be willing to authorise the release of such materials to me.

As for my own records, I hardly kept any of the documents for HCA 558/2001, since I had always left the matter in the hands of Messrs. Fok & Johnson in Hong Kong.

10. I would like to express to the Court that at no point did I have any intention to mislead the Court or to present an unfair picture of the background to the present Action. Ideally, consent would have been given by Mr. Holman to release the documents for my new Action, in which case, I would merely have exhibited all 13 bundles of documents which were filed in HCA 558/2001 to my 1st Affirmation.
11. Indeed, I verily believe that my Utah attorneys subsequently wrote to the Company on 10th July 2001 to request the release of the documents in HCA 558/2001. However, my attorneys have yet to receive a reply. In any event, I was advised that if I had used the materials without Mr. Holman's consent, I may be in breach of my fiduciary duties as a director of the Company, since the materials belonged to the Company, and it was clear that the Company's intention was that the matter was to be discontinued.
12. In the circumstances, I was only able to instruct my legal advisers to commence the matter afresh, and refraining as much as possible from using any of the materials in HCA 558/2001. My Affirmation was prepared with great urgency, and although I had the invaluable assistance of my legal advisers, it was my Affirmation, and as such, it was I who had to tell the story which was within my personal knowledge. There was also the additional difficulty since I lived in an entirely different time zone as my legal advisers in Hong Kong, and as such, constant communication was difficult. I was also 8 months pregnant, and so I had to rest constantly. In any event, I had no intention of misleading the Court, and I apologise if, indeed, any documents or matters were inadvertently not alluded to in my 1st Affirmation.

B. Special Master's Report No. 3

13. I am informed by my Utah attorneys and I verily believe that the Special Master's Report No. 3 was served on my attorneys on 25th May 2001. I recall being shown the Report the next day in my attorneys' office. I was advised by my Utah attorneys and I verily believed that Report No. 3, like all the previous Special Master's Reports before it, were filed under seal and subject to a protective order. I was never allowed to have a copy of the Report and was allowed only to inspect it at my Utah attorneys' offices. Before being shown the Report, I was told that I could not disclose the contents of the Report to anyone other than those involved in the Utah proceedings.
14. It was for that reason that it never occurred to me that I should disclose to my legal advisers in Hong Kong and to the Hong Kong Court the contents of the Report. The Report was referred to, however, in the 1st June 2001 ruling of the Utah court granting leave to discontinue HCA 558/2001. The ruling together with the Compromise Agreement was, however, exhibited in my 1st Affirmation.
15. As such, I was surprised to find allegations made in the 1st Affirmation of George Anthony Ribeiro that I had deliberately misled the Court by failing to disclose that report. I was even more surprised to find the Report and some of its exhibits being excerpted and exhibited to his Affirmation. When I informed by Utah attorneys, they immediately wrote a letter dated 29th June 2001 to the Defendants' Utah attorneys demanding an explanation as to why the Report was disseminated outside of the Utah proceedings in breach of the Utah court's protective order of 11th May 2001. A motion for sanctions in the Utah court against the Defendants' attorneys and Hong Kong solicitors was also considered. A Summons has also been filed by my solicitors to strike out from the Affidavit of George Anthony Ribeiro any mention of the Report.
16. Indeed, it was not until the Utah court's ruling on 18th July 2001 that it was conclusively settled that Report No. 3 was not in fact covered by the 11th May 2001

order. I emphasise once again that I never had any intention of misleading or "hiding" the Report from the Court.

- 17 In any event, the matters contained in Report No. 3 are heavily disputed, and I have already filed an Affidavit in the Utah court objecting to the contents of the Report. That Affidavit has already been exhibited in the 3rd Affirmation of Chan Hung Yuen Robert as "CHY-10". Indeed, one of the primary reasons why the Court made the protective order on 11th May 2001 and 18th July 2001 sealing the Reports is that the Plaintiff has never had any opportunity of making any representations to either Mr. Holman nor the Court to challenge or rebut the allegations contained in the Reports. I will be filing further evidence in due course to the Utah Court in relation to the matters contained in Report No. 3 and the other Special Master's Reports.

C. Necessity for Interlocutory Relief

18. The Defendants argue that relief from the Hong Kong court is not necessary or appropriate in the present Action since:
- (1) There is no real risk of dissipation by any of the Defendants;
 - (2) There will be substantial hardship to the 1st Defendant if an Interim Receiver appointed;
 - (3) I had already received some US\$30 million allegedly paid into Credit Suisse account of the mother.

I shall deal with each point in turn.

19. As explained in my Affirmations in HCA 558/2001 and my 1st Affirmation, I verily believe that there is a real risk that any judgment either by the Hong Kong or Utah court will go unsatisfied. I summarise the salient points here:

(1) The conduct of the 1st Defendant does not inspire confidence:

- (a) Since the beginning of the dispute in February 2001, the 3rd and 4th Defendants, being the sole shareholders and directors of the 1st Defendant, have chosen to remain silent, until the 3rd Defendant filed her Affirmation on 19th July 2001;
- (b) Up until now, there has not been one single piece of documentary evidence substantiating the Defendants' claims as to the host of business functions carried out by the 1st Defendant, alleged to include market research, herbal formulation and purchasing, financing of distributors and software research and development. At the least, one would reasonably expect:
 - (i) A business address either in Hong Kong or in Shanghai. The only address supplied to date is that of a registered office at Messrs. Vivien Chan & Co., the Defendants' solicitors;
 - (ii) Evidence of employees and business premises;
 - (iii) Audited financial statements and annual reports.

None of these have been produced since February 2001.

(2) Although the 5th Defendant denies being a signatory of the 1st Defendant's accounts, there is substantial evidence that she has control of the funds in those accounts:

- (a) Bank statements of the 1st Defendant's accounts at First Pacific Bank indicating the balances and movements in those accounts were addressed to the 2nd or 5th Defendant. The 5th Defendant denies that this signifies control, but I note that the account is not a corporate banking account, but rather a "high net worth" client account. I am advised that information concerning such accounts, by their very

nature, are kept confidential and will ordinarily only be disclosed to those who control the account. No evidence has been sought from any of the 1st Defendant's banks to support the allegation that the 5th Defendant had no effective control over those accounts.

- (b) Correspondence between the First Pacific Bank and the 2nd and 5th Defendants at least suggest that the bank officers were very familiar with the 2nd and 5th Defendants.
- (c) Indeed, there is a hand-written message from one Ms. Becky Au at First Pacific Bank explaining to the 2nd and 5th Defendants how to instruct the Taiwan distributor to make payment into the 1st Defendant's bank accounts.

These documents were exhibited in my 1st Affirmation in HCA 558/2001 and I now re-exhibit them here as "JHS-12".

- (d) Blank sheets with the 1st Defendant's chop and the 3rd Defendant's signature were found in the office of the 5th Defendant after she left the Company. These were exhibited as "JHS-4A" in my 1st Affirmation. Although the 5th Defendant alleges that these sheets belonged to and were used by me, she has not produced any convincing evidence to substantiate her claim. The most obvious means of determining whether these blank sheets were used by me is to check the 1st Defendant's banking records, which the Defendants have refused to provide;+
- (e) In early February 2001, I recalled that the 5th Defendant once told me that she would leave instructions in her safe at home in case anything happened to her and the 2nd Defendant. As I was the executor of their wills, it was necessary for me to have such information. I retrieved these instructions and exhibited them in HCA 558/2001. I now re-

exhibit this document as "JHS-13". It is clear from these instructions that:

- (i) The 5th Defendant had full knowledge and control of the Plaintiff's finances, including the 1st Defendant;
- (ii) I refer to page 2 of the said instructions which refer specifically to the 1st Defendant's account at First Pacific Bank. Although the balances are clearly not up to date, it is clear that the 5th Defendant had full knowledge of all the details of the account.
- (iii) Significantly, near the bottom of the page, she states:
"Names in the accounts are: Ms. Zhang Sheng Mei and Zhang Mei Feng. Only one signature is needed to draw money or wire. Need stamp on top of signature. There are some forms for wire transfer. There is also a signature card there, imitate signature on it". (my emphasis)
- (iv) It is also clear from these instructions that the 5th Defendant had Credit Suisse accounts of her own under fictitious names;
- (v) The 5th Defendant denies the authenticity of this document. However, these instructions contain precise and specific details of, among other things, the 2nd Defendant's personal bank account in Taiwan. It is extremely unlikely that I would have the knowledge or access to such information. If necessary, I am willing to have this document examined by a forensic expert.
- (f) There is documentary evidence of various lump sum payments amounting to millions of US dollars being made out of the 1st

Defendant's accounts to, inter alia, the 3rd Defendant and unnamed Credit Suisse accounts. These documents were exhibited in HCA 558/2001, and I now re-exhibit them here as "JHS-14".

(g) The Defendants contend that the transfers were made for legitimate business reasons and/or to my mother's Credit Suisse account, and yet they have not produced the 1st Defendant's banking or accounting records to substantiate their allegations.

(h) There is also evidence that the 3rd Defendant has been paying to herself an exorbitant salary. This can be found in an account opening application by the 3rd Defendant with Citibank in 1998 where she claims to have an annual income of US\$ 1 million. This document is contained also in JHS-14. The 3rd Defendant contends, unconvincingly, that she has never drawn upon that salary. However, without the accounting and banking records of the 1st Defendant, her assertion is at least unsubstantiated;

(i) The secrecy surrounding the 1st Defendants' finances and accounts does not inspire confidence and itself points to a risk of dissipation.

20. In relation to the alleged hardship to the 1st Defendant if an Interim Receiver is appointed or if the Mareva injunction is continued, I make the following points:

(1) I verily believe that the 1st Defendant has failed to demonstrate, aside from the 3rd and 5th Defendants' bare allegations, how the 1st Defendant itself would suffer irreparable harm if an Interim Receiver is appointed. As mentioned above, no documentary evidence whatsoever has been produced as to substantiate the Defendants' claims as to the functions and business of the 1st Defendant;

(2) Mr. Hendrick Tjandra, the General Manager of the Malaysian distributor, has said on oath in proceedings in Utah that he had never seen, spoke or met

the 4th Defendant. Subsequently, in Mr. Tjandra's Affirmation in HCA 558/2001, he claims to have dealt with the 4th Defendant regularly and had met her several times. Mr. Ribeiro, in his 1st Affirmation, attempts to explain the inconsistency by saying that Mr. Tjandra misunderstood the question in Utah due to the English pronunciation of the 4th Defendant's name. However, in the Utah proceedings, the 4th Defendant was specifically referred to as the 2nd Defendant's sister. Moreover, I am informed by my Utah attorneys and I verily believe that a Chinese court translator was present at the hearing;

- (3) By the Defendants' own evidence, the activities of the 1st Defendant is centred around Shanghai and not in Hong Kong. The appointment of an Interim Receiver over the 1st Defendant's assets in Hong Kong is unlikely to have a major impact to the 1st Defendant's business in Shanghai;
 - (4) The powers of the Interim Receiver can be defined such that the 3rd and 4th Defendants would be able to continue carrying on the business of the 1st Defendant. The Interim Receiver would be restricted to preserving the disputed assets held by the 1st Defendant. On the other hand, the Interim Receiver can seek authorisation from the Court to make such investments proposed by the Defendants, including lending funds to and/or investing in the distributors, which he feels would be beneficial to the 1st Defendant;
 - (5) Indeed, there is no need for anyone to know about the appointment of the Interim Receiver outside of the parties and the 1st Defendant's bankers. It is therefore difficult to see how the 1st Defendant would be prejudiced in relation to its reputation amongst its suppliers and trade creditors;
21. In relation to the sums allegedly paid into the Credit Suisse account of my mother, I make the following points:

- (1) There is no evidence whatsoever that any money had been paid into my mother's account from the 1st Defendant. If any money had been paid, the parties with first hand knowledge of such payments must be the 3rd and 4th Defendants, since they are the sole directors and shareholders of the 1st Defendant and allegedly the signatories of the bank accounts;
- (2) Indeed, there has never been any evidence that any money has been paid from the 1st Defendant to my mother. I am informed by my mother and verily believe that the 5th Defendant would from time to time deposit money into my mother's Credit Suisse account as gifts from daughter to mother. However, I do not know from which account these sums originated nor was I informed as to how much was deposited, as these were matters entirely between the 5th Defendant and my mother;
- (3) It is disingenuous for the Defendants to allege that they have paid various sums into my mother's account, and yet refuse to produce any records of the same, to which they clearly have access. On the other hand, they accuse me of not disclosing the balance of my mother's bank account. The account belongs to my mother, and she has told me that she does not wish to disclose the balance of her account, and I must respect her wishes.
- (4) In any event, no claims have been made by the Defendants' against my mother for these or any other sums.

D. There was never any alleged coup

22. I have already explained the trust position of the shares in the Company in paragraphs 7 to 12 of my 1st Affirmation, and I do not repeat it here. The comments made by Judge Howard on 7th February 2001 related only to the preliminary issue of the children's standing to bring an action against me, and no final determination on the trust position of the shares can be made until trial of the trust proceedings,

which has yet to take place. Indeed, if the trust position of the shares has already been determined, there would have been no need for the Interim Consent Order dated 19th February 2001 appointing Mr. Holman as the interim CEO, since the 5th Defendant would have been reinstated as the president and CEO of the Company.

23. In any event, I wish to point out that the Defendants' contention that while the 5th Defendant was not in Utah, I had staged an alleged coup and seized control of the Company cannot be farther from the truth. The transition of control of the Company from the 5th Defendant to myself in October 2000 was both smooth and orderly:

- (1) There is now shown to me and exhibited hereto marked "JHS-15" two emails dated 2nd November and 4th November 2000 between the 5th Defendant and myself where we discussed the hand-over of control of the Company. It is clear from the tone of these emails that there was never any alleged usurpation of power or that I had seized the Company against her will;

- (2) The 4th November 2001 email is also indicative that control of the Company's accounting matters clearly rested with the 5th Defendant:

"Regarding transfer of duty/accounting: Once you become President of E. Execut formally, I will transfer all duties including accounting for each country to you formally in the presence of that country's respective GM immediately as requested by them. It is more complicated than meets the eye..." (my emphasis)

24. The smooth transition also suggests that the 5th Defendant initially accepted that I was the trustee of 75% of the Company's shares and that I was entitled to assume control of the Company.

E. My alleged conduct against the interests of the Company

25. The Defendants allege, inter alia, that:
- (1) I terminated bona fide contracts with the distributors;
 - (2) I disobeyed the temporary restraining order of Judge Schofield ordering me to ship product to the distributors.
 - (3) I was setting up a competing business with the Company when I was president and CEO of the Company;
 - (4) The Company has not received payment for goods shipped to the new distributors;
 - (5) I removed or destroyed property belonging to the Company upon my departure;
 - (6) I am wrongfully competing with the Company and appropriating its trademarks.
 - (7) The tape recording of my conversation with Mr. Hu and Mr. Tzu.
26. I have already dealt with these allegations substantially in my affirmations in HCA 558/2001. As such, I shall only deal with each allegation briefly and refer the Court to my earlier evidence in the previous action.
27. Before I do so, however, I wish to emphasise that the Defendants' allegations are not only misleading but unfair. I have dedicated the past ten years of my life, day in and day out, working to build up this family business. I have made huge sacrifices both to my personal and family life, and it is unfair that the 5th Defendant now accuses me of intending to destroy the Company, of which I own 25%.

28. Indeed, it is not in dispute that 75% of the Company is beneficially owned by my nieces and nephews. I practically brought them up as the 2nd and 5th Defendants were often outside of Utah. I love them very much, and would do nothing to prejudice their interests.

Termination of contracts with distributors

29. The Defendants allege that I had terminated bona fide contracts between the Company and distributors, including Extra Excel International Korea Inc., Extra Excel International Limited in Hong Kong, E. Excel International (Taiwan) Inc. and Extra Excel (Malaysia) Sdn. Bhd, and thereby causing deliberate and irreparable harm to the Company.
30. The Defendants rely on the dicta of Judge Schofield on 10th January 2001 when he granted an interim injunction ordering the Company and myself to ship products to the distributors pursuant to alleged contracts between the Company and the distributors. The Defendants fail to mention, however, that the comments were made pursuant to an *ex parte* application by the distributors, and that I did not have an opportunity to be heard on that occasion. As such, I verily believe the comments should be given little, if any weight.
31. In respect of the purported agreement between the Company and Extra Excel International Limited in Hong Kong, I refer to the Affirmation of Taig Stewart made in HCA 264/2001 which I now re-exhibit this document as "JHS-16". As explained in paragraphs 4 to 7 of that Affirmation, the authenticity of the irrevocable licence purportedly issued is seriously and justifiably disputed. I also refer to the Affirmation of Sam Tzu, the former general manager of the Hong Kong distributor, which was exhibited in HCA 264/2001, the action brought by the Company's original Hong Kong distributor against the distributor I established on behalf of the Company. I now re-exhibit the Affirmation as "JHS-17". In the said

Affirmation, Mr. Tzu explains in paragraphs 10 to 14 the circumstances in which the Hong Kong irrevocable license is believed to have been forged.

32. I am informed by Mr. Tzu and I verily believe that the alleged supply contracts with the Malaysian and Taiwan distributors are also forged in the same manner as the alleged Hong Kong irrevocable license, namely that they were executed by Jau-Fei purportedly as president of the Plaintiff when she had already been removed from office and backdated. This is supported by the fact that neither the Company's staff nor I have been unable to find any record or copy of any such contracts in the Plaintiff's offices in Utah.
33. However, the most important, and indeed, obvious reason why I refused to ship product to these distributors is the fact that under the then existing arrangement, any payment from the distributors would be made to the 1st Defendant and not to the Company. As such, further orders merely resulted in further diversion of funds from the Company. I attempted to negotiate with these distributors so that they would pay the full price to the Company directly, but with the exception of Mr. Sam Tzu and Mr. Richard Hu, the general managers of the Hong Kong and Philippines distributors respectively, the distributors refused. Both Mr. Tzu and Mr. Hu were virtually immediately dismissed by the 5th Defendant from the Hong Kong and Philippines distributor as a result.
34. I am also informed by Mr. Tzu and I verily believe that the 5th Defendant approached him after she was removed as president and CEO of the Company to enter into a supply contract similar to the ones purportedly entered into by the Malaysian and Taiwan distributors. He refused, and that is why in Hong Kong there is only a purported irrevocable license signed only by the 5th Defendant as opposed to a purported supply contract in the case of Malaysia and Taiwan.
35. In the Affirmations made by Han Dong Min, Cheong Sai Weng, Lee Huan Hsin Barry and Hindrick Tjandra, it is alleged that the distributors have suffered severe damage as a result of my refusal to supply products to the distributors during my

presidency. Such an allegation is misleading. A Temporary Restraining Order was granted by the Utah Court on 24th January 2001 which required that I fill as far as possible any outstanding purchase orders for product from the Taiwan and Malaysian distributors. However, these distributors, allegedly for quality reasons which have not been substantiated, then refused to follow through with their purchase orders and to accept delivery of the ordered goods pursuant to the TRO. As such, the losses to the distributors, if any, were predominantly caused not by my refusal to sell product under the alleged contracts, but rather by their refusal to follow through with their own orders.

Setting up competing businesses with the Company

36. I should explain at this stage the close relationship between the 5th Defendant and the distributors of the Company's products. As shown in paragraph 38 of my 1st Affirmation, Mr. Hendrick Tjandra, the general manager of the Malaysian distributor, is even willing to risk perjury to advance the 5th Defendant's cause. The primary reason is that the 5th Defendant is the major shareholder and director in most if not all of the Company's distributors. For example, the 5th Defendant owns more than 50% of the shares in Extra Excellence International Limited, the Company's original distributor. On the other hand, the Company has no direct interest in or control of these distributors.
37. After I assumed control of the Company, I attempted to restructure the Company's distributorship channels so that the Company can have at least some degree of control and interest in its distributors. This brings me to the 5th Defendant's allegation that I was setting up "competing" businesses in various Asian countries. Such an allegation is misleading. I have never established any business that competed with the Plaintiff, but rather, when I was president, I established on behalf of the Plaintiff new distribution companies in Hong Kong and the Philippines.

38. Unlike the original distributors in those countries, the new distributors that were set up by me are predominantly owned and controlled by the Plaintiff. I had no personal interest in either the Hong Kong or the Philippines distributor which I had set up on behalf of the Company.

Not receiving payment for the products

39. The Defendants also allege that the Company had not received any payment for certain goods shipped to the new Hong Kong and Philippines distributors which I had set up on behalf of the Company. I am not sure what the status of the payments is as Mr. Holman has taken over the Company since March this year. However, I vehemently deny that I deliberately failed to collect payment from them so that they may dump the Company's products onto the market. Such a claim is unsubstantiated, and I verily believe that it is the responsibility of Mr. Holman, as the Interim CEO and president of the Company since March of this year, to pursue such payments.
40. Moreover, as mentioned above, the Company is the majority shareholder of both distributors, and as such, there should be no difficulty in recovering payment. One possibility why payment was not made by the new Hong Kong distributor was that its business was ground to a halt in its first few days of business due to an injunction obtained by the original Hong Kong distributor allegedly for passing off in HCA 264/2001.

Removal or destruction of Company property

41. I refer to my Affidavit dated 30th May 2001 filed in the Utah Court and exhibited as "CHY-10" in the 3rd Affirmation of Chan Hung Yuen Robert. I emphasise once

again that I have never ordered anyone to remove or destroy any equipment or records belonging to the Company nor have I observed any such events.

Seeking to compete with the Company

42. The Defendants attempt to draw negative inferences against me for seeking to compete with the Company. I should explain first of all that I have been involved in the nutritional product business ever since I had graduated from university. The Company's business has, for the past 10 years, been my life. Since Mr. Holman assumed control of the Company, I was no longer able to take an active role in the Company's business. On the other hand, the Company has now retained the 5th Defendant as a consultant, as well as dealing with the companies in Singapore and Malaysia in which I verily believe the 2nd and 5th Defendants have a direct interest. There is now shown to me marked "JHS-18" a copy of the companies search record of the 2nd and 5th Defendants' company in Singapore.
43. As such, I wish to be able to start up my own business, and compete fairly with the Company. For this reason, I recently resigned as a director of the Company in order to avoid any conflict of interest. I deny having set up any manufacturing facility nor have I attempted to register any of the Company's trademarks in my name, as alleged by the Defendants.

Tape recording

44. I wish to deal briefly with the tape recording of my conversation with Mr. Hu and Mr. Tzu, leaving aside the question of how such a recording was obtained by the Defendants. First of all, I regret very much attempting to mislead the Utah court. At the time, I was so angry with my sister, the 5th Defendant. As can be seen from the emails which I have exhibited, the relationship between 5th Defendant and I

was very good and we along with each other very well. I practically brought up her kids and treated them like my own. We (my mother, my elder sister and my husband) all trusted her to manage the finances of the family business, and yet we were so shocked to find that she had betrayed us after all these years.

45. I apologise for my conduct, which in hindsight was very foolish, and I sincerely ask that the Court not to regard me as a dishonest or malicious person, which I am not, as the people who know me well will testify at trial.

E. Knowledge or control of diversion arrangements

The system of operation at the Company

46. I strongly deny the Defendants' allegation that the establishment of the 1st Defendant and the diversion arrangements were conceived by me. Indeed, the Defendants have provided no evidence whatsoever that this arrangement was my idea or under my control. Although I acted as the de facto personal assistant to the 5th Defendant, my involvement in making decisions regarding the financial workings and arrangements of the Company was minimal.
47. I recall there being occasions when I would be asked to carry out certain transfers of money to different accounts, including those belonging to the 1st Defendant. However, I never saw the need to and was never in a position to question the purpose and details of such transfers. In any event, I know that the 5th Defendant operated the Company's business through a number of different companies and bank accounts, and I verily believed at the time that any funds held by those companies or accounts would be eventually find their way back to the Company.
48. It was clear to all of the Company's staff that the 5th Defendant was the primary decision-maker on all important matters within the company and that my daily

tasks were determined almost entirely by the 5th Defendant. I acted as a conduit to the 5th Defendant when she and the 2nd Defendant were not in Hong Kong. She would manage the affairs of the Company from abroad via e-mail instructions to me, and if such instructions concerned manufacturing, raw materials or various sundry matters, I would carry them out. However, for matters concerning pricing and invoicing, I would always pass her instructions to Angela Barclay or Sun Ya Ping, who handled these matters exclusively.

49. My ignorance of such matters is supported by the evidence of Angela Barclay, Beverly Warner, Robert Maxwell and the Company's former accountant, John O. Sump. The Defendants have attempted to discredit the evidence of Angela Barclay, by saying that she was "my friend". I affirm once again that I did not know Angela Barclay until she joined the Company, and that she worked directly under the supervision of the 5th Defendant and not myself. Although I remain on good terms with Ms. Barclay until this day, she would not perjure herself to protect me. I note also that the Defendants have not included the Affirmation of Mr. Sump in their Bundle of Selected Affirmations. As such, I have asked Mr. Sump to make a new Affirmation.
50. I should add that none of these employees have any interest in the outcome of this litigation. On the other hand, the only employee that has given evidence on behalf of the Defendants is Ms. Sun Ya Ping, who is the sister in law of the 2nd Defendant. Her evidence is, unsurprisingly, diametrically opposed to that of Ms. Barclay, Ms. Warner and Mr. Maxwell.
51. I should also mention that the Defendants have attempted to distort the evidence of Ms. Warner by reading certain words in isolation to argue that Ms. Sun, who together with Ms. Barclay was responsible for the invoicing of the distributors, worked under my supervision throughout these years. This is certainly untrue. After I assumed control of the Company, it is true that I became the immediate supervisor of Ms. Sun, and remained so until she was dismissed. However, prior to

the 5th Defendant's departure, she had always acted under the direction and supervision of the 2nd and 5th Defendants. Technically speaking, as I was the vice-president of the Company, Ms. Sun and indeed all of the Company's employees with the exception of the 2nd and 5th Defendants would have reported to me. However, in truth, it was always clear to all of the Company's staff that Ms. Sun was one of the 2nd Defendant's "people", and as such, was responsible only to the 2nd and 5th Defendants.

The 5th Defendant's control of the invoicing system

52. There was never any doubt that the 5th Defendant had full control of the Company's financial and accounting arrangement at all times. It is clear from the evidence of Mr. Maxwell and Ms. Barclay that I was never involved with any of the preparation of the Company's invoices and the financial arrangement in relation to the distributors. The only occasions when I was told of the price of a product, was when the 5th Defendant was out of town and I was asked to make an enquiry by email to the 5th Defendant by her staff. There is no need for me at this stage to exhibit all of the correspondence which I exhibited to my Affirmation in HCA 558/2001, as the following two emails suffice to support my account:

- (1) Message dated 19.9.2000 from the 5th Defendant to Richard Hu, the former general manager of the Company's Philippines distributor. In that message, the 5th Defendant writes that "...I am the only one that knows about the real invoices...If you have any questions regarding the balances, pls contact me directly..."; The detailed circumstances of that message is explained in paragraph 26 of my 3rd Affirmation in HCA 558/2001;
- (2) Message dated 10.10.2000 from the 5th Defendant to Sam Tzu, the former general manager of the Company's Hong Kong distributor. In that message, the 5th Defendant writes: "I would appreciate if you do not reveal any

accounting information to Jaw-Hwa presently. I would like to talk to you first. I will call you from HK..." There is now shown to me and exhibited hereto marked "JHS-19" the said email.

The 5th Defendant's control of and interest in the 1st Defendant

53. Further, I refer to the testimony of Barry Le, the general manager of the Taiwan distributor who gave evidence in the Utah proceedings. By the 5th Defendant's own evidence, the Defendants have a very close relationship with Mr. Le and the 2nd and 5th Defendants have known him for many years. There is now shown to me and exhibited hereto marked "JHS-20" excerpts from the Court transcript. On cross examination by the Company's attorneys, he said the following:

Q: Have you ever heard of E. Excel Limited Hong Kong?

A: Yes.

Q: What is that?

A: It's one of the company for headquarters, because they got so many companies that -

Q: You don't know whether Jau-Fei or Rui-Kang have any interest in E. Excel Limited?

A: I think they are, but I never find out, no. I think they are.

...

Q: And E. Excel Limited you previously testified, is an entity that Dr. Chen and her husband Rui-Kang had some involvement in?

A: Yeah.

Q: Now, in every instance you paid a consultant fee to Dr. Chen's company E. Excel Limited; isn't that right?

A: Yeah.

54. It is significant that Mr. Le did not say that the 1st Defendant was my company or the 3rd and 4th Defendants' company. It is in these same proceedings that Mr. Hendrick Tjandra later testifies that he had neither met nor spoken to the 2nd Defendant's sister, the 4th Defendant.

55. Indeed, when I first assumed control of the Company, I found it extremely difficult to run the company as I had little knowledge of its financial workings and matters of pricing and invoicing. This was aggravated by the departure of Sun Ya Ping, who was responsible for all of the invoicing to overseas distributors under the immediate supervision of the 5th Defendant. As such, on several occasions, it was necessary for me to consult the 5th Defendant on various matters, especially in respect of the Company's finances. The email I have exhibited in JHS-15 above is one such example. Fortunately, I was later able to persuade Angela Barclay to return to the Company to help me since she had dealt with the invoicing before she departed from the Company in August 1999.

56. In contrast, the 5th Defendant has not exhibited in her Affirmation any documents or correspondence, and I verily believe that none exist, that I had any control of the 1st Defendant or its accounts. I should mention out of caution that I am not aware as to whether I have been granted any power of attorney for the First Pacific Account or any other account of the 1st Defendant. It may be that the 5th Defendant may have executed such a power of attorney in case something happened to her and the 2nd Defendant. In any event, I affirm that I have never exercise any such power, if such existed.

Correspondence bearing my name

57. As explained in my 1st Affirmation, the Defendants base their allegations that I had full knowledge and control of the 1st Defendant and the invoicing arrangements primarily on the basis of documents and email messages bearing my name. However, as I had explained in my 2nd Affirmation in HCA 558/2001:

- (1) The emails were not written by me, but rather by the 5th Defendant using my email account. The 5th Defendant frequently accessed my email account and often sent out messages under my name. At the same time,

messages concerning the Company's dealings with overseas distributors were often sent to my account, whereupon I would immediately pass them on to the 5th Defendant;

- (2) It is difficult to explain why the 5th Defendant often preferred at times to use my name and account and at other times use her own name. My understanding is that she liked to appear presidential and maintain her image as a scientist and founder of the Company. As such, she did not wish to appear to be personally involved in dealing with distributors on day to day matters, when in fact, she kept a very tight reign on the business.
- (3) In my 2nd Affirmation in HCA 558/2001, I exhibited some messages from the 5th Defendant written to me using my own email account "Hwa009@aol.com". I now re-exhibit these emails as "JHS-21". I presume that she did so out of convenience after having used my account to deal with other matters. In the email dated 14th March 2000, the 5th Defendant admits to using my email account to send out messages in my name. Although this is only a small piece of documentary evidence, I verily believe that it does show that she had access to and did access my email account in dealing with routine matters of the Company.
- (4) The Defendants rely substantially on an email dated 22nd April 1997 emanating from my email account instructing one of the distributors to make payment into the 1st Defendant's accounts. There is now shown to me and exhibited hereto marked "JHS-22". I confirm that I never wrote that email. Indeed, the email is likely to have been written by the 5th Defendant on the basis of her distinctive writing style. I refer to paragraph 6 of the Affirmation of Angela Barclay.
- (5) There is now shown to me 3 other emails which I had exhibited in HCA 558/2001 and now re-exhibited as "JHS-23". These 3 messages are nearly identical to the 22nd April 1997 email allegedly written by me. All 3

messages exhibit the 5th Defendant's distinctive writing style and as such, I verily believe that they were all written by the 5th Defendant.

(6) Further, these instructions are nearly identical in form to the instructions which were provided by Ms. Becky Au of First Pacific Bank to the 2nd and 5th Defendants on 14th September 1995, as exhibited in JHS-12 above.

58. In respect of the messages addressed to me or emails sent into my email account from overseas distributors regarding payments and invoicing, I always passed them on to the 5th Defendant, Angela Barclay or Sun Ya Ping.

59. I realise that the Court may be somewhat sceptical about such a peculiar system of operation, but this arrangement had been devised by the 5th Defendant for her own reasons and was known to all of the Company's staff.

Allegation that I had devised or controlled the diversion arrangement

60. In any event, the Defendants' allegations that I had devised the entire drop shipment arrangement is inherently absurd:

(1) The Defendants contend that I requested her to set up the 1st Defendant with the 3rd and 4th Defendants as its only shareholders and directors and the signatory of its bank accounts. I have, however, never met nor spoken to the 3rd and 4th Defendants and as such it is unlikely that I would suggest or allow the 3rd and 4th Defendants, both of whom lived far away in the PRC and over whom I or the Company had little control, to be in charge of the 1st Defendant and its bank accounts, which holds vast sums belonging to the Company;

(2) Indeed, it is difficult to see how I could have exercised control over the 1st Defendant as both the 3rd and 4th Defendants, being the sisters of the 2nd Defendant, would naturally be loyal to the interests of the 2nd Defendant.

The 5th Defendant alleges that I had the practice of forging the signature of others, and thus suggests that I therefore controlled the 1st Defendant in this manner. This is absurd. If I were truly the architect of this arrangement, and that it was legitimate, there is absolutely no reason for using such a complicated method of controlling the 1st Defendant. I could simply have allowed the Company or members of my own family here in Utah to be its shareholders and directors. It has always been admitted by the Defendants that our family (the Chen family) never truly trusted the 2nd Defendant.

- (3) The more likely version of events is that the 5th Defendant did not entirely trust the 3rd and 4th Defendants to carry out the instructions of the 5th Defendant in relation to the affairs and accounts of the 1st Defendant, and therefore she kept the blank sheets with the 1st Defendant's chop and the 3rd Defendant's signature as a safety mechanism in case anything went wrong;
- (4) If the entire arrangement had been legitimate, as claimed by the Defendants, it is only commercially sensible that the Company itself would have some interest or control over the assets held by the 1st Defendant. There is always a risk that the 3rd and 4th Defendants, or whoever else controlled the 1st Defendant, would abscond with the money, unless the Company itself had some degree of control over its accounts. Under the present arrangement, the 3rd and 4th Defendants were never accountable to the Company nor was the Company able to exercise any control over them;
- (5) Most importantly, if had truly was able to control the 1st Defendant's accounts, I could simply have withdrawn the funds from the 1st Defendant's bank accounts without the need to appoint outside investigators and to bring HCA 558/2001 on behalf of the Company and now the present Action against the 1st Defendant;

F. The 3rd Defendant's Affirmation

61 In her recently filed Affirmation, the 5th Defendant makes various claims and allegations, including:

- (1) The necessity of the Company to rely on the supply of raw materials and secret product formulations that only she and the 4th Defendant can provide;
- (2) The various business functions carried out by the 1st Defendant;
- (3) The hardship caused by the appointment of a receiver or the continuation of the Mareva injunction;
- (4) Monies withdrawn by me through the use of pre-signed blank sheets

I have already dealt with sub-paragraphs (2) to (4) above.

62. Although I have not been in Shanghai to see whether all of the 3rd Defendant's claims are true, it is at least odd that if the 3rd and 4th Defendants had played such an active role in the Company's business, that I have never spoken to or met the 3rd or 4th Defendants. As vice-president of operations of the Company, I was responsible for the manufacturing of the Company's products here in Utah as well as sourcing raw materials in the United States.

63. Further, I am informed by Sam Tzu and Richard Hu and I verily believe that they too have never met nor spoken to either the 3rd or 4th Defendants. Sam Tzu joined the Company in the early 1990's and had worked in the Plaintiff's Taiwan distributor before moving to the Hong Kong distributor. If the 3rd and 4th Defendants had performed any substantial services for the Company and its overseas distributors, it is most unlikely that neither I, Mr. Tzu nor Mr. Hu have ever spoken to or met her.

64. I recall the 2nd Defendant mentioning to me some years ago that his two sisters were helping him run minor errands in the PRC, including the sourcing of raw materials and liaising with suppliers. However, I verily believe that the 3rd

Defendant is grossly exaggerating her role and functions in the Company's business:

- (1) First of all, I verily believe that the research and formulation of the Company's products are done primarily by a team of scientists in the Company's own laboratories in Utah. Indeed, one of the reasons for the Company's success is the 5th Defendant's research into the field of nutritional immunology, in which she has earned a doctorate from Brigham Young University here in Utah. This research is then applied into the Company's products;
- (2) While it is true that many of the raw materials for the Company's products are Chinese herbs, I have never heard of any "unique formulations" passed down from the 2nd, 3rd, and 4th Defendant's ancestors being used in the Company's products;
- (3) No documents have been produced to substantiate the 3rd Defendant's allegations. If it were true that the 1st Defendant supplies some 400 tons of raw materials per year to the Company, surely this would be reflected in the accounting records of the 1st Defendant, which the Defendants have refused to provide.

AFFIRMED at the office of
this 24th day of July 2001

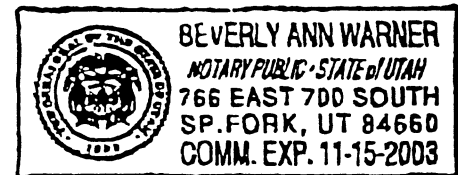
)
.....
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Before me,

Notary Public

Beverly Ann Warner

This Affirmation was filed on behalf the Plaintiff.



State of Utah)
: SS.
County of Utah)

Subscribed and sworn to before me
on this 23rd day of July, 2001, by
Jau-Hwa Stewart.

Tab H

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2493 OF 2001

BETWEEN

JAU-HWA STEWART

Plaintiff

and

E. EXCEL LIMITED
ZHANG RUI-KANG
ZHANG SHENG-MEI
ZHANG MEI-FENG
CHEN JAU-FEI

1st Defendant
2nd Defendant
3rd Defendant
4th Defendant
5th Defendant

4TH AFFIRMATION OF JAU-HWA STEWART

I, Jau-Hwa Stewart, merchant, of 1198 North Spring Creek Place, Springville, Utah 84663, U.S.A. do solemnly, sincerely and truly affirm as follows:-

1. I am the same Jau-Hwa Stewart who had affirmed the 1st, 2nd and 3rd Affirmations of Jau-Hwa Stewart. Save as otherwise stated, the matters deposed to herein are within my personal knowledge or are gleaned from documents in my possession the best of my knowledge.

following Affirmations filed in this Action:

tion of Chen Jau-Fei;

tion of Lau Pak Heng;



- (3) 1st and 2nd Affirmations of Zhang Sheng Mei;
- (4) 1st, 2nd and 3rd Affirmations of George Anthony Ribeiro.

I have also reviewed the Affirmations filed in HCA 558/2001 and exhibited by the Defendants in their "Bundle of Selected Affirmations".

- 3. In light of all the Affirmations that have been filed in the present Action and its predecessor HCA 558/2001, I verily believe that it would be convenient to the Court to consolidate my evidence filed in both actions, insofar as it is relevant to the present applications, into one Master Affirmation, which I now do. In addition, I deal also with the issues raised in the latest Affirmations filed on behalf of the Defendants. While I attempt to give the Court an overall history of the dispute between myself and the Defendants to date, I do not intend to deal with each and every matter raised by the Defendants, and the fact that I do not deal with a particular matter should not be taken to indicate any acceptance of such matters.

(1) **Arrangement of sections**

- 4. For the Court's ease of reference, this Affirmation is arranged into the following sections:

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(2) **Dramatis Personae**

5. First of all, I should give a brief overview of the more important parties and witnesses in the present Action and HCA 558/2001:

(1) E. Excel International Inc. ("Corporation") is a company incorporated under the laws of the State of Utah engaged in the business of manufacturing and distributing nutritional and beauty products through multi-level marketing or network selling. The Corporation's products are distributed in various countries, although the primary markets are Taiwan, Malaysia, Hong Kong and the Philippines;

(2) I am a 25% registered and beneficial shareholder of the Corporation. It is in dispute whether I am also the 100% registered shareholder of the Corporation holding 75% of the remaining beneficial interest in the Corporation on behalf of my 3 nieces and nephews, the 2nd and 5th Defendants' children ("Children"). This dispute is the subject of litigation in Utah, namely Civil Action No. 010400098 ("Trust Proceedings"). I was also the vice president of operations of the Corporation until the middle of October 2000. In October 2000, I took over from the 5th Defendant the duties of president and CEO of the Corporation pursuant to a resolution of the board of directors dated 1st September 2000. I held this position until I voluntarily stepped down to allow the appointment of an interim president and CEO by the Utah Court pursuant to an Interim Consent Order dated 21st February 2001 ("Interim Consent Order"). I was at all material times a director of the Corporation, until my resignation last month in order that I may fairly pursue other businesses;

- (3) The 1st Defendant is a key party in the present Action. It is a limited company incorporated under the laws of Hong Kong in 1994, whose sole registered shareholders and directors are the 3rd and 4th Defendants. A search of the Companies Registry of the 1st Defendant has been exhibited in JHS-4. The Defendants claim that the 1st Defendant is involved in a wide range of businesses, including product research and development, market research, formulation, financing the Corporation's distributors and software development. However, no documents or records of any kind have been produced to date to substantiate such claims;
- (4) The 2nd Defendant is the husband of the 5th Defendant. He is a director of the Corporation and was, until the middle of October 2000, the chief financial officer of the Corporation. The 2nd Defendant was removed as a director and chief financial officer of the Corporation after it was discovered that he was embezzling funds from the Corporation to his mistress in California. He was reinstated on an interim basis as a director of the Corporation pursuant to the Interim Consent Order;
- (5) The 3rd and 4th Defendants are sisters of the 2nd Defendant and both reside permanently in Shanghai, PRC. As mentioned above, they are the sole shareholders and directors of the 1st Defendant. They have no relationship with the Corporation, and I have never met nor spoken to either of them;
- (6) The 5th Defendant is my younger sister and was, until the middle of October 2000, the president and CEO of the Corporation. She was removed together with the 2nd Defendant after a dispute arose between us in relation to the 2nd Defendant's affair and embezzlement of funds from the Corporation. She has not been a shareholder of the Corporation since December 1995;
- (7) Gil Miller is the managing director of PriceWaterhouseCoopers LLP in Salt Lake City, Utah. PriceWaterhouseCoopers LLP was appointed by the Corporation at my behest to investigate its books and accounts after I

discovered that vast amounts of money belonging to the Corporation appeared to have been diverted to the 1st Defendant. Mr. Miller is now instructed in my personal capacity to give expert evidence in the present Action. Mr. Miller is a licensed frauds investigator and head of the litigation support unit at PriceWaterhouseCoopers LLP;

- (8) Larry Holman was appointed by the Utah Court to act as the interim CEO and president of the Corporation on 13th March 2001 pursuant to the Interim Consent Order. He remains as interim CEO and president of the Corporation until this day. He is also referred to as a "Special Master" of the Utah Court.
- (9) Hendrick Tjandra and Barry Le are general managers of the distribution companies for the Corporation's products in Malaysia and Taiwan respectively. Mr. Tjandra and Mr. Le are aligned with the interests of the 5th Defendant as they are partners with her in the distribution companies. It is noted here that the Corporation has no interest or control of these distribution companies.
- (10) Richard Hu and Sam Tzu are the former managers of the distribution companies in the Philippines and Hong Kong, which are also substantially owned by the 5th Defendant. Mr. Hu and Mr. Tzu, although partners with the 5th Defendant, disapproved of the 5th Defendant's conduct and supported my assumption of control of the Corporation in October 2000. Mr. Hu and Mr. Tzu were soon dismissed by the 5th Defendant from their respective distribution companies. Mr. Tzu also assisted the Corporation to establish a ~~new~~ distribution company in Hong Kong, which is 80% owned and ~~controlled by the Corporation~~ rather than by the 5th Defendant. There is now shown to me exhibited hereto marked "JHS-23A" a copy of a search of the Companies Registry for the said company.
- (11) Angela Ku Barclay was the 5th Defendant's assistant from 1994 to 1999. During that period, she was responsible for the pricing and invoicing of

distributors in the export department under the direction of the 5th Defendant. Ms. Barclay later rejoined the Corporation at my request in October 2000;

- (12) Sun Ya Ping is the sister in law of the 2nd Defendant and worked with Ms. Barclay in the export department prior to Ms. Barclay's departure. Her responsibilities were primarily to prepare invoices and shipping documents in relation to orders from overseas distributors. She was dismissed soon after the removal of the 2nd and 5th Defendants;
- (13) John O. Sump worked as an accountant in the Corporation from 1994 to 1997 and was responsible for, inter alia, all in-house accounting, payroll, payroll tax and drawing up the financial statements of the Corporation;
- (14) Beverly Warner was until April of this year the office manager of the Corporation;
- (15) Robert Kent Maxwell joined the Corporation in 1999 as an assistant to both the 5th Defendant and myself. He was transferred in September 2000 to the export department and was trained by Ms. Sun on how to prepare the invoices to the overseas distributors.

(3) Background

Establishment of the Corporation

- 6. The Corporation was established in 1987 as a family business between my parents and the 5th Defendant. My father, mother and the 2nd and 5th Defendants were all incorporators of the Corporation and its initial directors. The articles of incorporation of the Corporation are exhibited in JHS-1. I point out that Hwan-Lan Chen and Yung-Yeuan Chen in the said articles are my mother and father (who is now deceased) respectively.

7. Although the shares of the Corporation were registered at the time entirely in the name of the 5th Defendant, the Corporation was always understood to be a Chen Family business established with capital supplied by my parents. Indeed, I am informed by our mother ("our Mother") and verily believe that the initial funds for establishing the Corporation was around US\$3 million, which came from my parents and also partly from my brother, Chen Tei-Fu, at my parents' request for the specific purpose of setting up the Corporation. Before the establishment of the Corporation, I verily believe that the 5th Defendant held a junior teaching position at Brigham Young University, and clearly did not have sufficient means to establish her own business.
8. The Corporation's business was initially managed by the 2nd and 5th Defendants and was principally concerned with the importation and distribution of goods imported from China into the United States. However, that business was unsuccessful and collapsed after a scandal involving violations of United States import and labelling regulations. I recall that the Corporation and the 5th Defendant were ultimately convicted and fined in 1993 for US\$170,000.00 and US\$2,000 respectively. A copy of the judgment of the 5th Defendant's conviction is exhibited as "JHS-24".
9. In 1989, the Corporation decided to enter into the business of manufacturing and distributing nutritional products through network selling. The 2nd and 5th Defendants came upon the idea after seeing my brother's success in establishing Sunrider, a pioneer in the business of nutritional products. At the time, I worked in the operations department of Sunrider in California where I was responsible for manufacturing and sourcing of raw materials. I mention here that Sunrider had a separate accounting and finance department, and I was never involved in that aspect of the business.
10. One advantage the Corporation had over its competitors was the 5th Defendant's work in the area of microbiology and immunology, a subject which she had studied

and obtained a doctorate degree from Brigham Young University. I graduated from the same university with a bachelor's degree in the same subject, although I decided not to pursue postgraduate studies. The study of immunology concerns the strengthening of the body's immune system to maintain health and ward off diseases. The philosophy of the Corporation was to apply the study of immunology to its products. Indeed, the Corporation maintains a close relationship with the immunology department of Brigham Young University, and is equipped with its own laboratories.

11. In March 1990, shortly after the Corporation began developing its nutritional product business, my parents decided that I should return to Utah from California with my husband, Taig Stewart, to assist the 2nd and 5th Defendants in managing the Corporation. The 2nd and 5th Defendants had no experience in the nutritional product and network selling business, and it was intended that I bring my experience gained at Sunrider, where I had worked since graduation. In return, it was agreed between my parents, the 5th Defendant and I that the 5th Defendant and myself should each beneficially own 50% of the Corporation. This arrangement was not without business sense or logic, as the Defendants now contend. At the time, the Corporation was in financial trouble and it was foraging into a completely new business. By returning to Utah with my husband to join the Corporation, I resigned from Sunrider and left everything we had in California to join a new venture, the future success of which was at least questionable at the time.
12. There were never any documents showing my parents' interest in the Corporation and the subsequent transfer of that interest to me because those matters were always thought to be arrangements within our Family. As noted by the 5th Defendant, we belong to a very traditional Chinese family, and the Corporation was ~~was~~ viewed as a family business belonging to the Chen Family, whose members were the only ones to have contributed to its founding capital. Although

the 2nd Defendant was also involved in the business, he never contributed any capital to the Corporation.

Establishment of the Trusts

13. By the latter half of 1995, my father's health deteriorated, and in order to ensure that my 50% beneficial interest in the Corporation would be recognised by the 2nd and 5th Defendants after his death, my father was adamant that the 5th Defendant formalise the beneficial shareholding agreement between us. However, the 5th Defendant was by that time quite reluctant to "give up" a significant percentage of the company to me, as the Corporation's nutritional product business was quickly becoming very successful. The possibility of a 1/3 beneficial interest for each of 5th Defendant, myself and my parents was also discussed. However, with pressure from my parents, a compromise agreement was finally reached, whereby:

- (1) The 5th Defendant and I would establish three irrevocable trusts ("Trusts") in respect of 75% of the Corporations shares for the benefit of the Children in equal shares;
- (2) The 5th Defendant would transfer the legal title to the remaining 25% of the Corporation's shares to me;
- (3) The 5th Defendant would remain as president and CEO of the Corporation.

(Out of precaution, I mention that my father passed shortly before the agreement was finalised.)

14. By ~~this~~ agreement, I would become the 100% registered shareholder of the Corporation's shares, while 75% of those shares would be held on trust for the Children and the remaining 25% would belong to me beneficially. I should explain the reasons why the 5th Defendant agreed to such an arrangement. From about 1994 onwards, the 2nd and 5th Defendants spent a substantial amount of time outside of

Utah to promote the Corporation's business and to liaise with overseas distributors. They spent very little time with the Children, and so the Children have literally been brought up by my parents and myself. I love them very much, and the 5th Defendant knew I would never do anything to harm their interests. In turn, as the Children's mother, the 5th Defendant would be able to maintain her control of the shares and thus the Corporation. In any event, she believed that I was unlikely to do anything contrary to her wishes.

15. Pursuant to the said agreement, the 5th Defendant transferred 25% of the Corporation's shares to me and executed three notarised trust agreements on 30th December 1995 as the settlor and with me as the trustee. For some reason unknown to me, Schedule A of each of the trust documents, which specified the subject of the Trusts, were never filled in when the Trust documents were executed. However, it had clearly been agreed between the 5th Defendant and myself that the subject of the Trusts would be 75% of the company's shares. The Trust documents have been exhibited in JHS-2. It can be seen from the Trust documents that the shares do not vest in the Children until they reach the age of forty, which would be more than thirty years from the time of execution.
16. Indeed, the fact that the 5th Defendant knew of and accepted the existence of the subject matter of the Trusts is evidenced by the following:
 - (1) By an application to the United States revenue authorities in early 1996, the 5th Defendant applied for preferential tax treatment of the income arising from 75% of the Corporation's shares on the basis that the shares were held by the Trusts. I am advised by my Utah attorneys that in order for the United States Internal Revenue Service to accept the existence of the Trusts in favour of the Children for tax purposes, there is a legal requirement that the 5th Defendant, as settlor of the Trusts, personally apply to the IRS and make a signed declaration that the shares in the Corporation have been placed in the Trusts;

- (2) For the fiscal years from 1996 to 2000, each of the Children received income from the Trusts, being the dividends accruing from 75% of the Corporation's shares, and tax was paid on such income by each of the Children. The letters from the US revenue authorities and the Children's tax returns evidencing the existence and subject matter of the Trusts have been exhibited in JHS-3.
17. I subsequently took delivery of the shares in October 2000 by requesting the share certificates for 75% of the shares in the Corporation, and of which I was trustee from Lynn Gilbert, the auditor for the Corporation. Indeed, the Trusts were Mr. Gilbert's idea, and if I were not entitled to those share certificates, he would not have delivered them to me. Unfortunately, the share certificates were lost sometime between October 2000 and December 2000, and upon the advice of my Utah attorneys, I applied for them to be re-issued. As there had never been any dispute that the shares belonged to the Trusts, I was advised that the shares should be issued in my name as trustee for the Children to reflect properly the status of those shares. My Utah attorneys then prepared the necessary paperwork for me to sign for the shares to be re-issued.
18. The 5th Defendant, however, now denies the existence of the Trusts, and alleges that the Trusts were a fraud committed against her by me. The 5th Defendant has affirmed that she signed the trust documents "*without query*" and was allegedly ignorant of the contents and effects of the documents. As the Court can see from JHS-2, these were 16 page legal documents witnessed and notarised by two notary publica. I verily believe that it is most unbelievable that the 5th Defendant would execute such a document casually without seeking proper advice as to its meaning and effect. Even more unlikely is the fact that her lawyers or accountants would have presented such critical documents for her execution without having had any proper instructions from their client and without having advised her as to their effect.

The Utah Court's ruling on standing

19. On 7th February 2001, the Utah Court made an interim ruling in the Trust Proceedings on the question of whether the Children, as represented by their mother, the 5th Defendant, had standing to bring an action against me. In the context of that ruling, the Court took the preliminary view that the shares had not been properly delivered to the Trusts and that the acts done by the Corporation's board of directors were, after I assumed control in October 2000, "void ab initio".

20. However, it must be emphasised that the comments of the judge were made in the context of an interim ruling. The crux of the Court's ruling was:

"Therefore, generally speaking I find that there's enough basis for [the 5th Defendant] to have what appears to me to be an adequate basis for standing at law to institute this lawsuit..."

21. I am advised by my Utah attorneys and I verily believe that no substantive determination will be made by the Court until trial of the Trust Proceedings, which has yet to take place. Moreover, the ruling must be seen in the light of the subsequent Interim Consent Order of 21st February 2001, which expressly provides for the appointment of an interim president and CEO until the final determination of the Trust Proceedings. If the Court had intended to make a final pronouncement on the trust position of the shares, there would have been no need for the Interim Consent Order, since the 5th Defendant would have been immediately reinstated as the president and CEO of the Corporation. It is also expressly recognised in paragraph 4 of the Interim Consent Order that the trust position of the shares is still very much in dispute:

"There is a dispute between the Parties concerning whether the 75% stock of the children is owned by the children individually or is held in trust for the children. Regardless of this dispute, throughout the course of this proceeding, the stock

owned by the children or their purported trusts will be represented by a person appointed by the natural guardians of the children..." (emphasis added)

22. The position has been explained in paragraph 2(i) of the 2nd Affirmation of Willis Orton filed in HCA 558/2001, which the Defendants have not exhibited in their "Bundle of Selected Affirmations".

Dispute with the 5th Defendant

23. From around 1994 onwards, the business of the Corporation seemed to prosper, and the "E. Excel" brand of nutritional products was becoming very well established in Malaysia, Taiwan, Hong Kong and the Philippines. Although I was not responsible for the finance and accounting aspects of the Corporation's business, I believed that the Corporation earned substantial profits based upon the volume of product that was being shipped.
24. Around April 2000, the 5th Defendant and I discovered that the 2nd Defendant was having an affair with a woman by the name of Yau Ju' E, who lived in California. Upon further investigation, we discovered that the 2nd Defendant had for years been embezzling substantial amounts of money and funnelling it to Ms. Yau. One of the methods in which this was accomplished was an arrangement between the 2nd Defendant and one of the Corporation's suppliers in Taiwan by the name of Kao Dong Wei, where sums were paid substantially in excess of Mr. Kao's invoices prices. Over the years, this practice created a "slush fund" of millions of dollars which Mr. Kao then wired in lump sums to the bank account of Ms. Yau. There is now shown to me and exhibited hereto email correspondence between the 5th Defendant and myself on our investigations into the 2nd Defendant's affair, which the 5th Defendant now denies. An action in relation to the affair has also been instituted by Ms. Yau against the 2nd Defendant in California.

25. When our Mother found out about these matters, she was extremely upset. our Mother was never particularly fond of the 2nd Defendant, and after she learned that he had been embezzling millions of dollars from our family business to a mistress, she demanded that the 5th Defendant dismiss him from the Corporation at once. To our surprise, however, the 5th Defendant refused to do so and chose to turn a blind eye to the affair and the embezzled money. A bitter dispute then erupted between the 5th Defendant and our Mother. Although I sympathised with the 5th Defendant's feelings for the 2nd Defendant, I clearly felt that our Mother was in the right and that the 2nd Defendant should at least be dismissed from the Corporation.
26. After months of wrangling, I finally exercised at our Mother's request my powers as the 100% shareholder of the Corporation and as trustee of the Children's shares and took control of the Corporation. I immediately forced the resignation of the 2nd Defendant from the Corporation. As for the 5th Defendant, we remained on reasonably amicable terms, as I think she understood that I had no choice but to do what I did. The 5th Defendant seemed to accept the outcome of events, and shortly afterwards, she left Utah to join the 2nd Defendant in Singapore, where they now permanently reside.
27. The 5th Defendant now contends, however, that I had staged an alleged coup and seized control of the Corporation while she was not in Utah. This cannot be farther from the truth. The transition of control of the Corporation to myself in October 2000 was done with the full co-operation of the 5th Defendant. This is demonstrated by two emails exhibited in JHS-15 dated 2nd November and 4th November 2000 between the 5th Defendant and myself where we discussed hand-over matters. It is clear from the tone of these emails that there was never any alleged usurpation of power or that I had seized the Corporation against her will.
28. In her email to me dated 4th November 2001, the 5th Defendant said to me, *inter alia*:

"Thank you for your e-mail regarding the taking over of my position as president and my duties. As the president of E. Excel, it is the most important position in E. Excel to the distributors and GMs, therefore, it is important that we treat this matter with importance and in a business-like manner..."

Ever since I received your email, I have started to communicate sincerely with the GMs regarding your taking over of all matters as mentioned in your email. I have made my intentions and also your intentions very clear to them. Please contact them directly regarding your plans. They will be looking forward to discussing with you on how to cooperate with you in future business dealings..."

29. These emails strongly suggest that the 5th Defendant initially accepted:
- (1) That I was lawfully entitled to exercise the rights in those shares to assume control of the Corporation; and therefore,
 - (2) That I was a *bona fide* trustee of 75% of the Corporation's shares for the Children.

Discovery of misappropriation of assets

30. It was at first very difficult for me to operate the Corporation without the 5th Defendant. Prior to October 2000, I was involved only in the manufacturing and operations aspects of the business and had little involvement with the finances, invoicing and accounting. I will discuss more of these matters below.
31. After examining the books and accounts of the Corporation and the masses of papers left behind in the 5th Defendant's office at the Corporation's premises and at home, I found that the numbers did not tally and that vast amounts of money were missing from the Corporation's accounts. It appeared that overseas distributors

were not paying the Corporation for their shipments but rather to a company incorporated in Hong Kong by the name of E. Excel Limited, the 1st Defendant. My understanding of accounting matters, however, was very limited, and as such, I sought the advice of my attorneys, who referred me to Mr. Gil Miller, a licensed frauds investigator at PriceWaterhouseCoopers LLP in Salt Lake City, Utah.

32. Mr. Miller was retained in late December 2000 / early January 2001. After an initial investigation of the books and accounts of the Corporation and interviews with various members of the Corporation's staff in the export department, Mr. Miller and his team were able to ascertain that the Corporation had, for the past 5 years, been operating a double invoicing system. The effect of such a system was that a substantial portion of the Corporation's profits was diverted to the 1st Defendant, a company wholly owned and controlled by the 2nd Defendant's two sisters, whom I had never met. Mr. Miller's findings were explained in his Affirmation, and can be summarised as follows:

- (1) Prior to October 2000, there was in operation a system of "double invoicing" for the Corporation's sales to certain of its overseas distributors ("Distributors"):
 - (a) Two invoices were prepared on the Corporation's letterhead and at the Corporation's offices in Utah for each shipment to these Distributors: one for a higher price which was issued directly to the Distributors ("higher-priced invoices"), and another for an abnormally low price (usually around 50% of, but sometimes up to three or four times less than, the price in the higher priced invoices) which was issued to the freight forwarder ("lower-priced invoices");
 - (b) Distributors were then asked to pay the value of the higher-priced invoices directly to the 1st Defendant, which does not appear to carry on any active business. As mentioned in paragraph 5(3) above, the 1st Defendant's sole shareholders and directors are the 3rd and 4th

Defendants, who are the 2nd Defendant's sisters and resident in the PRC;

- (c) The Corporation has no registered shareholding in or legitimate control of the 1st Defendant. However, accounting statements, correspondence and instruction confirmations from the 1st Defendant's bankers, First Pacific Bank, were addressed to the 2nd and 5th Defendants personally;
 - (d) From time to time, lump sums were wire transferred at the direction of the 5th Defendant from the 1st Defendant to the Corporation. However, these sums that were transferred, amounting to some US\$23 million in the period from 1st January 1999 to 31st October 2000 ("Examined Period"), being the period examined at the time by PriceWaterhouseCoopers, do not correlate with any of the invoices or the total value of invoices that were issued to the Distributors;
 - (e) Over the Examined Period, a total value of some US\$52 million was issued to these Distributors. It follows that some US\$29 million (US\$52 million - US\$23 million) must have been retained, at least at one point, by the 1st Defendant. There is no evidence that the US\$29 million or any substantial portion of it, has gone to any legitimate purpose for the benefit of the Corporation.
- (2) In addition, there was a second independent scheme involving one of the Corporation's two Taiwan distributors:
- (a) This was an arrangement whereby one E. Excel International (Taiwan) would pay to the Corporation only 50% of the invoice value of the goods shipped. The other 50% was paid directly to the 1st Defendant under the guise of a "consulting fee";

- (b) There is no evidence of any consulting services provided by the 1st Defendant worth even close to 50% of the invoice price. From the invoices examined to date, such purported consulting fees paid to the 1st Defendant in the Examined Period total about US\$7 million;
- (3) Hence, the total amount belonging to the Corporation estimated to be retained by the 1st Defendant over the Examined Period is therefore about US\$36 million (US\$29 million + US\$7 million). PriceWaterhouseCoopers has now worked out the total amount invoiced from 1st January 1997 to 31st October 2000 to be approximately US\$75 million. Mr. Miller and his team have not finished calculating, however, the amount that has been wired back in lump sums to the Corporation over the same period, but I am informed by Mr. Miller and I verily believe that the total sum diverted to the 1st Defendant in the period from 1st January 1997 to 31st October 2000 will be significantly greater than US\$36 million.
- (4) Most significantly, neither I nor any of the Corporation's staff have been able to find:
 - (a) Any board or shareholder resolutions authorising either of these arrangements;
 - (b) Any documents evidencing any legitimate functions carried on by the 1st Defendant to justify receiving more than 50% of the Corporation's profit margins;
 - (c) Any written agreements between the 1st Defendant, the Corporation and the Distributors governing such arrangements.
- (5) Finally, as a director and the vice-president of operations, I certainly had not and would not have authorised, approved or acquiesced to any such arrangements.

33. After Mr. Miller revealed his findings to me. I was advised by the Corporation's legal advisers to institute proceedings both in Hong Kong and in Utah against:
- (1) The 2nd and 5th Defendants for breach of their fiduciary duties to the Corporation;
 - (2) The 1st, 3rd and 4th Defendants for knowing assistance in the 2nd and 5th Defendants' breach of duty and/or knowing receipt of assets properly belonging to the Corporation.
34. Proceedings in Utah were instituted against the Defendants in the name of the Corporation in Utah District Court Civil Action No. 010400201 on 12th January 2001. Proceedings and injunctive relief were also instituted in Hong Kong in the form of HCA 558/2001. However, before going further, I need to explain the events in the intervening period from October 2000 February 2001:

Events between October 2000 to February 2001

Trust Proceedings and Temporary Restraining Order

- (1) On 8th January 2001, the 5th Defendant representing the Children instituted the Trust Proceedings against me, and on 10th January 2001 obtained *ex-parte* a Temporary Restraining Order ("TRO") restraining me from acting as president and CEO of the Corporation;
- (2) It is disputed between the 5th Defendant and myself whether the TRO had subsequently lapsed, but such a dispute is now academic as the TRO has clearly been superseded by the Interim Consent Order on 21st February 2001. As mentioned in paragraph 21 above, the Interim Consent Order confirms that any ruling of the Court in the Trust Proceedings are of an interim nature only, and trial of the Action has yet to take place.

- (3) I will defend vigorously my rights under the Trusts at trial of the Trust Proceedings, and I am advised by my Utah attorneys and I verily believe that I have a strong and bona fide defence against the 5th Defendant's claims.

The Distributors Actions against me and the Corporation

- (4) Soon after assuming control of the Corporation, I learned from the general managers of the Hong Kong and Philippines Distributors, Mr. Tzu and Mr. Hu respectively, that the 2nd and 5th Defendants were intending to start up a competing business under the "E. Excel" name in, inter alia, Singapore;
- (5) As mentioned above, the 2nd and 5th Defendants have always had a close relationship with the Distributors due to the fact that the 2nd and 5th Defendants are substantial shareholders of the Distributors. For example, there is now shown to me and exhibited hereto marked "JHS-25" a search of the Companies Registry of Extra Excellence International Limited, the Distributor in Hong Kong. As can be seen from this document, the sole registered shareholders of the company are the 2nd and 5th Defendants;
- (6) I was informed by Mr. Tzu and Mr. Hu that the 2nd and 5th Defendants were setting up their own manufacturing facilities in Singapore and Malaysia to manufacture products under the "E. Excel" name, and to be distributed by the Distributors. Indeed, the 2nd and 5th Defendants have helped set up a new company on 23rd December, 2000 by the name of "Extra Excellence Manufacturing (S) Pte Ltd.", of which they were directors and shareholders. A copy of a search of the Singapore Companies Registry has been exhibited in JHS-18.
- (7) It was then that I realised that the Corporation effectively had no control over or interest in any of the Distributors of its products. As such, I decided

that the Corporation should have its own distribution channels so as to ensure that its network of distributors would be loyal to the interests of the Corporation, rather than to those of the 2nd and 5th Defendants. I therefore established on behalf of the Corporation new Hong Kong and Philippines distributors ("New Distributors"). As mentioned in paragraph 5(10) above, the Corporation is the 80% shareholder of the New Distributor in Hong Kong.

- (8) At the same time, I negotiated with the existing Distributors that if they wished to continue doing business with the Corporation, they must agree not to distribute the 2nd and 5th Defendants' unauthorised products which were soon to be manufactured in Singapore and Malaysia;
- (9) However, the most important and indeed obvious reason why I refused to ship product to the Distributors, including Taiwan, Malaysia and Korea, is that under the then existing payment arrangements, the Distributors never paid the Corporation but rather to the 1st Defendant for their shipments, and hence, further orders would only result in further diversion of funds from the Corporation. I attempted to negotiate with the Distributors so that they would pay the full price of their shipments to the Corporation directly, but the general managers of the Distributors, with the exception of Mr. Tzu and Mr. Hu, all refused. As a result, I rightfully refused to ship them any more product;
- (10) It was critical for the 5th Defendant and the Distributors, however, to maintain a steady supply of the Corporation's product until the 2nd and 5th Defendants' manufacturing facilities were fully operational in Singapore and Malaysia, which, I was informed by Mr. Tzu and Mr. Hu, was still a few months away. In a network selling business, if the supply of products is cut off, then the network of sub-distributors would be unable to generate any income, in which case, they are likely to leave and join other networks;

- (11) Hence, the Distributors in Malaysia, Taiwan and Korea decided to institute proceedings against the Corporation and myself to compel the Corporation to continue supplying product to them. The difficulty, however, is that the Corporation never had any exclusive and compulsory supply contracts with any of these Distributors, and as such, the Corporation was not bound to continue supplying products to them. Indeed, before cutting off the Corporation's supply of products to these Distributors, I conducted a search of the Corporation's offices and was initially unable to find any compulsory supply contracts, exclusive or otherwise. The situation was explained in the Affirmation of Taig Stewart filed in HCA 264/2001, which has been exhibited as JHS-16. However, out of precaution, I should mention that we subsequently found exclusive distributorship agreements between the Corporation and these Distributors, but these were entirely different agreements from those submitted by the Distributors to the Utah Court.
- (12) I verily believe that historically, shipments were dealt with on an order by order basis. As such, it was necessary for the 5th Defendant and the Distributors to find a way to compel the Corporation to continue supplying products to them until the 2nd and 5th Defendants' new manufacturing facilities were ready. The 5th Defendant's attempts to do so in Hong Kong are set out in the Affirmation of Sam Tzu filed in HCA 264/2001, a copy of which has been exhibited as JHS-17. I am informed by Mr. Tzu and Mr. Hu and I verily believe that:
- (a) The 5th Defendant executed exclusive supply contracts with the Malaysian, Singapore and Korean distributors purportedly on behalf of the Corporation, and backdated the agreements so that they appear to have been made while the 5th Defendant was still the president and CEO of the Corporation;

- (b) The 5th Defendant demanded Mr. Tzu and Mr Hu to execute backdated contracts with the 5th Defendant as well, but they refused. As such, no Actions were brought by the Distributors in Hong Kong and the Philippines against myself and the Corporation, even after the dismissal of Mr. Tzu and Mr. Hu. Rather, in HCA 264/2001, the 5th Defendant's distributor relies upon an "irrevocable license" executed unilaterally by the 5th Defendant and purportedly dated 1st August 1997.
- (c) Primarily for this reason, both Mr. Tzu and Mr. Hu were virtually immediately dismissed by the 5th Defendant from the Hong Kong and Philippines Distributors.
- (13) On the basis of these purported agreements, the Malaysian, Taiwan and Korean Distributors filed Actions against me in Utah District Court for breach of contract. A TRO was also obtained *ex-parte* before the Honourable Judge Schofield on 10th January 2001 requiring me to ship product to these Distributors. The Defendants now seek to rely on the comments made by the Judge in those proceedings as evidence of my conduct against the interests of the Corporation. However, I wish to emphasise that those proceedings were *ex-parte* and I was not afforded the opportunity to be heard. As such, the judge's remarks are of limited, if any evidentiary value.
- (14) In any event, I used my best efforts to comply with the TRO and to ship product according to the orders of the relevant Distributors. However, these Distributors, allegedly for quality reasons which have not been substantiated by any documentary evidence, then refused to follow through with most of their purchase orders and to accept delivery of their ordered goods pursuant to the TRO.

Gary Takagi, dated June 28, 2001, a true and correct copy of which is attached hereto as Exhibit A.

DATED this 26 day of September, 2001.

Carl D Brewer

Carl Brewer

SUBSCRIBED AND SWORN before me this 26th day of September, 2001.

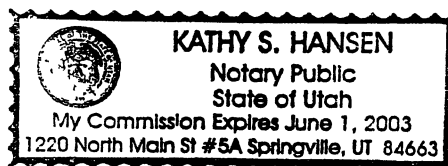
Kathy S Hansen

NOTARY PUBLIC

Residing at: Springville, UT

My Commission Expires:

June 3, 2003



Memo

To: Gary Takagi
From: Carl Brewer
CC: Pat Hoog
Date: 06/28/01
Re: Graphics department equipment and Microsoft software inventory listing.

Following is a list of equipment that was in the graphics printing area. This list has been developed by checking current employees that were here when the equipment was here. The employees interviewed indicated they saw equipment in the graphics department on a permanent basis. They were able to identify items by remembering the number or manufacture or type of product. I have contacted the respective manufactures and obtained technical information and replacement costs.

Item	Status	Replacement Cost
Epson 9000 Printer	Damaged beyond repair	\$ 7000.00
Epson 9000 Printer	Damaged beyond repair	\$ 7000.00
Ledco DL42 Laminator	Missing	\$ 9000.00
FlexTight Precision II Scanner	Missing	\$15000.00
Rastor Imaging Processor (RIP)	Missing	\$ 5000.00
LinoType Scanner	Missing	\$ 6000.00
Xante Accel-a-Writer Printer	Missing	\$ 3200.00
3 Apple G4 computers	Missing	\$ 7500.00
2 Apple G3 computers	Missing	\$ 5000.00
3 Graphics monitors	Missing	\$ 4000.00
1 PC computer	Missing	\$ 2000.00

The following list of **Microsoft** software was obtained by an internal software audit. However, I was unable to locate necessary software media and corresponding licenses.

Item	Count	Status
Windows 95/98	40	Missing
Windows NT40 Server	2	Missing
Windows 2000 Server	1	Missing
MS Office 97/2000	40	Missing
MS Exchange 5.5 Server	1	Missing
MS Exchange 5.5 CAL	40	Missing
MS NT40 Workstation	4	Missing

- (15) Indeed, these Distributors subsequently vacated their TRO, effectively abandoning the relief which they had sought ex-parte from the Court. In their "Memorandum in Support of Motion to Release Bonds Posted in Connection with TRO" dated 22nd March 2001, the Distributors expressly stated to the Court:

"The TRO [granted January 10 2001] was intended to be effective for ten days. However, on February 1, 2001, counsel for each of the parties appeared before the Court because the Plaintiffs [Distributors] had determined that they did not want the relief ordered in the TRO after all..."

There is now shown to me and exhibited hereto marked "JHS-26" the said Memorandum. I verily believe that these Distributors no longer wanted the TRO since they were, by that time, able to procure products manufactured by the 2nd and 5th Defendants' manufacturing facilities in Singapore.

Injunctions for passing-off

- (16) In the meantime, within days after the New Distributors opened for business in Hong Kong and the Philippines, the Distributors obtained interlocutory injunctions prohibiting them from operating. HCA 264/2001 was brought by the Distributor against the New Distributor in Hong Kong for, inter alia, passing off, and an ex-parte injunction was granted by the Honourable Mr. Justice Stone on 16th January 2001. Indeed, it is difficult to see how the New Distributor was passing-off the business and products of the Hong Kong Distributor, since the New Distributor is owned and licensed by the Corporation. I verily believe that this fact was not properly drawn to the attention of the learned Judge at the time.

- (17) I should mention that the injunction ordered against the New Distributor in the Philippines was overturned by the Philippines Court of Appeal on 3rd July, 2001.

(4) HCA 558/2001 brought by the Corporation

35. After learning of Mr. Miller's findings, our Mother and I were shocked to find that not only were the 2nd and 5th Defendants now setting up a competing business in Singapore, but that they had over the years been diverting millions of dollars rightfully belonging to the Corporation to the 1st Defendant and the 2nd Defendant's family. It was clear from the documents retrieved in the 5th Defendant's office and home that:

- (1) The bank accounts of the 1st Defendant, consisting primarily of offshore deposits at First Pacific Bank, were effectively controlled by the 2nd and 5th Defendants;
- (2) Millions of dollars had been paid out of the 1st Defendant's accounts to the 3rd Defendant and other parties without any evidence of legitimate purpose;
- (3) Blank pages pre-stamped with the chop of the 1st Defendant together with the signature of the 4th Defendant, which suggested that the 2nd and 5th Defendants were able to exercise unilateral authority and control over the 1st Defendant and its assets.

I substantiate these points further in paragraphs 131 to 134 below.

36. My family and I were all extremely dismayed that the 5th Defendant, whom we had entrusted with running the family business, had betrayed us for all these years. It was thus decided that decisive steps should be taken against the Defendants. In Hong Kong, a Writ was issued on 3rd February 2001, and on 5th February 2001, Counsel for the Corporation made an urgent ex-parte application to the Honourable

Mr. Justice Yeung, who upon the evidence before him granted, inter alia, the following Orders:

- (1) Leave to issue and serve the concurrent Writ outside of the jurisdiction upon the 2nd to 5th Defendants;
- (2) A worldwide Mareva injunction against the 1st to 5th Defendants;

("1st Mareva Order")

A copy of the Writ and the Order of the Honourable Mr. Justice Yeung dated 5th February 2001 has been exhibited in JHS-5.

37. By a Summons dated 23rd February 2001, the Defendants applied for the 1st Mareva Order to be discharged, which was eventually fixed to be heard on 11th June 2001. The Defendants based their application on a number of grounds, predominantly that:

- (1) The Action was commenced without proper authority of the Corporation;
- (2) There was a failure to disclose material facts to the Court;
- (3) There was no serious issue to be tried since I had full knowledge and control of the diversion arrangements, and in any event, the arrangements were entirely legitimate;
- (4) My conduct was such that a remedy should be denied to the Corporation;

These grounds were explained in some detail in my 1st Affirmation. It is clear, however, that some of them are no longer applicable to the present Action. However, insofar as the grounds which are also being relied upon in these applications by the Defendants, I deal with them in paragraphs 61 to 134 below.

38. By a Summons dated 21.2.2001, I also applied to be joined as a Plaintiff in my personal capacity in HCA 558/2001, and the joinder application was also fixed to be heard together on 11th June 2001.

Interim Consent Order and discontinuance of HCA 558/2001

39. As mentioned in paragraph 5(2) above, I entered into an Interim Consent Order in the Trust Proceedings dated 21st February 2001 whereby I voluntarily stepped down as the president and CEO of the Corporation in order to allow for the appointment of an interim president/CEO by the Utah Court. The Interim Consent Order provides, inter alia:

- (1) *"The Court will appoint an individual to act as interim CEO/president" of the Corporation; (paragraph 1)*
- (2) *"Neither the Corporation's board of directors nor the interim CEO/President shall cause to be dismissed, settled or otherwise compromised, any lawsuit pending purportedly on behalf of or against the [Corporation] without prior approval of the Court." (paragraph 9)*
- (3) *"The board of directors...as it existed prior to September 1, 2000...is deemed to consist of [myself, the 5th Defendant and the 2nd Defendants]." (paragraph 3)*

A copy of the Interim Consent Order has been exhibited in JHS-8A.

40. On 13th March 2001, Mr. Larry Holman was appointed as the interim president and CEO of the Corporation by the Utah Court pursuant to paragraph 1 of the Interim Consent Order. Relations between Mr. Holman and myself (and my attorneys) were difficult from the beginning. For reasons unknown to me, Mr. Holman rarely attempted to communicate or co-operate with me, while on the other hand, he flew several times over to Singapore expressly to meet with the 5th Defendant. Moreover, he has made a number allegations against me for misconduct against the Corporation, which I verily believe are unsupported by any evidence. My

objections to Mr. Holman's unsubstantiated allegations are set out in my Affidavit filed in Utah Court on 30th May 2001, and which has been exhibited as "CHY-9".

41. On the other hand, Mr. Holman has chosen to condone blatant breaches of fiduciary duties by the 2nd and 5th Defendants. For example, my attorneys brought to the attention of Mr. Holman the manufacturing facility and company set up by the 2nd and 5th Defendants in Singapore which by that time had begun manufacturing products under the "E. Excel" label without license from the Corporation. Indeed, the actual counterfeit products manufactured by the 2nd and 5th Defendants' facility were shown in my Utah attorney's offices to Mr. Patrick Hoog, the Corporation's legal adviser appointed by Mr. Holman. Yet, Mr. Holman refused to take any action despite repeated requests from my attorneys.
42. Further, Mr. Holman has accused me of such petty acts as not returning printers and taking forklifts from the Corporation's premises, all of which I vehemently deny. Mr. Holman also accused me of setting up a competing business, yet he was unable to produce any evidence when requested by my attorneys. Indeed, I live about 15 minutes away from the Corporation's offices, and if I were setting up any competing business in Utah, surely he would have little difficulty in obtaining substantial evidence.
43. I am advised by my Utah attorneys and I verily believe that Mr. Holman's lenient attitude towards the 5th Defendant is not difficult to understand. It is clear that the key to success of Mr. Holman's administration of the Corporation depends upon the co-operation of the Distributors, which as explained above, are loyal to and substantially owned by the 5th Defendant. It would also be important to secure the co-operation of the 5th Defendant to maintain the Corporation's market image, which has historically been associated with the 5th Defendant's research in the field of nutritional immunology. On the other hand, my role in the Corporation in all these years has been operational and "behind the scenes", such as the sourcing of raw materials in the United States and overseeing the manufacturing process. In

Mr. Holman's view, without the continued support of the 5th Defendant and her Distributors, the Corporation would not and probably could not succeed. On the other hand, I would always be disposable.

44. Reverting back to HCA 558/2001, Mr. Holman issued a notice for meeting of directors on 29th May 2001 to pass a resolution authorising the dismissal of the Action as part of a global settlement of all actions between the Defendants, the Corporation, and the Distributors. I was informed by Mr. Holman that the decision to discontinue was a commercial decision due to:

- (1) The potential exposure of the Corporation to liability from litigation taken by the Distributors against the Corporation, namely the Distributor actions explained in paragraphs 34(4) to (15) above;
- (2) The Corporation's need to continue dealings with the 2nd and 5th Defendants, who have now established manufacturing facilities for the Corporation's products in Asia;
- (3) It was a condition that HCA 558/2001 be discontinued before the Defendants would be willing to do business with the Corporation, and in Mr. Holman's view, unless the Corporation agreed to enter into the settlement agreement, the Corporation was likely to become bankrupt.

A copy of the Compromise Agreement between the Corporation and the Defendants has been exhibited as JHS-10.

45. An application for leave to discontinue HCA 558/2001 pursuant to the Interim Consent Order was made by Mr. Holman to the Utah Court on 1st June 2001. Although my Utah attorneys objected to the discontinuation on my behalf, leave to discontinue was granted by the Utah Court on the basis of Mr. Holman's recommendation as contained in his Report No.3. A copy of the Utah Court's ruling dated 1st June 2001 has been exhibited as JHS-11.

(5) Present action brought in my personal capacity

Circumstances of the 3rd June 2001 application

46. When the Utah Court granted Mr. Holman's application to discontinue the HCA 558/2001, I thought that everything would be lost. The Action would inevitably be discontinued on Monday morning, 4th July 2001, and I verily believe that once the injunction is lifted, the funds held in the bank accounts of the 1st Defendant would immediately be removed from the jurisdiction and beyond the reach of the courts in Hong Kong or Utah. As such, even if I were to succeed in the personal action which I had instituted against the Defendants in Utah on similar causes of action, I would be left with an empty judgment, as I verily believe that the assets of the Defendants in the United States, if any, are grossly insufficient to meet any eventual judgment. (I am informed by my Utah attorneys and I verily believe that the house in which our Mother lives and which the Defendants have offered to put up as security for the present Action, in fact does not belong to the 5th Defendant, but to Brisbane, [REDACTED] owned by the Children, and of which I am the general partner).
47. Later on that day, being Saturday morning in Hong Kong, I was able to speak to Clement Tang of Messrs. Fok & Johnson, when I informed him of the Utah Court's decision. I was then told by Mr. Tang that he had already received instructions from Mr. Holman to discontinue HCA 558/2001 on Monday morning, which meant that the Mareva Order granted by Mr. Justice Yeung on 9th February 2001 would also immediately fall away. I asked him for advice on what remedies were available to me at that stage, and he informed me that he can no longer advise me on this matter, as he would be placed in a position of conflict with the Corporation. It was made quite clear to him by Mr. Holman that any action against the Defendants should be discontinued as soon as possible, and the funds secured by the Order of the Honourable Mr. Justice Yeung in HCA 558/2001 be released.

48. Mr. Tang then advised me to obtain independent legal advice, and recommended to me a new firm of solicitors, Messrs. Chui & Lau. Immediately, I contacted Mr. Robert Chan, a partner of Messrs. Chui & Lau, and explained to him briefly the entire situation. The background of the matter was very complicated, and after some discussion of the possible options open to me, it was decided that I should institute a fresh action in my personal capacity against the Defendants. However, a fresh Mareva injunction must also be sought and granted before the action was discontinued on Monday morning.
49. As such, the application for Mareva injunction was prepared as a matter of great urgency. As mentioned in paragraph 45 above, the Mr. Holman's application to the Utah Court to discontinue HCA 558/2001 was heard on 1st June 2001, Utah time. By the time the Utah Court had made its order, it was already in the early hours of 2nd June 2001 in Hong Kong. It was not until late in the afternoon that my legal advisers were able to commence work on the new action and to prepare the Mareva injunction application.
50. Moreover, without the assistance of Messrs. Fok & Johnson, my new firm of solicitors was severely handicapped as we had to reconstruct the entire factual background of the action in a very short period of time. F [REDACTED] m [REDACTED] belonging to HCA 558/2001 belonged to [REDACTED] and as such, I was not able to access the materials held by Messrs. Fok & Johnson, and I was almost certain that Mr. Holman would not be willing to authorise the release of such materials to me. As for my own records, I hardly kept any of the documents for HCA 558/2001, since I had always left the matter in the hands of Messrs. Fok & Johnson in Hong Kong.
51. In the circumstances, I was only able to instruct my legal advisers to commence the matter afresh, and refraining as much as possible from using the materials in HCA 558/2001. My Affirmation and that of Mr. Gil Miller at PriceWaterhouseCoopers LLP were prepared overnight. I verily believe that, in the circumstances, we have

summarised to the best of our knowledge the Defendants' contentions in HCA 558/2001 up to the date of the application.

52. I emphasise that Mr. Miller and I tried to the best of our ability to present a fair picture of the background and the various disputes between myself and the Defendants leading up to the present Action. Indeed, the Defence and Counterclaim in HCA 558/2001, which I am advised is a public document, was exhibited as "GAM-10A" and summarised in Mr. Gil Miller's Affirmation. Ideally, consent would have been given by Mr. Holman to release all of the documents in HCA 558/2001 for my new Action, in which case, I would merely have exhibited all 13 bundles of documents which were filed in that Action to my 1st Affirmation.
53. Indeed, I verily believe that my Utah attorneys subsequently wrote to the Corporation on 10th July 2001 to request the release of the documents in HCA 558/2001. Mr. Patrick Hoog, the Corporation's special counsel, has now replied to that letter denying permission for me to use those materials in the present Action. There is now shown to me and exhibited hereto marked "JHS-27" a copy of that letter received on 29th July 2001.
54. I was advised by my legal advisers that if I used the materials without Mr. Holman's consent, I may be in breach of my fiduciary duties as a director of the Corporation, since the materials belonged to the Corporation, and it was clear that the Corporation's intention was that the matter was to be discontinued. I verily believe that there was a serious risk the Defendants would cause the Corporation to institute proceedings for breach of fiduciary duties against me.
55. There was also the additional difficulty that I lived in an entirely different time zone as my legal advisers in Hong Kong, and as such, constant communication was difficult. I was also 8 months pregnant, and so I had to rest constantly. In any event, I had no intention of misleading the Court, and I apologise if, indeed, any documents or matters were inadvertently not alluded to in my 1st Affirmation.

The 3rd June 2001 Order

56. On 3rd June 2001, the Honourable Mr. Justice Waung granted a Mareva injunction ("2nd Mareva Order") against the 1st to 5th Defendants on similar terms as the 1st Mareva Order, pursuant to a claim brought in my personal capacity as a shareholder against the 1st to 5th Defendants.
57. While the Corporation may, due to financial and commercial pressures, be unwilling to pursue HCA 558/2001, I am advised by my Utah attorneys and I verily believe that the settlement agreement does not provide nearly adequate compensation to the Corporation and its shareholders. The Defendants have admitted to paying out millions of dollars from the Corporation's profits to the 1st Defendant, which in turn paid millions to the 3rd Defendant and other unknown parties. I verily believe that the value of my 25% beneficial shareholding in the Corporation would be seriously prejudiced if the Defendants are released from any liability to repay the money that they have diverted.
58. I am advised by my US legal advisers that under Utah law, in a closely held corporation such as the Corporation, directors may owe fiduciary duties directly to shareholders, such that shareholders may proceed against the directors directly for breaches of fiduciary duty. I am also advised and I verily believe that such a duty may be enforceable in Hong Kong against the Defendants. For the same reasons as HCA 558/2001, I verily believe that I have at least a good arguable case against the 2nd and 5th Defendants for breach of their fiduciary duties to me and the Corporation, and the 1st, 3rd and 4th Defendants for their role in assisting that breach. I refer to the 2nd Affirmation of Mark Larsen, one of my attorneys in Utah.

Applications before the Court

59. I am informed by my legal advisers and I verily believe that there are a number of applications before the Court:

- (1) The Defendants' application to discharge the 2nd Mareva Order;
- (2) My application to strike out references to Report No. 3 in the Affirmation of George Anthony Ribeiro dated 19.6.2001;
- (3) My application for preliminary issues to be ordered and the appointment of an interim Receiver over the 1st Defendant;
- (4) The Defendants' application for a stay of the present Action;
- (5) My application for leave to issue a subpoena to the officers of the 1st Defendant's bankers.

Although a number of Affirmations have been filed by me and my solicitors in relation to these applications, I shall as much as possible consolidate my evidence for each application into this Affirmation.

(6) Application to Discharge the 2nd Mareva Order

60. From the Affirmations filed by the Defendants and the Skeleton Submissions of the Defendants' Counsel, I verily believe that the Defendants intend to rely upon the following grounds in their discharge application:

- (1) That I had full knowledge and control and indeed was the architect of the diversion arrangements, and as such, I am precluded from any complaint;
- (2) That the arrangements are entirely legitimate, and that the 1st Defendant performs a variety of services to justify receiving more than 50% of the Corporation's profits margins;

- (3) That I had failed to disclose material facts, including Report No. 3, in my application before the Honourable Mr. Justice Waung on 3rd June 2001;
- (4) That I have "unclean hands", and as such, I should be denied an equitable remedy from the Court;

I shall deal with each of these grounds in turn.

Knowledge and control of the 1st Defendant and diversion arrangements

- 61. It is the crux of the Defendants' case in HCA 558/2001 as it is in the present case that:
 - (1) I was the architect and had full knowledge and control of the 1st Defendant and the diversion arrangements;
 - (2) I was responsible for the invoicing, finances and accounting of the Corporation;
- 62. I emphatically deny both of these allegations which, as I shall explain below, are absurd and do not make any sense. Indeed, the Defendants have provided no convincing documentary evidence that the diversion arrangements and the 1st Defendant were ever my idea or under my control. As mentioned above, I was vice-president of operations and my primary responsibilities were manufacturing and the sourcing of raw materials from the United States, being the same responsibilities which I held at Sunrider before I joined the Corporation.
- 63. Although I was the sister of the 5th Defendant, my involvement in decisions regarding the financial workings and arrangements of the Corporation was minimal. Indeed, the 2nd Defendant was the chief financial officer of the Corporation, and Mr. Lynn Gilbert the Corporation's chief accountant. It is somewhat dubious for the Defendants now to contend that I, as vice-president of operations, controlled also the accounting and finances of the Corporation.

64. I do, however, accept that there were occasions when I would be asked by the 2nd or the 5th Defendant to carry out transfers of money into different accounts, including possibly those belonging to the 1st Defendant. I verily believe, however, that I was unable to withdraw any money from the 1st Defendant's accounts, as I was never a signatory. In any event, I never saw the need to and was never in a position to question the purpose and details of such transfers. In any event, I understood that the 5th Defendant operated the Corporation's business through a number of different companies and bank accounts, but I verily believed at the time that any funds held by those companies or accounts must eventually find their way back to the Corporation. As explained in paragraph 32 above, this turned out not to be the case.
65. It was clear to all of the Corporation's staff that the 5th Defendant was the primary decision-maker on all important matters within the company and that my daily tasks were determined almost entirely by the 5th Defendant. In practice, aside from my regular duties in manufacturing and sourcing materials, I also acted as her personal assistant and a conduit between the Corporation's employees and the 5th Defendant when she and the 2nd Defendant were not in Utah. Although this may be difficult to envisage, the 5th Defendant kept a very tight reign on the Corporation's day to day operations, and would often give instructions to the Corporation's employees from abroad via e-mail instructions to me. If such instructions concerned manufacturing, raw materials or various sundry matters, I would carry them out. However, for matters concerning pricing and invoicing, I would always pass her instructions to Angela Barclay or Sun Ya Ping, who handled these matters exclusively. I verily believe that my email account was the only email account used for internal communications within the Corporation and to Distributors at the time. Many messages are sent out from that account each day, and I would not check or read what emails had been sent out, as the only other people with access to that account was the 5th and possibly the 2nd Defendant.

Evidence of the Corporation's Staff

66. My lack of knowledge in invoicing and accounting matters in the Corporation is supported by the evidence of Angela Barclay, Beverly Warner, Robert Maxwell and the Corporation's former in-house accountant, John O. Sump. I note that the Defendants have not exhibited Mr. Sump's Affirmation in the "Bundle of Selected Affirmations", and as such, I have asked Mr. Sump to make a new Affirmation for the present Action. I summarise their evidence briefly here:
67. In the Affirmation of Angela Ku Barclay filed in HCA 558/2001, Ms. Barclay stated, *inter alia*, that:
 - (1) From 1994 to 1999, she was the personal assistant of the 5th Defendant and in charge of the export department;
 - (2) She took instructions from the 5th Defendant and never from me or anyone else;
 - (3) All overseas orders came to her directly, irrespective of the person to whom the order was addressed, which was sometimes to the 5th Defendant or to myself;
 - (4) Only she had knowledge of the applicable prices for each foreign country, which were keyed into her computer by the 5th Defendant. No one else gave her any instructions in this regard;
 - (5) She would work out the prices of each order and then ask Ms. Sun Ya Ping, who worked (in the Corporation for about a year and a half) under her supervision, to prepare the shipping documents directly from her computer;
 - (6) She would then stamp the invoices with the 2nd Defendant's signature chop, which was kept by me, for the "lower-priced invoices";

- (7) She would then stamp the "higher priced invoices" with the 3rd or 4th Defendants' signature chops which were given to her by me on the instructions of the 5th Defendant;
- (8) I have never given any instructions to Ms. Sun, who took instructions only from her and the 5th Defendant;
- (9) I had no knowledge of the prices and other details of the Corporation's exports to foreign countries, and no one would come to me for instructions on such matters;
- (10) I did not even check the invoices because as I had no information on the pricing of the products;
- (11) She kept the invoices and then passed them to the 5th Defendant whenever the 5th Defendant came into the office.
- (12) As the 5th Defendant's personal assistant for 5 years, she was able to recognise the distinctive writing style of the 5th Defendant:
 - (a) She almost invariably begins her correspondence with "How are you ?" with a space before the question mark;
 - (b) She usually (but not always) ends her correspondence with "Thank you and have a nice day!!" or "Thank you for your help!" or "Have a good day!"
 - (c) She rarely types her name at the end of her correspondence;
- (13) In her opinion, the 22nd April 1997 email exhibited in JHS-22 was likely to be written by her, and not by me (see paragraph 87(5) below);
- (14) The 5th Defendant had once asked her to notarise an Assignment bearing a Chinese signature, the characters of which she believed to be an alias of the 2nd Defendant, but which she now knows is the name of the 4th Defendant.

She expressly recognised the script of the signature to be that of the 2nd Defendant, and that she had seen the 2nd Defendant sign that name on previous occasions. A copy of the Assignment was exhibited to her Affirmation, and there is now shown to me and exhibited hereto marked "JHS-28" the same document;

(15) To the best of her knowledge, I have never forged anyone else's signature nor asked her or anyone else to do so.

68. The Defendants have attempted to discredit the evidence of Ms. Barclay, by saying that she was "my friend". I affirm once again that I did not know Angela Barclay until she joined the Corporation, and that until she rejoined the Corporation in September of last year, she worked directly under the supervision of the 5th Defendant and not myself. Although I remain on good terms with Ms. Barclay until this day, there is simply no reason why she would perjure herself to protect me.

69. At this juncture, I should explain why I had in my possession the chops of the 2nd to 4th Defendants. As the 5th Defendant's sister and one of the owners of the Corporation, I was placed "in charge" of the office whenever the 2nd and 5th Defendants were not in town – meaning I would relay to her any significant matters which needed to be decided upon via email. Further, I was asked by the 2nd and 5th Defendants to keep and safeguard the Corporation's cheques and chops. I was given a number of chops of various names and companies, some of which I never knew the purpose of. As mentioned above, I was not involved in the accounting and finance aspects of the business. However, key members of the Corporation's staff, including Ms. Barclay, Ms. Sun and Mr. Sump would come into my office on a daily basis and request a particular chop to stamp whatever that they needed to stamp. I was only the keeper of the stamps, and there was never any need for me to inquire what a particular chop was being used for since I believed

that he or she would invariably be acting upon instructions or procedures set down by the 5th Defendant.

70. I can no longer recall whether I ever had in my possession the 3rd and 4th Defendants' chops. It is possible, however, and I do recall at some point giving to Ms. Barclay at the request of the 5th Defendant certain chops for her to keep. I presume that when Ms. Barclay departed in 1999, she gave whatever stamps she had in her possession either to the 5th Defendant or to Ms. Sun.

71. In the Affirmation of Beverly Warner filed in HCA 558/2001, Ms. Warner stated, *inter alia*, that:

- (1) The 5th Defendant set all the standards and procedures for almost every task in the office and the factory, and that my role was merely to carry out her instructions;
- (2) Although the orders from the Distributors came to my fax machine and my email account, I would immediately pass them to Ms. Sun or Ms. Barclay to process;
- (3) I kept the 2nd Defendant's signature for stamping invoices, payroll and accounting checks;
- (4) My checking of invoices was limited to clerical errors;
- (5) Pricing decisions were made exclusively by the 5th Defendant;
- (6) All the invoices and shipping documents were kept in Ms. Sun and/or Ms. Barclay's office, and would eventually be passed to the 5th Defendant;
- (7) If the employees had any questions for the 5th Defendant, they would ask me to email it to the 5th Defendant, who would then reply by email to me, which I would then pass on to the relevant employee;
- (8) She has not seen me nor did I ever ask her to forge signatures of others.

72. I agree entirely with the evidence of Ms. Warner, and I wish merely to make a few clarifications:
- (1) It was only occasionally that I would stamp documents myself with the signature chop of the 2nd Defendant;
 - (2) In relation to the "lower priced invoices", I would stamp them with the 2nd Defendant's chop only after doing spot checks on invoices prepared by Ms. Sun, but such checking was limited to clerical and spelling mistakes due to her poor English skills. I believe I also used the chop when Ms. Sun or Ms. Barclay was unavailable, and I was presented with invoices by one of the other employees and asked to stamp them;
 - (3) I did not see the need to nor did I inquire upon the substantive content of the invoices since, as Ms. Warner and Ms. Barclay have explained, I had no knowledge of the pricing.
73. I should also mention that the Defendants have attempted to distort the evidence of Ms. Warner by reading certain words in isolation to argue that Ms. Sun, who together with Ms. Barclay was responsible for the invoicing of the distributors, worked under my supervision throughout these years. This is certainly untrue. After I assumed control of the Corporation, it is true that I became the immediate supervisor of Ms. Sun, and remained so until she was dismissed. However, prior to the 5th Defendant's departure, she had always acted under the direction and supervision of the 2nd and 5th Defendants. Technically speaking, as I was the vice-president of the Corporation, Ms. Sun and indeed all of the Corporation's employees with the exception of the 2nd and 5th Defendants would have been under my supervision. However, in truth, it was clear to all of the Corporation's staff that Ms. Sun was the 2nd Defendant's sister, and as such, was responsible only to the 2nd and 5th Defendants.

74. Indeed, it is at least odd that if I were in charge of the invoicing and pricing, why I would adopt such a complicated system of using the 2nd, 3rd or 4th Defendant's signature chops for all the different invoices, when I could simply have signed my name or used a signature chop of my own name to do the same.
75. In the Affirmation of Robert Kent Maxwell filed in HCA 558/2001, Mr. Maxwell, who joined after the initial departure of Ms. Barclay, stated, inter alia, that:
- (1) He was trained by Ms. Sun on the preparation of invoices and shipping documents upon her departure;
 - (2) I was unable to answer any of his questions in relation to the preparation of invoices and shipping documents;
 - (3) Although the orders placed by the Distributors came through my email or fax, they were handled solely by Ms. Sun;
 - (4) I never prepared or kept any invoice documents;
 - (5) The 5th Defendant was the only person in charge of the invoicing system of the Corporation and she had sole control of the pricing.
76. Further, in the Affirmation of John O. Sump, Mr. Sump stated, inter alia, that:
- (1) He was responsible for all in-house accounting, payroll, payroll tax reporting and the preparation of the Corporation Financial Statements from 1994 to 1997;
 - (2) All accounting and financial matters and decisions were made by the 2nd and/or 5th Defendants in consultation with Mr. Lynn Gilbert, CPA;
 - (3) I rarely dealt with any such matters, and when I did, it was only for minor or formal matters when the 2nd and/or 5th Defendants were unavailable;
 - (4) I would, on occasion, be presented with standard documents prepared by Mr. Gilbert and asked to sign them when the 5th Defendant was not in the

country. However, I would have had little understanding of the figures in those accounts.

77. I should add that none of the employees giving evidence on my behalf have any interest in the outcome of this litigation. On the other hand, the only employee that has given evidence on behalf of the Defendants is Ms. Sun, who is the sister in law of the 2nd Defendant. In her Affirmation, Ms. Sun alleges that I controlled the Corporation's invoicing to the Distributors in the following manner:

- (1) The Distributors would place their orders directly with me;
- (2) I would give a copy of the order to Ms. Barclay to prepare the invoice;
- (3) I would then instruct Ms. Sun to prepare double invoices and inform her of the prices to be used;
- (4) After the invoices were prepared, I would check their contents and stamp them or supervise the stamping of them with the relevant chops;
- (5) After stamping, I would give Ms. Sun the invoices to send to the Distributors and then retain my own copies;
- (6) I had the practice of forging other people's signatures;
- (7) I may "collude" with others to say that I had no knowledge of the double invoicing system.

78. I note that Ms. Sun's evidence, in particular sub-paragraphs (3), (5) and (6), are deeply inconsistent with that of Ms. Warner and Ms. Barclay. Although it will be a matter for trial to determine the credibility of each witness, I verily believe that the evidence of Ms. Warner, Ms. Barclay and Mr. Maxwell is to be preferred at this stage as they are impartial third parties unrelated to either myself or the Defendants. There is no reason why any of them should "protect" me in these proceedings.

The 2nd and 5th Defendant had full control of the accounting

79. To summarise, there is no doubt in the minds of the Corporation's staff that the 2nd and 5th Defendants controlled the Corporation's financial and accounting arrangements. It is clear from the evidence of Mr. Maxwell and Ms. Barclay that I was never involved with any of the preparation of the Corporation's invoices and the financial arrangements in relation to the Distributors. The only occasions when I was told of the price of a product, was when the 5th Defendant was out of town and I was asked to make an enquiry by email to the 5th Defendant by her staff. I would also check occasionally for clerical errors made by Ms. Sun in the invoices, primarily due to her poor proficiency in English. However, I never checked the prices or attempted to ascertain to whom each shipment was sold and shipped.
80. There is no need for me at this stage to exhibit all of the correspondence which I exhibited to my Affirmation in HCA 558/2001, as the following three emails suffice to support my version of events:
- (1) Message dated 19th September 2000 from the 5th Defendant to Mr. Hu. In that message, the 5th Defendant writes that:
- "...I am the only one that knows about the real invoices...If you have any questions regarding the balances, pls contact me directly..."; (emphasis added)*
- I am informed by Mr. Hu and I verily believe that he had made a request on invoice balances and pricing which was addressed to me. In the normal course of matters as explained in paragraph 65 above, I would have passed such an email directly to Ms. Barclay, Ms. Sun or the 5th Defendant. However, by this time, relations between the 5th Defendant and myself were becoming strained, and the 5th Defendant no longer trusted me as a conduit for requests from the distributors concerning such sensitive issues. As such,

this email was sent to Mr. Hu so that he would deal with the 5th Defendant directly in the future. Although it is not entirely clear what is meant by “real invoices”, this email message is at least inconsistent with the Defendants’ allegations that I was in control or had significant knowledge of the invoicing and pricing system with distributors. As explained in paragraph 6 of Ms. Warner’s Affirmation, my “checking and approving” of the invoices was limited to checking for clerical errors, due partly to Ms. Sun’s poor English skills;

- (2) Message dated 10th October 2000 from the 5th Defendant to Mr. Tzu. In that message, the 5th Defendant writes:

“I would appreciate if you do not reveal any accounting information to Jau-Hwa presently. I would like to talk to you first. I will call you from HK...”
(emphasis added)

This email has been exhibited as JHS-19. This message was written at a time when I was in the process of assuming control of the Corporation. I verily believe that she is likely have written similar messages to all the other Distributors as well. This message clearly refutes the Defendants’ case that I was in control of the accounting and invoicing of the Distributors.

- (3) Message dated 4th November 2000 already excerpted in paragraph 28 above and exhibited in JHS-15 stated that:

“Regarding transfer of duty/accounting: Once you become President of E. Excel formally, I will transfer all duties including accounting for each country to you formally in the presence of that country’s respective GM immediately as requested by them. It is more complicated than meets the eye...” (emphasis added)

81. Indeed, when I first assumed control of the Corporation, I found it extremely difficult to run the company as I had little knowledge of its financial workings and

matters of pricing and invoicing. This was aggravated by the departure of Ms. Sun who, as explained above, was responsible for all of the invoicing to overseas distributors under the supervision of the 5th Defendant. As such, on several occasions, it was necessary for me to consult the 5th Defendant on various matters, especially in respect of the Corporation's finances. The email I have excerpted in the paragraph above is but one such example. Another example is an email dated 2nd November 2000 from me to the 5th Defendant shortly after I took control of the Corporation:

"Would you give me the actual price list in which we charge each countries? And if you would please update me on where we are at? Which orders that we have received payment and which orders we have not received payments?"

There is now shown to me and exhibited hereto marked "JHS-29" this email.

82. Fortunately, I was later able to persuade Angela Barclay to return to the Corporation to assist me in these matters. Upon her return, she then played a pivotal role in assisting Mr. Miller to decipher the flow of payments between the Corporation, the 1st Defendant and the Distributors.

Knowledge and control of the 1st Defendant

83. In contrast, the 5th Defendant has not exhibited in her Affirmation any documents or correspondence, and I verily believe that none exist, that I had any control of the 1st Defendant or its accounts. I should mention out of caution that I am not aware as to whether I have been granted any power of attorney by the Defendants for the First Pacific Account or any other account of the 1st Defendant. In any event, I affirm that I have never exercise any such power, if such existed.

84. Further, I refer to the testimony of Barry Le, the general manager of the Taiwan distributor who gave evidence in the Utah proceedings. By the 5th Defendant's own evidence, the Defendants have a very close relationship with Mr. Le and the 2nd and 5th Defendants have known him for many years. An excerpt of the transcript has been exhibited in JHS-20. On cross examination by the Corporation's attorneys, he said the following (on p. 102):

"Q: Have you ever heard of E. Excel Limited Hong Kong?

A: Yes.

Q: What is that?

A: It's one of the company for headquarters, because they got so many companies that –

Q: You don't know whether Jau-Fei or Rui-Kang have any interest in E. Excel Limited?

A: I think they are, but I never find out, no. I think they are.

...

Q: And E. Excel Limited, you previously testified, is an entity that Dr. Chen and her husband Rui-Kang had some involvement in?

A: Yeah.

Q: Now, in every instance you paid a consultant fee to Dr. Chen's company E. Excel Limited; isn't that right?

A: Yeah. " (emphasis added)

85. It is significant that Mr. Le did not say that the 1st Defendant was my company or the 3rd and 4th Defendants' company. Given Mr. Le's relationship with the Defendants, he would clearly have known had that been the case. As for my own knowledge of the 1st Defendant:

- (1) I was told by the 5th Defendant around 1997 of the existence of the 1st Defendant, although I no longer recall the circumstances or reasons why she felt the necessity to inform me;
- (2) The 5th Defendant merely said that the 1st Defendant provided cash management and agency services for E. Excel USA in relation to the Corporation's exports. However, as I have explained above, I was not

concerned with the Corporation's financial arrangements and the export side of the business, and as such, I did not inquire into the details of the 1st Defendant;

- (3) In any event, the 5th Defendant had to my knowledge set up a large number of companies in relation to the Corporation's business for various purposes. I was never told nor did I ever inquire as to the function and purpose of such companies, which I believe were merely set up for the sole benefit of the Corporation;
- (4) Occasionally, I would come across the 1st Defendant's name in various documents and emails, although I would not think much of it at the time. Indeed, the 5th Defendant would sometimes ask me to carry out or to confirm a deposit into the 1st Defendant (but not a withdrawal, as I did not have the requisite authority);
- (5) However, I was never told nor was there any reason for me to inquire about the amount and flow of money held by the 1st Defendant. I assumed in any event that any money held by entities controlled by the 5th Defendant including the 1st Defendant would have been for the benefit of the Corporation.
- (6) It was not until the 2nd Defendant's affair with his mistress came to light and the ensuing dispute between the 5th Defendant and myself that I began to question who was in control of, and the sums held in these accounts;
- (7) This led me ultimately to instruct PriceWaterhouseCoopers to investigate the accounts of the Corporation after I assumed control as president, and it was upon his investigation that I knew to the full extent:
 - (a) The role of the 1st Defendant as a receptacle of payments for invoices to overseas distributors;

- (b) The magnitude of the sums held in the 1st Defendant's accounts;
- (c) The diversion of sums held to third parties including the 3rd Defendant.

86. In retrospect, I may have been a bit naïve throughout these years, but I trusted that the 5th Defendant would act in the best interests of the Corporation. It was not until I assumed control of the Corporation and after being advised by Gil Miller that I came to understand the flow of funds between the Distributors and the 1st Defendant, and that vast sums were missing and retained by the 1st Defendant over which the Corporation had no access or control.
87. As explained in my 1st Affirmation, the Defendants base their allegations that I had full knowledge and control of the 1st Defendant and the invoicing arrangements primarily on the basis of contemporaneous documents and email messages bearing my name. However, as I explained in HCA 558/2001:
- (1) The emails were not written by me, but rather by the 5th Defendant using my email account. The 5th Defendant frequently accessed my email account and often sent out messages under my name. As well, messages concerning the Corporation's dealings with overseas distributors would often be sent to my account, whereupon I would immediately pass them on to Ms. Sun, Ms. Barclay or the 5th Defendant;
 - (2) It is difficult to explain why the 5th Defendant at times preferred to use my name and account and at other times use her own name. My understanding is that she liked to appear presidential and market her image as a scientist and founder of the Corporation. As such, she did not wish to appear to be personally involved in dealing with distributors on day to day matters. The reality, however, is that she kept a very tight reign on the business;
 - (3) It can be seen from much of the correspondence purportedly authored by me that they would bear the 5th Defendant's distinctive writing style, in

particular the phrase "How are you ?" with the space before the question mark. In HCA 558/2001, I exhibited hundreds of email messages written by the 5th Defendant bearing this distinctive writing habit;

- (4) In HCA 558/2001, I exhibited some messages from the 5th Defendant written to me using my own email account "Hwa009@aol.com". These messages have been exhibited in JHS-21. I presume that she did so out of convenience after having used my account to deal with other matters. In the email dated 14th March 2000, the 5th Defendant admits to using my email account to send out messages in my name. Although I have shown only a small number of messages, I verily believe that it does show that she had access to and did access my email account in dealing with routine matters of the Corporation.
- (5) The Defendants relied substantially in HCA 558/2001 on an email dated 22nd April 1997 emanating from my email account instructing one of the distributors to make payment into the 1st Defendant's accounts. That email has been exhibited in JHS-22. I emphasise that I never wrote that email. Indeed, I verily believe that email to have been written by the 5th Defendant for the following reasons:
 - (a) On the basis of her distinctive writing style as recognised by Ms. Barclay in her evidence. Note the distinctive greeting with "How are you ?" and the space before the question mark;
 - (b) There is now shown to me 3 other emails which have been exhibited in JHS-23. These 3 messages are nearly identical to the 22nd April 1997 email allegedly written by me. All 3 messages, although purportedly written by different persons, all exhibit the 5th Defendant's distinctive writing style;

- (c) Further, these instructions are nearly identical in form to the instructions which were provided by Ms. Becky Au of First Pacific Bank to the 2nd and 5th Defendants on 14th September 1995, which has been exhibited in JHS-12.

88. I realise that the Court may be somewhat sceptical about such a peculiar system of operation, but this arrangement had been devised by the 5th Defendant for her own reasons and was known to all of the Corporation's staff. I verily believe that a clear picture will emerge at the trial of the present Action.

Allegation that I had devised the diversion arrangement inherent unlikely

89. In any event, the Defendants' allegations that I had devised the entire diversion arrangement (which the Defendants term as a "drop shipment arrangement") and the 1st Defendant are inherently unlikely:

- (1) The 5th Defendant contends that I requested her to set up the 1st Defendant with the 3rd and 4th Defendants as its only shareholders and directors and the signatory of its bank accounts;
- (2) As mentioned in paragraph 5(5) above, I have never met nor spoken to the 3rd and 4th Defendants. It is therefore unlikely that I would suggest or allow the 3rd and 4th Defendants, both of whom lived far away in the PRC and over whom I or the Corporation has no control, to play such a key role in the diversion arrangements and be in charge of the 1st Defendant;
- (3) Even by the Defendants' case, the 1st Defendant essentially controlled the purse strings of the Corporation, since any payment for goods sold must filter through the 1st Defendant. What remedy would I or the Corporation have if the 3rd and 4th Defendants were to abscond with the money in the PRC? The Defendants admit that my Family never trusted the 2nd

Defendant, and the 3rd and 4th Defendants would undoubtedly be loyal to him;

- (4) The Defendants allege that I have spoken to the 3rd and 4th Defendants before on the telephone on several occasions. Even if that were true (which it is not), it still does not make any sense that I would allow outsiders whom I have never met to control millions of US dollars ultimately belonging to my Family;
- (5) The 5th Defendant alleges that I had the practice of forging the signature of others and that I was able to control the 1st Defendant and its bank accounts using the pre-signed blank sheets exhibited in JHS-4A. Such an allegation is absurd. If I were truly the architect of this arrangement and it were legitimate, there is absolutely no reason for using such a complicated method of controlling the 1st Defendant. I would simply have allowed the Corporation or at least members of my own Family here in Utah to be its shareholders and directors;
- (6) On the other hand, there is persuasive evidence that the signatures on the blank sheets were actually made by the 2nd Defendant. It can be seen that the signature of the 3rd Defendant on these sheets were made by hand and not by a chop, as each one is slightly different. If one looks closely, the script of the signature on these sheets matches that on the Assignment exhibited in JHS-28, which Ms. Barclay has affirmed as being that of the 2nd Defendant.

- 90. In summary, if the entire arrangement had been legitimate, as claimed by the Defendants, it is only commercially sensible that the Corporation itself would have some interest or control over the assets held by the 1st Defendant. There is always a risk that the 3rd and 4th Defendants, or whoever else controlled the 1st Defendant, would abscond with the money, unless the Corporation or its shareholders had some degree of control over its accounts. Under the present arrangement, the 3rd

and 4th Defendants were never accountable to the Corporation nor was the Corporation able to exercise any control over them.

91. Most importantly, however, is that if I truly controlled the diversion arrangements and the 1st Defendant through the pre-signed blank sheets or otherwise, I would simply have withdrawn all the funds from the 1st Defendant's bank accounts once I assumed control of the Corporation. It makes no sense at all that I would instead instruct outside investigators to examine the books and accounts of the Corporation, or to take the much more expensive and difficult route of seeking injunctive relief from this Court against the 1st Defendant. The current approach also carries the risk of unnecessarily exposing the Corporation and my Family to possible tax liabilities.

No evidence that the arrangements were legitimate

92. I am advised by my legal advisers and I verily believe that the second plank of the Defendants' case is that:

- (1) The double invoicing arrangement is in fact a legitimate "drop shipment arrangement"; and/or
- (2) The 1st Defendant carries on a variety of legitimate businesses and provides valuable services to the Corporation and the Distributors. As such, it justifiably earns 50% of the Corporation's profit margins, which have amounted to tens of millions of dollars over the past few years.

93. The weakness of the Defendants' first argument is clearly exposed by the evidence of Mr. Miller, in whose professional integrity and competence I have complete confidence. In paragraph 30 of the Affirmation of Gil Miller, Mr. Miller explained:

- (1) A drop shipment arrangement is an arrangement where a manufacturer would sell to another company, which acts as a middleman. The middleman

company then resells the manufacturer's products to customers. This way, the profit margin of the products may be allocated partly to the middleman company, which is normally located overseas, and therefore the middleman's tax liability may be reduced. However, allocation of profits to the middleman company is normally restricted to a reasonable rate of compensation for the agency and distribution services that it provides to the manufacturer.

- (2) It is at least doubtful, however, whether the present arrangement with the 1st Defendant can be properly considered a legitimate drop shipment arrangement:
 - (a) There is no evidence of any contractual relationship between the 1st Defendant and the Corporation and the Distributors. It is unlikely that if the arrangement was legitimate and done openly, there would be no contracts recorded in writing at all, considering the magnitude of the sums involved;
 - (b) The sporadic and lump sum payments from the 1st Defendant to the Corporation do not appear to correspond with any invoices or invoice amounts;
 - (c) The prices at which goods are sold to the 1st Defendant are abnormally low. The 1st Defendant thus retains a profit margin that is beyond any reasonable compensation for its services, even if any had been provided. Such an arrangement may have made sense if the 1st Defendant was partly or wholly owned by the Corporation and/or its shareholders, but this is clearly not the case;
 - (d) In respect of the consulting fee arrangement, there is again no evidence of any contractual agreement between the 1st Defendant, the Corporation and E. Excel International (Taiwan). Moreover, there is

no evidence of what functions this company performs which is worthy of 50% of the Corporation's profit margins.

94. For these reasons, Mr. Miller maintains the view that on the evidence available, the most likely reason for the arrangement was to allow profits of the Corporation to be retained by the 1st Defendant and eventually for the benefit of the 2nd to 5th Defendants.
95. It is also the Defendants' case that the 1st Defendant carries on a host of business functions including market research, herbal formulation and purchasing, financing of distributors and software research and development. Specifically, the Defendants have also claimed that the 1st Defendant:
 - (1) Has a software centre in Shanghai;
 - (2) Purchases over 400 tons of herbal raw materials a year for the Corporation.
96. However, there has not been a single piece of documentary evidence from the 1st Defendant to substantiate the Defendants' claims. At the least, one would reasonably expect in a company with such a wide scope of business and millions of dollars in revenues a year:
 - (1) A business address either in Hong Kong or in Shanghai. The only address supplied to date is that of a registered office at Messrs. Vivien Chan & Co., the Defendants' solicitors;
 - (2) Evidence of employees and business premises;
 - (3) Evidence of warehouse facilities or shipping facilities to handle the purchase and export of herbal materials;
 - (4) Export licenses;
 - (5) Audited financial statements and annual reports;

None of these have been produced since February 2001.

97. In their recently filed Affirmations, the Defendants make further claims, including:
- (1) The dire necessity of the Corporation to rely on the supply of raw materials and secret product formulations that only the Defendants can provide;
 - (2) The hardship caused by the continuation of the Mareva injunction or the proposed appointment of a Receiver over the 1st Defendant.
98. Although I have not been in Shanghai to personally verify the 3rd Defendant's claims, it is at least odd that if the 3rd and 4th Defendants had played such an active role in the Corporation's business and in material sourcing, that I have never spoken to or met the 3rd or 4th Defendants.
99. Further, it is also odd that the 3rd and 4th Defendants, as major buyers on behalf of the 1st Defendant of the Corporation's raw materials, have never visited the manufacturing facilities and laboratories of the Corporation in all these years. It is contended that the 3rd and 4th Defendants have difficulty coming to the United States due to visa restrictions. Yet, their brother, Max Zhang, is able to come to Utah and has worked at the Corporation. Furthermore, it is difficult to believe that the 3rd and 4th Defendants, who are purportedly the owners and operators of a multi-million dollar business in PRC that they would be unable to obtain even a visiting visa to the United States.
100. Further, I am informed by Sam Tzu and Richard Hu and I verily believe that they too have never met nor spoken to either the 3rd or 4th Defendants. Sam Tzu joined the Corporation in the early 1990's and had worked in the Corporation's Taiwan distributor before moving to the Hong Kong distributor. If the 3rd and 4th Defendants had performed any substantial services for the Corporation and its overseas distributors, it is most unlikely that neither I, Mr. Tzu nor Mr. Hu have ever spoken to or met her.

101. In the Affirmation of Mr. Tjandra, the general manager of the Corporation's Malaysia distributor, he affirms on behalf of the Defendants in HCA 558/2001 that he had:

"...personally met [the 3rd and 4th Defendants]...last year at EE2000 event together with the other general managers of the Territorial Owners to include Mr. Han Dong Min, Barry Le, Sam Tzu and Richard Hu, and when [he] was at the offices of the Territorial Owner for China in Shanghai on business as well as when [the 3rd and 4th Defendants] visited EE Malaysia in 1995 on business..."

102. However, in Utah District Court before Judge Anthony Schofield on 23rd January 2001, Mr. Tjandra, upon cross-examination by the Corporation's US Counsel, testified on oath to the following (on p.224 of the Court transcript):

"Q: And Mei-Feng Zhang [the 4th Defendant] is the sister of Rui Kang [the 2nd Defendant], isn't that right?"

A: I don't know.

Q: You don't know?

A: I don't know.

Q: You never met her?

A: No.

Q: You never go to Hong Kong and visited Rui-Kang's sister?

A: No."

The transcript has been exhibited in JHS-7.

103. This dramatic and undeniable contradiction between Mr. Tjandra's testimony in Hong Kong and that in Utah casts serious doubts on the Defendants' contention that the 1st, 3rd and/or 4th Defendant provided any actual business functions at all. If

so, there would have been no need for Mr. Tjandra to perjure himself about his alleged encounters with the 4th Defendant.

104. The Defendants' attempt to explain the inconsistency in George Ribeiro's 1st Affirmation by saying that Mr. Tjandra misunderstood the question in Utah due to the English pronunciation of the 4th Defendant's name is simply not credible. It can clearly be seen that the 4th Defendant was specifically referred to as the sister of the 2nd Defendant, whom Mr. Tjandra knew well. Moreover, I am informed by my Utah attorneys and I verily believe that a Chinese court translator was present at the hearing.

Exaggeration of the 3rd and 4th Defendants' roles

105. In fact, I do recall the 2nd Defendant mentioning to me some years ago that his two sisters were helping him run minor errands in the PRC, including the sourcing of raw materials and liaising with suppliers. However, I verily believe that the 3rd Defendant is grossly exaggerating her role and functions in the Corporation's business:
- (1) One of the reasons for the Corporation's success is the 5th Defendant's research into the field of microbiology and immunology. This research is applied into the Corporation's products;
 - (2) While it is true that some of the raw materials for the Corporation's products are Chinese herbs, I have never heard of any "unique formulations" passed down from the 2nd, 3rd, and 4th Defendant's ancestors being used in the Corporation's products as contended by the 3rd Defendant in paragraphs 4 and 5 of her Affirmation;
 - (3) Indeed, I distinctly recall the 5th Defendant admitting in cross examination in the Trust Proceedings that neither the 3rd nor 4th Defendant ever had any

experience in herbal or related products. My Utah attorneys are in the process of obtaining the correct official transcript of the proceedings. I verily believe this to be another example of the Defendants giving inconsistent evidence in the Utah and Hong Kong proceedings to suit their convenience;

- (4) Contrary to the assertions in paragraph 10 of the 3rd Defendant's Affirmation, the materials used in the Corporation's products are neither rare nor expensive, and are widely available on the open market in the PRC.
- (5) On the other hand, I verily believe that materials from the PRC were purchased by the Corporation through a company by the name of Maleolm Inc., which is owned by the 2nd Defendant's two brothers, and of which Ms. Sun is also an officer;
- (6) No documents have been produced to substantiate the 3rd Defendant's allegations. If it were true that the 1st Defendant supplies some 400 tons of raw materials per year to the Corporation, surely this would be reflected in the accounting records of the 1st Defendant, which the Defendants have refused to provide.
- (7) Out of precaution, I should explain that a substantial number of the Corporation's products are not manufactured from primary ingredients or materials, but are purchased pre-made by pharmaceutical companies in the PRC in bulk and shipped into the Corporation's plant for reprocessing and repackaging. These products are tested for quality by technicians in the Corporation's laboratories and occasionally certain simple ingredients may be added. The 3rd Defendant's contention that the Corporation relies on her family's unique or confidential herbal formulations is simply untrue, as I verily believe none exist.

Alleged failure to disclose material facts

106. As explained in paragraphs 46 to 55 above, the Affirmations of Mr. Miller and myself were prepared overnight with great urgency. However, I verily believe that we have fairly summarised the complex factual disputes between the parties, the arguments raised by the Defendants in HCA 558/2001 and the background leading up to the present Action. As mentioned above, the Defendants' Defence and Counterclaim in HCA 558/2001, the arguments in which I expect the Defendants will seek again to rely upon, was exhibited as GAM-10A in Mr. Miller's Affirmation.
107. Most significantly, the Defendants rely upon the fact that I had not disclosed to the Court one Special Master's Report No. 3 dated 25th May 2001, which contains a number of serious allegations against me made by Mr. Holman. I am informed by my Utah attorneys and I verily believe that Report No. 3 was served on my attorneys on 25th May 2001. I recall being shown the Report the next day in my attorneys' office. I was advised, however, by my Utah attorneys and I verily believed that Report No. 3, like the previous Special Master's Report, was filed under seal and subject to a protective order of the Utah court. My attorneys did not allow me to have a copy of the Report and I was able only to inspect it in their offices. Indeed, I was explicitly advised that disclosure of the Report outside of the Utah proceedings would amount to a contempt of the Utah Court. I respectfully refer the Court to paragraph 34 of the 2nd Affirmation of Mark Larsen.
108. As such, neither I nor my Utah attorneys disclosed the Report to my legal advisers in Hong Kong. The Report was referred to, however, in the 1st June 2001 ruling of the Utah court granting leave to discontinue HCA 558/2001. The ruling together with the Compromise Agreement were exhibited in my 1st Affirmation.
109. As such, I was very surprised to find allegations made in the 1st Affirmation of George Anthony Ribeiro that I had deliberately misled the Court by failing to disclose that Report. I was even more surprised to find the Report and some of its

exhibits being excerpted and exhibited to his Affirmation. When I informed by Utah attorneys, they immediately wrote a letter dated 29th June 2001 to the Defendants' Utah attorneys demanding an explanation as to why the Report was disseminated outside of the Utah proceedings in breach of the Utah court's protective order of 11th May 2001. That letter has been exhibited in CHY-5. A motion for sanctions in the Utah court against the Defendants' attorneys and Mr. Ribeiro was also considered. An application is also before the Court to strike out from the Affidavit of George Anthony Ribeiro any mention of Report No. 3.

110. Indeed, it was not until the Utah court's ruling on 18th July 2001 that it was conclusively settled that Report No. 3 was not in fact covered by the 11th May 2001 order. I emphasise once again that I never had any intention of misleading or "hiding" the Report from the Court, as contended by the Defendants. Indeed, as explained in paragraph 136 below, all of Mr. Holman's Reports have now been sealed by the Utah Court.
111. In any event, the matters contained in Report No. 3 are heavily disputed, and I have already filed an Affidavit in the Utah court objecting to the contents of the Report. That Affidavit has already been exhibited CHY-10. I will be filing further evidence in due course to the Utah Court in relation to the matters contained in Report No.3 and the other Special Master's Reports.

Alleged inequitable conduct or "unclean hands"

112. The Defendants allege, inter alia, that:
 - (1) I terminated bona fide contracts with the distributors;
 - (2) I disobeyed the temporary restraining order of Judge Schofield ordering me to ship product to the distributors;

- (3) I was setting up a competing business with the Corporation when I was president and CEO of the Corporation;
- (4) The Corporation has not received payment for goods shipped to the new distributors;
- (5) I removed or destroyed property belonging to the Corporation upon my departure;
- (6) I am wrongfully competing with the Corporation and appropriating its trademarks;
- (7) The tape recording of my conversation with Mr. Hu and Mr. Tzu;
- (8) Abuse of power.

113. Before I deal with each of these allegations, I wish to emphasise that the Defendants' allegation that the primary intention of this litigation is to destroy the Corporation is grossly unfair. I have dedicated the past ten years of my life, day in and day out, working to build up this family business. I have made huge sacrifices both to my personal and family life, and it is unfair that the 5th Defendant now accuses me of intending to destroy the Corporation, of which I own 25%.

114. Indeed, in my message to the 5th Defendant on 2nd November 2000, shortly after I took control of the Corporation, I said to her:

"I don't plan to close down E. Excel as we have worked very hard to build the company, and we are very blessed to be so successful. I will try my best to keep the company going."

Love,

H"

This message has been exhibited in JHS-15.

115. Further, it is not in dispute that 75% of the Corporation is beneficially owned by my nieces and nephews. As mentioned above, I brought them up as the 2nd and 5th Defendants were often outside of Utah. I love them very much, and would never intentionally do anything to prejudice their interests.

Termination of contracts with distributors

116. The Defendants allege that I had deliberately terminated bona fide contracts between the Corporation and distributors, including Extra Excel International Korea Inc., Extra Excel International Limited in Hong Kong, E. Excel International (Taiwan) Inc. and Extra Excel (Malaysia) Sdn. Bhd, and thereby caused serious and irreparable harm to the Corporation.
117. The Defendants rely on the dicta of Judge Schofield on 10th January 2001 when he granted an interim injunction ordering the Corporation and myself to ship products to the distributors pursuant to alleged contracts between the Corporation and the distributors. The Defendants fail to mention, however, that the comments were made pursuant to an *ex parte* application by the distributors, and that I did not have an opportunity to be heard on that occasion. As such, I verily believe the comments should be given little, if any evidentiary weight in these proceedings.
118. I have already explained in paragraphs 34(4) to (15) above the legitimate reasons why I refused at the time to make further shipments to the Distributors prior to the Order of the Judge Schofield on 10th January 2001.
119. The Defendants also allege that I had refused to ship product in breach of the TRO granted by Judge Schofield on 10th January 2001. Such an allegation is misleading and without basis. As explained in paragraphs 34(14) and (15) above, the Distributors, allegedly for quality reasons which have not been substantiated, refused to follow through with their orders, and then applied to the Court to vacate the TRO on 1st February 2001.

Setting up competing businesses with the Corporation

120. As explained in paragraph 34(7) above, after I assumed control of the Corporation, I attempted to restructure the Corporation's distributorship channels so that the Corporation can have at least some degree of control and interest in its distributors. The 5th Defendant's allegation that I was setting up "competing" businesses in various Asian countries is untrue and misleading. I have never established any business that competed with the Corporation, but rather, I established the New Distributors in Hong Kong and the Philippines. As mentioned above, the Corporation is the 80% shareholder of the New Distributor in Hong Kong, and I have no personal interest in either of the New Distributors in Hong Kong and the Philippines.

Not receiving payment for the products

121. The Defendants also allege that the Corporation had not received any payment for goods shipped to the New Distributors in Hong Kong and the Philippines. I am unclear as to the status of the payments as Mr. Holman has taken over the Corporation since March of this year. However, I vehemently deny that I deliberately failed to collect payment from them so that they may dump the Corporation's products onto the market. Such a claim is unsubstantiated, and I verily believe that it is the responsibility of Mr. Holman, as the Interim CEO and president of the Corporation since March of this year, to pursue such payments.
122. Moreover, as explained above, the Corporation is the majority shareholder of the New Distributor in Hong Kong, and as such, there should be no difficulty in recovering payment, if any is due. One possibility why payment may not have been made by the New Distributor in Hong Kong is that all of its goods were ordered to be delivered to the Hong Kong Distributor's solicitors in its first few days of

business pursuant to an injunction obtained by the original Hong Kong distributor allegedly for passing off in HCA 264/2001.

Removal or destruction of Corporation property

123. I refer to my Affidavit dated 30th May 2001 filed in the Utah Court and exhibited in CHY-10. I emphasise once again that I have never ordered anyone to remove or destroy any equipment or records belonging to the Corporation nor have I observed any such events.

Seeking to compete with the Corporation

124. The Defendants attempt to draw negative inferences against me for seeking to start my own business in competition with the Corporation. I should explain first of all that I have been involved in the nutritional product business ever since I had graduated from university. The Corporation's business has, for the past 10 years, been my life. Since Mr. Holman assumed control of the Corporation, I was no longer able to take an active role in the Corporation's business. On the other hand, the Corporation has now retained the 5th Defendant as a consultant, as well as dealing with manufacturing facilities in Singapore and Malaysia, in which I verily believe the 2nd and 5th Defendants to have a direct interest. A copy of the companies search record of the 2nd and 5th Defendants' company in Singapore has been exhibited in JHS-18.
125. For these reasons, I wish to be able to start up my own business, and to compete on level playing field with the Corporation. I have recently filed an application to the Utah Court for its express permission for me to do so. Further, I have recently resigned as a director of the Corporation in order to avoid any potential conflicts of interest. I deny having set up any manufacturing facility to produce the

Corporation's products nor have I attempted to register any of the Corporation's trademarks in my name, as alleged by the Defendants.

Tape recording

126. I wish to deal briefly with the tape recording of my conversation with Mr. Hu and Mr. Tzu, leaving aside the question of how such a recording was obtained by the Defendants. First of all, I regret very much if I did anything which may have misled the Utah court. At the time, we were all so angry with the 5th Defendant. As can be seen from the emails which I have exhibited in JHS-15, the relationship between 5th Defendant and I remained amicable up until I discovered that she had diverted millions of dollars belonging to the Family and was setting up a competing business in Singapore. My Family had all trusted the 5th Defendant to manage the finances of the family business, and yet we were being cheated for all these years.
127. I apologise for my conduct, which in hindsight was very foolish, and I sincerely ask that the Court not to regard me as a dishonest or malicious person, which I am not, as those who know me well will testify at trial.

Abuse of power

128. Shortly after I took control of the Corporation, I realised that the Corporation was in serious need of cash. I now realise, of course, the reason for the shortage of funds was due to the fact that after the departure of the 2nd and 5th Defendants, the 1st Defendant no longer wired money back to the Corporation. I requested the 5th Defendant on several occasions for cash to be released to the Corporation, but to no avail.

129. Our Mother was willing to infuse up to US\$ 3 million into the Corporation, but on the condition that she receive a registered shareholding in the Corporation. Upon the advice of Messrs. Kirton & McKonkie, my former Utah attorneys, a proper valuation was made of the Corporation, and it was decided that a number of shares would be issued to our Mother reflecting the value of the money she was injecting into the Corporation.
130. The 5th Defendant has now challenged that allotment in the Trust Proceedings, and as explained in paragraph 21 above, no final pronouncement of the validity and propriety of that allotment would be made until trial.

The Purported Need for Interim Relief

131. The Defendants argue that relief from the Hong Kong court is not necessary or appropriate in the present Action since:
- (1) There is no real risk of dissipation by any of the Defendants;
 - (2) There will be substantial hardship to the Defendants and the Corporation if the 2nd Mareva Order is continued or if an Interim Receiver appointed;
 - (3) I had already received some US\$30 million allegedly paid into our Mother's Credit Suisse account.

I shall deal with each point in turn.

132. I verily believe that there is a real risk that any judgment either by the Hong Kong or Utah court will go unsatisfied:
- (1) The conduct of the 1st Defendant does not inspire confidence:
 - (a) Since the beginning of the dispute in February 2001, the 3rd and 4th Defendants, being the sole shareholders and directors of the 1st

Defendant, have chosen to remain silent, until the 3rd Defendant filed her Affirmation on 19th July 2001;

- (b) As mentioned above, there has not been one single piece of documentary evidence substantiating the Defendants' claims as to the host of business functions allegedly carried on by the 1st Defendant.
- (2) Although the 5th Defendant denies that either she or the 2nd Defendant are signatories of the 1st Defendant's accounts, there is substantial evidence that they at least have control of the funds in those accounts:
- (a) Bank statements of the 1st Defendant's accounts at First Pacific Bank indicating the balances and movements in those accounts were addressed to the 2nd and/or 5th Defendants. The 5th Defendant denies that this signifies control, but it is noted that the account is not a corporate banking account, but rather a "high net worth" client account. I am advised that information concerning such accounts, by their very nature, are kept confidential and will ordinarily only be disclosed to those who control the account.
 - (b) The Defendants' explanation that the correspondence was in fact intended for me, but since I did not have a fax machine in my home, they were sent to the 2nd and 5th Defendants for them to pass to me is hardly credible. Although I have never received a large salary from the Corporation, I can easily afford a fax machine at my home, if that were ever necessary.
 - (c) In any event, the Defendants cannot explain why the correspondence is addressed to the 2nd and 5th Defendants by name, and yet makes no reference to me. No evidence has been sought from any of the 1st Defendant's banker to support their contention that the 5th Defendant had no effective control over those accounts;

- (d) Correspondence between the First Pacific Bank and the 2nd and 5th Defendants at least suggest that the bank officers were familiar with the 2nd and 5th Defendants;
- (e) Indeed, there is a hand-written message from one Ms. Becky Au at First Pacific Bank explaining to the 2nd and 5th Defendants how to instruct the Taiwan distributor to make payment into the 1st Defendant's bank accounts.

These documents have been exhibited in JHS-12.

- (f) Blank sheets with the 1st Defendant's chop and the 3rd Defendant's signature were found in the home of the 5th Defendant after she left the Corporation. These have been exhibited as JHS-4A. Although the 5th Defendant alleges that these sheets belonged to and were used by me, she has not produced any convincing evidence to substantiate her claim. As explained in paragraphs 68(14) above, there is convincing evidence that the signature on the sheets is the handwriting of the 2nd Defendant.
- (g) In early February 2001, I recalled that the 5th Defendant once told me that she would leave instructions in her safe at home in case anything happened to her and the 2nd Defendant. As I was the executor of their wills, it was necessary for me to have such information. I retrieved these instructions and exhibited them in HCA 558/2001. This document has been exhibited as JHS-13. It is clear from these instructions that:
 - (i) The 5th Defendant had full knowledge and control of the Corporation's finances, including the 1st Defendant, and regarded the money as being at her personal disposal;

- (ii) I refer to page 2 of the said instructions which refer specifically to the 1st Defendant's account at First Pacific Bank. Although the balances are clearly not up to date, it is clear that the 5th Defendant had full knowledge of all the details of the account;
- (iii) On the other hand, the need to give me such detailed instructions is evidence that I had little knowledge and control of the Corporation's finances and the 1st Defendant;
- (iv) Significantly, near the bottom of the page, she states:

"Names in the accounts are: Ms. Zhang Sheng Mei and Zhang Mei Feng. Only one signature is needed to draw money or wire. Need stamp on top of signature. There are some forms for wire transfer. There is also a signature card there, imitate signature on it". (my emphasis)
- (v) The 5th Defendant is likely to have regarded the money in the 1st Defendant as being at her personal disposal.
- (vi) It is also clear from these instructions that the 5th Defendant had Credit Suisse accounts of her own under fictitious names;
- (vii) The 5th Defendant denies the authenticity of this document. However, these instructions contain precise and specific details of, among other things, the 2nd Defendant's personal bank account in Taiwan. It is extremely unlikely that I would have the knowledge or access to such information. If necessary, I am willing to have this document examined by a forensic expert.

- (h) There is documentary evidence of various lump sum payments amounting to millions of US dollars being made out of the 1st Defendant's accounts to, inter alia, the 3rd Defendant and unnamed Credit Suisse accounts. These documents have been exhibited in JHS-14.
- (i) The Defendants contend that the transfers were made for legitimate business reasons and/or to our Mother's Credit Suisse account, and yet they have not produced the 1st Defendant's banking or accounting records, which should easily be obtainable by the 3rd and 4th Defendants, to substantiate their allegations.
- (j) There is also evidence that the 3rd Defendant has been paying to herself an exorbitant salary. This can be found in an account opening application by the 3rd Defendant with Citibank in 1998 where she claims to have an annual income of US\$ 1 million. (This figure should be compared to my annual salary of about US\$55,000 as vice-president of the Corporation). This document is contained also in JHS-14. The 3rd Defendant contends, unconvincingly, that she has never drawn upon that salary. However, without the accounting and banking records of the 1st Defendant, her assertion is unverifiable;
- (k) On the other hand, there is now shown to me and exhibited hereto marked "JHS-30" an agreement for a loan of US\$650,000 to the 2nd Defendant by the 3rd Defendant for the purpose of purchasing a house for Ms. Yau in California. I verily believe that the money lent by the 3rd Defendant is likely to have emanated from the 1st Defendant, as the 3rd Defendant has not shown how she would otherwise have the money on her own account to make such a loan;
- (l) The secrecy surrounding the 1st Defendants' finances and accounts does not inspire confidence and itself points to a risk of dissipation. It

is absurd for the 3rd Defendant to allege that the 1st Defendant is unable to produce banking records because they have been sent or passed to me. This is nonsense. The 3rd and 4th Defendants are the sole directors and shareholders of the company, and must have lawful and immediate access to any and all of the records and accounts of the company.

133. In relation to the alleged hardship to the 1st Defendant and the Corporation if the Mareva injunction is continued, I once again emphasise that no documentary evidence whatsoever has been produced to substantiate the Defendants' claims as to the functions and businesses of the 1st Defendant.
134. In relation to the sums allegedly paid into the Credit Suisse account of our Mother, I make the following points:
 - (1) There is no evidence whatsoever that any money had been paid into our Mother's account from the 1st Defendant. If any money had been paid, the parties with first hand knowledge of such payments must be the 3rd and 4th Defendants, since they are the sole directors and shareholders of the 1st Defendant and allegedly the signatories of the bank accounts;
 - (2) Indeed, there has never been any evidence that any money has been paid by me from the 1st Defendant to our Mother or, for that matter, to our aunt and uncle. I was informed by our Mother some time ago and verily believed that the 5th Defendant would from time to time deposit money into our Mother's Credit Suisse account as gifts from daughter to mother. However, I do not know from which account these sums originated nor was I informed as to how much was deposited, as these were matters entirely between the 5th Defendant and our Mother.
 - (3) It is disingenuous for the Defendants to allege that they have paid various sums into our Mother's account, and yet refuse to produce any records of

the same, to which they clearly have access. On the other hand, they accuse me of not disclosing the balance of our Mother's bank account. The account belongs to our Mother, and she has told me that she does not wish to disclose the balance of her account, and I must respect her wishes.

- (4) The Credit Suisse account is not my account. our Mother is the mother of not only me, but also the 5th Defendant and our three other siblings. Any money that has been given by the 5th Defendant to our Mother is neither under my control nor do I have any right to dispose or use;
- (5) I refer again to my email dated 2nd November 2000 and exhibited in JHS-29 above, where I said to the 5th Defendant shortly after I took control of the Corporation:

"Please keep in mind that Mom's money in CS is hers, and should not be counted as our portion to divide..."

It is clear from this email that whatever money that the 5th Defendant had given to our Mother belonged solely to our Mother, and not to me.

- (6) In any event, no claims have been made by the Defendants against our Mother for these or any other sums, as I verily believe they are not entitled to do the same.

(7) Application to Strike out references to Report No. 3

The body of Report No. 3

- 135. As explained in paragraphs 107 to 111 above, I was of the genuine belief, on the basis of advice from my Utah attorneys, that Report No. 3 was covered by an oral protective order of 11th May 2001 by the Utah District Court, and as such, I was prohibited from any dissemination of and/or disclosure of the contents of the Report. Indeed, my attorneys never released a copy of the Report to me or my

Hong Kong legal advisers prior to my application for the Mareva Order before the Honourable Mr. Justice Waung on 3rd June 2001.

136. Upon an application by my Utah attorneys for further directions and clarification of the 11th May 2001 order, the Utah District Court ruled on 18th July 2001 that Report No. 3 in fact fell outside the scope of the order. However, the Utah District Court, after hearing arguments from all parties concerned, granted a fresh protective order prohibiting as of that date prohibiting the disclosure of all of Mr. Holman's Reports, including Report No. 3, and their exhibits. It is not seriously disputed, however, that the exhibits to Report No. 3 were at all material times covered by the protective order of 11th May, 2001.
137. Although it is now clear that the 11th May 2001 order does not cover the body of Report No. 3, I am advised by my legal advisers and I verily believe that the Court should nevertheless regard the further use of the Report as oppressive in light of the 18th July 2001 order:
 - (1) Report No. 3 was created solely for the purposes of the Utah proceedings by Mr. Holman, who was appointed by and subject to the direct supervision of the Utah court pursuant to those proceedings;
 - (2) The 18th July 2001 order was made after consideration by the Utah court of concerns expressed by my Utah attorney that the reports, which were made without any opportunity for me to challenge their truthfulness, may inappropriately influence the mind of the judge in Hong Kong; (see p.11 of the Court transcript exhibited in CHY-14);
 - (3) In ~~its~~ ruling, the Court expressed that it was "*troubled*" by the "*potential mischief*" that such reports may cause outside of the Utah proceedings, and the 18th July 2001 order was made because of the concerns of the Court (p. 17 of the Court transcript);

- (4) Had the July 18th 2001 hearing occurred prior to the filing of Mr. Ribeiro's affidavit on 19th June 2001, I am advised by my Utah attorneys and I verily believe that the Utah court would have made the same order, and thus prohibiting the Report from being disclosed.

As such, it is respectfully submitted that the exhibits filed in breach of the 11th May 2001 order should be regarded as oppressive and be expunged.

The Exhibits to Report No. 3

138. In any event, it is not disputed that the exhibits to Report No. 3 were at all times subject to the 11th May 2001 order, and as such, any dissemination or disclosure by the 5th Defendant was clearly prohibited by the Utah District Court. A number of these exhibits, however, were exhibited in the Affidavit of George Anthony Ribeiro dated 19th June 2001 as exhibit "GAR-3".
139. The disclosed exhibits comprise certain reports made by the Corporation's distributors to Mr. Holman. The Defendants argue, however, that these exhibits were provided to Mr. Ribeiro by the distributors before their delivery to Mr. Holman and the date of his Report, and that these distributors were not parties to the Utah proceedings in question. The parties to the proceedings in which the order was made were the 5th Defendant, myself and the Corporation. The Defendants therefore contend that they were fully entitled to disclose the Reports.
140. I am advised by my legal advisers and I verily believe that such arguments are unconvincing:
- (1) Mr. Ribeiro swears his Affidavit in his capacity as a solicitor for the Defendants and upon their behalf. Mr. Ribeiro's acts, where performed with the authority of the 5th Defendant, must be regarded as the acts of the 5th Defendant;

- (2) The Defendants' argument that the exhibits were obtained in order to advise the distributors on potential claims against the Corporation does not mean that acts done and affidavits filed on behalf of the 5th Defendant somehow does not count;
 - (3) The affidavit was drafted and filed on 19th June 2001, subsequent to the 11th May 2001 order. As such, the 5th Defendant must be taken to have been aware of and bound by the Order insofar as it related to any acts done on her behalf;
 - (4) For the 11th May 2001 order to be meaningful, it must have been intended to cover not only the actual exhibits themselves, but also the information and contents contained in the exhibits, irrespective of their source;
 - (5) Although the Utah order did not bind the 1st, 3rd and 4th Defendants, it is submitted that the acts of a solicitor on a joint retainer for all the Defendants (a notice to act for the 2nd to 5th Defendants was filed on 19th June 2001 by Messrs. Vivien Chan & Co.), would have bound all the Defendants not to assist in a breach of the 11th May 2001 order by the 5th Defendant.
141. As such, it is respectfully submitted that the exhibits in "GAR-2" and "GAR-3" should not have been disclosed in the Affidavit of Mr. Ribeiro acting on behalf of, inter alia, the 5th Defendant.

(8) Application for order of preliminary issues and appointment of Receiver

142. I am advised by my legal advisers and I verily believe that the present Action is most sensibly dealt with by a quick trial of the preliminary issues set out in the Summons dated 7.7.2001, namely:

- (1) An Order that the following questions be tried as preliminary issues:

- (a) Whether, under Utah law, I can as a minority shareholder bring an action in the circumstances of this case against the directors of the Corporation for breach of duty which is alleged to be owed by such directors to me as a shareholder personally;
 - (b) If so, whether Utah is a more appropriate forum to try the merits of the present Action;
 - (c) Whether the Court should, if the present Action is stayed in favour of the Utah Court, grant ancillary relief in aid of the Utah proceedings.
- (2) An interim Receiver be appointed pursuant over the 1st Defendant to preserve the assets including the business and goodwill, if any, of the 1st Defendant pending the resolution of the matters above.

The Utah Court has now affirmed my standing under Utah law

143. I wish to highlight an important development since the 2nd Mareva Order granted on 3.6.2001. On 28.6.2001, the Utah Court heard an application by, inter alia, the 5th Defendant to dismiss the Utah equivalent of the present Action, which I claim both in a personal and derivative capacity against the Defendants. I am informed by my Utah attorneys and verily believe that the Court dismissed the Defendants' application, ruling expressly that:

- "a. *The claims pled in [the Utah Action] are both individual and derivative in nature, and in accordance with paragraph 9 of the Interim Order, [the Plaintiff] can pursue such derivative claims in her own name.*
- b. *[The Plaintiff] fairly and adequately represents the interests of the shareholders [of the Corporation];*

- c. *[The Plaintiff's] interests are not economically antagonistic to similarly situated shareholders [of the Corporation]."*

144. I verily believe that this Order affirms my standing under Utah law against the Defendants not only in a personal capacity, but also in a derivative capacity on behalf of the Corporation. As such, the Defendants' allegations that I have "unclean hands" or has sought to harm the interests of the Corporation must also be viewed with caution, since the Utah Court, which has dealt with the entire dispute between the parties since the beginning, has expressly ruled that I am entitled to bring a derivative action on the Corporation's behalf against the Defendants.
145. The Defendants argue that the Order should be read restrictively and that it does not take into account whether I had "unclean hands" or whether I have a proper personal claim. I have discussed this matter with my legal advisers, and I make the following points:
- (1) The Order was made after an *inter partes* hearing between the parties and the Utah court expressly stated in its order that it was "*fully informed*";
 - (2) The Order was made by the Honourable Judge Howard, the same judge who has been presiding over the various actions between the parties since the beginning of this year. As such, it must be presumed that the judge, in making the order that he did, took into proper consideration all relevant matters, including Mr. Holman's Reports and the Master Settlement Agreement in Hong Kong;
 - (3) In the Affidavit of Frederick M. Gedicks, the Defendants' expert on Utah law, the Utah Court would be reluctant to exercise its discretion to allow either a personal or a derivative action against the Defendants where I come to the court with "unclean hands";

- (4) It must follow that the 18th June 2001 Order dispels, at least at the interlocutory stage, any sustainable allegations by the Defendants that I have "unclean hands" or that I am acting contrary to the interests of the Corporation and its shareholders in pursuing her claims against the Defendants both in the Utah Action and in the present Action;
- (5) I verily believe that the Order is clear and unambiguous, and it is disingenuous for the Defendants to argue that the Order should be read restrictively, or that I am, as the Defendants allege, trying to "...make a mountain out of a molehill."

Order for Preliminary Issues

- 146. The dispute between the Defendants and myself, as reflected in the voluminous affidavits filed in HCA 558/2001, is substantial and factually complex. I am advised by my legal advisers and I verily believe that discovery for trial alone of the factual issues is likely to take many months and to incur significant costs.
- 147. As such, I am advised and I verily believe that there is a real possibility that the determination, as preliminary issues, of these matters set out in the Summons will lead to substantial savings in time and cost, since the questions concern whether:
 - (1) I have a proper cause of action against the Defendants under Utah law. Such a question involves an assessment as to whether I have a good cause of action as a matter of law;
 - (2) Hong Kong is the appropriate forum to try the present Action. Such a question does not require an investigation of the underlying merits, but rather an assessment of the factors connecting the matter to the forum, including the cost and convenience of the parties of litigating in Hong Kong, location of the evidence and where justice can best be achieved;

- (3) The Court has the power to grant ancillary Mareva relief in aid of concurrent proceedings properly brought in another forum where the proceedings in Hong Kong are stayed in favour of that forum. As the validity of my claim has now been affirmed by the Utah Court, such a question may be confined to one of international comity between the courts and in what circumstances assistance should be afforded to prevent the frustration of foreign judgments.

148. Although in ordinary cases it is beneficial for related disputes to be tried together, where there are questions of whether I have a proper cause of action or whether Hong Kong is the proper forum, I am advised and I verily believe that it is sensible and convenient for the Court to determine these issues first.

Appointment of an Interim Receiver

149. I am advised by my legal advisers and I verily believe that the appointment of a Receiver pending a quick trial of the preliminary issues above is not only sensible, but conducive to the efficient disposition of the Action. It is my case that the assets held by the 1st Defendant are being dissipated by the 2nd to 5th Defendants, while on the other hand, the Defendants claim that the 1st Defendant carries on genuine business functions, which are being impeded by the 2nd Mareva Order.
150. In the circumstances, the most sensible course is to have a Receiver appointed to maintain the status quo of the parties by preserving the assets of the 1st Defendant as well as its business and goodwill, if any. The Receiver may be authorised to maintain the 1st Defendant's business relationships and to carry out its contractual obligations. The receiver would, however, be supervised by the Court, which would ensure that an even hand is held between all parties during the short period pending trial of the preliminary issues above. By a letter dated 11th June 2001, my solicitors proposed to the 1st Defendant the appointment of a Receiver on terms to

be agreed, but the proposal was declined. The correspondence has been exhibited in "CHY-6".

151. In relation to the alleged hardship to the 1st Defendant contended by the Defendants if an Interim Receiver is appointed, I make the following points:

- (1) By the Defendants' own evidence, the activities of the 1st Defendant is centred around Shanghai and not in Hong Kong. The appointment of an Interim Receiver over the 1st Defendant's assets in Hong Kong is unlikely to have a major impact to the 1st Defendant's business in Shanghai;
- (2) The powers of the Interim Receiver can be defined such that the 3rd and 4th Defendants would be able to continue carrying on the business of the 1st Defendant. The Interim Receiver would be restricted to preserving the disputed assets held by the 1st Defendant. On the other hand, the Interim Receiver can seek authorisation from the Court to make such investments proposed by the Defendants, including lending funds to and/or investing in the distributors, which he feels would be beneficial to the 1st Defendant;
- (3) Indeed, there is no need for anyone to know about the appointment of the Interim Receiver outside of the parties and the 1st Defendant's bankers. It is therefore difficult to see how the 1st Defendant would be prejudiced in relation to its reputation amongst its suppliers and trade creditors;

152. The Defendants have also contended that a Receiver would impose a strain on the financial resources of the 1st Defendant. However, while I am advised that the remuneration and expenses of a Receiver will normally be paid out of the assets over which the Receiver is appointed, I would be willing to undertake to pay any costs of Receivership.

(9) It is convenient to try the present Action in Hong Kong

153. I am advised by my legal advisers and I verily believe that the Defendants contend that:

(1) Utah is a more appropriate forum for trial of the present Action:

(a) Many of the witnesses are in Utah;

(b) The documents are in Utah;

(c) The proper law is Utah law.

(2) There are concurrent proceedings in Utah on similar claims, and as such, there is a risk of inconsistent decisions.

154. However, after discussing the matter with my legal advisers in Hong Kong and Utah, I wish to make the following points:

(1) With the exception of myself, none of parties to the present Action are now residents or situated in Utah:

(a) The 1st Defendant is a Hong Kong incorporated company with a Hong Kong registered office and directors resident in Shanghai. There is no evidence, aside from its alleged role in receiving diverted funds belonging to the Corporation, that the 1st Defendant has any connection at all with Utah;

(b) As from October 2000, both the 2nd and 5th Defendants have taken up residence in Singapore;

(c) The 3rd and 4th Defendants were at all material times and are both resident in Shanghai.

(2) Although the wrongful acts alleged to have been done by the 2nd and 5th Defendants were done partly at the Corporation's offices in Utah, I verily

believe that a substantial number of witnesses are closely connected with if not situated in Asia:

- (a) I verily believe that the distributors concerned, principally Barry Le (Taiwan), Hendrick Tjandra (Malaysia), and Lau Pak Heng (Hong Kong) are all of Asian if not Chinese ethnicity, and it may be more convenient for them to give evidence in Chinese. Geographically, they are also situated much more closely to Hong Kong than to Utah;
 - (b) At least some of the Corporation's former employees, including Ms. Sun and Ms. Barclay, are Chinese. Indeed, I verily believe that Ms. Sun can only give evidence in Putonghua due to her limited English skills.
 - (c) The 3rd and 4th Defendants are likely to give their evidence in Chinese, and it is also much more convenient for them to travel to Hong Kong than to Utah due to possible visa restrictions;
 - (d) The bank accounts involved, most importantly those belonging to the 1st Defendant, are situated primarily in Hong Kong;
 - (e) The accounting records and banking documents of the 1st Defendant are likely to be situated in Hong Kong and/or Shanghai.
- (3) It is true that the fiduciary duties owed by the 2nd and 5th Defendants to the Corporation and me are governed by Utah law. However, a substantial part of my claim, including the improper receipt of trust property by the 1st Defendant and knowing assistance in breach of duty by the 1st, 3rd and 4th Defendants, is likely to be governed by Hong Kong law since the wrongful acts were likely performed in Hong Kong.
- (4) In any event, the Court is well experienced in dealing with questions of foreign law. Utah law is based on the English common law, and will not be

unfamiliar to the Court. All that is necessary is for the parties' Utah lawyers to give evidence on Utah law in Hong Kong;

- (5) I verily believe that the key documents in the present Action are the banking and accounting records of the 1st Defendant. Such documents will reveal not only the detailed workings of the diversion arrangements, but also the sums which have been paid out of the 1st Defendant, including, the sums allegedly paid into the Credit Suisse accounts;
- (6) As mentioned above, such documents are likely to be situated in Hong Kong, since the bank accounts and the registered office of the 1st Defendant are in Hong Kong. Discovery of such documents in the Utah Court may be inconvenient as the documents will have to be shipped to Utah. There may also be difficulties in enforcing any orders for discovery made by the Utah Court in relation to documents situated in Hong Kong and the Mainland.
- (7) Although the predominant market for the Corporation's products has always been Asia, I verily believe that a substantial amount of the Corporation's products are now also manufactured in Asia. Since the beginning of this year, there is evidence that the 2nd and 5th Defendants have been actively involved in manufacturing and selling the Corporation's products in Singapore and Malaysia. Part of the global settlement agreement between the Corporation, the Defendants and the distributors involves the licensing of the Corporation's trademarks and intellectual property to such facilities.

155. For these reasons, I am advised by my legal advisers and I verily believe that the present Action and the parties are on balance more closely connected to Hong Kong and Asia than to Utah. Indeed, there may not necessarily be a risk of inconsistent judgments, as contended by the Defendants, since parts of the Action may be tried in Utah and other parts in Hong Kong.

156. In any event, I am advised by my legal advisers that even if a stay of the present Action is granted by the Court, the Court still has the power to continue the 2nd Mareva Order or to appoint an interim Receiver pending the outcome of the Utah Action. I verily believe, for the reasons above, that this would be just and convenient in the circumstances.

(10) Subpoena of the 1st Defendant's bankers

157. As mentioned above, I verily believe that the key documents in the present Action are the 1st Defendant's banking records, since the documents will show, inter alia:

- (1) Whether the 1st Defendant in fact carries on a legitimate business;
- (2) Whether any money from the 1st Defendant has been dissipated, and to whom the money has been paid;
- (3) Whether any money has been transferred by me from to our Mother's Credit Suisse account or to our aunt and uncle, as alleged by the Defendants;
- (4) Who are the controllers of the funds in the 1st Defendant's bank accounts.

158. As such, I verily believe that the officers of the 1st Defendant's bankers will provide invaluable insight and evidence in order to show the Court a better picture of the 1st Defendant and the diversion arrangements. As mentioned in paragraph 132(2)(I) above, the 3rd Defendant has, rather dubiously, claimed that she is unable to provide proper banking records as she had sent them all to me. I affirm that I have never received any such documents, and as mentioned above, the documents that were found at home were clearly addressed by name to the 2nd and 5th Defendants..

159. I am advised by my legal advisers and verily believe that this evidence should be obtained now rather than at trial, as these records will have a significant impact upon whether interlocutory relief is necessary or appropriate in the circumstances.

(11) **Chronology**

160. The following is a chronology of material events prepared by my legal advisers which I verily believe to be true and correct:

Date	Event
Mid October 2000	The 2nd and 5th Defendants are dismissed as directors and officers of the Corporation and Plaintiff appointed as president and CEO pursuant to resolution of board of directors dated 1st September 2001
Late December 2000 / Early January 2001	Frauds investigative unit of PriceWaterhouse Coopers appointed by the Corporation to investigate the books and accounts of the Corporation, after the Plaintiff discovers that substantial sums may have been embezzled from the Corporation by, inter alia, the 2nd and 5th Defendants.
12th January 2001	The Corporation institutes Utah Civil Action No. 010400201 against the 1st to 5th Defendants for, inter alia, breach of fiduciary duties and knowing receipt of proceeds arising from breach of duty ("Utah Action").
5th February 2001	The Corporation commences HCA 558/2001 against the 1st to 5th Defendants for similar claims as in the Utah Action. A worldwide Mareva injunction is granted ex-parte by the Honourable Mr. Justice Young against the 1st to 5th Defendants.
19th February 2001	The Plaintiff steps down as interim president and CEO of the Corporation pending the resolution of a dispute between the Plaintiff and the 5th Defendant on the shareholding of the Corporation in the Utah Court. The 2nd and 5th Defendants also temporarily reinstated as directors of the Corporation. It was an express term of the Order that HCA 558/2001 was not to be dismissed or compromised without leave of the Utah Court.
21st February 2001	The Plaintiff applies to be joined as a plaintiff in HCA 558/2001 in her personal capacity
23rd February 2001	The 1st to 5th Defendants apply to discharge the 9th February 2001 Order

<u>Date</u>	<u>Event</u>
13th March 2001	The Utah Court appoints a Mr. Holman to act as the interim president and CEO of the Corporation pursuant to the 19th February 2001 order
1st June 2001	Application for leave to discontinue HCA 558/2001 by Mr. Holman pursuant to a global settlement agreement between, inter alia, the Corporation and the Defendants, is granted by the Utah Court.
3rd June 2001	The Honourable Mr. Justice Waung grants an application by the Plaintiff in the present Action for a worldwide Mareva injunction against the 1st to 5th Defendants on similar terms as the 9th February 2001 order in HCA 558/2001.
4th June 2001	HCA 558/2001 discontinued by consent between the Corporation and the 1st to 5th Defendants
18th June 2001	The Utah Court denies a motion to dismiss the Utah action, and rules that the Plaintiff is entitled to bring an action against the 1st to 5th Defendants in both her personal capacity and in a derivative capacity on behalf of the Corporation under Utah law.
19th June 2001	Mr. George Anthony Ribeiro files an affidavit files an affidavit on behalf of the Defendants in opposition to the 3rd June 2001 Order
4th July 2001	Summons by the Plaintiff applying to strike out parts of Mr. Ribeiro's Affidavit pursuant to RHC Order 41 r.8 as being scandalous and/or irrelevant and/or otherwise oppressive.
7th July 2001	Summons by the Plaintiff applying for an Interim Receiver to be appointed over the 1st Defendant pending the order of preliminary issues to be tried. Summons by the Defendants applying for a stay of the present Action on the grounds of, inter alia, lack of jurisdiction and forum non conveniens

<u>Date</u>	<u>Event</u>
13th July 2001	Statement of Claim filed by the Plaintiff
18th July 2001	Ruling of the Utah Court on the interpretation of its order dated 11th May 2001, holding that the Special Master's 3rd Report was not covered by its oral protective order of 11th May 2001. However, a new order protective order was granted prohibiting disclosure of all Special Master's Reports and exhibits thereto as of 18th July 2001
24th July 2001	Summons by the Plaintiff for subpoenas to be issued to officers of the 1st Defendant's bankers to produce 1st Defendant's banking records

AFFIRMED at the office of)

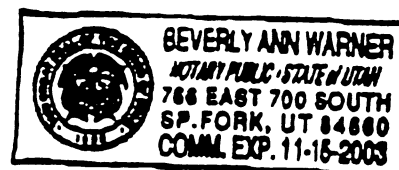
this 1st day of August 2001)

[Handwritten signature]

Before me,

Beverly Ann Warner
Notary Public

This Affirmation was filed on behalf the Plaintiff.



HCA 2493/01

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO.2493 OF 2001

BETWEEN

JAU-HWA STEWART

Plaintiff

and

E. EXCEL LIMITED

1st Defendant

ZHANG RUI-KANG

2nd Defendant

ZHANG SHENG-MEI

3rd Defendant

ZHANG MEI-FENG

4th Defendant

CHEN JAU-FEI

5th Defendant

4th Affirmation of Jau-Hwa Stewart

Filed on the 2nd day of August 2001.

Chui and Lam
Solicitors for the Plaintiff
Room 42, 4th Floor,
New Henry House,
10 Ice House Street,
Central, Hong Kong.

Tel : 2810 7822 Fax : 2845 0504

Ref : 010553/RC/LI/J024(MS)

Tab I

Jau-Hwa (JH)
Richard Hu (RH)
Sam Tzu (ST)
Jau Fei (JF)

(Beginning)

RH: Hello.
JH: Hi, Manager Hu?
RH: Yes.
JH: Hi, Is this Manager Hu? This is Jau-Hwa. I am with Manager Tzu now. You know we are going to testify tomorrow morning.
RH: Uh-huh.
JH: There will be our attorneys present tomorrow morning as well as the other party's attorneys. Therefore, I think we need to discuss in advance tonight.
RH: Uh-hum. OK.
JH: What kind of weak points do you think we have? During our last hearing...
RH: Heh.
JH: I noticed ... Turn it louder. Hello.
RH: Heh.
JH: Oh, this is better. I noticed that the attorneys on Jau-Fei's side kept trying to postpone the time for questioning you to a later date.
RH: Uh-huh.
JH: I know their intent for postponing was to find your weak points.
RH: They wanted to haul you too.
JH: Right. Mainly... So I insisted that it not to be postponed. I insisted on that, because we are going to court again on Tuesday. Right?
RH: M-hum.
JH: So, let's discuss this a little bit. Mainly we have to say, several things. You heard what Jau-Fei said when she was in Hendrick's room. Right?
RH: M-hum. M-hum.
JH: She asked whether we wanted to make a false document and put an earlier date on it.
RH: No. It was Hendrick who said that.
JH: Hendrick said that?
RH: Right.
ST: Hey, big brother, did they say that in the room that night?
RH: Yeah.
ST: But, I was there and I didn't hear that.
RH: Well, everyone was talking at that time. As I said, they were talking face to face. The President kept talking about finding new factory and other factory, right? Then she was bothered by not having product supply for these several months. Then Hendrick said, "you could have Jau-Hwa provide the products until we have our own products." The president said, "It wouldn't be soon enough. It's impossible for the new factory to provide products so soon." She said, "Have her provide products, but we don't have a contract," the President said that, "she won't provide products."
JH: Jua-Fei did say "we don't have a contract." Didn't she?

ST: It was the accountant that made the call first.

JH: All right.

RH: The accountant even knew to call Hendrick's room. So that means before the President met with us that night, she must have discussed this with the accountant about this part.

JH: All right.

RH: Of course. I will say I didn't know whom that call was from. It was the President who said, "It's your accountant."

JH: Um-hum.

JH: The accountant's name is Lynn Gilbert.

RH: All right. OK.

ST: That's right. She did say that.

JH: She did say the name, didn't she?

RH: Um-hum.

JH: Manager Tzu said she did mention the name, Lynn Gilbert. Good. This is a point that we can make. These two points. The first point. She seems to have said...that...she... So, you remember Hendrick mentioned making a false document, and it's not Jau-Fei. Correct?

RH: Uh... (thinking) frankly speaking..

JH: You can't remember?

RH: Not very clearly. But it was Hendrick's suggestion regarding putting an earlier date. Hendrick made that suggestion by saying, "Then we could write up a contract and that you could sign it." He suggested that to the President.

JH: That means they have talked about that earlier.

RH: The President said, "But Jau-Hwa doesn't want me to be the President any more. It would be invalid even if I do sign it." Hendrick then said, "You can put an earlier date on it. You were still in the President's position."

JH: You say all this (testify), all right?

RH: Hm...

JH: Only say a little bit, but say it more firmly. Don't say you can't remember who said what. If so, the testimony will appear to be weak.

ST: Sounds like you want to "harshly accuse" someone.

JH: Um. Um.

JH: OK. These two points then.

ST: We have to agree in advance whom we want to "harshly accuse".

RH: Hendrick.

ST: OK.

JH: You should say it was Hendrick who said "Let's make a false document," right?

ST: You should accuse, you should accuse Hendrick. I mean when I testify, I will also say "Hendrick said that."

RH: Hm... Hm...

ST: All right? We will say Hendrick then.

JH: Or should we accuse Jau-Fei, it's more... or should we say it was Jau-Fei that said, "Let's make a false document." Say we can not.... Which way do you think is better?

ST: If it were Jau-Fei who said that ... (not audible) But honestly speaking, if she said that in Hong Kong, but didn't say it clearly... (not audible)

JH: But everyone knew what she meant.

ST: What is your opinion, Richard?

RH: Only Taiwan and Malaysia have such a agreement now. In Korea too.

JH: In Korea too.

ST: Hong Kong has it also now. Just without my signature.

JH: Hong Kong has it also. It was just written (signed) by Jau-Fei herself. There is no Manager Tzu's signature. Jau-Fei wrote (signed) one authorizing the Hong Kong Company various rights. In fact, Manager Hu's Philippine Company also has it now. She authorized the Philippine Company various rights.

RH: Um-hum...

JH: She could not catch (get) you two together to sign. All other people have signed with her.

RH: Therefore, these two days in the Philippines, words are spreading that Excel Utah product will be arriving this coming February. Dr. Chen is coming to the Philippines in February too. I don't know why he/she was so sure to say that. Does that mean he/she can confiscate all of our products from the headquarters?

JH: Oh.... Is that right?

RH: Legally.

JH: He/she said he/she would confiscate all the products that you have now. Right?

RH: He/she didn't say that. He/she said other companies have no right to import E. Excel's products. If they imported the products, E Excel Company, E. Excel Philippine Company can hold back the products.

JH: Oh, Is that right? By the same token, just like the way she is dealing with Hong Kong. It's the same. It's OK, Manager Hu. We are in this situation. Don't know you... OK. Let's change the subject. I don't know whether you know some good attorneys in the Philippines?

RH: Uh.... I can check that out. But it depends on their specialty. What kind of case and what kind of laws, right?

ST: Hey, big brother.

RH: Um..

ST: You can go ask. Because we just learned when we talked to our Hong Kong attorney today that there is a law in Hong Kong. It was that a small stock shareholder may.... (not audible). When she kicked me out at that time... Actually, for a small stock shareholder, that's illegal.

RH: Uh-huh

ST: Then this small shareholder can request to audit and close the company.

RH: Why?

ST: That means, in Hong Kong, mine plus yours, plus Huang Jau Hong's (share) has a total of 32 percent. He said this is enough to make a request to audit and close the company. It is said to be a partnership. For a partnership, if there is a stock shareholder being kicked out, he shall have the right to make such request.

RH: Kicked out? What if you are not kicked out?

ST: He did kick me out. I am not the General Manager any more.

RH: OK. But if it's in the Philippines, do we have the right to make a request to audit and close the company if they didn't take any action?

ST: You have to ask the attorneys in the Philippines about this. Laws of different countries are probably different. I mean there is such a law in Hong Kong. But for details we need to consult with attorneys. This is an approach to... It is easier because you haven't started on your end. Don't let her sue you if (you) have such an approach.

RH: Uh-huh.

JH: We sue her first.

ST: Make it closed.

JH: We have a law in the USA. A small stockholder may sue his company.

RH: If the company does what?

JH: The small stockholder may sue the company. Then he (she) can make a request to close down. This approach won't work because I am not a small stockholder now. We can not take this route. Do you know what I mean? My current status is considered to be a powerful position. Therefore I cannot sue the E. Excel USA company. But if I become a small stockholder, for example, if she takes my trust away, I will become a small stockholder. Then I will make a request to close the company down. Do you know what I mean? Therefore, Jau-Fei herself, in fact, also knows what she can do. She wouldn't be successful.

ST: If she loses, she loses. If she wins, she still loses.

JH: That's right. But I am not going to. At this point I certainly will not pursue this approach. Right? Of course, it because I asked so I know this point. I guess the Philippines may have a similar law. Otherwise, all small stockholders would be eaten up. The Philippines may have some laws to protect small stockholders.

RH: Uh-huh. Uh-huh. OK.

ST: Big brother. Please go find out.

JH: About you. Adding yours and Zang Hong Zhi's together is not a small share. If you can go check it out I think we should act first. With our present situation, the company you established in the Philippines is still under someone else's name. Right?

RH: Right.

JH: Good. Then he will ask you whether Jau-Hwa gives you some kind of benefit, right?

RH: Legally, I have nothing to do with this company, right? I don't have to mention anything about the relationship between Jau-Hwa and I.

JH: Nothing.

RH: I don't have to mention this, right? It has nothing to do with this case. The only thing is that the money of this company is supported by me. I probably have to say I lent my money to that company or something.

JH: In fact, your money supports this company. If they ask you about you and this company, your name is not shown in this company anyway.

RH: Right, right, right.

JH: If your money supports this company, what evidence do they have?

RH: The bank account, because I drew a personal check. The money was sent to this company's account.

JH: Do you think they already know this company?
RH: They already know the name.
JH: They already know the name?
RH: It's very easy to get that. You can go to a government agency or a Health Department. I know they went to a Health Department and asked whether there was any one that applied for a license for E. Excel products. It's very easy to get the address of the company that applied for a license for the E. Excel Products from the Health Department. It's very easy to get that information.
ST: But the USA's case will... (not audible).
JH: I guess he/she may....
ST: Just giving you trouble.
JH: He/she was trying to do this. Maybe he/she...
ST: Because legally you have nothing to do with this company.
RH: Right. Legally we are not associated at all.
ST: You may say legally you have nothing to do with this company. And then you don't need to answer the rest of the questions.
RH: Um...
ST: If it's nothing to do with me then the second question need not be answered.
RH: Um...
JH: If it's the other party's attorney questioning, then you talk less.
RH: Jau-Hwa, I would like to ask you now. Who wired the money to me? In case one day I am asked this question.
JH: The person is my aunt.
RH: Say, we found out someone wired some money from the USA to your account in Taiwan.
JH: This information is very difficult to obtain. Checking your personal account is not that easy. It's not me who wired money to your account. It's my aunt. Right?
RH: Um... I hope it won't happen. But just in case.
JH: Right. I'll be on the USA side... We need to hurry. Hurry to attack back. It 's not enough for me to sue her with this. We need to sue her further. Now I probably will take both civil and criminal actions.
RH: OK.
JH: We can only do this to balance out. He asks you where the company's money was from, right? Did you support this company?
RH: It's a personal check to the company account.
ST: Does the check bear your name?
RH: Yes, yes.
JH: Can they obtain that?
ST: Should be able to.
RH: Should be able to obtain it. There is no confidentiality concept in the Philippines. If you know the bank, for instance, my financial manager could exchange my US Dollars to Pesos and then transfer to my account. He doesn't need my sign...signature. That means when we know each other well, then we can do such thing.
ST: Richard, who are the stock shareholders (?? Not audible) of that company.
RH: Paris... (not audible)

ST: Then can we say Paris borrowed from you?

RH: Yes we can. That is what I intend to say.

JH: You will say you lent to your friend.

RH: That's right. That's right. It's just a borrowing deal between friends. This shouldn't be illegal, but will just cause suspicion. Legally speaking, it's not necessary to touch the issues regarding this case.

JH: It's ok. This is the only way.

RH: That is it.

JH: I don't know what they are digging for, because they kept trying to postpone the questioning. When I saw he wanted to postpone, I ... (not audible) his information is not complete.

RH: Does that mean they are afraid?

JH: They wanted to postpone and I didn't want to let them postpone, because if it is extended, they will have more time to check some information. Right?

RH: Um... Um...

JH: What else do you think they will ask us?

RH: The other party you mean?

JH: He will ask you whether you left the company voluntarily, or why you left.

RH: There are many people that have heard this in the country. It was that Mr. Chang Rui Kang wanted to transfer me from the Philippines to Thailand. And I had to follow my supervisor's instruction. It's just that simple.

JH: Then you formally resigned, right?

RH: Resignation, it was verbal in Malaysia. Verbally resigned, nothing in writing. Therefore, in fact, I am still the President of this company.

ST: Thailand?

RH: The Philippines, because it was from the beginning to the end. But if you want to change the President, You have to call a Board of Directors Meeting to make the decision... Change the President. Changing the President requires most of the Board Members' concurrence, unless they are attending a meeting in Singapore at this time. Singapore meeting. Purposely they said they want to increase the number of stock shareholder or do something. They changed Paris' share and my share from 2/5 to 2/7. As an example like this, they will have authority to change the President.

JH: Let me tell you why I saw Andrew Lee's letter saying he's the Philippines... (not audible).

RH: I didn't see that letter. But maybe they made the decision at the meeting in Singapore.

ST: Have they held it (the meeting)?

RH: They have held it.

ST: Where are the official records?

RH: I haven't seen them. The attorney should have given them to me. But they haven't.

JH: Would they not give them to you on purpose?

RH: Right, not to give them to me on purpose. But I was obedient. Andrew rejected the offer to come to the Philippines to be the General Manager.

JH: Who was that?

RH: Andrew. He called Sandra too.
 JH: He claimed to be President in his letter to us in the USA.
 RH: Ha...Ha. (Laugh).
 JH: Didn't I show it to you at noon?
 ST: I know I thought it was a letter.....(not audible)
 RH: Date. What was the date?
 JH: Andrew Lee. The date when he faxed was January 19th
 ST: What was the fax for?
 JH: He was asking for the products.
 ST: On behalf of the Philippines (company)?
 JH: Yes.
 ST: It seems like the Philippines (company) is going to sue.
 RH: So they surely will sign a false contract.
 JH: Yes. They surely will sign a false contract.
 RH: Um...Then will they still be waiting for the legal procedures to take effect? This means the changing President part. But the false contract will only be valid with an earlier date.
 ST: They may utilize "Exclusive Right Distributorship". Like Hong Kong.
 JH: Yeah. I can fax it to show you.
 ST: Meaning it's an authorization, not a contract. A contract requires both parties' signatures.
 RH: Right. Right. But she signed this for us before, for the current company in the Philippines. It indicates that the headquarters may terminate it at any time.
 JH: Yeah. Do you have the original?
 RH: Yes. Yes.
 ST: Do you have the original?
 RH: Sarah has it.
 ST: That's great. I know PH saw it too.
 RH: Yes. So....
 JH: Is the one that Sarah has the original?
 RH: Um...
 JH: I am afraid it is too late to send by mail. But fax me a copy and I will mention it. If they want the original then we can provide one.
 RH: OK.
 ST: Does Jau-Hwa need to send a Termination Announcement?
 JH: It's not necessary. He... (not audible)... another false...(not audible).. See what options we have to hurry and sue them.
 RH: I also thought about that, but Sarah said that is useless. I intended to have Jau-Hwa sign a notice, Termination of Exclusive Right.
 ST: Where is the logo of the Philippines company?
 RH: Actually, our headquarters has hired attorneys to process the logo.
 JH: I have hired attorneys to process that. I haven't contacted him these few days.
 ST: Need to register or what?
 RH: Right. It's the patent.
 ST: Did we have that?

RH: We didn't have it. We applied. But we submitted it in 1999. Normally it will take several years. But if the headquarters has a Patent Right in the USA, the application will be placed to the first priority for approval.

ST: OK.

RH: That means now, no one has it now.

ST: ... (Not audible) ... They don't have any power to use... (not audible).. to file a law suit by an attorney... (not audible).. They don't have the power...

RH: But the problem is the USA side didn't get it in the Philippines either.

ST: Must we get it (license), or can we use the USA's original?

RH: The original is in USA.

ST: Yeah, that should be okay too.

RH: No way. You cannot (use the same license) in different country. The patent in Taiwan is in Barry's hands, right? You need to have an approval in each country

ST: In Hong Kong and Malaysia, even you have that in hand, the USA may still deny it.... (not audible). Besides, there is a business relationship. So, it should be okay.

RH: All right.

ST: ... (Not audible).. Taiwan's part. Taiwan's part is more complicated. But I am thinking. The Philippine laws should be similar to the USA laws. I mean we can check with the attorneys. Even I haven't finished my registration process. I can do an injunction.

RH: OK. I'll go ask.

ST: The current problem is taking down their sign.

RH: Take it down. They don't have any products to sell at this moment anyway.

ST: An injunction is pro-active. Don't let her sue you. Therefore I sue her first.

RH: That 's right. We sue them and they can still sue us. But this action regarding the patent, whether we act or not act... related to the development of the case.... we can try.

JH: This is the situation, they have been continuously acting against us. Do you know what I mean? If they are pro-active, at least you have to come out to clarify.

ST: Did Philippine (company) owe the USA (company) any money?

RH: I don't know what happened later on.

JH: Did you owe USA (company) any money before you left?

RH: When I left...

JH: Does Sarah know?

RH: It seems like I paid whatever I had to pay when I left.

RH: Is that right?

RH: Because at that time... Do you remember? At the CEO meeting in Singapore, I know they like to give me trouble. So I tried to pay off all the money that I owed. That was September. There weren't any orders in October. I don't know whether we paid off the remaining bills. But we probably didn't owe any money in September.

JH: All right

ST: Whose name did you use when you purchased that office building?

RH: Bestwell. Bestwell.

ST: Bestwell. Did we... (not audible)

RH: I don't know this. That is their Hong Kong company. This company and the other company called Extra Excel. Both companies are registered in Hong Kong.

JH: ...(not audible).. I guess. According to his/her characteristics, they wouldn't register under our names. Because we didn't sign anything...

ST: Then let's put this way. With that building we don't have any...

RH: Title. Yes that's correct. Our only share is called ...(not audible)... Paid for Bestwell to buy the company. Therefore that money is the collectable. to Bestwell.

ST: Big brother. Please say that one more time. What do you mean?

RH: When the current Excel branch office in the Philippines, the official branch office purchased the building, although the buyer's name was Bestwell, really the money was paid by the current company. At that time I was blamed by them due to this matter. So this is what happened. The money was paid by an Excel check. Therefore Bestwell, in the account book, still owes this money. They owe the current Philippine company the money for the building.

ST: Then according to the laws in the Philippines, the money went to another company. That company then purchased the building. And then rented the building to.... (not audible)..

RH: It's not rented. It's not rented. Bestwell never collected the rent. Therefore that building was really vacant. That means it was borrowed. They borrowed the office.

ST: That's right. I mean that's the way it goes.

RH: The way it goes is...

ST: Look. The current Philippine Company lent money to Bestwell, then Bestwell purchased this building.

RH: Right.

ST: This building was then used by the Philippine company.

RH: This is not a legal issue. It's an accounting issue. Did Bestwell really collect rent from Excel? The answer is still no. There isn't any substantial contract, or written agreement between the two companies stating the lent money involved, the way of paying the debt, how the building that is borrowed and how to be returned.

ST: OK. Big brother. Can you think of anything that will give the current Philippine Company a heavy blow?

RH: A heavy blow?

JH: Can we find some Philippine Attorneys and discuss with them?

RH: Presently, the Philippine Attorneys are hired by them. They are hiring them.

JH: No. No. We hire our own.

RH: In the past, the Philippine Company made the payment to a Hong Kong account. If the headquarters sees the problem when the products are shipped, but the payment didn't go to the USA headquarters account, I understand how they feel. We wired all our money to Honk Kong, but whether that money goes to the headquarters account or not is the first point.

JH: It didn't come to the USA headquarters account.

JH: Would this point involve you?

RH: No. We wire money through the bank account. We have all the records.
 ST: But ... you were... (not audible) at that time?
 RH: Chairman.
 ST: Were you the President at that time?
 RH: No. No. I was... (not audible)
 RH: Yeah, but I mean I can only say verbally that Dr. Chen gave me instructions and told me to wire the product payments to somewhere and I did that. Why would we wire the money without a reason? This must be product payment.
 JH: I'd like to ask you how you knew to wire money to E. Excel Limited?
 RH: That's where she told us to wire to.
 JH: I'd like to ask if you kept the e-mail that Jau-Fei sent you?
 RH: I don't know whether I have or not. That's a long time ago. Wiring money to that account must be more than two years ago. It's been two, three years.
 ST: Longer than that.
 JH: Did you keep Jau-Fei's e-mail?
 RH: Um... some, but not all.
 JH: Can you go back and check to see if there are any problems in her e-mail?
 RH: Um. OK.
 ST: I'll go back and check.
 JH: Because we... if you load her e-mail to the disk for me, I'll check closely to find her tax problems so that I can sue her right away.
 RH: Oh. Oh...
 JH: Do you know what I mean? Sometime she confirmed whether or not she received the money, right?
 RH: Right.
 JH: I need that type of evidence.
 RH: Hm..Hm...
 RH: That stuff to the Philippines... Of course... Those are the past records involved with the issue of the invoice value. To check if they were under valued or over valued will be quite troublesome. The Philippine company may have problems too.
 JH: That's all right. Since you are not with the old Philippine company anyway.
 RH: At that time... It was me. I mean the invoice value was not equal to the actual cost. Both the buyer and the seller had problems.
 JH: You check it out then. You are a small stock shareholder. See if you have any way to sue the old Philippine company.
 JH: We have to be pro-active too.
 RH: Um....OK. Sam, Do you have anything in your Hong Kong company that you can use to sue them and drag them down?
 ST: Sure. As an example, the attorney said we small shareholders can unite and request for an audit and close the company. I was very happy when I heard that. But mine plus your is 24, and plus Huang Jau Hong's is 32, which is a great influence. But I am not sure if Huang Jau-Hong will do it or not. Do you know what I mean?
 RH: Oh. OK. Audit and close the company. I don't think he will refuse. There is no impact to Barry.

ST: I don't know. Maybe he doesn't have to use his name. Maybe he can transfer his share trustee to me.

RH: The trust he has and requests the past right...

ST: No. No. They are not connected. The trustee can be transferred now. I am taking action now, not before. There is no difference. Of course I have to consult the attorneys to see if 24 is sufficient. If 24 is sufficient, we'll use the 24.

RH: I am very willing to do this.

ST: Wow. Just a shot and we'll get it closed.

JH: Yeah.

ST: I feel very happy.

JH: Is there any way to do the same in the Philippines?

RH: All right. I'll ask immediately. But what reasons shall we based the request an audit and close the company?

ST: Something like he kicked me out.

RH: Kicked you out to where?

ST: Kicked you out from the Board of Directors. Of course I'll consult the attorneys about the details.

RH: Because he/she kicked you out, you have the right to request an audit and close the company, right?

ST: Because he/she kicked me out. We are in a partnership business. A partner may not be kicked out from the partnership.

RH: You are still a stock shareholder. Just to re-elect the board members, right? Your share is still there.

ST: OK. Substantial details will need to be discussed with attorneys.

RH: Because basically, it doesn't affect shareholders' right.

JH: Our laws in the United States are this. You are a small shareholder, and you may make a request, like...

ST: There must be some conditions. It is impossible that every small shareholder can make a request to close the company, right? This way all the companies in the stock market will face such problem.

RH: If he /she does something to cause damage to the shareholders' right, we'll find ways to catch him/her. This means...

JH: He/she is not going to give you the money for your share, right?

RH: But legally, he/she doesn't have to give it to me. That means the company still exists. The company is still in operation. The company is just changing its products. And the new products haven't arrived yet. This has been agreed on by most of the shareholders.

ST: That's all right. But that was also what we disagreed about.

RH: So. Does it count if the majority of the shareholders agree?

JH: Maybe it is better if the share is given to me.

RH: Who?

JH: That all right. Our time tomorrow will be your late night tonight. After our conversation, you go think about this and discuss it with the attorneys. We have to be pro-active.

RH: OK.

JH: All right?

RH: All right. All right. All right.

JH: Maybe Manager Hu still belongs to the old company. But if he still belongs to the old company and he sues this new company, maybe Manager Hu can come forward and say, "I don't have a contract. I just don't have it." I testify against him/her. Maybe he/she will not sue if we do this.

RH: At least I am still the board member of the old company. Paris and I are still board members of the old company.

ST: Is that right? But the resolution of the board is based on the shares or the head count?

RH: The same. The number of board members is based on the number of shares. Then Alex's share and my share added together is 40%. Under this condition we may have two board members elected. Therefore, Paris and I are the representatives. This is ...

ST: (Not audible)...not....

RH: Hello. Hello.

ST: Ya-Yun is not?

RH: Ya-Yun agreed. She agreed to have Paris and I to serve. If it's our side, she agreed to be Paris and Richard.

ST & JH: ...(Not audible)...

RH: Paris is the representative of the Excel Essentials.

JH: Then he will probably be sued. Because if he has share in the old company and he establishes another one.

RH: This is arguable. I am a natural entity. Do I have the right to invest in different companies?

ST: But I think this question needs to be answered by consulting the attorneys. I feel that asking in advance will help you handle things better in the future. My problem in Hong Kong was I didn't ask in advance.

RH: What would happen if you asked? I did ask. Unless you claim you give up your current board membership.

ST: Can you transfer your current board membership to others?

RH: Maybe. Yes.

ST: I think you should transfer first and let the argument disappear.

JH: Transfer his position to Ya-Yun.

ST: Right. Ya-Yun is fine.
We discussed this issue with her/him a couple of days ago. To remove the argument from him is letting her run the new company.

RH: Transfer to Jason?

ST: But Jason is also in my new company. Is that all right?

RH: I don't know if they are connected in different countries.

ST: Ask the attorneys in the Philippines. I mean that's ok. You transfer to Jason and let him "fire the cannon" at the meetings.

JH: What should we do about Paris? He is a board member now. He is...

ST: Paris might have some problems too.

JH: Yes. If so, then Paris will have problems.

ST: That's means we are placing another "Big Cannon"

JH: Can Paris be transferred to someone else?

RH: Of course he can be transferred. As long as you are willing to give up, right?

ST: Do we want to have a new election or he just signs it?

RH: I have to ask about this. I'll ask that attorney...

ST: I think we can transfer one board membership to Jason and find another board member for the meetings.

JH: Do you have anyone that you can trust?

RH: For sure I can find someone that I can trust. But I think the purpose we are keeping this board member position is that the person can be involved in the resolution process at the board meeting. That person needs to know our situation. Therefore Jason is a pretty good candidate.

JH: There is a law in the United States. If you are a board member in that country, you have to be dedicated. It is not allowable if you establish another competitive company.

ST: ... (Not audible)...

JH: This is the law in the United States. I am afraid Paris has the same situation and will have problems.

ST: Paris must be transferred.

RH: Um... OK.

JH: I am afraid that Paris needs to be transferred out as soon as possible. Or transfer the new company to somebody else. Do not use Paris any more.

RH: OK.

JH: Which way should we take. Pick one.

ST: Does Paris "fire the cannon" at meetings?

RH: Not quite. He doesn't have the position. Do you know?

ST: A board member is a board member. Shouldn't be concerned about position.

RH: No, because our hatred for him is like a "deep sea of blood". Paris doesn't have that... Ha...Ha... (laugh)

JH: Then maybe we put Paris on a board member in the old company to replace someone.

RH: Let me think about this. Transfer me to another person.

JH: I can imagine this might be a problem. This is not allowable with the United States laws. You may not establish a competitive company. I am afraid Paris will be sued. If Paris is sued, the new company will be dragged down too.

RH: OK. This transfer can be quick. We can ask Paris to sign something stating he is willing to give up his share in the original company and his Director position.

JH: Is there a way to put down an earlier date?

ST: Earlier or later?

JH: Back date it to have him give up earlier. Because... why? I guess they have probably known this already. That essentials....

RH: They don't have any facts to sue at the present time because we haven't even received our products. And we haven't sold any either, right? His announce of resigning need to be done quickly. After he has done that, legally he can say he has given it up and he has transferred it to someone else.

JH: I am afraid they will say that the new company was established before that.

ST: No. No.

RH: I establish it but I haven't done anything yet. I am just.. maybe I am considering Chen Jau Fei's products, or something...

JH: Maybe you were just considering importing some total different products?

RH: That's right. That's right. I have my business scope registered, but I did not do anything, right? You don't have evidence to sue I have this company but didn't have any violations.

JH: But if giving up will work, is putting down the earlier date better of the later date? But this doesn't have any critical impact.

ST: What happens if establishing a new company?

RH: For what?

ST: To take care of all these problems

RH: For example, to import....

JH: Products from the USA has been shipped out.

RH: Or unless Paris gives up his shares in this new company, right? If he gives them up immediately, he can say, "I am not (in the company) anymore," if he/she sues.

ST: Can you find another person then?

RH: Yes. That stuff...

ST: Let's do this then. Give up the new company's...

RH: Representative position and stock shareholder position.

ST: OK. Let's do it.

JH: Is that all right? This way, let's change to a new...OK. We couldn't be ...Ask if there is a chance. Ask the attorneys as soon as possible about how we can sue the old company, all right?

RH: Um. Um. OK.

JH: Manager Hu, you probably have to rest for a while and sleep a little. It would be 10 AM our time and what is your time when we call you tomorrow?

ST: How can he sleep?

RH: 3 o'clock. 3 o'clock is OK. I am normally wide-awake at that time.

JH: Is that right?

RH: Um... But those questions are traps through special design. Ha.Ha. (laugh)

JH: When attorneys ask you, you...

RH: For some matters, can I just say they are not to do with this case and refuse to answer?

JH: Or you can say "I don't know", "I don't know". There is another way you can do it. If you don't want to answer, you say, "I don't remember now", then you may remember in the future. Do you know what I mean? All right? Do you know what I mean? You don't remember now. But later you may remember.

RH: I recall....

JH: Recall.... Do you know what I mean? I just don't want to let them postpone. I know they want to dig. What's next? Next they will be contacting you. Speaking of telephone, if the attorneys want to contact you, does your phone show who the caller is?

RH: No.

JH: No?

RH: If you are talking about Taiwan, generally I am not in Taiwan. It seems like international calls will not show the name.

JH: There are some. Sometimes my calls from Taiwanese distributor will show the names on my cellular phone.

ST: Strange. Some do and some don't.

JH: Some do and some don't. That's ok. You don't stay in Taiwan much. You will be very difficult to catch when they need you.

RH: Right, right.

ST: You can have your wife answer the phone, right? Have your wife screen the calls when the phone rings.

RH: What if I answer the phone?

ST: What if you answer the phone?

JH: If you answer, it won't... I'll be contacting you. I'll ask my attorney and contact you.

ST: If you answer, say "sorry I cannot hear you", disconnected. Ha. Ha. (laugh)

RH: Ha... "My English is poor". "I don't understand". We'll react appropriately when it comes time.

JH: OK.OK.OK.I have been busy with this matter these few days. We are extremely busy. I am very angry. I must sue her. I met that attorney last Saturday. I'll try my best to sue her. To sue Jau-Fei...

ST: To "scramble her brains"

JH: Hey, I am thinking about going abroad to sue her... I am continuously thinking about how to make her....

ST: Doesn't she go to the court every week? Every week you are tied up then?

JH: It will be different when we sue her.

RH: She doesn't have to appear in court by herself.

JH: I don't have to appear in court when I sue her.

ST: The problem is now you have two defendants, right? You have to go to court every time. How do you have so much time?

JH: No. So we have to counter-sue her.

RH: To make her have to go to the court.

JH: Of course Jau-Fei needs to go to the court too. Must keep her busy. I didn't intend to sue her before. Since now the fight has begun, We have to fight. We need to sue her more. Need to be quick. If I find a good lawyer and if you find a good lawyer who can sue her, then we need to sue her right away. My whole week was messed up by her. I didn't do anything. I am very mad now.

RH: She is free without doing anything anyway. I think because...

ST: Nothing to do? Go make the new products.

RH: Does she have any way out now? I think because the new products cannot be made or something. I am guessing that there are problems with the new products probably. Otherwise, her strategy earlier was telling distributors that the new products are coming out soon and ask them to wait. They can't come out now, so she has to distract their attention. Dr. Chen is going back to the United States to get back the power. Everyone is waiting for the arrival of the USA products. She is trying to distract attention. If the products don't come to the market, it's USA Company's fault and Jau-Hwa's fault. It's not my fault. My previous promise is gone. Sorry.

JH: I am afraid she is dragging us in the USA and making products in Malaysia.

RH: That is certainly possible.

JH: Hm.. All right. Manager Tzu, do you have anything to say?
Manager Hu, Do you have any thing to say?
Do you think we need to discuss...

ST: Schedule, schedule You are going to Hong Kong after the New Year.

JH: I am going to the eastern countries. You know, I am going to court on February 1st and 2nd after the New Year.

ST: I know. I meant going to court in Hong Kong.

JH: The case in Hong Kong is no big deal. Discussion between you and I should be fine.

ST: Hey, Richard, Did you get in touch with Jau-Hong. I don't know how to tell him. Please tell him to give you his 8% in Hong Kong.

RH: Then return them to him secretly, right?

ST: Whatever. Basically the Hong Kong company is for the battle. But neither he nor us will get anything back. Therefore, he will not lose anything no matter if he agrees or disagrees.

RH: Jau-Hong is still maintaining his neutral position. He may still have some hope.

ST: Because of his neutral position, it's OK if he doesn't come forward. But he can *give up his share. I mean to reach the 32% total. Do you think this is possible?*

RH: I don't think he will agree, but I will mention that to him. I just feel he would not be willing to. He knows if he gives up his shares, the other party will know and that would create more opportunity for a fight. He will be labeled.

ST: So what if he is labeled with his current position?

RH: He made himself very clear in Taiwan. I'll mention that to him. I guess his thought is like this.

ST: Besides, what will happen if he is labeled. Will someone kill him?

RH: His benefit will be reduced a bit in the future.

ST: What benefit does he have?

RH: I don't know. He is still a shareholder in Hong Kong and Malaysia. Maybe they are making money over there.

ST: Hong Kong has no chance.

RH: Who knows? To him, he has different goals from us. I'll think about it and will talk to him.

ST: It's okay. You don't really have to talk to him. If you want to talk to him, you better have some confidence, otherwise, it won't be too good if you get rejected. Think about it and make your decision. I'll ask the attorney whether our 24 total is sufficient.

RH: How did you come up with 24? Yours is 16, right?

ST: Right. Mine is 16 and yours is 8.

JH: Yours total is 24.

JH: Manager Hu, I wonder whether you can rest?

RH: Me? Don't worry about me. Don't worry. No matter how tired I am, I am always wide awake during the midnight.

JH: OK. Let's just need to stick to the point that Hendrick or Jau-Fei mentioned to draw a false document.

RH: If we say that, Jau-Fei may go to jail, right?

JH: Speaking of document, Jau-Fei and Li-Huan Hsin made-up a false document.
RH: Um... Um...
JH: Shall we say it was Jau-Fei who said is this better or we make a false document.
ST: If he says that, the other party will definitely deny it.
JH: Will Jau-Fei deny it? Even if she denies it, we had some people that heard that.
So we...right?
RH: If Hendrick goes to jail, everyone will be happy. If someone makes Jau-Fei go to jail, many distributors will not forgive that person.
JH: Let me tell you. If Jau-Fei goes to jail, it wouldn't be due to this falsified document. If Jau-Fei goes to jail, it will be because of tax problem.
ST: She has more severe problems.
JH: You know? So going to jail for Jau-Fei is a matter of...
RH: sooner or later.
JH: Tax. This is civil. There are civil and criminal lawsuits in the United States. Falsifying document will not make her go to jail.
ST: No?
JH: No.
ST: Falsifying a document will not.
JH: That will be civil. Criminal case will.
RH: Falsifying a document is a criminal case, it's a fraud. Forgery is a deception.
JH: This is not enough to make Jau-Fei go to jail. It needs to be the tax issue. In fact, I am processing with both civil and criminal. Only this way that we will maintain ourselves. You see, I have been dragged by her. I didn't do anything for the whole week. Where is our future in the world? In addition, is that financial management report correct? A very prosperous business was totally messed up by her during a couple of days. Therefore, we are a little bit winning in the Hong Kong's case, There are still lots of information to prepare for the attorneys here. Therefor I say no matter what action we take, we need to act first. In fact, she has acted first already. We are just fighting back. I feel...

(End)

Tab J

CONVERSATION

A is the Vice General Manager

B is the female

C is Tzufang¹

The italics show the English words that the parties use

The words in the square brackets show the emotion of the speakers and what they imply

PART I (On One Side of the Tape)

B I am going to give evidence in court tomorrow morning There will be our attorneys and the other party's attorneys. Therefore we want to have a talk with you this evening

A Hum ² *O.K*

B What kind of weakness do you think we have? When I appeared in court last time, the other party's attorneys always wanted to delay their interrogation to you to the very last moment I think they must try to find your weakness

A. They also want to hold you back at the same time.

B: Yes. Therefore I insisted that there should be no delay as I would appear in the court on Tuesday, right? Now let's have a discussion. There are several major issues. One is that you heard Jiaufei said in the room of Henrik: "Shall we forge certain false documents . . . " thus to delay [matters]?

¹I learned his name when B calls him towards the end of this conversation.

²This is a pet phrase of A, it seems he uses this term to cover up his hesitation in answering and to imply "yes" sometimes.

A: That is what Henrik said.

B: That is what Henrik said?

C: Elder Brother,³ that was said in that room that evening. I was also present and I heard [Jiaufei said] it as well.

A: Well, your opinion is different from mine. The two of them were talking together face to face. The Chairman of the Board [COB hereafter] said that a new factory was going to build and she⁴ was worrying about the possibility that there might be no products for several months. Henrik said that they could just continue to supply products until we had got ours. The COB said that it was impossible that there would be products that quick, that the new factory could not produce products very soon. Henrik said that we had to supply products, but the COB said: “We do not have a contract and we will not supply products.” That is what the COB said.

B: So Jiaufei also said that we did not have a contract?

A: They just will not supply products. Do you have a contract with them? I forget who said that, however, “no contract” was mentioned at that time. Then Henrik said: “Let us write a contract, you sign it, and the date should be a date in the past.”

B: Manager Hu, you may keep your opinion steady and don’t say that you cannot remember who said what, is that all right? It is very important since you were present.

C: Did Jiaufei hear what Henrik said?

³C uses this term to address A. However, “elder brother” may not mean the biological elder brother and can usually be employed as a respectful term to someone who is elder than the speaker. Therefore it is difficult to say whether A has any blood relationship with C.

⁴“He” and “she” have the same pronunciation in Mandarin, therefore it is difficult to ascertain the gender.

A: I am not sure whether she heard of it or not

B: There is another issue, Jiaufei said that she would ask other factories to produce the products. Was that in the evening of the first day or the second day?

A: Ask Sara. We were all crowded in Henrik's room in the evening of either the first or the second day.

C: It was the first evening.

A: Was it?

C: Yes, I know [it was the first evening].

B: Didn't we all go out to have dinner in the first evening?

C: Then it was the second evening.

B: The first evening of the meeting was on 19th October 19, US time.

A: We arrived there in the evening of [October] 18.

B: We took you to the restaurant to have dinner and then went back to the hotel. That was all what we did that evening.

The meeting was formally held on 19. You talked about asking other factories to produce the products in the evening of 19. How could you call our accountant in daytime that day?

A: Right at the meeting, right at the meeting.

B: She called the accountant that evening?

A: It seems that the accountant called during the meeting, right?

C: I remember that it was the accountant who called first. There were several calls between them after that.

A: The first call was made by the accountant, Henrik answered the phone and then gave the

phone set to the COB

B The accountant called before we knew about that

C I think they already knew before we did

B They had already called each other?

C It was the accountant who called first

B O K

A The accountant called Henrik's room, therefore she must have discussed this issue with the accountant before we met in the evening

B Hum, good

A I will say that I did not know who called but the COB said herself "It is your accountant "

B Hum; his name is Gilbert Lin

A O K

C [Unclear words]

B She also mentioned the name She mentioned it recently It is Gilbert Lin, isn't it?

We have to take two actions First, you heard that Henrik talked about forging some false documents, it was not Jiaufei who said that, right?

A: [hesitatingly] Hum, honestly . . .

B: You don't remember?

A: I cannot remember it clearly. But the date was mentioned and it was Henrik who suggested to use a date in the past. That was suggested by Henrik, saying: "We will write out a document, and you, the COB, sign it."

B: That shows that the two of them found it difficult to handle that issue.

A: The COB said: “Perhaps Hwa Chang [Hua Zhang]⁵ will not let me be the COB, therefore it will be invalid even if I sign.” Henrik then said: “You fill in a date in the past, you were still the COB at that time.”\

B: Can you speak out all these [details]?

A: Hum.

B: You have to speak out in a definite way. Don’t say you don’t remember who said what. The evidence will sound weak [if you say that].

C: We have to make a definite charge against someone.

A: [laughing] Good, about this . . .

C: We have to make decision to make a definite charge against someone.

A: It was Henrik.

B: You mean that it was Henrik who said: “Let us prepare some false documents?”

C: You insist that it was Henrik. I will say that Henrik said that when I was giving evidence.

B: I think we had better make a definite charge against Jiaufei. We assert that Jiaufei said that they would forge a false document. Which one will serve our purpose better?

C: Jiaufei [unclear words]. She is in Hong Kong [unclear words].

B: But everyone knows what that means.

C: [Unclear words].

A: Is Taiwan the only place that produces this product?

⁵There are two different spellings for Chinese person or place names, one is the Taiwanese, and the other the Mainland *pinyin*. I usually put both in this translation, the first is the Taiwanese spelling since this involves chiefly Taiwanese people and the one in the square brackets the Mainland one. Those names that I have checked with Mr. David Hill, like Jiaufei and Zhang Rui-kang, have just one form of spelling.

C Republic of Korea also produces it

A Republic of Korea?

C Hong Kong also produces it, just we [unclear words]

B [Laughing] About Hong Kong, it is just a piece of paper on which Jiaufei wrote something but without Manager Tzu's [Zi] signature and it rules what kind of rights the Hong Kong company has. Manager Hu, there is also a similar statement for the company in the Philippines, ruling the rights that the company in the Philippines will enjoy. There is not a signature of yours therein either. She said that she could not find both of you to sign but other people signed.

A Words are *spreading* in the Philippines these days that the products from Utah will arrive in the Philippines in February. I don't know how can she be that sure. Whether she wants to grab the products that we prepared.

B Is that so?

A [To grab our products] *legal*'

B She may take over the company in the Philippines that you are in charge of now?

A They spread words that no other companies enjoy the right to buy this product. If it happens, the company in the Philippines can detain [the products].

B. She said something to that effect about the company in Hong Kong.

Manager Hu, it does not matter. *O.K.*, let's change the topic, do you have a real good attorney in the Philippines?

A: I have to ask around. It depends on which sort of attorneys, what kind of cases and/or laws they are good at.

C Elder Brother, you may ask around. When we talk to an attorney in Hong Kong today, we

learn that there is a law in Hong Kong that small shareholders can [unclear words]. She kicked me out, therefore as a small shareholder, I can demand an inventory of the assets. I met with [unclear words] in Hong Kong who said that it was difficult to demand an inventory, but if it is a partner business and one partner is kicked out then this partner can ask for an inventory.

A: If she does not kick you out?

C: She has already kicked me out. I am no longer a Director of the Board.

A: *O.K.* Do we have the right to ask for an inventory in the Philippines if she does not take any action?

C: You have to consult with a Philippine attorney. Every country may have different laws. There is such a law in Hong Kong. We have to make researches with our attorneys.

A: Hum, hum.

C: This is a means of action. You have not started there, it is fairly simple, if [you] adopt this means . . .

B: We will sue her first.

C: To make the business close down.

B: Small shareholders can sue the company in US.

A: Small shareholders can sue the company in US? Under what kind of circumstances can they sue the company?

B: They can sue the company. They can demand the disbanding of the company.

C: [Unclear words].

B: The rights that I have now are not those of a small shareholder, therefore I cannot take this means. Understand?

A: Hum, hum.

B: I have certain rights so that I cannot sue her. If I become a small shareholder and I am deprived of my rights, I will have the right to demand the disbanding of the company. You understand? Jiaufei knows clearly she cannot win whatever she may try to do.

A: Hum, hum.

B: For the time being I will not take this means of course [Unclear words]. I guess that there are similar laws in the Philippines. When one makes money, one can take over all the shares of small shareholders? There may be certain laws to protect the small shareholders in the Philippines.

A: Hum, hum. O.K.

C: You ask around.

B: If you are united with Hung Chang [Hong Zhang] your power will not be that small. You ask around and I think we shall take the action first. The company you established in the Philippines is still under other people's name, right?

A: Yes.

B: Good. She will ask you what kind of profit can you get in the future.

A: *Legally* I don't have any relationship with this company. I will not give full detail of my relationship with Chang under the excuse that it does not involve this case. The only problem is that I afford money to *support* this company, but I can say that I lent money to this company.

B: As a matter of fact, they may ask you about whether your name is associated with this company or is there any evidence that you *support* this company?

A: Bank's *account*. I gave a *personal check* and deposited it in this company's *account* when it was established.

B You think they know about this company?

A They should They can get information concerned They can get the information from either the governmental institutions or public health ones I know they went to the public health institution to inquire whether there are people who apply for the *license* of *Exel*,⁶ and the public health institution replied very soon that there was such a unit with its address and that it was applying for the *license* of the [unclear words] *product*

C This is a case in US and they will make investigation in the Philippines?

B It is possible They are trying their best to handle this issue

A They are trying their best to cause trouble

B Yes, they are trying their best, maybe

C It does not have any legal relationship with this company

A You are right, it does not have

C Since it does not have any legal relationship with this company, we don't need talk about the second issue

B You talk little when the other party's attorney is asking you questions

A Hum Could I ask who is the remitter of the other party?

B. It is my aunt.

A: They are saying that we find that there is a sum remitted to your account in Taiwan

B: It is very difficult to check your residence registration [in Taiwan] It is not that easy to check a personal residence registration, not that simple, right?

A: This, this .

⁶I am not sure whether this is the correct spelling of this company

B I can give you the residence registration if you need It is my aunt

A I hope nothing will happen But I have to be prepared for the worst

B I hope there will be counter-attack in US as soon as possible I will countercharge her, and that will be enough I will bring both a civil and a criminal lawsuit against her and then we can be safe and sound

A O K

B She asked you where did the money of this company come from, right? Did you *support* this company?

A It was just my *personal check* deposited in this company's *account*

C Was it a *check* with your own name?

A Yes, yes, yes

B Do you think they can find it out?

C I think they w "

A They will find it out There is not the concept of "laws" in the Philippines For example, if you are familiar with the bank, my manager for financial affairs can let the bank convert my US dollars into pesos and *transfer* it to my *account* without my *signature*. These things can be done when people are friends, in other words

C: [Unclear words].

A: [Unclear words].

C: [Unclear words].

A: I intend to say it that way.

B Suppose you are asked, you can say you lent this sum of money to your friend.

A: Yes. It was just a loan between friends. This should not be considered as illegal although it may be called in question. However, I don't think there will be many legal questions that associate this with this case.

B: It is all right. Let's do it this way.

A: Yes, let's do it this way.

B: I think they are trying to find out something as she always wants to delay your [unclear words, could be "evidence" or "testimony"]

A: I think they are afraid.

B: They want to delay but I won't let them do that. It is because delay may cause many [unclear words]

A: Hum, hum.

B: What else do you think they will ask us?

A: You mean the other party will ask us?

B: They may ask why you quit [the company]?

A: Many people know that Ruikang Zhang wanted to transfer me from the Philippines to Thailand and I must *follow* my boss's *instruction*. It is as simple as that.

B: So you have formally *resigned*?

A: *Resign* is *verbally*.⁷ It was in Malaysia. *Verbally*, a verbal resignation. There was no written resignation at all. Hence, as a matter of fact, I am still the *President* of this company, *legally*.

C: [President of the company in] Thailand?

⁷This line is not in good grammar but I translated according to the text, especially A uses two English words in this short line.

A: [President of the company in] the Philippines.

C: Why?

A: Because I have been the President of the company there since the very beginning. If you want to change the *President*, you have to call a *Board of Directors Meeting* and get the agreement of the majority of directors. They called a meeting in Singapore and intentionally mentioned the increase of number of directors. Thus they can change my President's quota from 2/5 [two fifths] to 2/7 [two sevenths] and then they will enjoy the power to appoint a new President.

B: Let me tell you, why. I saw Julie's letter, she wondered how she would become a director.

A: I did not see that letter, but that was carried at the meeting in Singapore.

C: The meeting was already held?

A: Already held. ten

C: Is there the minutes of the meeting?

A: I did not see it. The attorney should give it to me but he has not.

B: They did not give it to you intentionally?

A: Yes, intentionally. But I learn that Andrew refused to be the General Manager⁸ in the Philippines.

B: Who?

A: Andrew. He talked to Sara on the phone.

B: [Unclear words].

A: [Laughing].

B: Didn't I show you at noon?

⁸Sic. According to the context, this seems to be "President."

C: I know.

A: What is the date [of this meeting]?

B: It was faxed to me on January 19

A: Why was it faxed to you?

B: They urged me to give products

C: What is your address in the Philippines. It seems that they will sue [you] in the Philippines

A: Hum. They want to lay their own fault on somebody else's door. They will forge a false document for certain.

B: They will forge a false document for certain

A: Then they have to wait until the legal procedures come into force, until they appoint a new President. A false document must have a date in the past.

C: It cannot work. They may use a [unclear words] in Hong Kong

B: I can fax it to you to let you read it.

C: It will be a letter of authorization instead of a contract. A contract requires your signature

A: Yes. There was a signed one to the company in the Philippines and it says that the head company can *terminate* [it] whenever it wants.

B: Do you have the original?

A: Yes, yes.

C: You have it?

A: It is kept by Sara.

C: I know about that copy.

B: It will take too much time to mail the original that Sara keeps here. Can you give me a

copy? Suppose there is the need of delay we can delay it

C It requires that Hwa Chang gives a *terminate announcement* ⁹

B She will forge something I have to sue them as soon as possible

C Yes

A I gave considerations to that Sara says that it is not of much use I want to ask Chang to sign a *termination of associate rights* ¹⁰

C Where is he *local*¹¹ of the Philippines?

A *Local*? The head company has already employed an attorney to handle this

B Yes I already employed an attorney but I have not contacted him for a few days

A Yes It involves the patent

C Was it there in the past?

A It was not We applied for it and the application was handed in in 1999 but it will take a few years time [to get the approval] If the head company has *patent right* in US, our application will then be filed as the first priority for approval No one has it now

C I have an idea They don't have any rights for them to use We can employ an attorney to sue them since they don't have any rights to use

A: The problem is that the American party does not get it in the Philippines either.

C: Is it necessary to get it? It will be all right if it is got in US.

A: [Unclear words] in US.

⁹Sic.

¹⁰Sic., the word "associate" is not clear and could be another word

¹¹Sic. As I mentioned before, the words in italics are spoken in English.

C It should be all right

A No You cannot hinder them in other countries The patent in Taiwan is the hands of Jiaufei You have to get *approval* separately in different countries

C Even if it is in your hands in either Hong Kong or Malaysia, US can still *deny* it [unclear words] In addition, there are business contacts [unclear words] The shares in Taiwan [unclear words] I think the laws in the Philippines should be the same as those in US

A Hum, hum

C You can ask your attorney, even though I have not accomplished the registration [unclear words]

A O K I will ask about it

C Let's defame their shop sign [or brand name] Do you think it is of any use?

A To defame their shop sign they don't have any products to sell now

C [Unclear words] We have to seize the initiative We should not let them sue us Therefore we will sue them first so that they cannot sue us

A She can still sue us This action, this issue involving the patent right, whether we do it or not the development of this case well, could have a try

B: We have to seize the initiative, understand?

A: Hum, hum.

C: Does [the company in] the Philippines owe money to US?

A: I don't know after I quit.

B: Did it owe money to US before your quit?

A. When I quit . . . it seemed that what should be paid was paid. You remember, at the

meeting in Singapore, I knew that they would find fault with me, therefore I paid all what should be paid as quickly as possible. It was in September. We did not order any products in October. I don't know whether they ordered products after that or whether the payment for goods was paid or not. The company in the Philippines was not in debt in September.

B: Is that so?

C: O.K. the *Office Building* was bought in whose name?

A: Best Well.

C: Best Well? We [unclear words]

A: I have no idea. This is a company they established in Hong Kong. Both Best Well and an Extra Exel¹² are in Hong Kong.

B: [Unclear words].

A: I guess her practice is not to register with our name. It is because there has never been any signed documents. It is not her style of working to let it be registered with our name.

B: Then about that *building*, we have just a little . . .

A: Status of rights. The Exel paid for Best Well to buy this company, therefore this sum of money should be account payable to *Best Well*.

C: You mean . . .

A: Now the company in the Philippines owned by Exel, a titular branch company, bought it in the name of Best Well, but it is the present company that paid. I was called names by them at that time. You see, the money was paid by Exel, but Best Well owed it to the present company in the Philippines.

¹²I am not sure whether the spelling is correct.

C Elder Brother, the money was transferred to another company and then another company bought it, do Philippine laws have any articles against that?

A It did not pay and it has never even collected the rent It was empty all the time Therefore you can say that they borrowed the *office*

C Yes What was the whole process?

A The whole process

C The whole process was the present branch company in the Philippines lent [money] to Best Well, Best Well bought this building and then this building was given to the company in the Philippine for use

A Theoretically, it cannot be considered as a defect of law, it can only be considered as a defect in accounts [I don't know] whether Best Well asked for rent from Exel There was no substantial contracts or agreements about the loan or lease relationship between the two companies, no contracts or agreements to rule how you will pay me back the money I lend to you now, or how you will pay me for the building I let you use

C: *O.K.* Elder Brother, do you think there is any very heavy blow for us to deal at the present company in the Philippines?

A: Hum, a very heavy blow . . .

B: Can you have a serious consultation with a Philippine attorney?

A: The attorney is being hired by them now. They hire him.

B: Any other attorneys?

A We paid money to the account in Hong Kong in the past. Perhaps the head company in US ruled that the payment for goods should be paid to the account of the head company in US. I paid

attention to this. We always paid money to Hong Kong, whether the money was transferred to the account of the head company in US, this is the first [important] point.

A. The money was not transferred to the head company in US

C. How can it involve you?

A. We have the record since we pay all our payments through the bank

C. But you were the President at that time?

A. Chairman, chairmn.

PART II (On the Reverse Side of the Tape)

A. . . . also the representatives of the company

Then C interrupted with a question that cannot be heard clearly.

A. . . .No. I mean, I can only say that in Ravel¹³ Dr. Chen gave me instructions to remit my payment for goods here. Why so much money should be paid since there were no sales, it must be payment for goods.

B. I want to ask how can you know where to remit the money correctly?

A. She asked to me to remit money here.

B. I want to ask whether you have her e-mail to you?

A. *Wow*, I don't know whether it can still be found. It is difficult to find it. The account to which the money was remitted must be one existed more than two years ago, two to three years.

B. Do you still have Jiaufei's e-mails?

A. Some of them, not all of them.

¹³It seems a place name or a company name. I am not sure about the spelling.

B You go back to check whether there are certain e-mails that have problems

A Hum, hum *O.K*

B If you put the e-mails in a disk and give it to me, I will examine it carefully and see whether there are any problems about my tax and I can sue her with it You understand?

A Hum, hum

B She also said that she would *confirm* you whether the money was received or not, right?

A Yes, hum

B I want this evidence

A Hum, hum However, if it involves the record in the past of the company in the Philippines, the *value of invoice, undervalue or overvalue*, it will be fairly troublesome to check, and the company in the Philippines will also have problems

B It does not matter since the old company of yours in the Philippines did not exist

A It was me at that time Why *value of invoice is equal to the actual cost*, that is an issue between the buying and selling parties

B Then you should see you are a small shareholder and whether you can work out some ways to sue the old company in the Philippines. We must seize the initiative

A: *O.K.* Is there anything in the old company in Hong Kong that can be used to sue and win the case?

C: Yes. I am glad that the attorney says that we shareholders can unite and ask for an inventory of the assets. But mine plus yours is twenty-four, then plus Fang Chao's will be 32 and these can exert great influence. But I don't know whether Fang Chao will agree [to work with us] or not. You understand?

A: He¹⁴ may not agree to have an inventory of assets. It will ill affect Jiaofei much.

C: It is hard to say. Maybe he does not want to use his name, then he can transfer the ownership of his shares and trust to me.

A: Now trust and the power that it required in the past . . .

C No I need the trust and the transfer of ownership as I want to take action. I am not referring to the past, there was not much difference then. I will ask my attorney whether twenty-four is enough or not. If it is enough, I will take action with twenty-four.

A: I am very glad to take this action.

C: We take action and then make it close down. It will make everyone happy.

B: Is there any way to involve the Philippines . . .

A: I will do it right away. But with what reason we will ask her to make an inventory or close down?

C: Because she wants to kick me out.

A: Kick you out of . . . ?

C: Kick me out of the Board of Directors.

A: Kick you out of the Board of Directors . . .

C: I will ask the attorney about the details.

A: You enjoy the right to make an inventory because you are kicked out of the Board?

C: Yes, because she kicked me out. It is a partnership and a partner cannot be kicked out.

A: You are still the *shareholder*. It just involves a new election of the Board, right? You still have your shares.

¹⁴It may mean Fang Chao.

C O.K. I have to ask my attorney about the details

A It does not involve the rights of shareholders in principle

B The practice in US is that small shareholders can ask for, for example

C But there must be certain reasons, not every small shareholder can ask for an inventory, right? Listed companies have such problems quite often

A When there is something that infringe upon the rights of shareholders, it is adequate to take action, in other words

B She does not give money to you for your shares now, right?

A Hum But legally she does not need give me money The company still exists, and will continue its business The company is just to change its productions either now or in the future, or something like that And the majority of shareholders agree to it

C It does not matter We don't agree

A. Therefore it depends on whether the agreement of the majority of shareholders counts

B You give [there are some words here that are not clear] to me

A Who?

B: Well, it does not matter. Hi, Manager Hu, we have spent much time this evening. You work out some way for our action. To consult with an attorney. We must seize the initiative.

A: O.K. Good, good, good, good.

B: Manager Hu still belongs to the old company?

A: Yes.

B: Still belong to the old company. Suing this new company, Manager Hu may say: "I don't have any contract. I don't have it at all." I may propose counter-evidence. It is possible that he has

not sued yet.

A: Hum, hum. I am still a Director of Board of the old company. Peter, Barry and I are the on the Board of the old company.

C: Is that right? [A laughs] The decision of Board depends on shares or quorum?

A: It is the same. Directors are elected according to the shares. Alex and I have 40% of the shares, therefore we have the right to elect two directors and they are Barry and me

C: Hello, hello, Yayuan has any opinion?

A: Yayuan agrees to let Barry and me be on the Board. Yayuan is on our side and Yayuan agrees that Barry and Richard be on the Board. Barry is now the responsible person of Excellent Essential.

[C is explaining something to B but the words are not clear]

B: Then he may be sued because he has shares in the old company . . .

A: There will be disputes. I am a natural person, do I have the right to invest in other companies?

C: I will ask my attorney first. I think you should first ask about it and it will be of help to what will happen afterwards. I did not ask about the details clearly when I was in Hong Kong, therefore . . .

A: It is because I asked about it. He said unless you first declare that you give up the position of director in the present company . . .

C: Can the seat of the director in the present company be *transferred* to another person?

A: It is possible . . .

C: I think you should *transfer* it first, then it will be beyond dispute.

B: What about *transfer* it to Yayuan?

C: I discussed this with him [or her] a few days ago. I wanted to see he would not carry a dispute about the new company.

A: *Transfer* it to Jason?

C: Jason also *runs* a new company.

A: I don't know whether there are such concepts about ordinary shares.

C: I asked an attorney in the Philippines. I think you can transfer [yours] to Jason to "fire a gun"¹⁵ at a meeting.

A: Hum, hum.

B: What about Barry? He and the present directors.

C: There must be some problems with Barry.

A: There must be some problems with Barry, if that is the case.

C: We will let another one "fire a gun" at every meeting.

B: Is there any way to transfer and solve this problem?

A: There must be a way to transfer, it will be all right as long as you are willing to go into action, right?

C: Then there will be the trouble of re-voting and re-election. Is it all right if he [or she] simply signs?

A: I will ask the attorney.

C: We will let a director transfer it to Jason at a meeting. Then we will find another director.

A: Hum, hum.

¹⁵Meaning to "attack someone verbally."

B: Is there anyone that you can trust?

A: A trustworthy person can be found for certain. But I think the motive that I want to keep this director is that whenever the Board meetings are called and they want to make any *decision*, then we can *involve*. This person must understand our situation. *Jason* is a quite good candidate.

B: There are laws in US ruling that one must be loyal to the company if one is a director in this country. It is forbidden to establish another company to compete [against the company where one is a director]. There are such laws in US. Hence there may be problems with Barry.

C: Barry should be evacuated.

A: Hum, hum. *O.K.*

B: Barry should be evacuated as soon as possible or the new company should be transferred to another person. We cannot use Barry.

A: *O.K.*

B: [says something the words of which are not clear.]

C: Will Barry “fire a gun” at a meeting?

A: Not likely. He does not adopt that sort of attitude.

C: As a shareholder, what sort of attitude should he have?

A: It is because we have huge debt of blood against them and Barry does not have that [laughing].

B: Barry may be transferred to another company and let another person take his place of director.

A: Hum. I will give considerations to *transfer* to another person.

B: I think there will be problems. It is forbidden according to US laws, no competitive

company should be established.

A: Hum.

B: Also I fear that Barry will be sued. Barry will be sued because of the new company

A: It will be quick to *transfer*. We will ask Barry to sign something, saying that he is willing to give up his shares in the original company and the capacity of director.

B: Or to put himself off?

A: What?

C: To do it in advance or to put it off?

B: To put it off thus to let him give it up in advance. I guess that they already know about Essential.

A: They don't have any facts with which to sue [us]. We have not got the products yet and we have not sold them. It can be quick to declare giving up, then he can say, according to law, that he has already declare to give it up or *transfer* to someone else.

B: I fear that they will say that this new company is established before the system is changed

C: No, no.

A: It [this company] does not engage in any business after its establishment. I just think that *maybe* Jiaufei Chen's products should be considered.

B: To give considerations to import products that does not have any relationship with those of hers.

A: Yes, yes. We can register those items of business but we have not done anything, right? There will be no evidence with which I will be sued. I have this company but I have not done anything that violates [the law].

B: Hum. Suppose it is to give up, it seems safer to put it off a little bit.

A: Hum.

C: Suppose we establish another new company now.

A: For what purpose?

C: All the problems can get a package solvation.

A: Hum. You mean to be in charge of import . . .

B: We send those products out to handle them.

C: Ah.

A: [Heaving a sigh] Unless Barry gives up all shares in this new company. Suppose he gives them up very soon, then when the other party sues [us], he can say: "I was not involved in it long ago."

C: That is true. Then can you find another person?

A: Yes, that . . .

C: Then let's do this, give up the new company's . . .

A: Give up the capacity of the responsible person, and the capacity of shareholder.

C: Yes. It should be done this way.

B: It could be done? Thus we won't [words cannot be understood]. We have to find someone else . Please ask around as soon as possible if there is the opportunity.

We have to consult with an attorney to see what we can sue the old company, is that all right?

A: Hum, hum. *O.K.*

B: Manager Hu, you had better have some rest, have some sleep. We will call you tomorrow morning, what will be your time then?

C How can he go to sleep?

A Three o'clock I am usually quite clear-headed at that time

B Really?

A There should be a trap set painstakingly [laughing]

B When you ask the attorney

A Do you think I can refuse to answer since [his questions] do not involve this case?

B Hum Or you can say "*I don't know*" You say "I don't know" or you say when you are not willing to answer "I don't remember now" It means that you may remember it later, you understand me? Is that right? You don't remember it now, but you may remember it later

A Hum I can say I remember it afterwards

B Do you see my point?

A O.K.

B I don't want to let them practice their delaying tactics It is because I know what they are trying to ferret out Suppose she is going to contact you, can the phone at your home show who makes the call?

A: Hum . . . it cannot show. Suppose it is in Taiwan, well, I am not in Taiwan, generally speaking. It seems that all *International* calls cannot be *shown* by my phone.

B: Sometimes my colleagues in Taiwan will call my mobile phone and it will show.

C: Some can.

B: Yes, some can, some cannot. It does not matter. It will be difficult for them to find you if you are not in Taiwan.

C: Or you can let your wife answer the phone thus to see who makes the call.

A: What if I answer the call myself?

C: What if . . .

B: If it is you who answer the call, you can say: "I will contact you."

C: If it is you who answer the call, you can say: "Sorry, I don't understand you. Bye."

A: [laughing]. B: [laughing].

A: I will say: "I don't understand as my English is poor." Let's see what will be their move, and it can always be countered by another.

B: Good, good, good. We have been terribly busy these days. I am very angry and I must countercharge her. I meet with my attorney and I will try my best to sue Jiaufei.

C: We must sue her and make her badly battered.

B: I want to sue her abroad. I am still working out some way.

C: She has to attend the court every week, thus she cannot go away.

B: It will not be that way when we sue her.

A: She does not need appear in court.

B: No. I don't need appear in court when I sue her.

A: Hum.

C: The problem is that there are two defendants. Will there be so much time [for them] to appear in court?

B: No. That is why I must countercharge her.

A: Hum, thus she has to appear in court.

B: Jiaufei must appear in court. We must keep her busy. That is my motive to countercharge her. We have to fight against her. The more charges we bring against her the better. I am looking for

a good attorney. You can bring a lawsuit against her if you find a good attorney in the Philippines.

We will sue her right away. I could not do anything the whole past week.

A: [laughing].

B: She is really troublesome.

A: [laughing] I think she has nothing else to do.

C: She has nothing else to do? Why should she not engage in getting new products?

A: How can she get new products? I think she just cannot get any new products. I guess there is some problem with the new products. You see, she told people that there would be new products and asked them to wait for a while. That was her strategy. Now the new products cannot be brought forth and she has to divert people's attention. She said that she would go back to US to get back her own rights, therefore she would go back when the American products were produced. She wants to divert people's attention. She says to people. "US, and not me, should be blamed. Sorry I cannot keep my promise. There is nothing now."

B: I worry whether she will hold us back in US and produce products in Malaysia at the same time.

A: That is possible, hum.

B: All right. Tzuchin,¹⁶ do you have anything else to say. Vice Manager, do you have anything that you want to discuss with us?

C: *A schedule, a schedule.* After the New Year [we] will go . . .

A: To their country. Wait a minute, I have to appear in court on February 1 and 2 after the New Year.

¹⁶This seems to be the name of C.

A: Hum, hum.

C: Have to appear in court in Hong Kong.

B: It does not matter. I will discuss this with you.

C: Richard,¹⁷ Can you contact Hung Chao? I don't know how you can put this in words to him. You may ask him to give to you his eight *percent* in Hong Kong.

A: Hum. There is still the trust that should be returned to him?

C: That is all right. The company in Hong Kong is good for fighting [lawsuit] only. Either he or we cannot get anything back. Therefore whether he gives it to you or not will not cause him any personal loss.

A: Hung Chao is still keeping his neutral stand, perhaps he still has one gleam of hope.

C: It is O.K. if he does not act since he wants to keep his neutral stand. But he has to transfer the ownership of shares. Thus we can have thirty-two *in total*. Do you think this could be done?

A: I don't think he is willing to transfer, but I will suggest this to him. I think he will not agree. If he transfers the ownership of shares, the other party knows that he intentionally lets us have a better opportunity to fight [to win]. Then he will be labeled as one on our side.

C: What if he is labeled [as one on our side] in his present capacity and present situation?

A: He made it clear when in Taiwan. However, I will suggest this to him. But I guess he will not agree.

C: What he is labeled [as one on our side]? He will get killed?

A: He will not get as much gains after that.

C: What kind of gains can he have?

¹⁷This is the name of the Vice Manager.

A: I don't know. He is still a shareholder in Hong Kong. Perhaps he can make some money there.

C: It is impossible to make money in Hong Kong.

A: Who knows whether it is possible or not. He does not have the same determination as we do.

C: That is true.

A: I will give considerations to this and I will suggest it to him.

C: That is O.K. You may suggest to him or not. If you are to suggest it to him, you have to be fairly sure of success. It will not do any good if he turns down your suggestion.

A: Hum.

C: You may make some analysis and sound him out indirectly. I will ask the attorney tomorrow whether it is enough as it will twenty-four with mine plus yours.

A: Is twenty-four enough with yours plus mine? You have sixteen.

C: I have sixteen and you have eight.

B: Both of you have twenty-four altogether. It should be O.K. [The children made a loud noise and "O.K." is not very clear.]

A: All right.

B: All right. You can still have some rest?

A: Be rest assured. I am very clear-headed at midnight.

B: Good. We need insist that it was either Henrik or Jiaufei who said that they fabricated false documents.

A: Jiaufei will go to prison if we say she fabricated false documents.

B But she did make a false documents with Huanch'ing¹⁸ Lee

A. Hum

B Shall we say that Jiaufei said that or we should fabricate a false document?

A The other party will deny for certain if you say so

B Hum?

A The other party will deny for certain.\

B Jiaufei will deny, of course But we have someone who overheard it, therefore is that right?

A Everyone will feel happy if Henrik goes to prison. But if Jiaufei goes to prison, there may be many gentlemen who won't forgive [us]

B Ah, let me tell you that, if Jiaufei goes to prison, it is not because of false documents, it is because . . . [Then C interrupts but his words are not clear] of tax.

A. [laughing].

B Therefore if Jiaufei goes to prison, it is

A: She who entraps herself

B: There are civil and criminal lawsuits in US. One who fabricates false documents will not go to prison in a civil lawsuit.

C: Are you sure about that?

B: Yes, I am sure. A civil lawsuit is not grave.

A: I know that fabricating false documents is deceiving and a felony.

B: Jiaufei will not go to prison because of that. Her problem is tax. I will bring both a civil and

¹⁸The spelling could be either "ch'ing" or "ch'in".

L

criminal lawsuits against her at the same time. Only when I do that we can protect ourselves. You see, I have not done anything in the past week. What about our enterprise? And you are also being sued. Our good business was at a mess in one day's time [by that]. We have some [the words cannot be heard clearly here]. The attorney comes to us and we have to make a great deal of preparations. We have to make our move first. As a matter of fact, Jiaufei has already made her move first, we have to retrieve ourselves from an inferior position.

Tab K

MRC

11
277

inconsistent
incomplete
obstruction/subornation
(substantially the same)

Hwa (JH)
ard Hu (RH)
Tzu (ST)
ei (JF)

(Beginning)

Hello.

Hi, Manager Hu?

Yes.

Hi, Is this Manager Hu? This is Jau-Hwa. I am with Manager Tzu now. You know we are going to testify tomorrow morning.

Uh-huh.

There will be our attorneys present tomorrow morning as well as the other party's attorneys. Therefore, I think we need to discuss in advance tonight.

Uh-hum. OK.

What kind of weak points do you think we have? During our last hearing...

Heh.

I noticed... Turn it louder. Hello.

Heh.

Oh, this is better. I noticed that the attorneys on Jau-Fei's side kept trying to postpone the time for questioning you to a later date.

Uh-huh.

I know their intent for postponing was to find your weak points.

They wanted to haul you too.

Right. Mainly... So I insisted that it not to be postponed. I insisted on that, because we are going to court again on Tuesday. Right?

M-hum.

So, let's discuss this a little bit. Mainly we have to say, several things. You heard what Jau-Fei said when she was in Hendrick's room. Right?

M-hum. M-hum.

She asked whether we wanted to make a false document and put an earlier date on it.

CONVERSATION

A is the Vice General Manager

B is the female

C is Tzufang¹

The italics show the English words that the parties use.

The words in the square brackets show the emotion of the speakers and what they imply

PART I (On One Side of the Tape)

B: I am going to give evidence in court tomorrow morning. There will be our attorneys and the other party's attorneys. Therefore we want to have a talk with you this evening.

A: Hum.² O.K.

B: What kind of weakness do you think we have? When I appeared in court last time, the other party's attorneys always wanted to delay their interrogation to you to the very last moment. I think they must try to find your weakness.

A: They also want to hold you back at the same time.

B: Yes. Therefore I insisted that there should be no delay as I would appear in the court on Tuesday, right? Now let's have a discussion. There are several major issues. One is that you heard Jiaufei said in the room of Henrik: "Shall we forge certain false documents . . ." thus to delay [matters]?

¹I learned his name when B calls him towards the end of this conversation.

²This is a not abrupt of A. It seems to be a not abrupt of A.

RH: No. It was Hendrick who said that.

JH: Hendrick said that?

RH: Right.

ST: Hey, big brother, did they say that in the room that night?

RH: Yeah.

ST: But, I was there and I didn't hear that.

RH: Well, everyone was talking at that time. As I said, they were talking face to face. The President kept talking about finding new factory and other factory, right? Then she was bothered by not having product supply for these several months. Then Hendrick said, "you could have Jau-Hwa provide the products until we have our own products." The president said, "It wouldn't be soon enough. It's impossible for the new factory to provide products so soon." She said, "Have her provide products, but we don't have a contract," the President said that, "she won't provide products."

JH: Jua-Fei did say "we don't have a contract." Didn't she?

RH: Yes.

RH: She then said, "Jau-Hwa would not provide products. Which one of you has a contract?" Ah.... I forgot who said that. I just heard that anyway. No one has a contract anyway. During that time, Hendrick said, "We could draw up a contract and then you could sign it. Just put an earlier date on it."

A: That is what Henrik said.

B: That is what Henrik said?

C: Elder Brother,³ that was said in that room that evening. I was also present and I [Jiaufei said] it as well.

A: Well, your opinion is different from mine. The two of them were talking together face to face. The Chairman of the Board [COB hereafter] said that a new factory was going to build and was worrying about the possibility that there might be no products for several months. Henrik said that they could just continue to supply products until we had got ours. The COB said that it was impossible that there would be products that quick, that the new factory could not produce products very soon. Henrik said that we had to supply products, but the COB said: "We do not have a contract and we will not supply products." That is what the COB said.

B: So Jiaufei also said that we did not have a contract?

A: They just will not supply products. Do you have a contract with them? I forget who said that, however, "no contract" was mentioned at that time. Then Henrik said: "Let us write a contract you sign it, and the date should be a date in the past."

³C use: this term to address A. However, "elder brother" may not mean the biological elder brother and can usually be employed as a respectful term to someone who is elder than the speaker. Therefore it is difficult to say whether A has any blood relationship with C.

"He" and "she" have the same pronunciation in Mandarin, therefore it is difficult to ascertain the gender.

JH: Manager Hu?

RH: Yes.

JH: Then let's do this... You, you, you just state this more firmly. Don't say you can't remember who said what. All right?

RH: Uh-huh.

JH: Ok. This is a key point.

ST: ~~Barry~~ was there at that time. Did he say anything?

RH: No. We were all just listening.

ST: Did ~~Barry~~ hear that conversation?

RH: I'm not sure whether he heard that or not.

JH: OK. Another matter. Jau-Fei talked about having other manufacturers produce products. Did she say that on the first day that you arrived? The first night, right?

RH: We need to ask Sam about this, OK? Was that the first night or the second night? We were all together in Hendrick's room, weren't we?

ST: The first night. The first night.

RH: The first night.

ST: That was on the first night.

JH: On the first night. We only went out and had the meal on the first night you arrived.

ST: Oh, no, then it's the second night. That's ... when we had our meeting.

JH: The first night for the meeting. That was the 19th. Manager Hu, it was the 19th then. That was October 19. American time.

RH: OK. We arrived on the 18th. What did we do on the evening of the 18th?

B: Manager Hu, you may keep your opinion steady and don't say that you cannot remember who said what, is that all right? It is very important since you were present.

C: Did Jiaufei hear what Henrik said?

A: I am not sure whether she heard of it or not.

B: There is another issue, Jiaufei said that she would ask other factories to produce products. Was that in the evening of the first day or the second day?

A: Ask Sara. We were all crowded in Henrik's room in the evening of either the first or second day.

C: It was the first evening.

A: Was it?

C: Yes, I know [it was the first evening].

B: Didn't we all go out to have dinner in the first evening?

C: Then it was the second evening.

B: The first evening of the meeting was on 19th. October 19, US time.

A: We arrived there in the evening of [October] 18.

JK: Right. On the evening of the 18th, (I) only took you all to the hotel after we finished our dinner at the restaurant.

RH: Uh-huh. OK.

JH: Then, we had a formal meeting on the 19th. Then it was the evening of the 19th that you guys said she kept talking about having other factory.... When did she call our accountant?

RH: Right then. Right then.

ST: In the evening.

JH: Right at that time in the evening she called our accountant. Correct?

RH: It seems like it was the accountant who called, right?

ST: I remember it was the account who made the call first. After that, the calls came back and forth.

RH: Right. The first call was from the accountant. Then Hendrick answered it and passed it on to the President.

ST: That's right.

JH: The accountant called? The account did not know about this matter at the time.

ST: No. In other words, they probably had discussed this before we (arrived).

JH: They must have talked on the phone.

ST: It was the accountant that made the call first.

JH: All right.

RH: The accountant even knew to call Hendrick's room. So that means before the President met with us that night, she must have discussed this with the accountant about this part.

JH: All right.

B: We took you to the restaurant to have dinner and then went back to the hotel. That was all what we did that evening.

The meeting was formally held on 19. You talked about asking other factories to produce the products in the evening of 19. How could you call our accountant in daytime that day?

A: Right at the meeting, right at the meeting.

B: She called the accountant that evening?

A: It seems that the accountant called during the meeting, right?

C: I remember that it was the accountant who called first. There were several calls between them after that.

A: The first call was made by the accountant, Henrik answered the phone and then gave the phone set to the COB.

B: The accountant called before we knew about that.

C: I think they already knew before we did.

B: They had already called each other?

C: It was the accountant who called first.

B: O K.

A: The accountant called Henrik's room, therefore she must have discussed this issue with the accountant before we met in the evening.

B: Hum, good.

RH: Of course. I will say I didn't know whom that call was from. It was the President who said, "It's your accountant."
 JH: Um-hum.
 JH: The accountant's name is Lynn Gilbert.
 RH: All right. OK.
 ST: That's right. She did say that.
 JH: She did say the name, didn't she?
 RH: Um-hum.
 JH: Manager Tzu said she did mention the name, Lynn Gilbert. Good. This is a point that we can make. These two points. The first point. She seems to have said...that...she... So, you remember Hendrick mentioned making a false document, and it's not Jau-Fei. Correct?
 RH: Uh... (thinking) frankly speaking..
 JH: You can't remember?
 RH: Not very clearly. But it was Hendrick's suggestion regarding putting an earlier date. Hendrick made that suggestion by saying, "Then we could write up a contract and that you could sign it." He suggested that to the President.
 JH: That means they have talked about that earlier.
 RH: The President said, "But Jau-Hwa doesn't want me to be the President any more. It would be invalid even if I do sign it." Hendrick then said, "You can put an earlier date on it. You were still in the President's position."

A: I will say that I did not know who called but the COB said herself: "It is your accountant."

B: Hum, his name is Gilbert Lin.

A: O.K.

C: [Unclear words].

B: She also mentioned the name. She mentioned it recently. It is Gilbert Lin, isn't it?

We have to take two actions. First, you heard that Henrik talked about forging some documents, it was not Jiaufei who said that, right?

A: [hesitatingly] Hum, honestly . . .

B: You don't remember?

A: I cannot remember it clearly. But the date was mentioned and it was Henrik who suggested to use a date in the past. That was suggested by Henrik, saying: "We will write out a document, you, the COE, sign it."

B: That shows that the two of them found it difficult to handle that issue.

A: The COB said: "Perhaps Hwa Chang [Hua Zhang]³ will not let me be the COB, therefore it will be invalid even if I sign." Henrik then said: "You fill in a date in the past, you were still COB at that time."

³There are two different spellings for Chinese person or place names, one is the Taiwanese, and the other the Mainland *pinyin*. I usually put both in this translation, the first is the Taiwanese spelling since this involves chiefly Taiwanese people and the one in the square brackets is the Mainland one. Those names that I have checked with Mr. David Hill, like Jiaufei and Zhang Rui-kang, have just one form of spelling.

JH: You say all this (testify), all right?
 RH: Hm...
 JH: Only say a little bit, but say it more firmly. Don't say you can't remember who said what. If so, the testimony will appear to be weak.
 ST: Sounds like you want to "harshly accuse" someone.
 JH: Um. Um.
 JH: OK. These two points then.
 ST: We have to agree in advance whom we want to "harshly accuse".
 RH: Hendrick.
 ST: OK.
 JH: You should say it was Hendrick who said "Let's make a false document," right?
 ST: You should accuse, you should accuse Hendrick. I mean when I testify, I will also say "Hendrick said that."
 RH: Hm... Hm...
 ST: All right? We will say Hendrick then.
 JH: Or should we accuse Jau-Fei, it's more... or should we say it was Jau-Fei that said, "Let's make a false document." Say we can not.... Which way do you think is better?

ST: If it were Jau-Fei who said that ... (not audible) But honestly speaking, if she said that in Hong Kong, but didn't say it clearly... (not audible)
 JH: But everyone knew what she meant.
 ST: What is your opinion, Richard?
 RH: Only Taiwan and Malaysia have such an agreement now. In Korea too.
 JH: In Korea too.
 ST: Hong Kong has it also now. Just without my signature.

B: Can you speak out all these [details]?

A: Hum.

B: You have to speak out in a definite way. Don't say you don't remember who said what.

The evidence will sound weak [if you say that].

C: We have to make a definite charge against someone.

A: [laughing] Good, about this ...

C: We have to make decision to make a definite charge against someone.

A: It was Henrik.

B: You mean that it was Henrik who said: "Let us prepare some false documents?"

C: You insist that it was Henrik. I will say that Henrik said that when I was giving evidence.

B: I think we had better make a definite charge against Jiaufei. We assert that Jiaufei said they would forge a false document. Which one will serve our purpose better?

C: Jiaufei [unclear words]. She is in Hong Kong [unclear words].

B: But everyone knows what that means.

C: [Unclear words].

A: Is Taiwan the only place that produces this product?

C: Republic of Korea also produces it.

A: Republic of Korea?

C: Hong Kong also produces it, just we [unclear words].

JH: Hong Kong has it also. It was just written (signed) by Jau-Fei herself. There is no Manager Tzu's signature. Jau-Fei wrote (signed) one authorizing the Hong Kong Company various rights. In fact, Manager Hu's Philippine Company also has it now. She authorized the Philippine Company various rights.

RH: Um-hum...

JH: She could not catch (get) you two together to sign. All other people have signed with her.

RH: Therefore, these two days in the Philippines, words are spreading that Excel Utah product will be arriving this coming February. Dr. Chen is coming to the Philippines in February too. I don't know why he/she was so sure to say that. Does that mean he/she can confiscate all of our products from the headquarters?

JH: Oh.... Is that right?

RH: Legally.

JH: He/she said he/she would confiscate all the products that you have now. Right?

RH: He/she didn't say that. He/she said other companies have no right to import E. Excel's products. If they imported the products, E. Excel Company, E. Excel Philippine Company can hold back the products.

JH: Oh, Is that right? By the same token, just like the way she is dealing with Hong Kong. It's the same. It's OK, Manager Hu. We are in this situation. Don't know you...OK. Let's change the subject. I don't know whether you know some good attorneys in the Philippines?

RH: Uh.... I can check that out. But it depends on their specialty. What kind of case and what kind of laws, right?

B: [Laughing] About Hong Kong, it is just a piece of paper on which Jiaufei wrote something but without Manager Tzu's [Zi] signature and it rules what kind of rights the Hong Kong company has. Manager Hu, there is also a similar statement for the company in the Philippines, ruling the rights that the company in the Philippines will enjoy, There is not a signature of yours there either. She said that she could not find both of you to sign but other people signed.

A: Words are *spreading* in the Philippines these days that the products from Utah will arrive in the Philippines in February. I don't know how can she be that sure. Whether she wants to grab the products that we prepared.

B: Is that so?

A: [To grab our products] *legally*.

B: She may take over the company in the Philippines that you are in charge of now?

A: They spread words that no other companies enjoy the right to buy this product. If it happens, the company in the Philippines can detain [the products].

B: She said something to that effect about the company in Hong Kong.

Manager Hu, it does not matter, *O.K.*, let's change the topic, do you have a real good attorney in the Philippines?

A: I have to ask around. It depends on which sort of attorneys, what kind of cases and/or law they are good at.

ST Hey, big brother
 RH Um
 ST You can go ask Because we just learned when we talked to our Hong Kong attorney today that there is a law in Hong Kong It was that a small stock shareholder may (not audible) When she kicked me out at that time Actually, for a small stock shareholder, that's illegal.
 RH Uh-huh
 ST Then this small shareholder can request to audit and close the company
 RH Why?
 ST That means, in Hong Kong, mine plus yours, plus Huang Jau Hong's (share) has a total of 32 percent. He said this is enough to make a request to audit and close the company It is said to be a partnership For a partnership, if there is a stock shareholder being kicked out, he shall have the right to make such request. *no counter part*
 RH Kicked out? What if you are not kicked out?
 ST He did kick me out I am not the General Manager any more.
 RH OK. But if it's in the Philippines, do we have the right to make a request to audit and close the company if they didn't take any action?
 ST You have to ask the attorneys in the Philippines about this Laws of different countries are probably different. I mean there is such a law in Hong Kong But for details we need to consult with attorneys. This is an approach to .. It is easier because you haven't started on your end Don't let her sue you if (you) have such an approach.
 RH Uh-huh
 JH We sue her first
 ST Make it closed

C Elder Brother, you may ask around When we talk to an attorney in Hong Kong today, we learn that there is a law in Hong Kong that small shareholders can [unclear words] She kicked me out, therefore as a small shareholder, I can demand an inventory of the assets I met with [unclear words] in Hong Kong who said that it was difficult to demand an inventory, but if it is a partnership business and one partner is kicked out then this partner can ask for an inventory

A If she does not kick you out?
 C She has already kicked me out I am no longer a Director of the Board
 A O K Do we have the right to ask for an inventory in the Philippines if she does not take any action?
 C You have to consult with a Philippine attorney Every country may have different laws
 There is such a law in Hong Kong We have to make researches with our attorneys
 A Hum, hum.
 C This is a means of action. You have not started there, it is fairly simple, if [you] adopt this means . . .
 B We will sue her first
 C To make the business close down.

JH: We have a law in the USA. A small stockholder may sue his company.
 RH: If the company does what?
 JH: The small stockholder may sue the company. Then he (she) can make a request to close down. This approach won't work because I am not a small stockholder now. We can not take this route. Do you know what I mean? My current status is considered to be a powerful position. Therefore I cannot sue the E. Excel USA company. But if I become a small stockholder, for example, if she takes my trust away, I will become a small stockholder. Then I will make a request to close the company down. Do you know what I mean? Therefore, Jau-Fei herself, in fact, also knows what she can do. She wouldn't be successful.
 ST: If she loses, she loses. If she wins, she still loses.
 JH: That's right. But I am not going to. At this point I certainly will not pursue this approach. Right? Of course, it because I asked so I know this point. I guess the Philippines may have a similar law. Otherwise, all small stockholders would be eaten up. The Philippines may have some laws to protect small stockholders.
 RH: Uh-huh. Uh-huh. OK.
 ST: Big brother. Please go find out.
 JH: About you. Adding yours and Zang Hong Zhi's together is not a small share. If you can go check it out I think we should act first. With our present situation, the company you established in the Philippines is still under someone else's name. Right?
 RH: Right.

B: Small shareholders can sue the company in US

A: Small shareholders can sue the company in US? Under what kind of circumstances can they sue the company?

B: They can sue the company. They can demand the disbanding of the company.

C: [Unclear words].

B: The rights that I have now are not those of a small shareholder, therefore I cannot take it means Under stand?

A: Hum, hum.

B: I have certain rights so that I cannot sue her. If I become a small shareholder and I deprived of my rights, I will have the right to demand the disbanding of the company. Y understand? Jiaufei knows clearly she cannot win whatever she may try to do.

A: Hum, hum.

B: For the time being I will not take this means of course. [Unclear words]. I guess that there are similar laws in the Philippines. When one makes money, one can take over all the shares of small shareholders. There may be certain laws to protect the small shareholders in the Philippines.

A: Hum, hum. O.K.

C: You ask around.

B: If you are united with Hung Chang [Hong Zhang] your power will not be that small. ask around and I think we shall take the action first. The company you established in the Philippines is still under other people's name, right?

A: Yes.

JH: Good. Then he will ask you whether Jau-Hwa gives you some kind of benefit, right?

RH: Legally, I have nothing to do with this company, right? I don't have to mention anything about the relationship between Jau-Hwa and I.

JH: Nothing.

RH: I don't have to mention this, right? It has nothing to do with this case. The only thing is that the money of this company is supported by me. I probably have to say I lent my money to that company or something.

JH: In fact, your money supports this company. If they ask you about you and this company, your name is not shown in this company anyway.

RH: Right, right, right.

JH: If your money supports this company, what evidence do they have?

RH: The bank account, because I drew a personal check. The money was sent to this company's account.

JH: Do you think they already know this company?

RH: They already know the name.

JH: They already know the name?

RH: It's very easy to get that. You can go to a government agency or a Health Department. I know they went to a Health Department and asked whether there was any one that applied for a license for E. Excel products. It's very easy to get the address of the company that applied for a license for the E. Excel Products from the Health Department. It's very easy to get that information.

ST: But the USA's case will...(not audible).

JH: I guess he/she may....

ST: Just giving you trouble.

JH: He/she was trying to do this. Maybe he/she...

ST: Because legally you have nothing to do with this company.

RH: Right. Legally we are not associated at all.

B: Good. She will ask you what kind of profit can you get in the future.

A: *Legally* I don't have any relationship with this company. I will not give full detail of my relationship with Chang under the excuse that it does not involve this case. The only problem is that I afford money to *support* this company, but I can say that I lent money to this company.

B: As a matter of a fact, they may ask you about whether your name is associated with this company or is there any evidence that you *support* this company?

A: Bark's account. I gave a *personal check* and deposited it in this company's *account* where it was established.

B: You think they know about this company?

A: They should. They can get information concerned. They can get the information from either the governmental institutions or public health ones. I know they went to the public health institution to inquire whether there are people who apply for the *license* of *Excel*,⁶ and the public health institution replied very soon that there was such a unit with its address and that it was apply for the *license* of the [unclear words] *product*.

C: This is a case in US and they will make investigation in the Philippines?

B: It is possible. They are trying their best to handle this issue.

A: They are trying their best to cause trouble.

B: Yes, they are trying their best, maybe...

C: It does not have any legal relationship with this company.

A: You are right. It does not have.

ST: You may say legally you have nothing to do with this company. And then you don't need to answer the rest of the questions.

RH: Um...

ST: If it's nothing to do with me then the second question need not be answered.

RH: Um

JH: If it's the other party's attorney questioning, then you talk less.

RH: Jau-Hwa, I would like to ask you now. Who wired the money to me? In case one day I am asked this question.

JH: The person is my aunt.

RH: Say, we found out someone wired some money from the USA to your account in Taiwan.

JH: This information is very difficult to obtain. Checking your personal account is not that easy. It's not me who wired money to your account. It's my aunt. Right?

RH: Um... I hope it won't happen. But just in case.

JH: Right. I'll be on the USA side... We need to hurry. Hurry to attack back. It's not enough for me to sue her with this. We need to sue her further. Now I probably will take both civil and criminal actions.

RH: OK.

JH: We can only do this to balance out. He asks you where the company's money was from, right? Did you support this company?

RH: It's a personal check to the company account.

ST: Does the check bear your name?

RH: Yes, yes.

C: Since it does not have any legal relationship with this company, we don't need talk about the second issue

B: You talk little when the other party's attorney is asking you questions.

A: Hum. Could I ask who is the remitter of the other party?

B: It is my aunt

A: They are saying that we find that there is a sum remitted to your account in Taiwan.

B: It is very difficult to check your residence registration [in Taiwan]. It is not that easy to check a personal residence registration, not that simple, right?

A: This, this

Residence Registration makes no sense

B: I can give you the residence registration if you need. It is my aunt.

A: I hope nothing will happen. But I have to be prepared for the worst.

B: I hope there will be counter-attack in US as soon as possible. I will countercharge her, and that will be enough. I will bring both a civil and a criminal lawsuit against her and then we can be safe and sound

A: O.K.

B: She asked you where did the money of this company come from, right? Did you support this company?

A: It was just my personal check deposited in this company's account.

C: Was it a check with your own name?

A: Yes, yes, yes

H: Can they obtain that?
 ST: Should be able to.
 RH: Should be able to obtain it. There is no confidentiality concept in the Philippines. If you know the bank, for instance, my financial manager could exchange my US Dollars to Pesos and then transfer to my account. He doesn't need my sign... signature. That means when we know each other well, then we can do such thing.
 ST: Richard, who are the stock shareholders (?? Not audible) of that company.
 RH: Paris... (not audible)

T: Then can we say Paris borrowed from you?
 H: Yes we can. That is what I intend to say.
 H: You will say you lent to your friend.

H: That's right. That's right. It's just a borrowing deal between friends. This shouldn't be illegal, but will just cause suspicion. Legally speaking, it's not necessary to touch the issues regarding this case.
 H: It's ok. This is the only way.
 H: That is it.
 I: I don't know what they are digging for, because they kept trying to postpone the questioning. When I saw he wanted to postpone, I ... (not audible) his information is not complete.
 H: Does that mean they are afraid?
 I: They wanted to postpone and I didn't want to let them postpone, because if it is extended, they will have more time to check some information. Right?
 H: Um...Um...

B: Do you think they can find it out?

C: I think they will.

A: They will find it out. There is not the concept of "laws" in the Philippines. For example, if you are familiar with the bank, my manager for financial affairs can let the bank convert my US dollars into pesos and *transfer* it to my *account* without my *signature*. These things can be done when people are friends, in other words.

C: [Unclear words].

A: [Unclear words].

C: [Unclear words].

A: I intend to say it that way.

B: Suppose you are asked, you can say you lent this sum of money to your friend.

A: Yes. It was just a loan between friends. This should not be considered as illegal although it may be called in question. However, I don't think there will be many legal questions that associate this with this case.

B: It's all right. Let's do it this way.

A: Yes, let's do it this way.

B: I think they are trying to find out something as she always wants to delay your [unclear words], could be "evidence" or "testimony".

A: I think they are afraid.

B: They want to delay but I won't let them do that. It is because delay may cause many [unclear words].

JH: What else do you think they will ask us?
 RH: The other party you mean?
 JH: He will ask you whether you left the company voluntarily, or why you left.
 RH: There are many people that have heard this in the country. It was that Mr. Chang Rui Kang wanted to transfer me from the Philippines to Thailand. And I had to follow my supervisor's instruction. It's just that simple.
 JH: Then you formally resigned, right?
 RH: Resignation, it was verbal in Malaysia. Verbally resigned, nothing in writing. Therefore, in fact, I am still the President of this company.
 ST: Thailand?
 RH: The Philippines, because it was from the beginning to the end. But if you want to change the President, You have to call a Board of Directors Meeting to make the decision... Change the President. Changing the President requires most of the Board Members' concurrence, unless they are attending a meeting in Singapore at this time. Singapore meeting. Purposely they said they want to increase the number of stock shareholder or do something. They changed Paris' share and my share from 2/5 to 2/7. As an example like this, they will have authority to change the President.

B: What else do you think they will ask us?

A: You mean the other party will ask us?

B: They may ask why you quit [the company]?

A: Many people know that Ruikang Zhang wanted to transfer me from the Philippines to Thailand and I must *follow* my boss's *instruction*. It is as simple as that.

B: So you have formally *resigned*?

A: *Resign* is *verbally*.⁷ It was in Malaysia. *Verbally*, a verbal resignation. There was no written resignation at all. Hence, as a matter of fact, I am still the *President* of this company, *legally*.

C: [President of the company in] Thailand?

A: [President of the company in] the Philippines.

C: Why?

A: Because I have been the President of the company there since the very beginning. If you want to change the *President*, you have to call a *Board of Directors Meeting* and get the agreement of the majority of directors. They called a meeting in Singapore and intentionally mentioned the increase of number of directors. Thus they can change my President's quota from 2/5 [two fifths] to 2/7 [two sevenths] and then they will enjoy the power to appoint a new President.

⁷This line is not in good grammar but I translated according to the text, especially A uses two English words in this short line.

JH: Let me tell you why I saw Andrew Lee's letter saying he's the Philippines... (not audible).
 RH: I didn't see that letter. But maybe they made the decision at the meeting in Singapore.
 ST: Have they held it (the meeting)?
 RH: They have held it.
 ST: Where are the official records?
 RH: I haven't seen them. The attorney should have given them to me. But they haven't.
 JH: Would they not give them to you on purpose?
 RH: Right, not to give them to me on purpose. But I was obedient. Andrew rejected the offer to come to the Philippines to be the General Manager.
 JH: Who was that?

RH: Andrew. He called Sandra too.
 JH: He claimed to be President in his letter to us in the USA.
 RH: Ha... Ha. (Laugh).
 JH: Didn't I show it to you at noon?

B: Let me tell you, why I saw Julie's letter, she wondered how she would become a director.

A: I did not see that letter, but that was carried at the meeting in Singapore.

C: The meeting was already held?

A: Already held . . . ten

C: Is their the minutes of the meeting?

A: I did not see it. The attorney should give it to me but he has not.

B: They did not give it to you intentionally?

A: Yes, intentionally. But I learn that Andrew refused to be the General Manager¹ in the Philippines.

B: Who?

A: Andrew. He talked to Sara on the phone.

B: [Unclear words].

A: [Laughing].

B: Didn't I show you at noon?

¹Sic. According to the context, this seems to be "President."

ST: I know I thought it was a letter.....(not audible)
 RH: Date. What was the date?
 JH: Andrew Lee. The date when he faxed was January 19th.
 ST: What was the fax for?
 JH: He was asking for the products.
 ST: On behalf of the Philippines (company)?
 JH: Yes.
 ST: It seems like the Philippines (company) is going to sue.
 RH: So they surely will sign a false contract.
 JH: Yes. They surely will sign a false contract.
 RH: Um... Then will they still be waiting for the legal procedures to take effect? This means the changing President part. But the false contract will only be valid with an earlier date.
 ST: They may utilize "Exclusive Right Distributorship". Like Hong Kong.
 JH: Yeah. I can fax it to show you.
 ST: Meaning it's an authorization, not a contract. A contract requires both parties' signatures.
 RH: Right. Right. But she signed this for us before, for the current company in the Philippines. It indicates that the headquarters may terminate it at any time.
 JH: Yeah. Do you have the original?
 RH: Yes. Yes.
 ST: Do you have the original?
 RH: Sarah has it.

C: I know.

A: What is the date [of this meeting]?

B: It was faxed to me on January 19.

A: Why was it faxed to you?

B: They urged me to give products.

C: What is your address in the Philippines. It seems that they will sue [you] in the Philippine

A: Hum. They want to lay their own fault on somebody else's door. They will forge a false document for certain.

B: They will forge a false document for certain.

A: Then they have to wait until the legal procedures come into force, until they appoint a new President. A false document must have a date in the past.

C: It cannot work. They may use a [unclear words] in Hong Kong.

B: I can fax it to you to let you read it.

C: It will be a letter of authorization instead of a contract. A contract requires your signature

A: Yes. There was a signed one to the company in the Philippines and it says that the head company can terminate [it] whenever it wants.

B: Do you have the original?

A: Yes, yes.

C: You have it?

A: It is kept by Sara.

ST: That's great. I know PH saw it too.
 RH: Yes. So....
 JH: Is the one that Sarah has the original?
 RH: Um...
 JH: I am afraid it is too late to send by mail. But fax me a copy and I will mention it. If they want the original then we can provide one.
 RH: OK.
 ST: Does Jau-Hwa need to send a Termination Announcement?
 JH: It's not necessary. He... (not audible)... another false...(not audible).. See what options we have to hurry and sue them.
 RH: I also thought about that, but Sarah said that is useless. I intended to have Jau-Hwa sign a notice, Termination of Exclusive Right.
 ST: Where is the logo of the Philippines company?
 RH: Actually, our headquarters has hired attorneys to process the logo.
 JH: I have hired attorneys to process that. I haven't contacted him these few days.
 ST: Need to register or what?
 RH: Right. It's the patent.
 ST: Did we have that?

C: I know about that copy.

B: It will take too much time to mail the original that Sara keeps here. Can you give me a copy? Suppose there is the need of delay we can delay it.

C: It requires that Hwa Chang gives a *terminate announcement*.⁹

B: She will forge something. I have to sue them as soon as possible.

C: Yes.

A: I have considerations to that. Sara says that it is not of much use. I want to ask Chang sign a *termination of associate rights*.¹⁰

C: Where is he *local*¹¹ of the Philippines?

A: *Local*? The head company has already employed an attorney to handle this.

B: Yes. I already employed an attorney but I have not contacted him for a few days.

A: Yes. It involves the patent.

C: Was it there in the past?

⁹Sic.

¹⁰Sic., the word "associate" is not clear and could be another word.

¹¹Sic. As I mentioned before, the words in italics are spoken in English.

makes no sense in English - ought to make sense

RH: We didn't have it. We applied. But we submitted it in 1999. Normally it will take several years. But if the headquarters has a Patent Right in the USA, the application will be placed to the first priority for approval.

ST: OK.

RH: That means now, no one has it now.

ST: ... (Not audible) ... They don't have any power to use.... (not audible).. to file a law suit by an attorney... (not audible).. They don't have the power...

RH: But the problem is the USA side didn't get it in the Philippines either.

ST: Must we get it (license), or can we use the USA's original?

RH: The original is in USA.

ST: Yeah, that should be okay too.

RH: No way. You cannot (use the same license) in different country. The patent in Taiwan is in Barry's hands, right? You need to have an approval in each country. In Hong Kong and Malaysia, even you have that in hand, the USA may still deny it.... (not audible). Besides, there is a business relationship. So, it should be okay.

RH: All right.

ST: (Not audible).. Taiwan's part. Taiwan's part is more complicated. But I am thinking. The Philippine laws should be similar to the USA laws. I mean we can check with the attorneys. Even I haven't finished my registration process. I can do an injunction.

RH: OK. I'll go ask.

A: It was not. We applied for it and the application was handed in in 1999 but it will take a few years time [to get the approval]. If the head company has *patent right* in US, our application will then be filed as the first priority for approval. No one has it now.

C: I have an idea. They don't have any rights for them to use. We can employ an attorney to sue them since they don't have any rights to use.

A: The problem is that the American party does not get it in the Philippines either.

C: Is it necessary to get it? It will be all right if it is got in US.

A: [Unclear words] in US.

C: It should be all right.

A: No. You cannot hinder them in other countries. The patent in Taiwan is the hands of Jiaufei. You have to get *approval* separately in different countries.

C: Even if it is in your hands in either Hong Kong or Malaysia, US can still *deny* it. [unclear words]. In addition, there are business contacts. [unclear words]. The shares in Taiwan [unclear words]. I think the laws in the Philippines should be the same as those in US.

A: Hum, hum.

C: You can ask your attorney, even though I have not accomplished the registration [unclear words].

A: O.K. I will ask about it.

ST: The current problem is taking down their sign.
 RH: Take it down. They don't have any products to sell at this moment anyway.
 ST: An injunction is pro-active. Don't let her sue you. Therefore I sue her first.
 RH: That 's right. We sue them and they can still sue us. But this action regarding the patent, whether we act or not act...related to the development of the case.... we can try.
 JH: This is the situation, they have been continuously acting against us. Do you know what I mean? If they are pro-active, at least you have to come out to clarify.
 ST: Did Philippine (company) owe the USA (company) any money?
 RH: I don't know what happened later on.
 JH: Did you owe USA (company) any money before you left?
 RH: When I left...
 JH: Does Sarah know?
 RH: It seems like I paid whatever I had to pay when I left.
 RH: Is that right?
 RH: Because at that time... Do you remember? At the CEO meeting in Singapore, I know they like to give me trouble. So I tried to pay off all the money that I owed. That was September. There weren't any orders in October. I don't know whether we paid off the remaining bills. But we probably didn't owe any money in September.

JH: ~~All right~~

ST: ~~Whose name did you use when you purchased that office building?~~

RH: ~~Bestwell. Bestwell.~~

ST: ~~Bestwell. Did we... (not-audible)~~

next page

C: Let's defame their shop sign [or brand name]. Do you think it is of any use?

A: To defame their shop sign . . . they don't have any products to sell now.

C: [Unclear words]. We have to seize the initiative. We should not let them sue us. Therefore we will sue them first so that they cannot sue us.

A: She can still sue us. This action, this issue involving the patent right, whether we do it or not . . . the development of this case . . . well, could have a try.

B: We have to seize the initiative, understand?

A: Hum, hum.

C: Does [the company in] the Philippines owe money to US?

A: I don't know after I quit.

B: Did it owe money to US before your quit?

A: When I quit . . . it seemed that what should be paid was paid. You remember, at the

meeting in Singapore, I knew that they would find fault with me, therefore I paid all what should paid as quickly as possible. It was in September. We did not order any products in October. I do know whether they ordered products after that or whether the payment for goods was paid or not. The company in the Philippines was not in debt in September.

H: All right
 JT: Whose name did you use when you purchased that office building?
 JH: Bestwell. Bestwell.
 JT: Bestwell. Did we... (not audible)
 JH: I don't know this. That is their Hong Kong company. This company and the other company called Extra Excel. Both companies are registered in Hong Kong.
 JH: ... (not audible)... I guess. According to his/her characteristics, they wouldn't register under our names. Because we didn't sign anything...
 ST: Then let's put this way. With that building we don't have any...
 RH: Title. Yes that's correct. Our only share is called ... (not audible)... Paid for Bestwell to buy the company. Therefore that money is the collectable to Bestwell.
 ST: Big brother. Please say that one more time. What do you mean?
 RH: When the current Excel branch office in the Philippines, the official branch office purchased the building, although the buyer's name was Bestwell, really the money was paid by the current company. At that time I was blamed by them due to this matter. So this is what happened. The money was paid by an Excel check. Therefore Bestwell, in the account book, still owes this money. They owe the current Philippine company the money for the building.
 ST: Then according to the laws in the Philippines, the money went to another company. That company then purchased the building. And then rented the building to.... (not audible)..

B: Is that so?

C: O.K. the *Office Building* was bought in whose name?

A: Best Well.

C: Best Well? We [unclear words].

A: I have no idea. This is a company they established in Hong Kong. Both Best Well and an **Extra Excel**¹² are in Hong Kong.

B: [Unclear words].

A: I guess her practice is not to register with our name. It is because there has never been any signed documents. It is not her style of working to let it be registered with our name.

B: Then about that *building*, we have just a little . . .

A: Status of rights. The Excel paid for Best Well to buy this company, therefore this sum of money should be account payable to *Best Well*.

C: You mean . . .

A: Now the company in the Philippines owned by Excel, a titular branch company, bought it in the name of Best Well, but it is the present company that paid. I was called names by them at that time. You see, the money was paid by Excel, but Best Well owed it to the present company in the Philippines.

C: Elder Brother, the money was transferred to another company and then another company bought it, do Philippine laws have any articles against that?

- I: It's not rented. It's not rented. Bestwell never collected the rent. Therefore that building was really vacant. That means it was borrowed. They borrowed the office.
That's right. I mean that's the way it goes.
- I: The way it goes is...
- I: Look. The current Philippine Company lent money to Bestwell, then Bestwell purchased this building.
- I: Right.
- I: This building was then used by the Philippine company.
- I: This is not a legal issue. It's an accounting issue. Did Bestwell really collect rent from Excel? The answer is still no. There isn't any substantial contract, or written agreement between the two companies stating the lent money involved, the way of paying the debt, how the building that is borrowed and how to be returned.
- I: OK. Big brother. Can you think of anything that will give the current Philippine Company a heavy blow?
- H: A heavy blow?
- I: Can we find some Philippine Attorneys and discuss with them?
- H: Presently, the Philippine Attorneys are hired by them. They are hiring them.
- I: No. No. We hire our own.

A: It did not pay and it has never even collected the rent. It was empty all the time. Therefore you can say that they borrowed the office.

C: Yes. What was the whole process?

A: The whole process . . .

C: The whole process was the present branch company in the Philippines lent [money] to Best Well, Best Well bought this building and then this building was given to the company in the Philippine for use.

A: Theoretically, it cannot be considered as a defect of law, it can only be considered as a defect in accounts. [I don't know] whether Best Well asked for rent from Excel. There was no substantial contracts or agreements about the loan or lease relationship between the two companies, no contracts or agreements to rule how you will pay me back the money I lend to you now, or how you will pay me for the building I let you use.

C: O.A. Elder Brother, do you think there is any very heavy blow for us to deal at the present company in the Philippines?

A: Hmm, a very heavy blow . . .

B: Can you have a serious consultation with a Philippine attorney?

A: The attorney is being hired by them now. They hire him.

B: Any other attorneys?

RH: In the past, the Philippine Company made the payment to a Hong Kong account. If the headquarters sees the problem when the products are shipped, but the payment didn't go to the USA headquarters account, I understand how they feel. We wired all our money to Honk Kong, but whether that money goes to the headquarters account or not is the first point.

JH: It didn't come to the USA headquarters account. (Excel LTD. issue)

JH: Would this point involve you?

RH: No. We wire money through the bank account. We have all the records.

ST: But ... you were... (not audible) at that time?

RH: Chairman.

ST: Were you the President at that time?

RH: No. No. I was... (not audible)

RH: Yeah, but I mean I can only say verbally that Dr. Chen gave me instructions and told me to wire the product payments to somewhere and I did that. Why would we wire the money without a reason? This must be product payment.

JH: I'd like to ask you how you knew to wire money to E. Excel Limited?

RH: That's where she told us to wire to.

JH: I'd like to ask if you kept the e-mail that Jau-Fei sent you?

A: We paid money to the account in Hong Kong in the past. Perhaps the head company in ruled that the payment for goods should be paid to the account of the head company in US. I pay attention to this. We always paid money to Hong Kong, whether the money was transferred to account of the head company in US, this is the first [important] point.

A: The money was not transferred to the head company in US.

C: How can it involve you?

A: We have the record since we pay all our payments through the bank.

C: But you were the President at that time?

A: Chairman, chairman.

PART II (On the Reverse Side of the Tape)

A: ... also the representatives of the company

Then C interrupted with a question that cannot be heard clearly.

A: ... No. I mean, I can only say that in Ravel¹³ Dr. Chen gave me instructions to remit payment for goods here. Why so much money should be paid since there were no sales, it must be payment for goods.

Excel LTD issue

B: I want to ask how can you know where to remit the money correctly?

A: She asked to me to remit money here.

B: I want to ask whether you have her e-mail to you?

It like this

F: I don't know whether I have or not. That's a long time ago. Wiring money to that account must be more than two years ago. It's been two, three years.
 F: Longer than that.
 F: Did you keep Jau-Fei's e-mail?
 F: Um... some but not all.
 F: Can you go back and check to see if there are any problems in her e-mail?
 F: Um. OK.
 F: I'll go back and check.
 F: Because we... if you load her e-mail to the disk for me, I'll check closely to find her tax problems so that I can sue her right away.
 F: Oh. Oh...
 F: Do you know what I mean? Sometime she confirmed whether or not she received the money, right?
 F: Right.
 F: I need that type of evidence.
 F: Hm..Hm...
 F: That stuff to the Philippines... Of course... Those are the past records involved with the issue of the invoice value. To check if they were under valued or over valued will be quite troublesome. The Philippine company may have problems too.
 F: That's all right. Since you are not with the old Philippine company anyway.
 F: At that time... It was me. I mean the invoice value was not equal to the actual cost. Both the buyer and the seller had problems.

A: *Wow*, I don't know whether it can still be found. It is difficult to find it. The account which the money was remitted must be one existed more than two years ago, two to three years.

B: Do you still have Jiaufei's e-mails?

A: Some of them, not all of them.

¹³It seems a place name or a company name. I am not sure about the spelling.

B: You go back to check whether there are certain e-mails that have problems.

A: Hum, hum. *OK*.

B: If you put the e-mails in a disk and give it to me, I will examine it carefully and see whether there are any problems about my tax and I can sue her with it. You understand?

A: Hum, hum.

B: She also said that she would *confirm* you whether the money was received or not, right?

A: Yes, hum.

B: I want this evidence.

A: Hum, hum. However, if it involves the record in the past of the company in the Philippines, the *value of invoice, undervalue or overvalue*, it will be fairly troublesome to check, and the company in the Philippines will also have problems.

B: It does not matter since the old company of yours in the Philippines did not exist.

A: It was me at that time. Why *value of invoice is equal to the actual cost*, that is an important factor between the buying and selling parties.

JH: You check it out then. You are a small stock shareholder. See if you have any way to sue the old Philippine company.

JH: We have to be pro-active too.

RH: Um....OK. Sam, Do you have anything in your Hong Kong company that you can use to sue them and drag them down?

ST: Sure. As an example, the attorney said we small shareholders can unite and request for an audit and close the company. I was very happy when I heard that. But mine plus your is 24, and plus Huang Jau Hong's is 32, which is a great influence. But I am not sure if Huang Jau-Hong will do it or not. Do you know what I mean?

RH: Oh. OK. Audit and close the company. I don't think he will refuse. There is no impact to Barry.

ST: I don't know. Maybe he doesn't have to use his name. Maybe he can transfer his share trustee to me.

RH: The trust he has and requests the past right...

ST: No. No. They are not connected. The trustee can be transferred now. I am taking action now, not before. There is no difference. Of course I have to consult the attorneys to see if 24 is sufficient. If 24 is sufficient, we'll use the 24.

RH: I am very willing to do this.

ST: Wow. Just a shot and we'll get it closed.

JH: Yeah.

ST: I feel very happy.

JH: Is there any way to do the same in the Philippines?

B: Then you should see you are a small shareholder and whether you can work out some way to sue the old company in the Philippines. We must seize the initiative.

A: O.K. Is there anything in the old company in Hong Kong that can be used to sue and the case?

C: Yes. I am glad that the attorney says that we shareholders can unite and ask for inventory of the assets. But mine plus yours is twenty-four, then plus Fang Chao's will be 32 these can exert great influence. But I don't know whether Fang Chao will agree (to work with) or not. You understand?

A: He⁴ may not agree to have an inventory of assets. It will ill affect Jiaofei much.

C: It is hard to say. Maybe he does not want to use his name, then he can transfer the ownership of his shares and trust to me.

A: Now trust and the power that it required in the past...

C: No. I need the trust and the transfer of ownership as I want to take action. I am referring to the past, there was not much difference then. I will ask my attorney whether twenty-four is enough or not. If it is enough, I will take action with twenty-four.

A: I am very glad to take this action.

C: We take action and then make it close down. It will make everyone happy.

B: Is there any way to involve the Philippines...

All right. I'll ask immediately. But what reasons shall we based the request an audit and close the company?

Something like he kicked me out.

Kicked you out to where?

Kicked you out from the Board of Directors. Of course I'll consult the attorneys about the details.

Because he/she kicked you out, you have the right to request an audit and close the company, right?

Because he/she kicked me out. We are in a partnership business. A partner may not be kicked out from the partnership.

You are still a stock shareholder. Just to re-elect the board members, right? Your share is still there.

OK. Substantial details will need to be discussed with attorneys.

Because basically, it doesn't affect shareholders' right.

Our laws in the United States are this. You are a small shareholder, and you may make a request, like...

There must be some conditions. It is impossible that every small shareholder can make a request to close the company, right? This way all the companies in the stock market will face such problem.

I: If he/she does something to cause damage to the shareholders' right, we'll find ways to catch him/her. This means...

A: I will do it right away. But with what reason we will ask her to make an inventory or close down?

C: Because she wants to kick me out.

A: Kick you out of...?

C: Kick me out of the Board of Directors.

A: Kick you out of the Board of Directors...

C: I will ask the attorney about the details.

A: You enjoy the right to make an inventory because you are kicked out of the Board?

C: Yes because she kicked me out. It is a partnership and a partner cannot be kicked out.

A: You are still the *shareholder*. It just involves a new election of the Board, right? You still have your shares.

"It may mean Fang Chao.

C: OK. I have to ask my attorney about the details.

A: It does not involve the rights of shareholders in principle.

B: The practice in US is that small shareholders can ask for, for example...

C: But there must be certain reasons, not every small shareholder can ask for an inventory, right? Listed companies have such problems quite often.

A: When there is something that infringe upon the rights of shareholders, it is adequate to take action, in other words...

JH: He/she is not going to give you the money for your share, right?
 JH: But legally, he/she doesn't have to give it to me. That means the company still exists. The company is still in operation. The company is just changing its products. And the new products haven't arrived yet. This has been agreed on by most of the shareholders.
 ST: That's all right. But that was also what we disagreed about.
 RH: So. Does it count if the majority of the shareholders agree?
 JH: Maybe it is better if the share is given to me.
 RH: Who?
 JH: That all right. Our time tomorrow will be your late night tonight. After our conversation, you go think about this and discuss it with the attorneys. We have to be pro-active.
 RH: OK.
 JH: All right?
 RH: All right. All right. All right.
 JH: Maybe Manager Hu still belongs to the old company. But if he still belongs to the old company and he sues this new company, maybe Manager Hu can come forward and say, "I don't have a contract. I just don't have it." I testify against him/her. Maybe he/she will not sue if we do this.
 RH: At least I am still the board member of the old company. Paris and I are still board members of the old company.
 ST: Is that right? But the resolution of the board is based on the shares or the head count?

B: She does not give money to you for your shares now, right?

A: Hum. But legally she does not need give me money. The company still exists, and will continue its business. The company is just to change its productions either now or in the future, or something like that. And the majority of shareholders agree to it.

C: It does not matter. We don't agree.

A: Therefore it depends on whether the agreement of the majority of shareholders counts

B: You give [there are some words here that are not clear] to me.

A: Who?

B: Well, it does not matter. Hi, Manager Hu, we have spent much time this evening. You work out some way for our action. To consult with an attorney. We must seize the initiative.

A: O.K.. Good, good, good, good.

B: Manager Hu still belongs to the old company?

A: Yes.

B: Still belong to the old company. Suing this new company, Manager Hu may say: "I don't have any contract. I don't have it at all." I may propose counter-evidence. It is possible that he has not sued yet.

A: Hum, hum. I am still a Director of Board of the old company. Peter, Barry and I are still on the Board of the old company.

C: Is that right? [A laughs] The decision of Board depends on shares or quorum?

RH: The same. The number of board members is based on the number of shares. Then Alex's share and my share added together is 40%. Under this condition we may have two board members elected. Therefore, Paris and I are the representatives. This is ...

ST: (Not audible)...not....

RH: Hello. Hello.

ST: Ya-Yun is not?

RH: Ya-Yun agreed. She agreed to have Paris and I to serve. If it's our side, she agreed to be Paris and Richard.

ST & JH: ... (Not audible)...

RH: Paris is the representative of the Excel Essentials.

JH: Then he will probably be sued. Because if he has share in the old company and he establishes another one.

RH: This is arguable. I am a natural entity. Do I have the right to invest in different companies?

ST: But I think this question needs to be answered by consulting the attorneys. I feel that asking in advance will help you handle things better in the future. My problem in Hong Kong was I didn't ask in advance.

RH: What would happen if you asked? I did ask. Unless you claim you give up your current board membership.

ST: Can you transfer your current board membership to others?

RH: Maybe. Yes.

ST: I think you should transfer first and let the argument disappear.

A: It is the same. Directors are elected according to the shares. Alex and I have 40% shares, therefore we have the right to elect two directors and they are Barry and me.

C: Hello, hello, Yayuan has any opinion?

A: Yayuan agrees to let Barry and me be on the Board. Yayuan is on our side and I agrees that Barry and Richard be on the Board. Barry is now the responsible person of Excel Essential.

[C is explaining something to B but the words are not clear]

B: Then he may be sued because he has shares in the old company . . .

A: There will be disputes. I am a natural person, do I have the right to invest in companies?

C: I will ask my attorney first. I think you should first ask about it and it will be of what will happen afterwards. I did not ask about the details clearly when I was in Hong Kong therefore . . .

A: It is because I asked about it. He said unless you first declare that you give up the position of director in the present company . . .

C: Can the seat of the director in the present company be *transferred* to another person?

A: It is possible . . .

C: I think you should *transfer* it first, then it will be beyond dispute.

JH: Transfer his position to Ya-Yun.
 ST: Right. Ya-Yun is fine.
 We discussed this issue with her/him a couple of days ago. To remove the argument from him is letting her run the new company.
 RH: Transfer to Jason?
 ST: But Jason is also in my new company. Is that all right?
 RH: I don't know if they are connected in different countries.
 ST: Ask the attorneys in the Philippines. I mean that's ok. You transfer to Jason and let him "fire the cannon" at the meetings.
 JH: What should we do about Paris? He is a board member now. He is...
 ST: Paris might have some problems too.
 JH: Yes. If so, then Paris will have problems.
 ST: That's means we are placing another "Big Cannon"
 JH: Can Paris be transferred to someone else?
 RH: Of course he can be transferred. As long as you are willing to give up, right?
 ST: Do we want to have a new election or he just signs it?
 RH: I have to ask about this. I'll ask that attorney...

B: What about *transfer* it to Yayuan?

C: I discussed this with him [or her] a few days ago. I wanted to see he would not carry dispute about the new company.

A: *Transfer* it to Jason?

C: Jason also *runs* a new company.

A: I don't know whether there are such concepts about ordinary shares.

C: I asked an attorney in the Philippines. I think you can transfer [yours] to Jason to "fire gun"¹⁵ at a meeting.

A: Hum, hum.

B: What about Barry? He and the present directors . . .

C: There must be some problems with Barry.

A: There must be some problems with Barry, if that is the case.

C: We will let another one "fire a gun" at every meeting . . .

B: Is there any way to transfer and solve this problem?

A: There must be a way to transfer, it will be all right as long as you are willing to go action, right?

C: Then there will be the trouble of re-voting and re-election. Is it all right if he [or simply signs?

A: I will ask the attorney. . .

"I will ask the attorney to 'attack someone verbally' "

ST: I think we can transfer one board membership to Jason and find another board member for the meetings.

JH: Do you have anyone that you can trust?

RH: For sure I can find someone that I can trust. But I think the purpose we are keeping this board member position is that the person can be involved in the resolution process at the board meeting. That person needs to know our situation. Therefore Jason is a pretty good candidate.

JH: There is a law in the United States. If you are a board member in that country, you have to be dedicated. It is not allowable if you establish another competitive company.

ST: ... (Not audible)...

JH: This is the law in the United States. I am afraid Paris has the same situation and will have problems.

ST: Paris must be transferred.

RH: Um... OK.

JH: I am afraid that Paris needs to be transferred out as soon as possible. Or transfer the new company to somebody else. Do not use Paris any more.

RH: OK.

JH: Which way should we take. Pick one.

ST: Does Paris "fire the cannon" at meetings?

RH: Not quite. He doesn't have the position. Do you know?

ST: A board member is a board member. Shouldn't be concerned about position.

C: We will let a director transfer it to Jason at a meeting. Then we will find another director.

A: Hum, hum.

B: Is there anyone that you can trust?

A: A trustworthy person can be found for certain. But I think the motive that I want to keep this director is that whenever the Board meetings are called and they want to make any *decision*, then we can *involve*. This person must understand our situation. Jason is a quite good candidate.

B: There are laws in US ruling that one must be loyal to the company if one is a director in this country. It is forbidden to establish another company to compete [against the company where one is a director]. There are such laws in US. Hence there may be problems with Barry.

C: Barry should be evacuated.

A: Hum, hum. O.K.

B: Barry should be evacuated as soon as possible or the new company should be transferred to another person. We cannot use Barry.

A: O.K.

B: [says something the words of which are not clear.]

C: Will Barry "fire a gun" at a meeting?

A: Not likely. He does not adopt that sort of attitude.

C: As a shareholder, what sort of attitude should he have?

No, because our hatred for him is like a "deep sea of blood". Paris doesn't have that... Ha...Ha... (laugh)

Then maybe we put Paris on a board member in the old company to replace someone.

Let me think about this. Transfer me to another person.

I can imagine this might be a problem. This is not allowable with the United States laws. You may not establish a competitive company. I am afraid Paris will be sued. If Paris is sued, the new company will be dragged down too.

I: OK. This transfer can be quick. We can ask Paris to sign something stating he is willing to give up his share in the original company and his Director position. Is there a way to put down an earlier date?

Earlier or later?

Back date it to have him give up earlier. Because...why? I guess they have probably known this already. That essentials....

I: They don't have any facts to sue at the present time because we haven't even received our products. And we haven't sold any either, right? His announce of resigning need to be done quickly. After he has done that, legally he can say he has given it up and he has transferred it to someone else.

A: It is because we have huge debt of blood against them and Barry does not have that [laughing].

B: Barry may be transferred to another company and let another person take his place of director.

A: Hum. I will give considerations to *transfer* to another person.

B: I think there will be problems. It is forbidden according to US laws, no competitive company should be established.

A: Hum.

B: Also I fear that Barry will be sued. Barry will be sued because of the new company.

A: It will be quick to *transfer*. We will ask Barry to sign something, saying that he is willing to give up his shares in the original company and the capacity of director.

B: Or to put himself off?

A: What?

C: To do it in advance or to put it off?

B: To put it off thus to let him give it up in advance. I guess that they already know about Essential.

A: They don't have any facts with which to sue [us]. We have not got the products yet and we have not sold them. It can be quick to declare giving up, then he can say, according to law, that he has already declare to give it up or *transfer* to someone else.

H: I am afraid they will say that the new company was established before that.
 T: No. No.
 H: I establish it but I haven't done anything yet. I am just...maybe I am considering Chen Jau Fei's products, or something...
 H: Maybe you were just considering importing some total different products?
 H: That's right. That's right. I have my business scope registered, but I did not do anything, right? You don't have evidence to say I have this company but didn't have any violations.
 H: But if giving up will work, is putting down the earlier date better of the later date? But this doesn't have any critical impact.
 T: What happens if establishing a new company?
 H: For what?
 T: To take care of all these problems
 H: For example, to import....
 H: Products from the USA has been shipped out.

B: I fear that they will say that this new company is established before the system is changed.

C: No, no.

A: It [this company] does not engage in any business after its establishment. I just think *maybe* Jiaufei Chen's products should be considered.

B: To give considerations to import products that does not have any relationship with the company of hers.

A: Yes, yes. We can register those items of business but we have not done anything, right? There will be no evidence with which I will be sued. I have this company but I have not done anything that violates [the law].

B: Hum. Suppose it is to give up, it seems safer to put it off a little bit.

A: Hum.

C: Suppose we establish another new company now.

A: For what purpose?

C: All the problems can get a package solution.

A: Hum. You mean to be in charge of import...

B: We send those products out to handle them.

C: Ah.

E: Or unless Paris gives up his shares in this new company, right? If he gives them up immediately, he can say, "I am not (in the company) anymore," if he/she sues.
 : Can you find another person then?
 E: Yes. That stuff...
 : Let's do this then. Give up the new company's...
 E: Representative position and stock shareholder position.
 : OK. Let's do it.
 : Is that all right? This way, let's change to a new...OK. We couldn't be ...Ask if there is a chance. Ask the attorneys as soon as possible about how we can sue the old company, all right?
 E: Um. Um. OK.
 : Manager Hu, you probably have to rest for a while and sleep a little. It would be 10 AM our time and what is your time when we call you tomorrow?

A: [Heaving a sigh] Unless Barry gives up all shares in this new company. Suppose he gives them up very soon, then when the other party sues [us], he can say: "I was not involved in it long ago."

C: That is true. Then can you find another person?

A: Yes, that . . .

C: Then let's do this, give up the new company's . . .

A: Give up the capacity of the responsible person, and the capacity of shareholder.

C: Yes. It should be done this way.

B: It could be done? Thus we won't [words cannot be understood]. We have to find someone else. Please ask around as soon as possible if there is the opportunity.

We have to consult with an attorney to see what we can sue the old company, is that all right

A: Hum, hum. O.K.

B: Manager Hu, you had better have some rest, have some sleep. We will call you tomorrow morning, what will be your time then?

How can he sleep?

3 o'clock. 3 o'clock is OK. I am normally wide-awake at that time.

Is that right?

Um... But those questions are traps through special design. Ha.Ha. (laugh)

When attorneys ask you, you...

For some matters, can I just say they are not to do with this case and refuse to answer?

Or you can say "I don't know", "I don't know". There is another way you can do it. If you don't want to answer, you say, "I don't remember now", then you may remember in the future. Do you know what I mean? All right? Do you know what I mean? You don't remember now. But later you may remember.

I recall....

Recall.... Do you know what I mean? I just don't want to let them postpone. I know they want to dig. What's next? Next they will be contacting you.

Speaking of telephone, if the attorneys want to contact you, does your phone show who the caller is?

L: No.

: No?

I: If you are talking about Taiwan, generally I am not in Taiwan. It seems like international calls will not show the name.

C: How can he go to sleep?

A: Three o'clock. I am usually quite clear-headed at that time.

B: Really?

A: There should be a trap set painstakingly.(laughing).

B: When you ask the attorney . . .

A: Do you think I can refuse to answer since [his questions] do not involve this case?

B: Hum. Or you can say: "*I don't know*." You say "I don't know" or you say when you are not willing to answer: "I don't remember now." It means that you may remember it later, you understand me? Is that right? You don't remember it now, but you may remember it later.

A: Hum. I can say I remember it afterwards.

B: Do you see my point?

A: O.K.

B: I don't want to let them practice their delaying tactics. It is because I know what they are trying to ferret out. Suppose she is going to contact you, can the phone at your home show who makes the call?

A: Hum . . . it cannot show. Suppose it is in Taiwan, well, I am not in Taiwan, generally speaking. It seems that all *International* calls cannot be *shown* by my phone.

JH: There are some. Sometimes my calls from Taiwanese distributor will show the names on my cellular phone.

ST: Strange. Some do and some don't.

JH: Some do and some don't. That's ok. You don't stay in Taiwan much. You will be very difficult to catch when they need you.

RH: Right, right.

ST: You can have your wife answer the phone, right? Have your wife screen the calls when the phone rings.

RH: What if I answer the phone?

ST: What if you answer the phone?

JH: If you answer, it won't... I'll be contacting you. I'll ask my attorney and contact you.

ST: If you answer, say "sorry I cannot hear you", disconnected. Ha. Ha. (laugh)

RH: Ha... "My English is poor" "I don't understand". We'll react appropriately when it comes time.

JH: OK.OK.OK.I have been busy with this matter these few days. We are extremely busy. I am very angry. I must sue her. I met that attorney last Saturday. I'll try my best to sue her. To sue Jau-Fei...

ST: To "scramble her brains"

JH: Hey, I am thinking about going abroad to sue her... I am continuously thinking about how to make her....

ST: Doesn't she go to the court every week? Every week you are tied up then?

JH: It will be different when we sue her.

B: Sometimes my colleagues in Taiwan will call my mobile phone and it will show.

C: Some can.

B: Yes, some can, some cannot. It does not matter. It will be difficult for them to find you if you are not in Taiwan.

C: Or you can let your wife answer the phone thus to see who makes the call.

A: What if I answer the call myself?

C: What if . . .

B: If it is you who answer the call, you can say: "I will contact you."

C: If it is you who answer the call, you can say: "Sorry, I don't understand you. Bye."

A: [laughing]. B. [laughing].

A: I will say: "I don't understand as my English is poor." Let's see what will be their reaction and it can always be countered by another.

B: Good, good, good. We have been terribly busy these days. I am very angry and I need to countercharge her. I meet with my attorney and I will try my best to sue Jiaufei.

C: We must sue her and make her badly battered.

B: I want to sue her abroad. I am still working out some way.

C: She has to attend the court every week, thus she cannot go away.

B: It will not be that way when we sue her.

H: She doesn't have to appear in court by herself.
 F: I don't have to appear in court when I sue her.
 T: The problem is now you have two defendants, right? You have to go to court every time. How do you have so much time?
 H: No. So we have to counter-sue her.
 H: To make her have to go to the court.
 H: Of course Jau-Fei needs to go to the court too. Must keep her busy. I didn't intend to sue her before. Since now the fight has begun, We have to fight. We need to sue her more. Need to be quick. If I find a good lawyer and if you find a good lawyer who can sue her, then we need to sue her right away. My whole week was messed up by her. I didn't do anything. I am very mad now.
 H: She is free without doing anything anyway. I think because...
 T: Nothing to do? Go make the new products.

A: She does not need appear in court.

B: No. I don't need appear in court when I sue her.

A: Hmm.

C: The problem is that there are two defendants. Will there be so much time [for them] appear in court?

B: No. That is why I must countercharge her.

A: Hmm, thus she has to appear in court.

B: Jiaufei must appear in court. We must keep her busy. That is my motive to countercharge her. We have to fight against her. The more charges we bring against her the better. I am looking for a good attorney. You can bring a lawsuit against her if you find a good attorney in the Philippines. We will sue her right away. I could not do anything the whole past week.

A: [laughing].

B: She is really troublesome.

A: [laughing] I think she has nothing else to do.

C: She has nothing else to do? Why should she not engage in getting new products?

RH: Does she have any way out now? I think because the new products cannot be made or something. I am guessing that there are problems with the new products probably. Otherwise, her strategy earlier was telling distributors that the new products are coming out soon and ask them to wait. They can't come out now, so she has to distract their attention. Dr. Chen is going back to the United States to get back the power. Everyone is waiting for the arrival of the USA products. She is trying to distract attention. If the products don't come to the market, it's USA Company's fault and Jau-Hwa's fault. It's not my fault. My previous promise is gone. Sorry.

JH: I am afraid she is dragging us in the USA and making products in Malaysia.

RH: That is certainly possible.

JH: Hm... All right. Manager Tzu, do you have anything to say?

Manager Hu, Do you have anything to say?

Do you think we need to discuss...

ST: Schedule, schedule. You are going to Hong Kong after the New Year.

JH: I am going to the eastern countries. You know, I am going to court on February 1st and 2nd after the New Year.

A: How can she get new products? I think she just cannot get any new products. I guess there is some problem with the new products. You see, she told people that there would be new products and asked them to wait for a while. That was her strategy. Now the new products cannot be brought forth and she has to divert people's attention. She said that she would go back to US to get back her own rights, therefore she would go back when the American products were produced. She would divert people's attention. She says to people: "US, and not me, should be blamed. Sorry. I will keep my promise. There is nothing now."

B: I worry whether she will hold us back in US and produce products in Malaysia at that time.

A: That is possible, hum.

B: All right. Tzuchin,¹⁶ do you have anything else to say. Vice Manager, do you have anything that you want to discuss with us?

C: *A schedule, a schedule.* After the New Year [we] will go . . .

A: To their country. Wait a minute, I have to appear in court on February 1 and 2 after the New Year.

¹⁶This seems to be the name of C.

T: I know. I meant going to court in Hong Kong.

C: The case in Hong Kong is a discussion between you and I should be fine.

T: Hey, Richard. Did you talk to Jau-Hong. I don't know how to tell him. Please tell him that I am in Hong Kong.

H: Then return to the company, right?

T: Whatever. The Hong Kong company is for the battle. But neither he nor us will get anything back. Therefore, he will not lose anything no matter if he agrees or not.

H: Jau-Hong is not maintaining his neutral position. He may still have some hope. Because of his neutral position, it's OK if he doesn't come forward. But he can give up his share. I mean to reach the 32% total. Do you think this is possible?

H: I don't think he will agree, but I will mention that to him. I just feel he would not be willing to. He knows if he gives up his shares, the other party will know and that would create more opportunity for a fight. He will be labeled.

T: So what if he is labeled with his current position?

H: He made himself very clear in Taiwan. I'll mention that to him. I guess his thought is like this.

A: Hum, hum.

C: Have to appear in court in Hong Kong

B: It does not matter. I will discuss this with you.

C: Richard,¹⁷ Can you contact Hung Chao? I don't know how you can put this in words him. You may ask him to give to you his eight *percent* in Hong Kong.

A: Hum. There is still the trust that should be returned to him?

C: That is all right. The company in Hong Kong is good for fighting [lawsuit] only. Either we can get something back. Therefore whether he gives it to you or not will not cause him a personal loss

A: Hung Chao is still keeping his neutral stand, perhaps he still has one gleam of hope.

C: It is O.K. if he does not act since he wants to keep his neutral stand. But he has to transfer the ownership of shares. Thus we can have thirty-two *in total*. Do you think this could be done?

A: I don't think he is willing to transfer, but I will suggest this to him. I think he will agree. If he transfers the ownership of shares, the other party knows that he intentionally lets us have a better opportunity to fight [to win]. Then he will be labeled as one on our side.

C: What if he is labeled [as one on our side] in his present capacity and present situation?

A: He made it clear when in Taiwan. However, I will suggest this to him. But I guess he will not agree.

¹⁷This is the name of the Vice Manager

T: Besides, what will happen if he is labeled. Will someone kill him?
 H: His benefit will be reduced a bit in the future.
 T: What benefit does he have?
 H: I don't know. He is still a shareholder in Hong Kong and Malaysia. Maybe they are making money over there.
 T: Hong Kong has no chance.
 H: Who knows? To him, he has different goals from us. I'll think about it and will talk to him.
 T: It's okay. You don't really have to talk to him. If you want to talk to him, you better have some confidence, otherwise, it won't be too good if you get rejected. Think about it and make your decision. I'll ask the attorney whether our 24 total is sufficient.
 H: How did you come up with 24? Yours is 16, right?
 T: Right. Mine is 16 and yours is 8.

C: What he is labeled [as one on our side]? He will get killed?

A: He will not get as much gains after that.

C: What kind of gains can he have?

A: I don't know. He is still a shareholder in Hong Kong. Perhaps he can make some money there.

C: It is impossible to make money in Hong Kong.

A: Who knows whether it is possible or not. He does not have the same determination as we do.

C: That is true.

A: I will give considerations to this and I will suggest it to him.

C: That is O.K. You may suggest to him or not. If you are to suggest it to him, you have to be fairly sure of success. It will not do any good if he turns down your suggestion.

A: Hum.

C: You may make some analysis and sound him out indirectly. I will ask the attorney tomorrow whether it is enough as it will twenty-four with mine plus yours.

A: Is twenty-four enough with yours plus mine? You have sixteen.

C: I have sixteen and you have eight.

JH: Yours total is 24.
 JH: Manager Hu, I wonder whether you can rest?
 RH: Me? Don't worry about me. Don't worry. No matter how tired I am, I am always
 wide awake during the midnight.
 JH: OK. Let's just need to stick to the point that Hendrick or Jau-Fei mentioned to
 draw a false document.
 JH: If we say that, Jau-Fei may go to jail, right?
 JH: Speaking of document, Jau-Fei and Li-Huan Hsin made-up a false document.
 RH: Um... Um...
 JH: Shall we say it was Jau-Fei who said is this better or we make a false document.
 ST: If he says that, the other party will definitely deny it.
 JH: Will Jau-Fei deny it? Even if she denies it, we had some people that heard that.
 So we...right?
 RH: If Hendrick goes to jail, everyone will be happy. If someone makes Jau-Fei go to
 jail, many distributors will not forgive that person.

B: Both of you have twenty-four altogether. It should be O.K. [The children made a loud noise
 and "O.K." is not very clear.]

A: All right.

B: All right. You can still have some rest?

A: Be rest assured. I am very clear-headed at midnight.

B: Good. We need insist that it was either Henrik or Jiaufei who said that they fabricated false
 documents.

A: Jiaufei will go to prison if we say she fabricated false documents.

B: But she did make a false documents with Huanch'ing¹⁸ Lee.

A: Hum.

B: Shall we say that Jiaufei said that or we should fabricate a false document?

A: The other party will deny for certain if you say so.

B: Hum?

A: The other party will deny for certain.

B: Jiaufei will deny, of course. But we have someone who overheard it, therefore . . . is it
 right?

A: Everyone will feel happy if Henrik goes to prison. But if Jiaufei goes to prison, there will
 be many gentlemen who won't forgive [us]

¹⁸The spelling could be either "ch'ing" or "ch'in"

Let me tell you. If Jau-Fei goes to jail, it wouldn't be due to this falsified document. If Jau-Fei goes to jail, it will be because of tax problem.

She has more severe problems.

You know? So going to jail for Jau-Fei is a matter of... sooner or later.

Tax. This is civil. There are civil and criminal lawsuits in the United States.

Falsifying document will not make her go to jail.

No?

No.

Falsifying a document will not.

That will be civil. Criminal case will.

Falsifying a document is a criminal case, it's a fraud. Forgery is a deception.

This is not enough to make Jau-Fei go to jail. It needs to be the tax issue. In fact, I am processing with both civil and criminal. Only this way that we will maintain ourselves. You see, I have been dragged by her. I didn't do anything for the whole week. Where is our future in the world? In addition, is that financial management report correct? A very prosperous business was totally messed up by her during a couple of days. Therefore, we are a little bit winning in the Hong Kong's case. There are still lots of information to prepare for the attorneys here. Therefore I say no matter what action we take, we need to act first. In fact, she has acted first already. We are just fighting back. I feel...

(End)

B: Ah, let me tell you that, if Jiaufei goes to prison, it is not because of false documents, it is because... [Then C interrupts but his words are not clear] of tax.

A: [laughing].

B: Therefore if Jiaufei goes to prison, it is

A: She who entraps herself.

B: There are civil and criminal lawsuits in US. One who fabricates false documents will not go to prison in a civil lawsuit.

C: Are you sure about that?

B: Yes, I am sure. A civil lawsuit is not grave.

A: I know that fabricating false documents is deceiving and a felony.

B: Jiaufei will not go to prison because of that. Her problem is tax. I will bring both a civil and a criminal lawsuits against her at the same time. Only when I do that we can protect ourselves. You see, I have not done anything in the past week. What about our enterprise? And you are also being sued. Our good business was at a mess in one day's time [by that]. We have some [the words cannot be heard clearly here]. The attorney comes to us and we have to make a great deal of preparation. We have to make our move first. As a matter of fact, Jiaufei has already made her move first, we have to retrieve ourselves from an inferior position.

Tab L

IN THE UTAH SUPREME COURT

JAU-FEI CHEN, individually and as the natural
guardian of CHI WEI ZHANG, E. LEI ZHANG,
and E. E. ZHANG, her minor children,

Plaintiffs/Appellees,

vs.

JAU-HWA STEWART, E. EXCEL
INTERNATIONAL, INC., a Utah corporation,
and Does I through X,

Defendants/Appellant.

Case No. 20020927-SC

E. EXCEL INTERNATIONAL, INC., a Utah
corporation,

Third-Party Plaintiff,

vs.

TAIG STEWART; BEVERLY WARNER;
ANGELA BARCLAY; DALE STEWART;
HWAN LAN CHEN, et al.,

Third-Party Defendants/Cross
Appellants.

BRIEF OF APPELLEE E. EXCEL INTERNATIONAL, INC.

Interlocutory Appeal from the Fourth District Court, Utah County, State of Utah
The Honorable Fred D. Howard, District Judge

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STATEMENT OF JURISDICTION

This appeal arises out of a petition for interlocutory review, pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Does the appellants' failure to marshal evidence in support of the trial court's findings preclude their attacking the trial judge's factual findings and any legal rulings premised upon those findings?

Standard of Review: Appellant must marshal the evidence in support of the trial court's findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be "against the clear weight of the evidence," thus making them "clearly erroneous." Young v. Young, 1999 UT 38, ¶15, 979 P.2d 338. Where a trial court's rulings on fact-dependent issues are challenged, this court grants broader than normal deference to the trial court. See State v. Pena, 869 P.2d 932, 936-38 (Utah 1994). Appellants' failure to marshal the evidence requires this Court to assume that all findings are adequately supported by the evidence. See Utah Medical Products, Inc. v. Searcy, 958 P.2d 228, 233 (Utah 1998); In re Estate of Beesley, 883 P.2d 1343, 1347-49 (Utah 1994).

2. Did the trial court abuse its discretion in appointing an Interim CEO of E. Excel International, Inc. to conduct the company's business and operations and designating him a special master as a means of providing the Interim CEO with judicial immunity?

3. Standard of Review: Trial courts historically are given considerable latitude in deciding whether and when to appoint judicial officers, such as special masters, receivers, or monitors to assist in implementing their orders. These decisions are reviewed for an abuse of discretion. See, e.g., Plumb v. State, 809 P.2d 734, 744 (Utah 1990) (reference to special master reviewed for abuse of discretion); Richardson v. Arizona Fuels Corp., 614 P.2d 636, 638 (Utah 1980) (appointment of receiver reviewed for abuse of discretion). As a consequence, the trial court’s appointment of a interim CEO and the designation of that person as special master under Rule 53 of the Utah Rules of Civil Procedure for purposes of assuring maximum protection from legal harassment is reviewed under a harmless error standard. Plumb v. State, 809 P.2d 734, 744 (Utah 1990) (“The standard for determining harmless error is whether it is reasonably likely that the trial court’s final order would have been different absent the master’s improper activities.” (citing State v. Ramsey, 782 P.2d 480, 485 (Utah 1989); State v. Knight, 734 P.2d 913, 919-23 (Utah 1987))).

4. Did the trial court abuse its discretion in entering a preliminary injunction against Hwan Lan Chen (“Madame Chen”) and Jau Hwa and Taig Stewart (the “Stewarts”) barring them from competing with E. Excel based upon the trial court’s findings that Madame Chen and the Stewarts had conspired to strip E. Excel of corporate assets and opportunities?

Standard of Review: “In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact . . . [which] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

judge the credibility of the witnesses.” Utah R. Civ. P. 52(a). This court will “reverse the trial court’s findings of fact . . . only if they are ‘clearly erroneous’ as demonstrated by the challenger’s marshaling of the evidence.” Searcy, 958 P.2d at 233 (Utah 1998) (citations omitted). This court “will not disturb a district court’s grant of a preliminary injunction unless the district court abused its discretion or rendered a decision against the clear weight of the evidence.” Water & Energy Sys., Tech., Inc. v. Keil, 1999 UT 16, ¶ 6, 974 P.2d 821 (Utah 1999) (citing Kasco Services Corp. v. Benson, 831 P.2d 86, 90 (Utah 1992) (citing System Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983))).

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition Below.

In September of 2000, Ms. Stewart, Madame Chen, and others purported to remove Jau Fei Chen (“Dr. Chen”) and her husband as directors and officers of E. Excel International, Inc. (“E. Excel”) and took over the operations of the company. On January 10, 2001, Dr. Chen filed a verified complaint against Ms. Stewart, then acting as CEO of E. Excel, asserting, among other things, that Ms. Stewart improperly sought to force Dr. Chen out as the leader of E. Excel and to establish a competing distribution network by terminating E. Excel’s exclusive contractual relationships with its territorial owners. (R. 1-24). The complaint detailed the alleged harm to E. Excel from the destruction of the existing distribution network, including diminished profitability and significant layoffs of E. Excel employees. (Id.). Dr. Chen simultaneously sought a preliminary injunction and temporary restraining order prohibiting Ms. Stewart from causing E. Excel to violate its exclusive contracts with territorial owners. (R. 27-29). On January 10, 2001, the court

granted the temporary restraining order, finding that Dr. Chen was likely to prevail on the merits of her claim that Ms. Stewart had engaged in ultra vires acts that were damaging to E. Excel. (R. 55-58). On January 18, 2001, Dr. Chen amended the verified complaint to add E. Excel as a defendant. (R. 95-97).

On February 21, 2001, after evidentiary hearings on Dr. Chen's preliminary injunction motion, the parties agreed to a stipulated order, which, among other things, prohibited Ms. Stewart from tortiously interfering with any contract between E. Excel and its distributors, and provided for the appointment of a CEO to conserve the remaining assets of E. Excel and to operate the company pending a final determination of all legal issues in the suit. (R. 626-33). On or about March 13, 2001, the Court appointed Larry Holman to serve as Interim CEO/Special Master of E. Excel. (R. 704).

During the Summer of 2001, Dr. Chen filed two contempt motions against Ms. Stewart, alleging extensive violations of the temporary restraining order. (R. 2072-74; 14306). On October 25, 2001, evidentiary hearings on those motions began. (R. 14244). Those motions resulted in findings of civil and criminal contempt by the trial court and are part of a separate appeal currently pending before this court.

On October 29, 2001, E. Excel filed an Amended Answer, Cross-Claim against Jua-Hwa Stewart, and Third-Party Complaint naming, among others, Madame Chen and Taig Stewart as Third-Party Defendants. (R. 4171-4214). At the same time, E. Excel filed motions for a temporary restraining order (R. 4167-70) and a preliminary injunction seeking to prohibit Madame Chen and the Stewarts, among others, from unlawfully competing against E. Excel during the pendency of this action in order that E. Excel

could have an opportunity to recover for the damage done to it in the marketplace by their wrongful acts. (R. 3718-21). E. Excel's Motion for Temporary Restraining Order was granted on October 31, 2001. (R. 4215-4221.) Over the next ten months, joint hearings were held on Dr. Chen's contempt motion and E. Excel's injunction motion. On August 20, 2002, after 22 days of hearings on E. Excel's motion for preliminary injunction, the trial court entered two separate sets of findings of fact and conclusions on of law in connection with E. Excel's motion for preliminary injunction (R. 14318) and Dr. Chen's contempt motions. (R. 14317).¹ Copies of the Preliminary Injunction Findings and Contempt Findings are included in E. Excel's Addendum as Exhibits A and B respectively.

On October 16, 2002, the trial court entered an order granting E. Excel's motion for preliminary injunction. (R. 9135-45). A copy of the court's preliminary injunction order is included in E. Excel's Addendum as Exhibit C. On October 24, 2002, Madame Chen filed a Motion to Vacate and Set Aside Judge Howards' orders relating to the Interim CEO's appointment. (R. 9238). On January 24, 2003, the trial court denied the Motion to Vacate. (R. 12754-70). A copy of the court's January 24, 2003 order is included in E. Excel's Addendum as Exhibit D. This appeal followed, as well as an appeal of the contempt order on Dr. Chen's motion. This court entertained both appeals, but directed the parties to address the appeal from the E. Excel action first. Both the

¹ The evidentiary hearings on E. Excel's preliminary injunction were combined with hearings on Dr. Chen's motion for contempt. However, the trial court issued separate and independent findings of fact and conclusions of law pertaining to the preliminary

Stewarts and Madame Chen have filed briefs challenging the trial court's refusal to vacate Mr. Holman's appointment as interim CEO and special master, and the grant of a preliminary injunction to E. Excel. This brief responds to both those briefs.

II. Statement of the Facts.

The trial court made extensive findings of fact that document the almost unbelievable malicious activities of the appellants directed against E. Excel, as well as appellants' intentional flouting of the trial court's orders and processes. This brief synthesizes these facts in a relatively dispassionate manner. The court is invited to review the trial court's complete findings to view this activity in full color and in detail.

A. E. Excel and its Relationship to the Chen Family.

E. Excel International, Inc. is a manufacturer of nutritional supplements and skin care products that are sold through multi-level marketing networks. (R. 14317 (Ex. B hereto) at 6, ¶ 6 (citing R. 14293)). E. Excel is incorporated under and governed by principles of Utah corporate law. Various members of the Chen family have served in various roles, as directors, officers, or employees of E. Excel. The members of the family now include appellee Dr. Jau-Fei Chen ("Dr. Chen"), her estranged sister, appellant Jwa-Hwa Stewart ("Ms. Stewart"), her estranged mother, appellant Hwan Law Chen ("Madame Chen"), her brother Tei Fu Chen, and two other siblings. (Id.).

Dr. Chen, the founder of E. Excel, is a highly accomplished person. She was accepted as a student at Brigham Young University at the age of 16. She earned her

Bachelors degree in microbiology at the age of 19, a Masters degree in the same subject at the age of 21, and a Ph.D. in microbiology at the age of 26. (Id. at 6, ¶ 2 (citing R. 14293)). Together with her husband, Rui Kang Zhang, Dr. Chen incorporated E. Excel on July 20, 1987. (Id. at 6, ¶ 5 (citing R. 14293; R. 14230)). Dr. Chen quickly established herself as a charismatic leader of this multi-level marketing company. She was the public spokesperson for E. Excel within its distribution channels, and was often featured in photographs and articles regarding the company. (Id. at 8, ¶ 10 (citing R. 14293; R. 14262)).

Dr. Chen gained familiarity with multi-level marketing networks, in part, through her family's work in the industry. Her brother, Tei-Fu Chen, operated his own successful multi-level marketing business named Sunrider. (Id. at 6-7, ¶ 6 (citing R. 14293)). Dr. Chen's sister, Ms. Stewart, also gained extensive experience working at Sunrider. (Id.).

By the early 1990s, Ms. Stewart had officially left Sunrider to become vice-president of E. Excel, where she assumed substantial responsibilities, including directing E. Excel's finances and cash flow, arranging for credit, and overseeing the manufacturing of product and the payment of invoices. (Id. at 7, ¶ 7 (citing R. 14230)). In addition, Ms. Stewart communicated directly with E. Excel's territorial owners – foreign distribution companies in Malaysia, Taiwan, Hong Kong, and the Philippines, where much of its sales originated. (Id.; see also R. 14293).

E. Excel quickly became quite successful. From its beginning, manufacturing and selling approximately 20 product lines, it grew to market well over 100 product lines. (Id. at 8, ¶ 10 (citing R. 14293; R. 14262)). E. Excel sold its products to territorial

owners located in Korea, Taiwan, Philippines, Hong Kong, Malaysia, Singapore, France, and the United States, which in turn marketed the products to end users through local distribution networks.

B. Ms. Stewart and Madame Chen Attempt to Destroy E. Excel Because of a Family Dispute with Dr. Chen.

The Chen family has a long history of serious internal feuds. One familial dispute resulted in Ms. Stewart reporting her brother, Tei-Fu Chen, to the Internal Revenue Service and to U.S. Customs agents for various activities associated with Sunrider. As a result of Ms. Stewart's information, Tei-Fu Chen was prosecuted, sent to prison, and assessed several million dollars in fines and unpaid taxes. Ms. Stewart received a \$2 million bounty for informing on her brother. (R. 14317 (Ex. B hereto) at 25-26, ¶ 37 (citing R. 14230, R. 14235, R. 14255)).

Another family dispute, directly related to this case, arose when Ms. Stewart and Madame Chen learned that Dr. Chen's husband allegedly was keeping a mistress. Ms. Stewart and Madame Chen demanded that Dr. Chen divorce her husband immediately. When Dr. Chen refused, Ms. Stewart and Madame Chen, along with another Chen sister, took extreme measures. For example, the women would awaken Dr. Chen in the middle of the night, physically shake her, and accuse her of disloyalty to the family. Madame Chen and Ms. Stewart also told Dr. Chen that she was "of the devil" and told her that she should kill herself to end the family's dishonor. (*Id.*). Ms. Stewart also threatened to report Dr. Chen to authorities for unspecified wrongs so that she would be put in jail as had occurred to her brother, Tei-Fu. Madame Chen demanded that Dr. Chen grant her

custody of her three minor children, and then refused to allow the children to see their father. (Id.). Ms. Stewart also began monitoring telephone conversations between Dr. Chen and Mr. Zhang, to determine whether she was complying with the family's wishes. (Id.). Finally, in an apparent effort to strike at Dr. Chen's financial base, Madame Chen and Ms. Stewart demanded that Dr. Chen terminate her relationship with E. Excel and that she cut off all ties with the territorial owners, who were essential to the marketing network. (Id.).

Despite all these tactics, Dr. Chen eventually decided to reconcile with her husband. (Id. at 26, ¶ 38 (citing R. 14230)). To punish Dr. Chen for refusing to divorce Mr. Zhang and to resign from E. Excel, Ms. Stewart and Madame Chen developed an elaborate scheme to oust Dr. Chen and Mr. Zhang from the company, or, in the alternative, to destroy the company in order to prevent Dr. Chen and her husband from sharing in the company's wealth. (Id. at 26, ¶ 39). Dr. Chen's three minor children controlled 75% of E. Excel's shares. By an action taken in October 2001 (but dated September 1, 2000), and while Dr. Chen and her husband were out of the country, Ms. Stewart, purporting to act as trustee for Dr. Chen's children, voted these shares to remove Dr. Chen and her husband as directors of E. Excel. (Id. at 27, ¶ 40 (citing R. 14338)). Ms. Stewart then voted to install her husband, Taig Stewart, and her mother, Madame Chen, as new directors. At the same time, this newly constituted board of E. Excel voted to remove Dr. Chen as president and Mr. Zhang as secretary. The board then appointed Ms. Stewart as president and her husband, Taig Stewart, as secretary of E. Excel. (Id. at 27, ¶ 40 and at 27, ¶ 41 (citing R. 14338; R. 14255)).

In furtherance of their scheme to destroy E. Excel and deprive Dr. Chen and her husband of its financial rewards, Ms. Stewart and Madame Chen also began to take action against the territorial owners who were loyal to Dr. Chen. As a condition of receiving additional E. Excel product, Ms. Stewart demanded that the territorial owners sign new contracts with E. Excel that required the owners to renounce any business relationship with Dr. Chen. (*Id.* at 26-27, ¶ 39 (citing R. 14339; R. 14345)). The territorial owners who refused to comply were replaced by new distributors loyal to Ms. Stewart.

Perhaps mindful that her coup might be short-lived, Ms. Stewart began to take actions directly against E. Excel – actions which would damage it financially and in the marketplace. For example, on September 1, 2000, without any authorization from E. Excel’s board of directors, Ms. Stewart transferred \$425,000 from E. Excel’s money market account into her personal checking account. (*Id.* at 30, ¶ 47 (citing R. 14255; R. 14343)). Later, on September 28, 2000, Ms. Stewart made another unauthorized transfer of more of E. Excel’s funds to her personal checking account, this time in the amount of \$1.5 million. (*Id.*). Ms. Stewart also established two bank accounts at the Central Bank in Provo, Utah, one in her aunt’s name, Ching-Chun Lu Huang, and one in her uncle’s name, Ching Lu. (*Id.* at 36, ¶ 58). Ms. Stewart then arranged for over \$8 million to be transferred to these accounts. (*Id.*). Finally, Ms. Stewart set up a bank account in the name of her long-time friend, Su-Chiu Kuo Shen, with funds from Madame Chen, wire-transferred from Asian accounts. Ms. Stewart and Madame Chen used this account to fund Apogee, Inc., a competing nutritional supplements manufacturing company

incorporated and controlled by Ms. Stewart and Madame Chen. These funds were also used to pay former employees of E. Excel in cash to perform various tasks for Apogee. (Id. at 45-46, ¶ 68).

Similar patterns of financial manipulation of E. Excel's funds were found by a court in Hong Kong to have been engaged in by Ms. Stewart and Madame Chen. During this same period, Ms. Stewart brought an action in Hong Kong against the Board of Directors of E. Excel and E. Excel Limited and its shareholders. In its order denying Ms. Stewart's prayed for relief, the Hong Kong court found that Madame Chen personally received over \$32 million of E. Excel product sale proceeds, and that a Utah County Central Bank account controlled by Ms. Stewart by a power of attorney received over \$7.6 million. The Hong Kong judge found as follows:

As to the alleged wrongful diversions from [E. Excel Limited's] account [Jau Hwa Stewart] not only was privy to the diversion of \$7.6 million from [E. Excel Limited] to accounts of her aunt and uncle (for which she was the contact person), but further that she was instrumental in the utilization of at least part of these monies to pay certain of her US attorney fees, and also to provide seed capital for the establishment of companies to compete with existing Territorial Owners in Hong Kong and Taiwan

In addition, the diversion of a sum of US \$32,681,011, which was taken from the [E. Excel Limited's] accounts to buy cashier orders in the name of [Hwan Lan Chen] with regard to which [Jau Hwa Stewart] holds power of attorney

(See Hong Kong court's August 30, 2001 Order at ¶¶ 68-71, included in E. Excel's Addendum as Exhibit E.) (emphasis added).

Ms. Stewart and Madam Chen also struck at E. Excel's distribution network in ways that appear to have been calculated to destroy both the network and the company's goodwill. Ms. Stewart decided to unilaterally terminate contracts with Excel's Malaysian and Taiwanese distributors, and to sever all business relations with those territorial owners. (R. 14317 (Ex. B hereto) at 26, ¶ 39 (citing R. 14339; R. 14345; R. 14223; R. 14223; R. 14226)). Ms. Stewart, acting as President of E. Excel, cut off the flow of product to E. Excel's historical distributors. Ms. Stewart also arranged to fill some of the distributors' orders with expired or poor quality products. (Id. at 47, ¶ 70 (citing R. 14226)). In addition, Ms. Stewart and Madame Chen arranged for a transfer of millions of dollars back to Asia in order to establish new distribution networks loyal to them. (R. 14318 (Ex. A hereto) at 9, ¶ 15).

On January 10, 2001, Dr. Chen filed this action in the district court, alleging corporate waste, breach of fiduciary duty, and improper removal of a director. (R. 1-24). She then moved for a temporary restraining order to protect her and her children's interests in E. Excel. On January 10, 2001, Judge Howard of the Fourth District Court granted a temporary restraining order prohibiting Ms. Stewart from "directly or indirectly causing [E. Excel] to violate any of its exclusive contract[s] with [the historical distributors] or to compete with the [historical distributors] in violation of such contracts." The district court also directed Ms. Stewart to "fill, complete, and ship all pending orders for products received from [the historical distributors.]" (R. 14318 (Ex. A hereto) at 16-17, ¶ 33 (citing R. 14341)).

Ms. Stewart and her co-conspirators knew that there was a strong possibility that Ms. Stewart would be removed as president of the company. Faced with this likely loss of control, Ms. Stewart and Madame Chen, soon joined by Taig Stewart and others, determined both to destroy E. Excel, rather than let it revert to Jau-Fei Chen's control, and also to replace it in the market with Apogee, a new nutritional supplements manufacturing company controlled by Ms. Stewart and Madame Chen alone. (Id. at 17, ¶ 34 (citing R. 14262)).

Over the next few weeks, following entry of the temporary restraining order, the district court held several days of evidentiary hearings in order to determine whether the temporary restraining order should be converted into a preliminary injunction. During the time the court was hearing the evidence, and while the temporary restraining order was in place, Ms. Stewart and the third party defendants who assisted in the scheme, disabled the surveillance system that monitored activities at E. Excel's warehouses and offices. Ms. Stewart and her conspirators then stole or destroyed millions of dollars worth of E. Excel's inventory and equipment, as well as E. Excel's business records and computer files. (Id. at 23, ¶ 53; and at 26-27, ¶¶ 63-67)). In one of the more bizarre episodes in a bizarre case, the conspirators first removed huge amounts of product from E. Excel's warehouse and converted it to their own purposes. They then purchased mice at a pet store and released them into E. Excel's warehouse for the purpose of giving them a basis to claim that it was necessary to remove the products from the warehouse because of the presence of rodents. (Id. at 23, ¶ 53; and at 28-29; ¶¶ 71-74).

Some of the conspirators' activities, including the looting of E. Excel's warehouse and offices, were in direct violation of the temporary restraining order entered on January 10, 2001. Another example is Ms. Stewart's intentional failure to fill confirmed orders from the historical distributors. (R. 14317 (Ex. B hereto) at 35-36, ¶ 57). In addition, Ms. Stewart intentionally allowed and even caused shipments of E. Excel product within her control to be shipped to new distributors loyal to her. (Id.).

Matters came to a head when, on February 13, 2001, a tape was anonymously delivered to Dr. Chen and her attorneys which contained definitive evidence of Ms. Stewart's ongoing wrongdoing, and of her flouting of the trial court's temporary restraining order. The tape contained a recording of a telephone conversation between Ms. Stewart and two of her loyal distributors located in Asia, Sam Tzu and Richard Hu. During the conversation, Ms. Stewart, Mr. Tzu and Mr. Hu agreed that they all would testify falsely during the evidentiary hearing by denying knowledge of certain critical matters, and then blaming Dr. Chen for certain events harmful to E. Excel for which Ms. Stewart or others were actually responsible. (Id. at 57-60, ¶¶ 88-92). In fact, one of these associates did give false testimony in court in accordance with this joint agreement before the tape recording was delivered to the court and Ms. Stewart was confronted with it. (Id.). As a result of this incident, the trial court referred the tape recording and a transcript of the witness testimony to the County Attorney. (R. 14229). The hearing transcript relating to these events is included in E. Excel's Addendum as Exhibit F.

C. The Entry of the February 21, 2001 Interim Order and Mr. Holman's Appointment as Interim CEO of E. Excel.

Following these evidentiary hearings, and in anticipation of the court's ruling against Ms. Stewart and the other defendants, all parties stipulated to an interim order. Among other things, the stipulated order prohibited Ms. Stewart from tortiously interfering with any contract between E. Excel and its distributors or third parties. The order also required Ms. Stewart to return to E. Excel's corporate headquarters any corporate assets in her custody or control, including corporate records.² (R. 626-632). A copy of the Interim Order is included in E. Excel's Addendum as Exhibit G. Finally, the Interim Order provided for removal of Ms. Stewart as President of E. Excel, removal of Madame Chen and Taig Stewart from the board, reinstatement of Dr. Chen and Rui Kan Zhang to the board, and appointment by the court of a CEO to conserve the remaining assets of E. Excel and to operate the company pending a final determination of all legal issues in the suit. This stipulated order was presented to the court and became the court's February 21, 2001 Interim Order. (*Id.*). Actions taken by the court pursuant to the Interim Order are the subject of this appeal.

² The trial court later determined that, despite its February 21, 2001 Interim Order, Ms. Stewart and her husband continued to remove files, computer files, equipment, and the "entire contents of E. Excel's surveillance room" from E. Excel's offices. Ms. Stewart also continued to direct shipment of product to new E. Excel distributors using a new entity, Shannon River, Inc. (R. 14317 at 74-79; ¶¶ 112-114). To conceal these activities, Ms. Stewart's assistant Angela Barclay "removed all of the records relating to the Shannon River shipments from the premises of E. Excel and delivered them to Jau-Hwa Stewart," and erased all computer files pertaining to Shannon River (R. 14318 at 44, ¶ 126).

Paragraph 1 of the Interim Order directed the parties to exchange lists of proposed candidates for the position of Interim CEO/President of E. Excel. (R. 632 (Ex. G hereto)). However, the parties were unable to agree on a candidate, so the issue was submitted to the court. Significantly, from the standpoint of this appeal, the Interim Order does not contemplate that the interim CEO will be designated as a special master, nor does it suggest that any judicial powers will be conferred upon the CEO. Rather, the Interim Order is specific as to the interim CEO's duties with respect to the operations of the company. (R. 626-632). It provides that the "CEO / President shall have full executive authority to act on behalf of the Company, and conduct its business, subject to the continuing oversight of the board of directors and the Court." (R. 629). The Interim Order also obligates the CEO / President "to provide monthly written reports ... [and] financial statements, including a balance sheet, a statement of operations, cash receipts and disbursements journals, a detailed sales journal, copies of all bank statements, bank reconciliations, a detailed report showing what invoices have not been paid, and any other reports or information reasonably requested by the parties." (Id.).

The parties could not agree upon a candidate for the CEO position. The district court then held a telephonic hearing on March 5, 2001 to discuss the appointment of the Interim CEO / President. (R. 14274). A transcript of the March 5, 2001 Hearing is included in E. Excel's Addendum as Exhibit H. During the hearing, Dr. Chen's counsel noted that the proceedings had been hotly contested, and that, given the circumstances, anyone appointed to the Interim CEO position in the middle of hostile litigation would be very wary of becoming embroiled in the litigation personally. For that reason, Dr.

Chen's counsel argued that as an incentive to serve, the Interim CEO should be granted some form of judicial immunity or other protection from liability. Suggestions included the immunities available to "a receiver" or "a master."³

MR. CARLSTON [counsel for Dr. Chen]: Each of our candidates is very concerned, however, that they receive the maximum protection from the Court in the form of being—even though they're designated as an interim CEO—have the protections they would have if they were appointed a receiver or otherwise received limited judicial immunity. But they're both fine candidates. The people that –

THE JUDGE: I didn't understand your last statement. They're concerned about what protection?

MR. CARLSTON: Well they're, they're concerned that as contentious as this is that, that even though they're referred to as an interim CEO that they also be accorded the protection of being a, a master or a, or something like that so that, so that they're acting under the direction of the Court so they don't, so that these decisions can, can be taken to the Court as contemplated by the order and they be protected through that process.

(Id. at 5-6) (bracketed material and emphasis added). In response to this concern, the district court, when it appointed Mr. Holman as Interim CEO, also designated him as a "Special Master." (R. 704). A copy of the March 13, 2001 order naming Mr. Holman Interim CEO and special master is included in E. Excel's Addendum as Exhibit I.

The colloquy among court and counsel during the March 5 telephonic hearing, like the text of the stipulated order, makes it clear that all parties understood that the interim CEO was not appointed as some form of neutral magistrate, but instead was appointed as manager of E. Excel, to act in its best interests, and pursue any claims the company may have. All understood and agreed that the Interim CEO/President would have the

³ It soon became evident that this protection was necessary; Jau-Hwa Stewart sued Mr. Holman and E. Excel CFO Gary Takagi in December 2001.

authority to cause the company to assert claims and to conduct litigation on behalf of the company. In fact, Ms. Stewart's counsel relied on this fact as a basis for arguing to the Court on March 5 for the appointment of her candidate, a team from Arthur Anderson:

MR. JORDAN [former counsel for Ms. Stewart]: Well, you're asking me, what I hear you saying is is the CEO going to participate in the litigation.

THE JUDGE: And maybe the CEO is going to be burdened by the litigation. Maybe that's the way I –

MR. JORDAN: Well, we asked that question of everyone too. And we, of course, indicated that there's a provision in the, in the order of the Court already that allows the parties to proceed with the litigation on behalf of their respective clients unless the CEO decides he wants to participate in those claims actively.

The advantage of having someone like a Mr. Shields or Mr., or the Arthur Anderson group is is that they have the capability to investigate and participate in those claims. ... When I asked the question of Mr. Homan and Mr. Boyer about that they indicated they, they could do it as well. But obviously, if they're going to be participating in litigation that's going to deprive them of their time, directly of their time. Whereas if you were involving just members of the other two fellows' groups it doesn't take away from the other team members' ability to run the company while the litigation is going on.

(R. 14274 (Ex. H hereto) at 17-18) (bracketed material and emphasis added).

The district court confirmed this understanding of the anticipated duties when, in its March 13, 2001 order appointing Mr. Holman Interim CEO/Special Master, it gave him all authority provided for in the stipulated order just discussed. The March 13 order states: "Mr. Holman is given complete executive authority in his role as chief executive officer and special master . . . subject to this Court's Interim Order." (R. 703 (Ex. I hereto) at ¶ 3). Illustrative of the fact that the district court's addition of "special master" designation was intended to accomplish only the grant of immunity requested by the

lawyers as an incentive to the applicants for the interim CEO position is the fact that the district court never granted Mr. Holman authority to conduct functions appropriate to a neutral judge surrogate, such as hearing evidence, settling discovery issues, or taking testimony.

Consistent with one functioning as a fiduciary and CEO acting in the interest in E. Excel, and inconsistent with one functioning as a quasi-judicial official, all parties understood and agreed that in order to run the company the Interim CEO would engage in ex parte communications with both Jau-Fei Chen and Ms. Stewart, as well as with other E. Excel employees and territorial owners. (R. 14236 at 72). To that end, the parties specifically acknowledged the establishment of a procedure for Mr. Holman's necessary ex parte communications with parties and witnesses. (Id. at 69-74).

Pursuant to the Interim Order, and the rather atypical character of the "special master" designation, Mr. Holman has not acted in any quasi-judicial capacity as a neutral judge surrogate. Rather, he has behaved as a court appointed CEO whose duty is to preserve and protect the assets and the ongoing business opportunities of the company under the court's jurisdiction—E. Excel.

D. The District Court Issues a Preliminary Injunction Against Ms. Stewart and Madame Chen.

In the fall of 2001, E. Excel filed a cross-claim against Ms. Stewart and third-party complaints against several other third-party defendants, including Mr. Stewart and Madame Chen, seeking a preliminary and permanent injunction to prevent them from competing with E. Excel in the marketplace in order to permit E. Excel to recover from

the damage done by the defendants in the marketplace. (R. 4214). Beginning on November 27, 2001 and continuing through the winter and spring of 2002, the district court heard approximately 22 days of testimony and argument on E. Excel's motion for preliminary injunction. On August 20, 2002, the district court entered lengthy and comprehensive findings of fact and conclusions of law. (R. 14318 (Ex. A hereto)). It held that E. Excel had met its burden of proving an entitlement to the preliminary injunction against the Stewarts, Madame Chen, and against most of the Third-Party Defendants. (Id.).

A few weeks later, the district court issued an Order of Preliminary Injunction, granting, with several notable modifications, E. Excel's proposed form of preliminary injunction. (R. 9135-45 (Ex. C hereto)). In entering the order, the district court overruled numerous specific objections to the form of the order lodged by the Stewarts, Madame Chen and the other Third-Party Defendants. (R. 8550-73). A copy of the trial court's Ruling on Appellant's Objections is included in E. Excel's Addendum as Exhibit J.

E. Trial Court's Denial of Motion to Vacate.

On October 24, 2002, Madame Chen, after retaining her current counsel, filed a Motion to Vacate and Set Aside Judge Howard's orders relating to the Interim CEO's appointment. In her motion, Madame Chen for the first time argued that Mr. Holman's appointment as a "special master" exceeded the parameters of Rule 53 of the Utah Rules of Civil Procedure, which limited a special master's role to that of a subordinate judicial surrogate. Based on her newly developed theory, Madame Chen argued that all court orders subsequent to Mr. Holman's appointment should be set aside because they were

contaminated by reliance on the reports to the court of Mr. Holman and on his activities. (R. 12766-12767 (Ex. D hereto)).

Judge Howard denied the Motion to Vacate on January 24, 2003. (R. 12754-70 (Ex. D hereto)). He ruled that Mr. Holman's appointment and the powers to act as interim CEO which were bestowed on him and exercised by him under the order of reference were consistent with Rule 53(c) of the Utah Rules of Civil Procedure because that rule allows the Court to "specify or limit" a special master's powers. In particular, the trial court found that the unique circumstances which confronted E. Excel in early 2001 required "a unique and immediate response." (R. 12765). Specifically, the court concluded that "E. Excel was in chaos," that it "was losing stability rapidly," and that "[e]xigent circumstances necessitated the immediate appointment of a CEO / President of E. Excel without which the company would cease to operate." (Id.).

The court also revisited its decision to afford Mr. Holman judicial immunity by designating him a "special master." (R. 12764). The trial court noted that the "parties agreed that an interim CEO/President of E. Excel would be appointed to forestall the erosion of E. Excel's business and attempt to revitalize the business." (Id.). The trial court further noted that Mr. Holman was initially appointed as an interim CEO / President, but that he was given "the same immunities and protections of a special master ... because of the potential for oppressive lawsuits against him." (Id.). The Court also noted that all parties to the litigation at the time of his appointment had stipulated both to Mr. Holman's appointment as an interim CEO and the appropriateness of the accompanying judicial immunity. (Id.).

Finally, the trial court ruled that Madame Chen had waived her challenge to Mr. Holman's actions. The court found she had participated in the litigation for over 10 months, from December 12, 2001 on, with full knowledge of the provisions of the Interim Order and of the terms upon which Mr. Holman operated under the court's supervision, without raising an objection or asking the court to revisit Mr. Holman's authority. (R. 12761-12762). Rather, Madame Chen waited until after the lengthy preliminary injunction hearing was completed—and the district court had issued its findings which were adverse to her—before lodging any objection.

Based on the foregoing, the court concluded that Mr. Holman's appointment was proper.

SUMMARY OF THE ARGUMENT

The Stewarts and Madame Chen make two basic challenges to the trial court's actions in this interlocutory appeal. First, and most important, they challenge the orders of reference pursuant to which the trial court appointed Mr. Holman to act as an interim CEO / President of E. Excel and gave him the title of "special master". Second, they challenge both the entry and the scope of the trial court's preliminary injunction. Both of these challenges fail.

A fundamental flaw runs through appellants' challenge to these two rulings. Although appellants claim that this appeal presents only legal questions, in fact, the legal questions are heavily fact dependent. For the appellants to prevail, this court must revisit the facts and redetermine them. But appellants have not laid the necessary groundwork. They have not even attempted to marshal the evidence in support of the findings, and

then show the evidence is legally insufficient, as required by this court's long-standing authority. For good reason. The trial court heard 22 days of testimony and argument, and entered 110 pages of factual findings before entering the preliminary injunction. Then, when appellants belatedly challenged the appointment of Mr. Holman following the entry of the preliminary injunction, the court heard argument and issued another ruling that contained additional factual findings. All these findings are overwhelmingly adverse to appellants, which explains their aversion to discussing them. Because these findings are not properly challenged and must be accepted for purposes of this appeal, and because they are thoroughly integral to the rulings under attack and are more than sufficient to support them, the trial court's rulings can be affirmed on this basis alone.

The primary focus of Madame Chen and the Stewart's appeal is their challenge to the appointment of Mr. Holman as the interim CEO / President. Their challenge is based on the fact that he was given the title of "special master" under Utah Rule of Civil Procedure 53. Because Mr. Holman has not acted as a neutral judicial officer, appellants claim that everything that has happened since his appointment must be undone. Appellants are wrong, and the trial court's rulings should be upheld, for three independent reasons:

- First, there is no dispute that the trial court had ample legal authority to appoint an interim CEO / President to manage E. Excel's business affairs during the pendency of the litigation; such an appointment was clearly necessary in the context of this case; and Mr. Holman acted at all times consistent with the

detailed terms of the trial court's orders, which orders, not the title "special master," define his authority.

- Second, appellants did not timely challenge Mr. Holman's appointment. Ms. Stewart stipulated to the appointment of an interim CEO / President, and to the orders defining his responsibilities, and Madame Chen actively participated in the case for almost a year before raising this issue. Because the appellants chose to wait until after they had lost the preliminary injunction motion to raise this issue, this court should not entertain it now.
- Third, even if the trial court erred in using the title "special master," that error was technical only and completely harmless because (i) Mr. Holman's actions were entirely consistent with the actions of a receiver appointed pursuant to Rule 66 of the Utah Rules of Civil Procedure, and (ii) the trial court specifically found that even without the special master's reports to the court, there was ample evidence to support the preliminary injunction.

As something of an afterthought, the appellants attempt to challenge the preliminary injunction entered against them. Madame Chen argues that the trial court erred in finding that E. Excel had shown the requisite likelihood of prevailing on the merits, and both appellants argue that the injunction is overbroad because it is prospective. In challenging the preliminary injunction, appellants face an extremely heavy burden – they must show that the trial court abused its discretion or rendered a decision that was against the clear weight of the evidence. They have not begun to carry this burden. Madame Chen challenges the extensive findings that she acted wrongfully,

but does not even attempt to marshal the evidence, which overwhelmingly supports the injunction. And both appellants challenge the injunction's prospective operation, without attempting to refute the trial court's findings that appellants' actions are particularly egregious and harmful to E. Excel, and that it needs protection against further depredations pending the final termination of this litigation. Finally, Madame Chen claims, for the first time on appeal, that her due process rights were violated by the trial court's entry of the preliminary injunction against her because she was present and represented by counsel at only 18 of the 22 days of preliminary injunction hearings. She makes this argument even though she actively evaded service of process, her counsel was present for all 22 days of hearing, she had ample opportunity to present whatever evidence she deemed appropriate in her defense, and she never complained of any prejudice until after the trial court ruled against her.

For each of these reasons, the trial court's orders should be affirmed, and this matter remanded to the trial court for further proceedings.

ARGUMENT

I. The Trial Court's Findings of Fact Have Not Been Properly Challenged.

The Stewarts and Madame Chen try to paint their appeal as raising only questions of law. See Stewarts' Br. at 1-3; Madame Chen's Br. at 2-6. However, given the devastatingly negative findings that the trial court entered respecting the conduct of the Stewarts and Madame Chen, and the implication that those findings have for the legal issues, the briefs of both the Stewarts and Madame Chen attempt to recast the facts in a light more favorable to them. In so doing, they implicitly acknowledge the centrality of

the facts to the issues on appeal. When the highly selective statements of facts in appellants' two briefs are read against the extensive findings of the trial court, findings which appellants seldom cite, (see Stewarts' Br. at 5-27; Madame Chen's Br. at 6-46), it becomes apparent that not only are both the Stewarts and Madame Chen explicitly challenging the trial court's rulings of law, but of necessity implicitly challenging the trial court's factual findings upon which those rulings are based. Yet neither brief even attempts to carry the heavy burden Utah imposes upon one who seeks to overturn a trial court's factual findings.

A. The Stewarts and Madame Chen Have Failed to Marshal the Evidence.

As repeatedly recognized by this court, one attacking a trial court's findings "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (internal quotation and citation omitted). The Utah Court of Appeals, following the Supreme Court's lead, has said that "[i]n order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." Neely v. Bennett, 2002 UT App 189, ¶ 11, 51 P.3d 724 (finding that appellant failed to meet marshalling duty despite presenting 68 pages and 284 numbered paragraphs of facts) (emphasis added); Harding v. Bell, 2002 UT 108, ¶ 19, 57 P.3d 1093 (holding that appellant must marshal "every scrap" of evidence); Timm v. Dewsnup, 2003 UT 47, ¶ 24 (holding appellant must

marshal “all relevant evidence . . . that tends to support the findings”) (citation and quotation omitted).

The marshalling process requires that the challenger “assume the role of devil’s advocate.” Harding, 2002 UT 108 at ¶ 19 (internal quotations and citation omitted). “The party challenging the jury’s verdict must therefore temporarily remove its own prejudices and fully embrace the adversary’s position.” Id. (internal quotation and citation omitted). This “rigorous” and “strict requirement both grows from and nurtures two interrelated court objectives: efficiency and fairness.” Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1053 (Utah Ct. App. 1994). A proper marshaling of the evidence promotes efficiency by avoiding “retrying the facts” and by assisting the court in “decision-making and opinion-writing.” Id. It also promotes fairness by requiring that the appellants bear the expense and time of marshalling the evidence rather than putting the appellee in the “precarious position” of performing the appellants’ work, “at considerable time and expense.” Id. at 1053-54. “[T]he deference [appellate courts] afford to trial courts’ factual findings is based on and fosters the principle that appellants rather than appellees bear the greater burden on appeal.” Id.

Instead of marshalling the evidence supporting the factual findings and then demonstrating the insufficiency of this evidence, the Stewarts and Madame Chen have presented either a selection of facts that support arguments they have made below (for example, while arguing against the scope of the injunction, the Stewarts and Madame Chen do not point to all the racketeering activity the trial court found they committed against E. Excel), or they have asserted that there is “no evidence” to support the trial

court's findings.⁴ The marshalling duty, however, is not met by “merely present[ing] carefully selected facts” or by simply “rearguing” the evidence that was presented below. Oneida, 872 P.2d at 1053. And, even if an appellant asserts that there is “no evidence” for certain factual findings, the “heavy burden of marshaling all of the evidence in support of the finding of fact does not shift to the appellee in order to refute the appellant’s assertion of the absence of evidence.” Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶ 22, 54 P.3d 1177. Instead, “the appellee, when confronted with such a ‘no evidence’ sufficiency challenge, need only point to a scintilla of credible evidence from the record that supports the finding of fact in order to overcome the appellant’s ‘no evidence’ assertion and to demonstrate that the appellant has failed to meet its marshaling burden.” Id. (emphasis added).

As we will demonstrate throughout the argument section of this brief, the Stewarts and Madame Chen have utterly failed to meet their marshaling burden under this standard.

B. Because the Trial Court’s Findings of Fact Are Not Properly Challenged and Because They Dispose of the Stewarts’ and Madame Chen’s Legal Arguments, This Court Should Affirm the Trial Court’s Decisions.

Each of the legal issues appellants raise are highly fact-dependent. For example, the trial court’s finding that the Stewarts and Madame Chen have waived their right to challenge the order of reference appointing Mr. Holman as a special master is dependent upon what the appellants knew and what they did during the period preceding the filing

⁴ See, e.g., Madame Chen’s Br. at 41- 46 (the phrase “no evidence” is used at least ten

of their challenge. Similarly fact sensitive are the correctness of the trial court's determination of the need for, and the conditions under which, Mr. Holman was appointed interim CEO of E. Excel and a special master; the correctness of the trial court's conclusion that if the special master designation was error, it was harmless; the correctness of the trial court's conclusion that E. Excel can make out a prima facie case of wrongful conduct against Madame Chen sufficient to support the preliminary injunction against her; the correctness of the trial court's conclusion that Madame Chen was not prejudiced by not being technically represented at 4 days of E. Excel's preliminary injunction hearings; and the appropriateness of the scope of the preliminary injunction. Yet all of these rulings are challenged by appellants without properly challenging the fact findings that underlie them. See Madame Chen's Br. at 53-83; Stewarts' Br. at 28-49.

Where a trial court's rulings on such fact-dependent issues are challenged, this court grants broader than normal deference to the trial court. See State v. Pena, 869 P.2d 932, 936-38 (Utah 1994); see also Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 939-42 (Utah 1993) (recognizing that waiver is a highly fact intensive question on which trial courts exercise discretion in applying the law to facts). Consistent with that approach, this court has recognized that even if an appellant purports only to challenge a legal ruling, if a determination of the correctness of a court's application of a legal standard is extremely fact sensitive, the appellant also has a duty to marshal the evidence. See, e.g. In re Estate of Beesley, 883 P.2d 1343, 1347-49 (Utah 1994) (because

times and in response to almost all of the trial court's findings).

the appellant did not marshal the evidence, the findings were presumed valid and the findings proved fatal to appellant's legal argument). As the court explained in Utah v. Teuscher, 883 P.2d 922, 929 (Utah 1994), because the court "accord[s] a measure of discretion to the trial court's determination unless such determination exceeds established legal boundaries," it requires "as a preliminary matter" that the appellant "marshal all evidence in favor of the in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact."

As discussed in greater detail in the following sections, the Stewarts and Madame Chen's failure to properly marshal and then challenge the sufficiency of the evidence adduced respecting the factual predicates of each of the trial court's legal rulings under appeal ultimately dooms both the Stewarts and Madame Chen's arguments on all points under appeal.⁵

II. The Trial Court's Decision To Appoint An Interim CEO And To Afford The CEO Judicial Immunity As A Special Master Was Lawful.

In their opening briefs, the Stewarts and Madame Chen argue that Mr. Holman's appointment as interim CEO / President of E. Excel was improper under Rule 53 of the Utah Rules of Civil Procedure. See Madame Chen's Br. at 53-71; Stewart's Br. at 28-38. The Stewarts and Madame Chen contend that because Mr. Holman was given the title

⁵ Even if this court were to consider these fact issues, they are reviewed for whether any errors in the admission or exclusion of evidence were so substantial and prejudicial that the Stewarts and Madame Chen were deprived in some manner of a full and fair consideration of the disputed issues. Ashton v. Ashton, 733 P.2d 147 (Utah 1987),

“special master,” rather than, for example, “receiver,” he necessarily was converted from a CEO—a person having the duty to preserve company assets and operations, to protect them from others, and to operate the company with a view to making it profitable—to a quasi-judge whose powers and activities are strictly limited to that of a neutral magistrate. See Madame Chen’s Br. at 54-57; Stewart’s Br. at 28-29. They argue that all his post-appointment activities on behalf of E. Excel, and the court proceedings in which he participated, were fatally flawed because he did not act with impartiality towards all parties, and asserted claims on behalf of E. Excel against the appellants. See Madame Chen’s Br. at 53-57; Stewart’s Br. at 32. To remedy this hypothesized problem, the Stewarts and Madame Chen ask this court to treat Mr. Holman’s activities on behalf of E. Excel as without legal effect and to disregard two years of litigation and forty days of evidentiary hearings by vacating Mr. Holman’s appointment and any subsequent court orders. See Madame Chen’s Br. at 58-63; Stewart’s Br. at 45-47. The Stewarts and Madame Chen’s argument is as sophistic as it is belated.

Interestingly, the Stewarts and Madame Chen are silent about the implications that setting aside Mr. Holman’s actions and the trial court’s orders would have on E. Excel’s territorial owners, creditors, and customers, all of whom have relied on Mr. Holman’s board-approved actions in contracting and dealing with E. Excel. It takes little imagination to see that the consequences would be devastating for E. Excel.

The response to their claim is three-fold. First, Judge Howard acted properly in appointing Mr. Holman to act as interim CEO for E. Excel. Contrary to the Stewarts and Madame Chen's assertions, the terms of Mr. Holman's appointment never encompassed a grant of quasi-judicial powers. He was given the title of "special master" only to provide him with some form of judicial immunity to protect him in this highly acrimonious family war of attrition. The determinant of his authority or his role is not the title "special master," but the highly specific terms of the court's orders of February 21, 2001 and March 13, 2001. These orders nowhere suggest Mr. Holman's role was that of a neutral magistrate.

A second reason for rejecting appellant's challenge to Mr. Holman's appointment as Interim CEO/Special Master is that the Stewarts and Madame Chen did not timely challenge that appointment. Mrs. Stewart originally consented to Mr. Holman's appointment as interim CEO and the grant of judicial immunity to him by way of his being titled "special master." Both the Stewarts and Madame Chen were fully aware of all relevant facts concerning Mr. Holman's appointment and his activities throughout ten months of litigation and forty days of evidentiary hearings, yet never challenged Mr. Holman's appointment until after the court ruled against them and Madame Chen retained new counsel. The Stewarts and Madame Chen's objection to the reference is untimely and, therefore, waived.

Finally, even assuming that the trial court erred in titling Mr. Holman a "special master" under Utah Rule of Civil Procedure 53, the court's order appointing Mr. Holman should still be upheld and his actions sustained because any error was technical only and

was harmless. One reason is that in running E. Excel and in seeking to vindicate E. Excel's legal rights, Mr. Holman's actions were all within the scope of what a court-appointed CEO would ordinarily do, and would have been entirely unexceptional if he had been titled a court-appointed "receiver." See Utah R. Civ P. 66(a). A second reason appellants cannot show harmful error is that the trial court specifically found that, even without the special master's testimony, there was ample evidence to support its entry of a preliminary injunction against the Stewarts and Madame Chen. Under these circumstances, any error the court may have committed by titling Mr. Holman a "special master" was harmless.

A. The Trial Court had Authority to Appoint an Interim CEO to Manage E. Excel's Business Affairs and Operations.

Judge Howard's decision to exercise his inherent equitable powers to appoint an interim CEO to manage E. Excel's affairs was both lawful and necessary under the circumstances of this litigation. The need for an Interim CEO in early 2001, when the order under attack was entered, cannot seriously be questioned. At that time, members of the Chen family were fighting for control of E. Excel, and Ms. Stewart and Madame Chen were systematically wrecking the company and stripping it of its assets. In its January 24, 2002 order, the trial court rejected appellants' belated challenge to Mr. Holman's appointment, a decision which is under review here. In so doing, the trial court described the company's situation at the time of Mr. Holman's appointment as follows:

The circumstances of the litigation was an extraordinarily troubled one in January and February 2001 creating the need for a unique and immediate response. Exigent circumstances necessitated the immediate appointment of a CEO / President of E. Excel without which the company would cease

to operate. E. Excel was in chaos and was losing stability rapidly. Among other things the record reflects that E. Excel was missing important files, documents, equipment, product, and cash flow needed for day to day operations. This Court later discovered and concluded from the evidence that E. Excel had been stripped by it's [sic] acting President and Officers and that certain of it's [sic] employees were involved in a conspiracy led by Defendant Mrs. Stewart and funded by Madame Chen. The intent and purpose of the conspiracy was to destroy E. Excel and then install a new competing company named Apogee with a distribution network carved from E. Excel's distribution network.

(R. 12764-65 (Ex. D hereto)).

The court's January 24, 2003 order then describes the response of the court and the parties, after the court held its initial hearings at which the malfeasance of Ms.

Stewart, Madame Chen, and others was revealed:

Following the initial 10 day hearing, the Court and the parties agreed that an interim CEO / President of E. Excel would be appointed to forestall the erosion of E. Excel's business and attempt to revitalize it's [sic] business. Mr. Holman was appointed to this position and was given the title of interim CEO / President. The parties and Mr. Homan insisted that the same immunities and protections that a special master would receive be bestowed on him because of the potential for oppressive lawsuits against him as interim CEO. At this critical time the parties included Plaintiff Jau-Fei Chen, Defendant Jau-Hwa Stewart and E. Excel. Each stipulated that Mr. Holman would act as CEO / President of E. Excel and as special master with full executive authority to act as CEO under the direction of the Board of Directors and with the prescribed protections an immunities. The parties having stipulated to such appointment, the Court approved the stipulation.

(Id.).

Significantly, in their brief to this court, the Stewarts and Madame Chen never seriously challenge Judge Howard's findings on this point. They do not dispute that a court-appointed officer was necessary to protect E. Excel's interests. They do not assert that the trial court lacked the inherent equitable power to appoint an Interim

CEO/President for E. Excel to preserve its assets and operations. They do not contend that the authority the court bestowed on Mr. Holman, pursuant to the stipulation of all parties to the terms of the February 21, 2001 order, exceeded the scope of the court's equitable power.⁶ Instead, the Stewarts and Madame Chen contest Mr. Holman's appointment and challenge everything he and the court have done thereafter on the ground of one technicality: that the court entitled Mr. Holman a "special master" in an effort to give him immunity, rather than a "receiver." They argue that as a Rule 53 special master, Mr. Holman had to act as a quasi-judicial neutral magistrate only, and that any number of the things he did as interim CEO / President were inconsistent with those limitations. See Madame Chen's Br. at 54-57; Stewart's Br. at 39-42. In the words of the trial court before which this same argument was made, appellants contend that "Mr. Homan is a renegade judicial officer operating far afield from the mandates of his appointment" and far beyond what the court had authority to authorize under Rule 53. (R. 12765 (Ex. D hereto)).

1. The trial court had ample equitable powers to appoint an Interim CEO.

The first problem with the Stewarts' and Madame Chen's argument is that the trial courts' power to appoint Mr. Holman did not derive solely from Rule 53. The rules of civil procedure that established modes for the exercise of substantive power by courts, such as Rule 53 on special master, and Rule 66 on receivers, were not created out of whole cloth. Rather, they are efforts to describe circumstances and procedures which

⁶ Indeed, they could not. See Utah R. Civ. P. 66(a).

govern the exercise by courts of inherent judicial power. It is well established under the common law that a trial court has the equitable authority to appoint a receiver or other judicial officer to preserve the corporation's assets and manage its operations. See, e.g., Wilentz v. Home Serv. Society, 21 A.2d 795, 795 (N.J. Ct. Chan. 1941); State Ex Rel. Ind. Dist. Telegraph Co. v. Second Judicial Dist. Ct., 39 P. 316, 321 (Mont. 1895). This authority is particularly well recognized where, as here, allegations are made that a shareholder has converted corporate assets for their own use, or otherwise destroyed the value of the corporation. See, e.g., Anglo-American Royalties Corp. v. Brentnall, 29 P.2d 120, 121 (Olka. 1934); Allen v. Hawley, 6 Fla. 142, 164 (Fla. 1855); Southern Maryland Agricultural Assoc. v. Magruder, 81 A.2d 592, 595 (Md. Ct. App. 1951).⁷

Utah follows the uniform weight of authorities recognizing that a court may “appoint a receiver at the request of the stockholders of the corporation suing either individually or on behalf of the corporation.” Richardson v. Arizona Fuels Corp., 614 P.2d 636, 638 (Utah 1980) (citing 3 Clark on Receivers § 738(d) (3rd ed. 1959); 16 Fletcher, Cyclopedia of the Law of Private Corporations, § 7688 (rev. perm. ed. 1979); 65 Am. Jur.2d Receivers § 11 (1972); 19 C.J.S. Corporations § 833c (1940)). In that

⁷ The modern courts continue to observe this inherent equitable power. See, e.g., SEC v. Keller Corp., 323 F.2d 397, (7th Cir. 1963) (recognizing federal courts possess equitable authority to appoint trustee-receiver for protection of corporation and stockholders); Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997) (noting that a trial court may appoint a receiver in the absence of a statute pursuant to its inherent equitable authority); Suphers v. Scardino, 1985 U.S. Dist. Lexis 13161 * 56 (E.D. Penn. 1985) (recognizing that the appointment of a receiver is warranted when gross mismanagement of a corporation or misappropriation of corporate assets is at issue); Petitpren v. Taylor School Dist., 304 N.W.2d 553, 557 (Mich. Ct. App. 1981) (receiver may be appointed under appropriate facts and circumstances pursuant to the court's equitable jurisdiction).

regard, Utah law also observes the well-established common law rule that allows a court to appoint a receiver “in cases where misappropriation of corporate assets by corporate insiders is asserted.” Id. (citing Stevens v. South Ogden Land, Bldg. & Improvement Co., 14 Utah 232 (1896); Bookout v. Atlas Fin. Corp., 395 F. Supp. 1338 (D. Ga. 1974)).

The vitality of these principles is acknowledged in modern law through the adoption of Rule 66 of the Utah Rules of Civil Procedure, which sets guidelines for the exercise of this inherent power. That rule allows the trial court to appoint a receiver over a “corporation in imminent danger of insolvency” or in other cases where a receiver could be appointed by a court of equity. See Utah R. Civ. P. 66(a). Recognizing that a receiver is appointed to protect the property and assets at issue, Rule 66 further empowers a receiver to “bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, to collect debts, to compound for and compromise the same, to make transfer and generally to do such acts respecting the property as the court may authorize.” Utah R. Civ. P. 66(e). Thus, without relying on Rule 53 pertaining to special masters, the trial court had undisputed authority to appoint an officer to act on behalf of E. Excel and to preserve its assets.

While the trial court would have been within its authority under Rule 66 to appoint Mr. Holman as a receiver for E. Excel in order to protect the company’s assets and interests, the title “special master” was bestowed to acknowledge Mr. Holman’s immunity from suit in his personal capacity. Like Rule 66, Rule 53 of the Utah Rules of Civil Procedure also recognizes the trial court’s inherent ability to appoint a officer to assist the court in carrying out its orders. See Plumb v. State, 809 P.2d 734, 741 (Utah

1990) (“We see little virtue in an interpretation of rule 53(b) that unnecessarily narrows a trial judge’s options in dealing efficiently with the issues presented for decision.”). To that end, Rule 53 allows a court to refer any or all issues pending in an “to a master upon the written consent of the parties...” and to “specify or limit” the master’s powers through the order of reference. See Utah R. Civ. P. 53(a) and 53(c). Rule 53 also allows a court to appoint a variety of judicial officers as masters, including referees, auditors, and examiners. Utah R. Civ. P. 53(a).

The facts surrounding the formulation of the interim order by counsel for all parties and the court in February 2001, (see supra, at pp. 12-18), demonstrate that the appointment of an interim CEO for E. Excel was contemplated as being done pursuant to this inherent equitable power. There is no indication that anyone contemplated the appointment of a neutral judicial officer to run E. Excel. See supra at pp. 15-18. Instead, the duties specified in the stipulated interim order are entirely consistent with this court’s equitable power to appoint an officer to preserve and protect E. Excel’s assets, to conduct the company’s operations, and to restore it to profitability. The special master designation was only to provide Mr. Holman some protection from collateral harm he might suffer in this highly acrimonious family war of attrition. The title bestowed on him was not the determinant of his authority or role. Rather, the determinant is the highly specific terms of the court’s interim order.

2. Mr. Holman's activities were consistent with his authority as a Court-Appointed CEO.

The Stewarts' and Madame Chen's challenges to specific activities of Mr. Holman acting as interim CEO of E. Excel are all specific applications of their general legal claim that anyone given the title of a Rule 53 special master is limited to performing actions consistent with the role of a neutral judicial officer. Each of these particularized contentions is subject to the same fundamental flaw: Mr. Holman's appointment was not so limited.

The Stewarts and Madame Chen contend that Mr. Holman overreached his authority under Rule 53 when he directed that E. Excel pursue its claims against the Stewarts and Madame Chen, among others. They contend that such actions are unsuitable for a special master. See Madame Chen's Br. at 58-63; Stewart's Br. at 40-42. The response is that not only are such activities appropriate to an interim CEO, but all parties understood at the time of Mr. Holman's appointment that the court-appointed interim CEO would be authorized to pursue litigation as an officer of the corporation, and subject to the board's control. As described in detail above, during the March 5, 2001 telephonic hearing, which preceded Mr. Holman's selection as interim CEO, the parties discussed the role of the court-appointed CEO in the pending litigation. See supra at pp. 15-18. The parties and the trial court understood and agreed that the Interim CEO/President, acting with board approval, would have the right and authority to cause the company to bring claims on behalf of the company. Indeed, it was precisely because the court and parties foresaw that anyone appointed would be involved in the time-

consuming activity of investigating and pursuing claims on behalf of E. Excel that Mr. Jordan, Ms. Stewart's former counsel, argued in favor of appointing a team of accountants to run E. Excel, as opposed to one individual. See supra at p. 18; (R. 14274 (Ex. H hereto) at 17-18).

Another contention of the Stewarts and Madame Chen that is a particularized application of this general claim that Mr. Holman is limited to acting as a neutral judicial officer is the assertion that his actions have manifested a bias in favor of Jau-Fei Chen, and as such, he has engaged in conduct that undermines appellants in the litigation. The Stewarts and Madame Chen wholly ignore the trial court's finding that the Stewarts and Madame Chen – not Jau-Fei Chen – acted against the interest of E. Excel. Among other things, the trial court noted that Ms. Stewart and Madame Chen founded Apogee, Inc., an entity which Madame Chen funded, to compete with E. Excel. (R. 12759 (Ex. D hereto) (citing R. 14318 at ¶¶ 138, 143)). Madame Chen and Mrs. Stewart attempted to conceal these activities from Mr. Holman. (Id.; R. 14245 at 94-95). The trial court also recognized that its findings were largely in favor of E. Excel and Dr. Chen, but it observed that it found “the evidence in this matter overwhelmingly persuasive to the positions of Dr. Chen and E. Excel.”

The Stewarts and Madame Chen mount an attack on Mr. Holman and the trial court that depends entirely on the premises that designating Mr. Holman a special master trumped all the provisions of the stipulated interim order and entirely vitiated the authority that equity would permit a court to bestow on an interim CEO. Once that

premise is rejected, all their particular claims of misconduct and trial court error must fail.

3. A Rule 53 Special Master is not necessarily precluded from exercising the power of an Interim CEO if the Order appointing him specifically so provides.

The Stewarts and Madame Chen assert that the text of Utah Rule of Civil Procedure 53, and the cases construing that rule and its federal analogue, require that the rule be construed narrowly and that anyone appointed under that rule cannot be other than a neutral judicial officer. They contend that to appoint someone to act as an interim CEO for a company with power to act in the company's interests, even if that requires bringing suit against others, is necessarily beyond the power the rule gives to a court.

Significantly, the Stewarts' and Madame Chen's position is based on their reading of LaBuy v. Howes Leather Co., 352 U.S. 249 (1956), which construed the Judicial Rule 53 narrowly and displayed a traditional hostility of federal courts to the delegation of judicial power to non-judges. The Utah Supreme Court has previously recognized that Rule 53 of the Federal Rules of Civil Procedure is nearly identical to Rule 53 of the Utah Rules of Civil Procedure. Plumb, 809 P.2d at 740, n. 9. Thus, federal case law is considered a "useful guide" in interpreting Rule 53, provided that it does not "unnecessarily narrow[] a trial judge's options in dealing efficiently with the issues present for decision. Id. at 740, n. 9; 741. But this court specifically rejected LaBuy's approach to Utah's analogous Rule 53 in Plumb v. State, 809 P.2d 734 (Utah 1990). As noted in Plumb, the LaBuy decision was authored over forty years ago, long before the widespread use of magistrates within the federal system softened the federal courts'

hostility to delegating judicial authority. In addition, this court has recognized that LaBuy is too limited in scope as it “unnecessarily narrows a trial judge’s options in dealing efficiently with the issues presented for decision.” Id. at 741.

A number of more recent federal and state cases demonstrate a tendency to allow trial courts to appoint a variety of officers to assist in implementing their orders under Rule 53, even when they do not seem to fall squarely within the literal terms of Rule 53. The key to these decisions seems to be the fact that the scope of the officer’s authority is determined by the court order appointing the officer, not the arbitrary title assigned to the officer. The ultimate question is whether the court has the power to make the appointment and has spelled out the master’s duties so as to minimize the potential for abuse.

The Eighth Circuit Court of Appeals articulated this principle in Jenkins v. Missouri, 890 F.2d 65 (8th Cir. 1989), a case involving a court-appointed monitoring committee. In Jenkins, the state of Missouri challenged the trial court’s decision to appoint a monitoring committee to oversee its desegregation orders. Specifically, the state argued that the district court did not comply with Rule 53 of the Federal Rules of Civil Procedure in appointing the committee. In affirming the trial court’s appointment, the Eighth Circuit rejected the narrow approach to what can be done under Rule 53:

Rule 53 does not terminate or modify the district court’s inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy. The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established. Such court-appointed agents have been identified by a confusing plethora of titles: ‘receiver, Master, Special Master, master hearing officer, monitor, human

rights committee, ombudsman,' and others. The function is clear, whatever the title.

Id. at 67 (quoting Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982) (emphasis added)).

The Ninth Circuit has reached a similar conclusion in Federal Trade Commission v. World Wide Factors, Ltd., 882 F.2d 344 (9th Cir. 1989), a case involving a court-appointed receiver / special master. In World Wide Factors, the district court entered a preliminary injunction finding that the defendants had violated certain FTC regulations. The court sua sponte appointed a special master to account for and preserve the corporations' assets so that they would be available for distribution following trial. See id. at 348. The defendant challenged the appointment, arguing that the special master had been transformed into a "receiver" for purposes of the litigation. See id. In reviewing the district court's decision, the Ninth Circuit recognized that the special master's responsibilities technically met the definition of a receiver. Nevertheless, the court concluded that the trial court had not erred by designating the court-appointed officer a special master. Id. at 348.

The same principles apply to the case at hand. Here, the trial court appointed an interim CEO, pursuant to a stipulation of the parties and in the exercise of its historical equitable powers, in order to preserve E. Excel's assets and operations. Although the same objective of protecting E. Excel's assets likely could have been achieved by appointing a receiver or some other officer, under Utah Rule of Civil Procedure 66 or otherwise, the title "special master" was bestowed in the hope it would protect Mr.

Holman from being dragged into the family's internal and ongoing struggles. Mr. Holman has behaved entirely consistently with the definition of his authority in the stipulated order, and has acted with board approval and under the court's supervision. The Stewarts and Madame Chen do not suggest any judicial act taken by Mr. Holman in his capacity as CEO / special master. The fact that the trial court denominated Mr. Holman a special master under Rule 53, pursuant to the agreement of the parties and to protect him from suit does not change the scope of duties or responsibilities under the Interim Order. There is nothing inherent in Rule 53 that forbids a judge from defining with particularity duties a special master is to perform. Consistent with the liberal approach signaled by Plumb v. State, and the decisions in the Jenkins and World Wide Factors cases, the trial court's appointment of Mr. Holman as a special master under Rule 53 should not be found to have been in error.

B. Madame Chen and the Stewarts Waived Their Right to Challenge Mr. Holman's Appointment When They Failed to Timely Object.

As shown above, the challenge to Mr. Holman's actions based on his being titled a "special master" fails on its merits. But this court need not reach the merits of that challenge because Madame Chen and the Stewarts have waived their right to challenge the order appointing the interim CEO/special master by not asserting their challenge in a timely manner.

A party challenging an order of reference to a special master must timely raise their objection or forfeit their claim. See, e.g., Score v. Wilson, 611 P.2d 367, 368 (Utah 1980) (defendant failed to object to master's report and was barred from raising same);

Cruz v. Hauck, 515 F.2d 322, 327 (5th Cir. 1975) (party waived objection to by failing to object to reference at earliest possible opportunity).⁸ The policy behind this rule was articulated by the Fifth Circuit in Cruz:

A party objecting to a reference should do so prior to or at the time of the reference. If this is infeasible, the objection should be made to the judge at the earliest possible opportunity. Such procedure permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master's report would be able to obtain "a second bite at the apple" by withholding his objection to the reference until after the report.

Cruz, 515 F.2d at 331.

In this case, the same policy against parties having a second bite at the apple is applicable. Madame Chen participated in litigation for 10 months, between December 12, 2001 and October 2002. During that period she raised no challenge to Mr. Holman's appointment as CEO of E. Excel or as a special master. And Ms. Stewart not only participated in the litigation for over two years without challenging the terms of Mr. Holman's appointment, but had stipulated to them originally. Both Madame Chen and Ms. Stewart waited until after Mr. Holman filed several extensive and unfavorable reports, had filed claims against them on behalf of E. Excel, and had successfully sought

⁸ This principle is well-established by the federal appellate courts interpreting Rule 53. See, e.g., Regents v. Knight, 321 F.3d 1111, 1127-28 (Fed. Cir. 2003) (finding parties waived objection to special master's appointment when the parties had waited over one year before raising objection, and only objected after special master issued two unfavorable reports); Adrian Intl. Corp. v. Lewis & Co., 913 F.2d 1406, 1410 (9th Cir. 1990) ("[A]n objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter or the party's objection is waived.") Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1566 (Fed. Cir. 1988) ("A party cannot wait to see whether he likes a master's findings before

a preliminary injunction against them, and after Madame Chen hired new counsel, to challenge his appointment as CEO/special master.

As this court has recognized, “waiver is a highly fact-dependent question.” Pena, 869 P.2d at 938. When Madame Chen’s new lawyer raised the issue for the first time in October of 2002, and the Stewarts then joined in the objection, the trial court addressed the issue at length and found, inter alia that Madame Chen had been involved in the litigation, had engaged in “hide and seek tactics” in an effort to evade service of process, and had been given “ample opportunity to timely challenge the Master’s appointment....” (R. 12761 (Ex. D hereto)). In light of these unchallenged findings and the supporting evidence, the trial court correctly concluded that Madame Chen and the Stewarts’ objections to the special master’s appointment were untimely, and therefore waived.

C. Any Error by the Court in Designating Mr. Holman as a Special Master was Harmless.

As noted above, there is precedent for the proposition that designating as a Rule 53 special master a person charged with performing the duties traditionally those of a receiver at equity is not an abuse of discretion on the part of a trial court. See FTC v. WW Factors, 882 F.2d at 348. However, even if this court were to conclude that Mr. Holman should not have been titled a “special master,” that fact would not warrant reversal of the trial court’s order appointing him E. Excel’s interim CEO, or any consequent order of the trial court, because any such error would have been harmless.

challenging the use of a master. Failure to object in a timely fashion constitutes a waiver.”).

An entirely separate ground for affirming the trial court is the rule that this court will not reverse a trial court if the ruling in question can be sustained on alternative grounds. See Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993) (appellate court affirm trial court's ruling "on any ground available to the trial court, even if it is one not relied on below."). The trial court here equally could have designated Mr. Holman a "receiver" under Rule 66, or under its common law equitable power, and given him exactly the same duties. See Utah R. Civ. P. 66(d) (recognizing power of receiver to preserve assets and assert claims on behalf of corporation). As a receiver, nothing Mr. Holman has done would be exceptional. Under this approach, the appointment of Mr. Holman was not error, much less harmful error. Under either approach, a reversal would not be warranted.

Returning to the harmless error analysis, this court has said it will reverse a trial court's decision based on the fact that it acted improperly in the appointment of a special master only if this court first determines that "it is reasonably likely that the trial court's final order would have been different" if the court had not committed the Rule 53 error. Plumb v. State, 809 P.2d 734, 744 (Utah 1990). In Plumb, the trial court acted on a report prepared by a special master that was beyond the scope of his authority and in connection with which parties had had little opportunity to participate. Id.; see also State v. Ramsey, 782 P.2d 480, 485 (Utah 1989). In this case, appellants cannot show that Mr. Holman did anything inconsistent with the order appointing him. Also, nothing that Mr. Holman did as a special master, as opposed to as a CEO, altered the outcome of the

preliminary injunction proceeding. And appellants openly contested with E. Excel at every stage.

The Stewarts and Madame Chen attempt to draw an analogy between the activities of the special master in Plumb and the activities of Mr. Holman in an attempt to show that the trial court's rulings are somehow tainted by reliance on Mr. Holman as a court officer. This argument is without merit, as the trial court's January 24, 2003 ruling demonstrates. When Madame Chen moved to vacate on this ground, Judge Howard viewed as whole the evidence that had been presented to determine if there would have been a different result absent the alleged error in designating Mr. Holman as a special master. (R. 12760 (Ex. D hereto)). The court noted that "[t]here exists an extensive record in this case from which the Court based its Findings of Fact and Conclusions of Law." (Id.). The court concluded that the "Findings and Conclusions relative to the Preliminary Injunction and Civil Conspiracy, while they include recitals to the Special Master Reports, were based upon record recitals independent from the Master Reports and the Master's Settlement Agreement." (Id.). The trial court also noted that while the Special Master's Reports were admitted into evidence, the reports represented only a small fraction of the record which was relied upon in entering its findings.⁹ The court then specifically concluded "that the outcome of the hearings would not have been any different if the errors alleged by Madame Chen, particularly regarding the Special Master,

⁹ For example, other evidence which supports the trial court's factual findings regarding the malfeasance of Ms. Stewart and Madame Chen, among others—evidence which was not marshaled by appellants—includes the testimony of Jwa-Hwa Stewart, the testimony

had never occurred.” (Id.). This court, viewing the evidence as a whole, should be led to the same conclusion.

The Stewarts and Madame Chen assert, again in an attempt to make the case appear analogous to the facts of Plumb, that the trial court relied entirely on Mr. Holman and adopted E. Excel’s proposed findings in their entirety. See Madame Chen’s Br. at 25; Stewarts’ Br. at 18.

This is not true. Rather, Judge Howard made several notable revisions to the proposed findings. For example, he excised block quotations from Judge Schofield in two separate places, removed Dr. Kim O’Neill and Dr. Byron Murray from the list of individuals and entities associated with the criminal racketeering enterprise, and removed “Dr. Kim O’Neill’s statement at his deposition regarding his trip to California on behalf of Apogee” from the list of the false or inconsistent material statements made by members of the criminal racketeering enterprise. These changes, which were substantive in nature, indicate that the trial court carefully reviewed the proposed findings and that those entered were the court’s own.¹⁰

of Beverly Warner, and the tape recording introduced on February 13, 2001, all of which were relied upon in the trial court’s findings of facts.

¹⁰ In its separate and independently-authored ruling, issued after two months of deliberations, the district court noted that it had received and carefully reviewed the proposed findings and conclusions submitted by all parties in their entirety. The district court referred to all of the proposed findings as “legal service of the highest quality” and stated that it had given “studious consideration” of all the proposed findings and conclusions. In addition, the court noted that it had also undertaken a considerable review of the cited record and authorities.

III. The Trial Court Did Not Abuse Its Discretion In The Entry Or Scope Of The Preliminary Injunction Against The Appellants.

Seemingly as an afterthought, appellants challenge the trial court's entry of the preliminary injunction on the following three grounds: (i) Madame Chen challenges the findings of fact alleging there is no evidence of a "prima facie" case against her (See Madame Chen's Br. at 77-83); (ii) Madame Chen and the Stewarts both challenge the scope of the preliminary injunction (See Madame Chen's Br. at 74-77; Stewarts' Br. at 47-49); and (iii) Madame Chen claims that the preliminary injunction was entered in violation of her due process rights. See Madame Chen's Br. at 72-74. Each of these arguments should be rejected.

A. The Preliminary Injunction Against Madame Chen is Supported by the Court's Factual Findings.

Madame Chen claims that E. Excel "did not come close" to make a prima facie showing of the elements of its underlying claims that support the injunction. See Madame Chen's Br. at 77. She argues that "[t]he evidence against Hwan Lan Chen shows only that she was a mother, a matriarch of a Chinese family that defers to its elders, a director for a limited time, and a potential competitor." Id. Madame Chen explicitly challenges the following legal conclusions and findings made by the trial court: (i) that Madame Chen breached her duty of care to E. Excel; (ii) that Madame Chen breached her duty of loyalty to E. Excel; (iii) that Madame Chen usurped E. Excel corporate opportunities for her own benefit; (iv) that Madame Chen engaged in unfair competition; (v) that Madame Chen engaged in racketeering activities directed to destroying E. Excel; and (vi) that Madame Chen engaged in a conspiracy to unlawfully

disable E. Excel. See Madame Chen's Br. at 77-83 (challenging the court's finding at R. 9142-44 (Ex. C hereto)).

These conclusions of the trial court are obviously highly fact-dependent. See, e.g., C&Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 54 n. 7 (Utah Ct. App. 1995) ("we point out that the law of breach of fiduciary duty by corporate directors is highly fact-dependent") (internal citation and quotation omitted). As noted earlier in this brief, when challenging fact-dependent legal conclusions an appellant faces a very high hurdle. See supra at pp. 25-30. The appellant must marshal all evidence in support of the underlying factual findings and then demonstrate that the findings are so lacking in support that they are clearly erroneous. See Young v. Young, 1999 UT 38 at ¶ 15. And when one challenges a preliminary injunction, the Utah Rules of Civil Procedure underscore the burden on the challenger. Rule of Civil Procedure 52(a) states that a trial court's findings of fact made in support of a preliminary injunction "shall not be set aside unless clearly erroneous, and due regard of a preliminary injunction shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a). The appellate court gives the trial court an added measure of deference when reviewing the application of the law to those facts. Searcy, 958 P.2d at 233, n. 7. Madame Chen has not begun to overcome these hurdles.

- 1. Madame Chen has failed to marshal the evidence, much less show that it is insufficient to support the trial court's factual findings.**

In Utah Medical Products, Inc. v. Searcy, this court addressed the issue of marshaling in the course of reviewing a challenge to the denial of a preliminary

injunction by the trial court. See 958 P.2d at 232-33. It held that appellant failed to meet its marshaling burden when it “[i] merely stated those facts favorable to its position or [ii] stated that there was no evidence whatsoever to support the trial court’s findings.” Id. at 232 (bracketed material added). This is precisely what Madame Chen has done.

Madame Chen acknowledges in the facts sections of her brief that she has a marshaling burden, but she fails to comply with that burden in the fact section when she points only to select evidence. See Madame Chen’s Br. at 41-46. To comply with the marshaling requirement, appellants must marshal all the favorable evidence at the point at which they challenge the factual finding. See Roderick v. Ricks, 2002 UT 84, ¶ 47 n. 11, 54 P.3d 1119 (citing Tanner v. Carter, 2001 UT 18, ¶¶ 18-19, 20 P.3d 332; Fitzgerald v. Critchfield, 744 P.2d 301, 304 (Utah Ct. App. 1987) (concluding appellant’s listing of favorable facts in facts section did not meet marshaling requirement)). Madame Chen’s attempt to comply with her marshaling burden only in the fact section of her brief fails for this reason. And, in the argument section of her brief, Madame Chen simply asserts there was “no evidence” of any wrongdoing by her. See Madame Chen’s Br. at 77-83.¹¹

¹¹ Among other things, Madame Chen states as follows: “there is no evidence, or even a finding, that Hwan Lan Chen either funded, acquired or controlled an ‘enterprise’ through a ‘pattern of unlawful activity.’” Madame Chen Br. at 77. “There is no evidence that Hwan Lan Chen committed any of the alleged predicate acts under UPUAA.” Id. at 78. “[T]here is no evidence that Hwan Lan Chen conspired to violate UPUAA or ‘unlawfully disable[d] E. Excel.’” Id. “There is no direct evidence of any agreement by Hwan Lan Chen to violate UPUAA or unlawfully act against E. Excel.” Id. “There is no evidence that Hwan Lan Chen acted to cripple E. Excel, stole any of its assets, solicited any of its employees while she was an E.Excel director, or had any involvement with Jau-Hwa Stewart’s cutting off the Territorial Owners from obtaining E. Excel Products.” Id. at 80. “[T]here is no evidence that any of Hwan Lan Chen’s actions that allegedly were in breach of her fiduciary duties were continuing, as required to support the Preliminary

This assertion of “no evidence” directly contradicts the trial court’s factual findings, as is demonstrated below, and is legally insufficient, as Searcy found.

In support of the preliminary injunction against Madame Chen, the trial court made extensive specific findings of wrongdoing which she has not addressed other than with flat denials. Among those findings are the following which we give with supporting record references:

- “Ms. Stewart and [Madame Chen] determined to take revenge upon [Dr. Chen’s husband], and, when [Dr.] Chen objected, upon [Dr.] Chen herself.” (R. 14318 (Ex. A hereto) at 7, ¶ 10 (citing R. 14228 at 73; R. 14222 at 49, 63; R. 14277 at 112-13)).
- “Having seized control of E. Excel, Ms. Stewart and Hwan Lan Chen then proceeded to attack E. Excel’s historical distributors in Asia. . . . Hwan Lan Chen and Jau-Hwa Stewart arranged for the transfer of millions of dollars to pay for Richard Hu and Sam Tzu to establish new distribution networks.” (Id. at 9, ¶ 15).
- “The second part of Jau-Hwa Stewart and Hwan Lan Chen’s strategy, as it developed through November and December 2000, was to establish new distribution channels for E. Excel’s product by splitting portions of E. Excel’s distribution channels . . . away from the historical distributors.” (Id. at 14, ¶ 24).
- “Ms. Stewart and her mother, Hwan Lan Chen, then sent \$2.3 million to Sam Tzu for the purpose of setting up a new distribution company.” (Id. at 14, ¶ 27 (citing R. 14247 at 119-20)).
- “Also at that same time period, Ms. Stewart and her mother provided no less than \$400,000 to Richard Hu to set up a new distribution company in the Philippines.” (Id. at 14, ¶ 28 (citing R. 14247 at 120-21)).
- “In December 2000, however, Ms. Stewart and her mother purported to initiate a transaction that would have rendered the children minority shareholders and made Ms. Stewart and Hwan Lan Chen collectively the majority shareholders of E.

Injunction.” Id. at 82. “There is no evidence that Hwan Lan Chen committed or had any knowledge of any theft of E. Excel assets or their use to compete with E. Excel.” Id. “There is no evidence that Hwan Lan Chen was in any manner connected with, directed, or was otherwise responsible for the Asian distributors’ sale of E. Excel products under the name of Apogee.” Id.

Excel.” (Id. at 16, ¶ 32 (citing R. 14223 at 62-64; R. 14293 at 37; R. 14228 at 61-62)).

- “Faced with this likely loss of control, Jau-Hwa Stewart and Hwan Lan Chen, soon joined by Taig Stewart and others, determined both to destroy E. Excel, rather than let it revert to Jau-Fei Chen’s control, and also to replace it with a new nutritional supplements manufacturing company controlled by Ms. Stewart and Hwan Lan Chen alone. Without such an agreement between Ms. Stewart, Hwan Lan Chen, and the others, there is no way to understand the coordinated efforts that followed.” (Id. at 17, ¶ 34).
- “Having commenced the disablement of E. Excel, Ms. Stewart and Hwan Lan Chen also determined to start their own competing enterprise (Apogee).” (Id. at 24, ¶ 58).
- “During that same period of time, Ms. Stewart, her mother, her sister, Sheue Wen Smith, and Dale Stewart, were making preparations to abscond with product and raw materials belonging to E. Excel and to use those items to support the new Apogee enterprise they were planning.” (Id. at 27, ¶ 65).
- “On February 20, . . . one day before Hwan Lan Chen was removed as a director, Sheue Wen Smith signed the lease for the ATL warehouse In her initial Answer in this matter, Ms. Smith directly implicated her mother in her decision to rent the facility, ‘affirmatively alleg[ing] that she was asked to lease the warehouse by her mother, Hwa[n] Lan Chen, and that she was not given an explanation as to the purpose of the warehouse.’” (Id. at 31-32, ¶ 81 (citing R. 5607)).
- “From the outset, Jau-Hwa Stewart and her mother, Hwan Lan Chen, worked hand-in-hand to establish the Apogee enterprise. As Ms. Stewart explained, ‘My mother helped me - my mother helped me to pay for anything of a bigger amount, but in setting up the - my mother - my mother helped to pay for anything of a larger, you know, more larger expenses.’ As Ms. Stewart also explained, she could not have taken any steps to set up Apogee without her mother’s active participation and assistance: ‘I really can’t do anything with my own idea. My mother’s the one with the money. I have no money.... In the first place you have to have some cash order to really make things happen.’ In some accounts, Ms. Stewart goes even further, stating that everything that happened prior to June 2001 (when Ms. Stewart resigned her directorship with E. Excel) was ‘all my mother’s idea.’ Whatever the exact allocation of responsibilities between them, the Court has no difficulty finding that Ms. Stewart and her mother, Hwan Lan Chen, have been working closely together from September 2000 onward.” (Id. at 47-48, ¶ 137 (citing R. 14248 at 40; R. 14295 at 45; R. 14250 at 75)).

- “In preparation for the Apogee enterprise, Hwan Lan Chen arranged for a wire of \$3.5 million into a Central Bank account, No. 42407353 As explained by Ms. Stewart, Hwan Lan Chen used the nominee bank account in order to conceal the existence of the monies in that account from Mr. Holman.” (Id. at 48, ¶ 138 (citing R. 14344; R. 14264 at 22)).
- “Ms. Stewart admitted, also, that all of the funds in the account were arranged for by Hwan Lan Chen, and that Ms. Stewart may herself have assisted in the wire transfers.” (Id. at 48, ¶ 139 (citing R. 14264 at 7, 22)).
- “On March 12, 2001, Hwan Lan Chen paid \$1.2 million in cash for the land purchased for use by Apogee, drawn entirely on the common fund ‘424 account’ ” (Id. at 50, ¶ 144 (citing R. 14264 at 12; R. 14343)).
- “Stan Houghton held three to four meetings in the ‘first week to ten days of March’ with Jau-Hwa Stewart, Hwan Lan Chen, and Sheue Wen Smith, leading to the creation of a drawing for an 80,000 square foot facility to be built on behalf of Apogee at a cost of \$3.2 million.” (Id. at 50, ¶ 146 (citing R. 14249 at 13-14)).
- “Hwan Lan Chen paid the cost of the construction for the Apogee facility.” (Id. at 51, ¶ 148 (citing R. 14249 at 17-19)).
- “According to Ms. Stewart, the money for the new distribution arms, a ‘few million dollars,’ came from Hwan Lan Chen and was used to ‘to help [Jau-Hwa Stewart] to prepare to compete with E. Excel.’” (Id. at 56, ¶ 163 (citing R. 14250 at 80)).
- “Ms. Stewart’s own expert, Dr. Bamossy, testified that it was inappropriate for Jau-Hwa Stewart and Hwan Lan Chen to use Richard Hu or Sam Tzu as a distributor for Apogee or to use the distribution systems that they had set up on behalf of E. Excel.” (Id. at 56, ¶ 163 (citing June 7, 2002 Transcript at 193-94, which is missing from the record)).
- “As Dale Stewart now admitted on the stand he, like Beverly Warner, had been receiving envelopes containing cash (\$1500 twice per month), ever since he left E. Excel. In his case, Mr. Stewart claimed that the money came from Hwan Lan Chen as a gift, rather than from Jau-Hwa Stewart as a salary Dale Stewart acknowledged finally that he understood that the cash, whatever its source, was given to him because of his assistance on the ‘Apogee enterprise.’” (Id. at 67-68, ¶¶ 163-64 (citing R. 14295 at 119-21, 123)).

“Exhibits 577K-L are E. Excel products that reflect that they were manufactured by E. Excel International, Inc., in Springville Utah. Under the shrink wrap for each of these products is a sticker indicating that it was imported by Mr Hu’s new

distributor, Excellent Essentials International. The demonstrated presence of this product in the hands of Apogee Philippines persuades the Court that the Apogee distributors are nothing other than the former “new distributors” for E. Excel set up by Ms. Stewart and Hwan Lan Chen, now operating under a different name.” (Id. at 78, ¶ 233).

These factual findings provide ample support for the trial court’s conclusion that E. Excel has made out a prima facie case of multiple claims of wrongdoing against it by Madame Chen and that it was entitled to a preliminary injunction against Madame Chen. Madame Chen has not begun to meet her marshaling duty, much less demonstrate that the evidence is insufficient to support these findings. Her challenge to the injunction should be rejected on this ground alone.

2. The trial court’s findings against Madame Chen are supported by substantial evidence.

To be entitled to a preliminary injunction, a party must show the following:

(1) The applicant will suffer irreparable harm unless the order or injunction issues; (2) the threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; (3) The order or injunction, if issued, would not be adverse to the public interest; and (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

Searcy, 958 P.2d at 231 (citing Utah R. Civ. P. 65A(e)). Here, the trial court concluded, based on its factual findings, that E. Excel had satisfied these requirements. (R. 9136-9145 (Ex. C hereto)). On appeal, Madame Chen does not challenge the trial court’s finding that E. Excel has shown it will be irreparably harmed in the absence of an injunction, that the balance of the hardship weighs in favor of issuing an injunction in

favor of E. Excel, or that the injunction will not be adverse to the public interest. (R. 9142-43). Rather, she only appears to attack the trial court's grant of an injunction on one ground—that E. Excel has not shown a “substantial likelihood of prevailing on the merits.” See Madame Chen's Br. at 77-83.

E. Excel's response to this challenge is twofold. First, Madame Chen misconceives E. Excel's burden. While the trial court's factual findings are adequate to support a conclusion that a prima facie case of the various causes of action has been established against Madame Chen, E. Excel need not meet that standard. Because this appeal is from the grant of a preliminary injunction, rather than from a final judgment on the merits, Utah law requires only that E. Excel “make a prima facie showing that the elements of its underlying claim can be proved,” Keil, 1999 UT 16, at ¶ 8 (emphasis added), or in the words of Utah Rule of Civil Procedure 65A(e)(4), quoted above, that “the case presents serious issues on the merits which should be the subject of further litigation.” Utah R. Civ. P. 65A(e)(4).¹² No matter how narrowly construed, the trial court's factual findings satisfy this test. Second, the trial court's factual findings on their face are more than sufficient to support the conclusion that E. Excel has a “substantial likelihood of prevailing on the merits” on its claims of breach of the duty of care, breach of the duty of loyalty, usurpation of corporate opportunities, unfair competition,

¹² Utah has expressly adopted the Tenth Circuit's relaxed standard in considering requests for injunctive relief under which the movant only needs to “raise[s] questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation.” Otero Saving and Loan Ass'n v. Federal Reserve Bank of Kansas City, 665 F.2d 275, 279 (10th Cir. 1981); see also Utah R. Civ. P. 65A comment at ¶ (e).

racketeering, and civil conspiracy. Madame Chen's bald assertion of "no evidence" or "no findings" on necessary elements of E. Excel's substantive claims cannot avail her here.

This court has long followed the rule that it surveys evidence and the reasonable inferences that may be drawn therefrom in the light favorable to the trial court's findings. See, e.g., Ovard v. Cannon, 600 P.2d 1246, 1247 n.1 (Utah 1979) (citing Charlton v. Hackett, 360 P.2d 176, 176 (Utah 1961)). The trial court's findings, just a few of which are detailed above (see supra at pp. 53-56), made after some 22 days of evidentiary hearings and two days of argument, together with the reasonable inferences drawn from those findings, demonstrate that there is overwhelming evidence that E. Excel has made a "prima facie showing that the elements of its underlying claims can be proved." Keil, 1999 UT 16, at ¶ 8 (emphasis added) (citing Utah State Road Comm'n v. Friberg, 687 P.2d 821, 833 (Utah 1984) (comparing the state's prima facie showing of the authority to condemn to the prima facie showing for a preliminary injunction and indicating that it can be met by a showing of "some evidence"). This trial court's finding that there is a prima facie showing will not be disturbed unless it is against the clear weight of the evidence. Id. at ¶ 6. The trial court here was presented with overwhelming evidence that supported the factual finding of a prima facie case against Madame Chen, including the testimony of Ms. Stewart. For example, the trial court made the following finding:

As Ms. Stewart also explained, she could not have taken any steps to set up Apogee without her mother's active participation and assistance: 'I really can't do anything with my own idea. My mother's the one with the money. I have no money.... In the first place you have to have some cash

order to really make things happen.’ In some accounts, Ms. Stewart goes even further, stating that everything that happened prior to June 2001 (when Ms. Stewart resigned her directorship with E. Excel) was ‘all my mother’s idea.’ Whatever the exact allocation of responsibilities between them, the Court has no difficulty finding that Ms. Stewart and her mother, Hwan Lan Chen, have been working closely together from September 2000 onward.

(R. 14318 (Ex. A hereto) at 47-48, ¶ 137 (citing R. 14248 at 40; R. 14295 at 45; R. 14250 at 75)).

Madame Chen’s efforts to deflect any wrongdoing are simply not supported by the record, and the trial court had more than sufficient evidence, particularly in the context of a preliminary injunction hearing, to conclude that E. Excel has made out a *prima facie* case against her for causes of action of racketeering, conspiracy, breach of fiduciary duty, usurpation of corporate opportunities, and unfair competition. Madame Chen’s challenge to the trial court’s findings should be rejected.

B. The Scope of The Injunction is Proper Based on the Appellants’ Actions.

This court “will not disturb a district court’s grant of a preliminary injunction unless the district court abused its discretion or rendered a decision against the clear weight of the evidence.” Keil, 1999 UT 16 at ¶ 6 (citing Kasco Services Corp. v. Benson, 831 P.2d 86, 90 (Utah 1992) (citing System Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983))). This court considers “whether the trial court exercised its discretion using sound equitable principles based on all of the facts and circumstances.” Dairy Prod. Servs. v. City of Wellsville, 13 P.3d 581, 587 (Utah 2000) (citation omitted) (emphasis added). The trial court’s detailed findings, which have not been marshaled by Madame

Chen or the Stewarts, show that it did not abuse its discretion either in granting the preliminary injunction or in fixing its scope.

On October 16, 2002, in a detailed order, the trial court entered a preliminary injunction against the appellants. Among other things, until there could be a final hearing on the merits, enjoined them from “competing, or preparing to compete with E. Excel or otherwise engaging or preparing to engage in the worldwide manufacture or marketing of herbal and dietary consumer products, and personal care, cosmetic, or hygiene products.” (R. 9125-45 (Ex. C hereto)). The district court’s preliminary injunction was based on findings and conclusions that the Stewarts and Madame Chen had: (i) breached their duty of care to E. Excel by, among other things, wrongfully causing E. Excel to terminate its highly successful relationships with its historical distributors; (ii) breached their duty of loyalty by, among other things, seeking the disablement of E. Excel by disabling its operations and establishing a competing enterprise; (iii) usurped E. Excel corporate opportunities for their own benefit; (iv) engaged in unfair competition by unlawfully misappropriating and converting E. Excel’s property and using it to compete with E. Excel; (v) engaged in racketeering activities directed to destroy E. Excel, including stealing and selling E. Excel’s product through a competing business; and (vi) engaged in a conspiracy to unlawfully disable E. Excel. (R. 9142-44 (Ex. C hereto)). Based on these findings, the court enjoined the Stewarts and Madame Chen from competing in E. Excel’s field pending a final hearing on the merits.

Appellants do not challenge the trial court’s findings that E. Excel was the victim of a particularly aggressive racketeering enterprise that was aimed at destroying E.

Excel.¹³ Instead, appellants quibble with the scope of the preliminary injunction.

Specifically, they claim that the injunction is overbroad because it operates prospectively.

See Madame Chen's Br. at 74-77; Stewarts' Br. at 47-49. They imply that the court's extensive findings of wrongful conduct do not include findings that the wrongful conduct is on-going, and that such a finding is essential.¹⁴ See id. In substance, the appellants argue that even if they were bad in the past, that provides no basis for restraining them in the future. Their arguments lack any merit.

Plaintiffs ignore the trial court's power under the Utah Pattern of Unlawful Activity Act, Utah Code Ann. § 76-10-1601 *et seq.* ("UPUAA"), to issue preliminary injunctions to protect the rights of innocent persons against the threat of ongoing racketeering activity. UPUAA provides that "[b]efore liability is determined in any action brought under this section, the district court may issue restraining orders and injunctions." Utah Code Ann. § 76-10-1605(10)(b)(i). Appellate courts construing the analogous Federal racketeering statute have consistently held that trial courts have broad authority to issue injunctive relief not only to restrain past, but to prevent future,

¹³ The Stewarts do not challenge the factual findings, (See Stewarts' Brief, *passim*) and Madame Chen recognizes that E. Excel has been the victim of a racketeering enterprise, but simply claims she is not to blame. See Madame Chen's Br. at 77-83 (for example, Madame Chen does not dispute that E. Excel's assets were stolen and used to compete with E. Excel, she simply claims that there is no evidence that she committed the theft). Neither party even attempts to marshal the trial court's findings regarding the acts that were committed at crippling and destroying E. Excel.

¹⁴ Once again, appellants attempt to challenge the trial court's findings without marshalling the evidence. See Madame Chen's Br. at p. 75 (the trial court made "no finding of any continuing irreparable harm"); Stewarts' Br. at p. 49 ("Because there is no underlying support or purpose for the Preliminary Injunction, it must be reversed."). As

racketeering violations. See, e.g., United States of America v. Local 30, 871 F.2d 404, 407-09 (3rd Cir. 1989).¹⁵ In the present case, the trial court took a similar approach to the Stewarts' and Madame Chen's conduct. When presented with the appellants' objections to the scope of the instant preliminary injunction, the trial court ruled:

This is a case where the Court has determined that the [appellants] have engaged in a 18-month long criminal racketeering enterprise and whose members have repeatedly and willfully spoliated evidence, committed perjury, and defied numerous court orders. The Court concludes that the E. Excel Proposed Order is properly tailored to prevent further criminal activities by the [appellants].

(R. 9129-30).

Appellants have failed to show that the court abused its discretion in entering an injunction which only remains in effect until a final decision on the merits and is narrowly tailored to prevent future racketeering activities.¹⁶ Given the appellants' past

discussed herein, the trial court specifically found that the injunction was necessary to prevent "further criminal racketeering activities." (R. 9128-9134).

¹⁵ The UPUAA was modeled after the federal RICO statute. See State v. Bell, 770 P.2d 100, 101 n.1 (Utah 1988). Because Utah law on this issue is sparse, and because the provisions of the Utah act are nearly identical to those in the federal act, federal district courts "look to the law of other states and to federal case law for guidance." See Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty, 668 P.2d 535, 540 (Utah 1983) (stating that "[i]dentity in language [in Utah and federal statutes] presumes identity of construction"); see also State v. Hutchings, 950 P.2d 425 (Utah Ct. App. 1997) (adopting federal courts' interpretation of RICO as Utah law).

¹⁶ Appellants' complaint about the length of the injunction has only been exacerbated by their own conduct of trying to avoid an adjudication of the merits of this suit, including action such as pursuing this interlocutory appeal.

conduct, and the trial court's detailed factual findings, this court should not disturb the preliminary injunction in place.¹⁷

C. The Court's Entry of the Preliminary Injunction did not Violate Madame Chen's Due Process Rights.

Madame Chen claims that she was denied due process because she was not a party to the case during a portion of the period during which E. Excel's preliminary injunction evidentiary hearing was being held. She asserts that the bulk of the hearing occurred "without notice to her." Madame Chen's Br. at 73-74. This argument should be rejected for two reasons. First, it was not properly preserved. Second, even if it was preserved, its factual premise is contradicted by the facts in the record.

1. This due process argument was not properly preserved below.

For the first time in this litigation, Madame Chen contends before this court that she was deprived of due process because the preliminary injunction against her was based

¹⁷ Appellants also claim that they do not currently have a duty not to compete, and, therefore, cannot now be barred from competition even if they violated their fiduciary duties while the duty existed. See Madame Chen's Br. at 74-75; Stewarts' Br. at 48. As found by the trial court, however, where the activities in question had their inception while fiduciary relationship existed, it does not matter if the director or officer resigns before the activities are consummated. (R. 14318 at 97-98 (citing Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981); Dowell v. Bitner, 652 N.E.2d 1372 (Ill. Ct. App. 1995))). Despite appellants' protestations, the trial court found that they breached their fiduciary duties and engaged in racketeering activities while they were still officers or directors. Those findings are not effectively challenged because the appellants once again have not marshaled the evidence.

on “18 days of evidentiary hearings held before she was joined as a party.”¹⁸ Madame Chen’s Br. at 72-74.¹⁹

This court adheres to the rule that it will not consider issues raised for the first time on appeal, including constitutional issues. Julian v. State, 966 P.2d 249, 258 (Utah 1998); see also Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996). To properly preserve an issue for appeal, a party must raise it in a manner in which the “trial court [is] offered an opportunity to rule on [the] issue.” Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998). “A trial court has the opportunity to rule if the following three requirements are met: (1) ‘the issue must be raised in a timely fashion;’ (2) ‘the issue must be specifically raised;’ and (3) a party must introduce ‘supporting evidence or relevant legal authority.’” Id. (citation omitted).²⁰ Madame Chen satisfied none of these conditions. Madame Chen never argued to the trial court that she had been denied her due process rights because evidence had been taken before she entered her appearance, even in her objection to the proposed form of order for the preliminary injunction. (R. 8550-73 (Ex. J hereto)). This court should decline to consider the claim now.²¹

¹⁸ In fact, Madame Chen was not formally present at only 4 of the days of hearings on E. Excel’s motion for preliminary injunction, not 18. See infra. at pp. 68-69.

¹⁹ Pursuant to Rule 24(a)(5)(A), Madame Chen is required to provide a “citation to the record showing that the issue was preserved in the trial court.” Madame Chen has failed to meet this requirement regarding this due process claim.

²⁰ The only exceptions to the preservation requirement are plain error and manifest injustice, neither of which are applicable here. See State v. Lopez, 886 P.2d 1105, 1113 (Utah 1994).

²¹ Madame Chen did not raise this argument on the record or in her objection to the proposed order of preliminary injunction. (R. 8550-8573 (Ex. J hereto)). Indeed, it would have been difficult for Madame Chen to do so, because she was present for 18 of the 22 days of evidence, her counsel was present during the entire hearings, and her

2. Madame Chen's avoidance of service, and actual notice of and participation in the preliminary injunction hearing, bars her claim.

Even if this court were to ignore Madame Chen's failure to preserve the issue below, her claim should still be rejected. Madame Chen claims that the preliminary injunction must be "set aside because it granted in fundamental denial" of her due process rights under article 1, section 7 of the Utah Constitution and Amendment XIV of the United States Constitution. Madame Chen's Br. at 72-74. The Utah and federal due process provisions provide that no person shall be deprived of "life, liberty or property, without due process of law."²² In interpreting this protection, this court has recognized that "due process is not a technical conception with a fixed content unrelated to time, place, and circumstances." Dairy Prod. Servs. v. City of Wellsville, 13 P.3d 581, 593 (Utah 2000) (citing V-1 Oil Co. v. Department of Env'tl. Quality, 939 P.2d 1192, 1196 (Utah 1997) (quoting Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961))). "Instead, due process is flexible and, being based on the concept of fairness, should afford the procedural protections that the given situation demands." Id. (internal quotation and citations omitted).

Madame Chen's current counsel argued in the petition for review, which this court granted, that she "first appeared in the trial court action on February 28, 2002," and that,

counsel was given a full opportunity to present evidence, call new witnesses, and re-call the former witnesses for cross-examination. See infra at pp. 66-70.

²² The Utah Supreme Court has repeatedly held that Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution. See, e.g., Untermeyer v. State Tax Comm'n, 129 P.2d 881, 885 (Utah 1942).

as a result, the preliminary injunction proceeding occurred, “in large part, prior to Hwan Lan Chen’s appearance” and “without her participation.” (R. 10206-07). Madame Chen has since abandoned that argument. She now asserts that she first made an appearance in this matter on December 17, 2001, and that the findings made against her were based on evidence presented before she “was made a party and without notice to her.” Madame Chen’s Br. at 28. But even this retrenchment is in error. In fact, her counsel stated on December 12, 2001, on the fourth day of the E. Excel preliminary injunction proceeding, that he would be appearing for her. And the record shows, and the trial court specifically found, that Madame Chen had actual notice of the preliminary injunction proceedings from the beginning, that she participated in the vast majority of the preliminary injunction hearing, that she would have participated in the entire proceedings if she had not avoided service, and that her counsel never asked the trial court for an opportunity to cure any prejudice that she now claims she supposedly suffered by reason of not participating in all of the evidentiary hearings. There is no merit to her due process claims.

On October 29, 2001, E. Excel filed its Amended Answer, Cross-Claim, and Third-Party Complaint, naming Madame Chen as a Third-Party Defendant. (R. 4171-4214). Four days earlier, E. Excel had filed a Motion for Preliminary Injunction, specifically seeking injunctive relief against “Jau-Hwa Stewart [and] Third-Party Defendants Taig Stewart, Hwan Lan Chen, Sam Tzu, Richard Hu, and Apogee, Inc.” (R. 3718-21). A few days later, E. Excel began its efforts to serve the new Third-Party Defendants with the Third-Party Complaint. On November 8, 2001, E. Excel successfully served process upon Apogee, Inc., a shell corporation owned and/or

controlled by Madame Chen. (R. 4490-93). That same day, E. Excel began a series of unsuccessful efforts to personally serve Madame Chen with the Third-Party Complaint.²³

On or about November 29, 2001, E. Excel asked the Court to allow alternative service upon Madame Chen. (R. 4750-55). That motion was granted by the court, but before service occurred, on December 12, 2001, E. Excel's counsel stated in open court that a Default Certificate would soon be filed against Apogee, Inc., which had theretofore refused to appear. (R. 14248 at 117-18). Not two hours later, Mr. Matt Steward of Clyde, Snow, Sessions & Swenson, the law firm that had been representing some of the Third-Party Defendants, stood up in open court and stated that his law firm was "filing a notice of appearance on behalf of two third-party defendants, Hwan Lan Chen, also known as Madam Chen, and the corporation Apogee Incorporated." (R. 14248 at 182-83) (emphasis added). The Court asked Mr. Steward, to be clear, whether he was representing both Apogee as well as Madame Chen, and Mr. Steward responded in the affirmative.²⁴ (Id.). Thus, according to the record, Madame Chen was represented by

²³ On November 8, 2001 at 5:45 p.m., E. Excel's process server went to the Orem mansion where Madame Chen resides (along with Jau-Hwa Stewart and Taig Stewart). (R. 4750-55). There is a security system at the mansion, including a camera and video surveillance system. The neighbors told the process server that there were persons at home in the mansion, but, despite the process server's continuing efforts for 20 minutes, no one would answer the door. (Id.). On November 10, November 13, and November 14, the process server returned, and received the same treatment each time—no one would answer the door at the Orem residence. (Id.).

²⁴ The next day, December 13, 2001, the Court again specifically asked Mr. Steward if he would "be representing Apogee and Madam Chen." (R. 14249 at 172). Mr. Steward again responded in the affirmative. (Id.). Four days later, on December 17, 2001, Clark Sessions and Matt Steward of Clyde Snow Sessions & Swenson filed a written document entitled Notice of Entry of Appearance of Counsel, in which they stated that they "enter

counsel in the preliminary injunction/contempt hearing no later than the afternoon of December 12, 2001.

Plainly, Madame Chen was not prejudiced by not being formally represented until December 12. The hearing on the preliminary injunction began on November 27, 2001. (R 14250). Contrary to Madame Chen's assertions, there were 22 days, not 34,²⁵ of combined hearings and argument on Dr. Chen's contempt motions and E. Excel's preliminary injunction motion. (R. 8109-8113). Madame Chen was present and represented at all hearings after and including December 12, 2001 (18 of the 22), and could have been present or represented at all 22 had she not dodged the process server. Moreover, Madame Chen's counsel, although not formally present for her until December 12, was present at all 22 hearing dates representing other third-party defendants, and thus did not have to get up to speed after being officially retained by

an appearance as counsel of record for the Third-Party Defendants Hwan Lan Chen and Apogee, Inc." (R. 4998-5000 (emphasis added)).

²⁵ Two of the hearing dates occurred in late October 2001, before the consolidation of the hearings on the contempt motions and the preliminary injunction motion, and were solely devoted to Dr. Chen's contempt motions which are not the subject of this appeal. (R. 14244, 14245, 14243 at 63-64, 14250). The other hearings occurred in January and February 2001, long before Dr. Chen filed her contempt motions, and before E. Excel filed its preliminary injunction motion. Any argument that Madame Chen makes that the district court committed error by relying upon the evidence presented during those earlier hearing dates is meritless. First, a district court may rely on affidavits and other forms of written unexamined evidence in granting a preliminary injunction. See, e.g., Drywall Tapers & Pointers Local 1974 v. Local 530, 954 F.2d 69, 76-77 (2nd Cir. 1992) (affidavits and records generated in prior hearings were sufficient to establish factual record). Second, at no time did Madame Chen come forward, even after her entry in the case, and object to the district court's reliance on the evidence presented at these early hearing dates. Finally, and most significantly, nowhere does Madame Chen explain how she was possibly prejudiced by such reliance, given that she was an active participant in

Madame Chen on December 12. He actively participated in the entire hearing, knowing all the while that relief was specifically being sought against Madame Chen. In addition, counsel for Jau-Hwa Stewart and Taig Stewart, Madame Chen's daughter and son-in-law with whom Madame Chen shares a home, had been present for the entire proceeding. Thus, despite Madame Chen's representations to the contrary, she was a participant in the vast majority of the preliminary injunction hearing. In addition, the court specifically found that Madame Chen had "actual knowledge" of the court's proceedings from the co-conspirators, including Ms. Stewart with whom she lived, from the very beginning of the proceedings.²⁶ (R. 12756 (Ex. D hereto)). Her non-participation was plainly her own choice. As Judge Howard explained:

[W]hat's troublesome and disturbing to me is this stonewalling in light of the rather involved injunctive TRO proceeding that is before the Court. I have reason to believe that the parties with the ability to retain counsel and to secure legal assistance had information available to them such that

the preliminary injunction hearing, and had every opportunity to present evidence, call new witnesses, and re-call the former witnesses for cross-examination.

²⁶ Madame Chen has been involved in the matters central to this case from the very outset, and has been acutely aware of this litigation from the beginning. Courts do not look favorably upon litigants that are aware of litigation that impacts their interests, but sit back and wait until the court has taken action, and then attempt to intervene to undo action taken by the court. See, e.g., Republic Ins. Group v. Doman, 774 P.2d 1130, 1131 (Utah 1989). The record discloses the following information: (1) Madame Chen was a member of the board of directors of E. Excel from September 2000 through February 21, 2001 and this litigation began during Madame Chen's tenure on the board (R. 14318 at 8, ¶ 12); (2) on February 1, 2001, Madame Chen and Taig Stewart had a conversation about the ongoing preliminary injunction hearing, and, specifically, that the \$3,000,000 upon which Madame Chen bases at least part of her newfound ownership claim was at issue in the litigation (R. 14226 at 16-18); and (3) Madame Chen (along with Jau-Hwa Stewart) was the one "in charge" of Third-Party Defendant Apogee (the front company for the criminal racketeering enterprise) as she was the one who had funded the project, (R. 14250 at 37-38), and was the driving force behind Apogee. (R. 14250 at 79-80).

they could have acted more expeditiously.

(R. 14258 at 35).

Finally, it is noteworthy that Madame Chen does explain how she suffered any actual prejudice by reason of not being formally represented by counsel for 4 of the 22 hearing dates. See Madame Chen's Br. at 74-77.

This court should reject Madame Chen's due process claim both because it was not properly preserved and because it lacks any merit.

CONCLUSION

The trial court in this case was confronted with a highly unusual situation. The court had before it a company, E. Excel, that had become the battleground of a highly contentious family war. That war was being fought by individuals with astounding personal wealth, an endless appetite for confrontation, and very little regard for the American rule of law. The trial court correctly recognized that E. Excel was not mere pawn, but a separate legal entity, with employees and distributors who depended on it for their livelihood. The trial court saw that this unusual situation required immediate action if E. Excel was to survive the pending litigation. The trial court's decisions to appoint an independent CEO / President, and to enter TRO's and preliminary injunctions, were solidly within its discretion. These decisions were not made casually – they were made only after what must be among the longest preliminary injunction proceedings in the history of this state.

The appellants' attacks on those rulings should be rejected because, as explained above, they are entirely without merit. But this court also should recognize the

seriousness of the issue before it. Although the appellants are silent about the necessary implications of a ruling that would set aside the appointment of Mr. Holman, and void his actions and the trial court rulings based upon them, such a decision likely would be devastating to E. Excel. E. Excel's territorial owners, its suppliers, its creditors, and its customers have all relied upon the lawful and binding nature of Mr. Holman's board-approved actions in contracting for and acting on behalf of E. Excel as its CEO. Only because of the trial court's protective actions toward E. Excel has it been able to survive the appellants' determined efforts to destroy it. Unwinding those protections on the technical and flimsy grounds advanced by the appellants could well permit them to accomplish by indirection that which the trial court stopped them from doing directly. The trial court's orders should be affirmed, and this matter remanded to the trial court for further proceedings.

DATED this 26th day of November, 2003.

Snell & Wilmer L.L.P.

A handwritten signature in black ink, appearing to read "M.D. Zimmerman", is written over a horizontal line.

Michael D. Zimmerman

Todd Shaughnessy

James D. Gardner

Kimberly Neville

Attorneys for E. Excel International, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2003, a true and correct copy of the foregoing BRIEF OF APPELLEE E. EXCEL INTERNATIONAL, INC. was served via regular mail, postage prepaid, upon the following:

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Tab M

(Cite as: 175 F.3d 1020, 1999 WL 184143 (7th Cir.(Ind.)))

H

NOTICE: THIS IS AN UNPUBLISHED
OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA7 Rule 53 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Seventh Circuit.

Edsel C. PETTIFORD, Plaintiff-Appellant,

v.

John DURM, David Hennie, Chief Deputy McAtee,
et al., Defendants-Appellees.

No. 97-2142, 97-2370.

Submitted March 24, 1999 [FN*].

FN* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. See Fed. R.App. P. 34(a)(2)(C).

Decided March 24, 1999.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 91-0570-C-M/S Larry J. McKinney, Judge.

Before Hon. WILLIAM J. BAUER, Hon. JOEL M. FLAUM, Hon. DANIEL A. MANION, Circuit Judges.

ORDER

****1** Edsel Pettiford appeals the district court's entry of judgment in favor of the defendants on his civil rights claims brought under 42 U.S.C. § 1983. For the following reasons, we affirm.

In a series of related lawsuits that were eventually consolidated into the case now before us, [FN1] Pettiford has asserted several different claims stemming from his pretrial detention at the Marion County Jail, including (1) that guards assaulted him without provocation, (2) that jail medical officials and others failed to treat him for delirium tremens, and (3) that numerous persons conspired to have him involuntarily committed to Logansport State Mental Hospital and given psychotropic medications while he was there. Pettiford represented himself for much of the pretrial proceedings in the case. In May 1996 the district court denied a motion to dismiss filed by the guards whom Pettiford accused of beating him--defendants Durm (sometimes misspelled as Durham) and Hennie (sometimes misspelled as Henney)--and set a jury trial on those claims for later in the year. The court appointed counsel to represent Pettiford on the claims that were going to trial. On all of the remaining claims, however, Pettiford continued to represent himself, a fact that has caused some difficulty in tracing the procedural history of the current consolidated appeals.

FN1. Much of the procedural history of this case is set out in our order entered in an earlier consolidated appeal in this case, *Pettiford v. Leshner*, Nos. 94-2155 & 94-3902, 1996 WL 341218 (7th Cir. June 17, 1996). As that history is not particularly relevant to the issues presently before us, we do not recount it here.

The trial of Pettiford's assault claims against Durm and Hennie commenced on December 11, 1996.

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Two days later, the jury returned a verdict in favor of the defendants. Through the attorney who had represented him at trial, Pettiford moved pursuant to Federal Rule of Civil Procedure 59 to amend the judgment or for a new trial. This Rule 59 motion asserted that the defense had used a peremptory challenge to strike an African-American from the venire for racial reasons, that testimony regarding Pettiford's murder convictions had been admitted improperly, and that the verdict was contrary to the weight of the evidence because Durm's testimony was not credible.

In February 1997, after the jury verdict but before judgment had been entered, Pettiford (acting *pro se*) renewed an earlier motion for leave to amend the complaint to add claims against various defendants. On April 10, 1997, the court denied both the Rule 59 post-trial motion and the motion for leave to amend. That same day, the district court entered judgment against Pettiford on all of his claims.

Pettiford filed a *pro se* motion to reconsider the district court's denial of leave to amend his complaint, which the judge interpreted as a Rule 59(e) motion and denied on May 7, 1997. On May 8, Pettiford's lawyer filed a notice of appeal from the final judgment entered on April 10 (Appeal No. 97-2142). Meanwhile, Pettiford filed another *pro se* motion asking the district court to re-evaluate his motion to reconsider denial of leave to amend under the standards of Federal Rule of Civil Procedure 60(b)(1). The district court denied Pettiford's Rule 60(b)(1) motion to reconsider on May 19, 1997, and Pettiford, acting *pro se*, appealed from that order (Appeal No. 97-2370). The two appeals have been consolidated for disposition.

****2** The notice of appeal filed by Pettiford's lawyer, which cites the judgment entered on April 10, 1997 as the order appealed from, is effective to bring up all issues in the case below. But the attorney has informed us that, on appeal just as in the district court, he represents Pettiford only in connection with Pettiford's assault claims against Durm and Hennie. Accordingly, Pettiford's attorney has briefed only issues related to the trial of the assault claims in appeal 97-2142. Pettiford has thus waived all other issues that could have been raised in that appeal. *Kauthar SDN BHD v. Sternberg*, 149

F.3d 659, 668 (7th Cir.1998).

The second notice of appeal, which was filed by Pettiford *pro se*, identifies the order appealed from as the district court's denial of Pettiford's Rule 60(b)(1) motion on May 19, 1997. An appeal from the denial of a Rule 60(b) motion raises only that denial and is ineffective to raise any other issues, including the judgment in the underlying case. *Jones v. Phipps*, 39 F.3d 158, 161-62 (7th Cir.1994). Our review in appeal 97-2370 is thus limited to determining whether the district court abused its discretion in denying the Rule 60(b)(1) motion to reconsider. *Id.* at 162.

We take this latter issue first. Rule 60(b)(1) permits relief from a judgment on the basis of mistake, inadvertence, surprise, or excusable neglect. Fed.R.Civ.P. 60(b)(1). "Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances." *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir.1997). Accordingly, our review of district court denials of Rule 60(b) motions is very deferential: only if no reasonable person could agree with the district court's decision will we disturb that decision. *Jones*, 39 F.3d at 162. The appellant bears the burden of demonstrating that the district court abused its discretion. *Cincinnati Ins. Co.*, 131 F.3d at 628.

Pettiford has not met that burden here. The sum total of the argument contained in his Rule 60(b) motion is that "[t]here have been too many mistakes, carelessness, and lack of attention by the Northern District Court and this Court in reference to this action since the filing of the said matter." Pettiford does not identify any of these asserted mistakes, however, or demonstrate any other basis on which he should be relieved from the district court's refusal to grant him leave to amend. Nor does Pettiford's brief, which unfortunately is devoted to the merits of his underlying claims, provide any reason to conclude that the district court erred. The district court did not abuse its discretion in finding that Pettiford had not met the standards of Rule 60(b) for relief from judgment.

We turn now to the issues raised in appeal 97-2142, the appeal from the jury trial. Pettiford

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first contends that the trial court erred in permitting counsel for Durm and Hennie to strike a member of the venire on the basis of race, in violation of *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and the Equal Protection Clause. During jury selection, the following exchange occurred:

****3 THE COURT:** The record needs to reflect that there is one African- American on this jury remaining and the defendants have just struck that defendant--or that juror and they need to articulate a rational reason for that, a race neutral reason for that strike.

MR. BYRON [defendants' attorney]: The reason we are striking is because we believe that she might be biased with regard to race.

THE COURT: It has to be a different reason than that. Got to have an articulable reason that has to do with something other than race.

MR. BYRON: I need to go back and look at our card.

THE COURT: Wait a minute, just a second. Unless the plaintiff doesn't care.

MR. HENDREN [plaintiff's attorney]: Your Honor, we--

THE COURT: You do care?

MR. HENDREN: Yes, sir.

THE COURT: Okay.
(Counsel conferred outside record)
(At the bench)

THE COURT: All right, Mr. Byron.

MR. BYRON: Yes. Number one, she's not working; and number two, she has been a claims rep and has litigation experience.

THE COURT: Do you have any comment you want to make?

MR. HENDREN: Yes, your Honor. I think they already stated the reason on the record for striking

her was because of her race, and these are [pretextual] reasons, neither one of which would impugn her ability to fairly judge the evidence in the case.

THE COURT: Well, an articulable reason is an articulable reason, and it doesn't have to be much. And the fact that there is a history with an insurance company is enough statement to make, and so I'm going to excuse her. Thank you.

In *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), the Supreme Court established a framework for district courts to follow when a party challenges the use of a peremptory strike to exclude an African-American from the jury. The party challenging the peremptory strike must first make a prima facie showing of intentional discrimination. The party making the strike then may articulate a race-neutral reason for the strike. The district court then weighs the evidence regarding the peremptory strike and determines whether the strike was animated by a forbidden reason, such as the juror's race or an assumption that African-American jurors will be unable to consider the case impartially when one of the parties is also African-American. *Id.* at 94-98; see also *Holder v. Welborn*, 60 F.3d 383, 388-89 (7th Cir.1995).

Here, the district court noted that the last African-American juror was being struck and asked the defendants' lawyer for a race-neutral reason, implicitly finding that the circumstances presented a prima facie showing and proceeding to the next step. The defendants' lawyer articulated a reason that was not race-neutral, but then, at the district court's prompting, articulated two reasons that were race-neutral. This court has held that, so long as a juror is not struck *solely* on account of race, the commands of *Batson* and the Equal Protection Clause are not violated. *Holder*, 60 F.3d at 389. Where, as here, both racially discriminatory and race-neutral reasons are given for the strike, no equal protection issue arises.

****4** Pettiford next complains that the defendants repeatedly referred to his prior murder convictions, thereby unfairly prejudicing the jury against him. But Pettiford himself first referred to his convictions during his own direct examination.

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Introducing harmful evidence before it is elicited by the opposing party is sometimes considered a wise trial strategy, but its legal effect is to waive the issue of the admissibility of that evidence. *See Wilson v. Williams*, 161 F.3d 1078, 1088-89 (7th Cir.1997). If a party wishes to preserve for appeal an objection to certain evidence, he must refrain from offering the evidence himself, wait to see if it is offered by the opposing party, and if so enter an objection. *Id.* at 1090. By not following this approach, Pettiford has waived the issue.

Pettiford has failed to cite authority or make adequate arguments in support of the other issues he mentions on appeal, and accordingly they are waived. *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 301 (7th Cir.1998). The judgment of the district court is AFFIRMED.

175 F.3d 1020 (Table), 1999 WL 184143 (7th Cir.(Ind.)), Unpublished Disposition

END OF DOCUMENT

Tab N

11/27/2001 Evidentiary Hearing (Contempt and PI)

1 the truth, the whole truth and nothing but the truth, so help
2 you God?

3 THE WITNESS: Yes.

4 THE COURT: Was Mr. Larsen examining her?

5 MR. VAN WAGONER: He was.

6 MR. LARSEN: I think what we have agreed to do,
7 though, is just --

8 MR. VAN WAGONER: -- reopen direct.

9 MR. LARSEN: Then have Mr. Himonas go, and then I'll
10 pick it back up.

11 THE COURT: Okay. I guess that's what you said.
12 Okay.

13

14 REDIRECT EXAMINATION

15 BY MR. VAN WAGONER:

16 Q. Now Ms. Stewart, the last time you were here on the
17 witness stand, you were you called, testifying about funds
18 that were sent to Richard Hu and Sam Tzu. Do you recall that?

19 A. Yes. We talk about funds being sent to Richard Hu
20 and Sam Tzu.

21 Q. Yes. And what was the source of those funds?

22 A. My mother.

23 Q. Did they come out of an account that your mother
24 owned?

25 MR. LARSEN: Objection. Foundation. Best evidence.

11/27/2001 Evidentiary Hearing (Contempt and PI)

1 THE COURT: Answer just yes or no if you know. Do
2 you know?

3 THE WITNESS: I don't remember.

4 Q. (BY MR. VAN WAGONER) You were involved in
5 facilitating or helping transfer those funds by wire to Richard
6 and Sam, weren't you?

7 A. Yes.

8 Q. As a matter of fact, on the wire instructions, you
9 were the contact person, weren't you?

10 A. I help her, but I didn't know whether, you know, the
11 bank needed to contact me or not.

12 Q. Okay. But because you speak English, you helped your
13 mother facilitate the transfer of those funds; is that right?

14 A. Yes.

15 Q. Okay. And did all of the funds that you sent to
16 Richard and Sam come from your mother?

17 A. Um -- I don't know.

18 Q. Do you recall accepting any other funds from any
19 other source?

20 A. One thing I know for sure is that the fund was never
21 from E. Excel.

22 Q. It wasn't from E. Excel?

23 A. No.

24 Q. But it came -- the funds came out of a bank account
25 or bank accounts at Central Bank; is that right?

11/27/2001 Evidentiary Hearing (Contempt and PI)

1 A. Yes.

2 Q. Okay. And you don't recall whether it was a bank
3 account that your mother owned?

4 A. Um -- I -- I don't think my mother owns any bank
5 accounts in Central Bank.

6 Q. Okay.

7 A. Because she, you know, she doesn't speak English.

8 Q. Okay. So the monies that went to Richard and Sam,
9 they came from Central Bank; correct?

10 A. Yes.

11 Q. And whose account did they come from?

12 A. Um -- let's see, I don't remember.

13 Q. Okay. Who is -- and I will spell that -- Jui-Ching
14 Lu? J-U-I. C-H-I-N-G. L-U?

15 A. That's my uncle.

16 Q. That's your uncle. Did he have an account at Central
17 Bank?

18 A. Yes.

19 Q. And did you help him set that account up?

20 A. Yes, I did.

21 Q. Okay. Isn't it true that on November 30th of 2000,
22 you assisted in the wiring of a hundred thousand dollars to
23 Sam Tzu from that account?

24 A. I don't remember the dates any more.

25 Q. Okay. Forgetting the dates, do you recall that you

11/27/2001 Evidentiary Hearing (Contempt and PI)

1 assisted in the wiring of a hundred thousand dollars to Sam
2 Tzu?

3 A. I don't remember the amount, but I remember assisting
4 in sending wire to Sam Tzu.

5 Q. Okay. You recall -- it's true, isn't it, that on
6 December the 10th, that you assisted in wiring to Sam Tzu
7 \$1,200,000 out of your uncles account?

8 A. Again, I really don't remember the amount or the
9 date, but I do remember helping to send wires.

10 Q. Okay. Isn't it true that on December the 19th of
11 2000, you assisted in the wiring of 400,000 to Richard Hu from
12 your aunt's Central Bank account?

13 A. I remember wiring, helping to send wire to Richard
14 Hu, but I don't remember the dates or the exact amount.

15 Q. Okay. It's true, isn't it, that on December 19th,
16 you assisted in the wiring of one million dollars to Sam Tzu
17 from your aunt's Central Bank account?

18 A. I really don't remember how many times or the amounts
19 or the date.

20 Q. Okay.

21 A. But I do remember in the assisting to send the wires.

22 Q. Okay. Earlier in this proceeding, and also in your
23 deposition, you testified that the funds that went to Richard
24 and Sam came from your mother; is that right?

25 A. Yes. I -- it was under my mother's instruction.

11/27/2001 Evidentiary Hearing (Contempt and PI)

1 Q. Okay. But they weren't your mother's funds, were
2 they?

3 A. I do not know for sure.

4 Q. You don't know whose funds?

5 A. But my mother instruction, yes.

6 Q. So this was done at your mother's instruction; is
7 that right?

8 A. Yes.

9 Q. Okay. Did you get your aunt and uncle's permission
10 to do this?

11 A. No. I assume my mom would talk to my aunt and my
12 uncle.

13 Q. Okay. Now, today and the last time we were here, you
14 testified about the transfer of funds to Richard and Sam,
15 right? But on a previous occasion in this Court, you
16 testified differently, didn't you, about transferring funds to
17 Richard?

18 A. Oh, I don't remember. Um -- I've been under a lot of
19 pressure, but I do remember sending wires to Richard Hu and
20 Sam Tzu.

21 Q. You remember sending wires to Richard Hu and Sam Tzu?

22 A. Yes. I remember assisting to send wires.

23 Q. And when you testified here in February at that point
24 in time, you remember at that point that you had wired money
25 to Richard and Sam; right?

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1 A. Oh. Um -- I don't know, but I do remember helping to
2 send wires.

3 Q. Okay. I'm going to have you take a look at the
4 transcript of the proceedings dated February the 8th, Your
5 Honor, and I'll ask you to turn to page 109, please.

6 MR. VAN WAGONER: Your Honor, may I stand next to the
7 witness. I don't have an extra copy of it.

8 THE COURT: Yes. February 8th?

9 MR. VAN WAGONER: February 8th.

10 MR. HIMONAS: I have one.

11 MR. VAN WAGONER: You do?

12 MR. HIMONAS: But I don't think it has the same
13 pagination, Mr. Van Wagoner.

14 MR. VAN WAGONER: Well, that's not going to help.

15 Q. (BY MR. VAN WAGONER) Let's go to page 109, and if I
16 might, beginning at line 10.

17 "QUESTION: Do you know if Richard Hu has
18 received --"

19 THE COURT: What page -- excuse me.

20 MR. VAN WAGONER: Page 109, Your Honor, beginning at
21 line 10.

22 Q. (BY MR. VAN WAGONER) "QUESTION: Do you know if
23 Richard Hu has received money through association with your
24 family for the purpose of setting up a sales distribution
25 network in the Philippines?

1 late later.

2 Q. It's true, isn't it, that during that telephone
3 conversation with Richard and Sam, the three of you agreed
4 that Mr. Hu, if he were asked the question, would falsely deny
5 any involvement or ownership in the start-up distributorship
6 in the Philippines. You and Mr. Hu and Mr. Tzu agreed to that
7 in that telephone call; correct?

8 A. I don't remember.

9 Q. Okay. It's also true, isn't it, that Mr. Hu, in that
10 telephone conversation, would attribute this new company to
11 Paras Uy, you three agreed to that, didn't you?

12 A. I did not remember Paras Uy is mentioned at that
13 time. That name does not ring a bell.

14 Q. Okay. You agreed in that telephone conversation with
15 Richard and Sam that Mr. Hu would claim that he had loaned
16 money to Mr. Uy for unknown uses. You guys agreed to that,
17 didn't you?

18 A. I do not remember exactly what was the
19 conversations --

20 Q. Okay. You --

21 A. -- regarding that.

22 Q. -- also agreed that you and Mr. Hu would deny that
23 you had any involvement in providing funds for the start up
24 company if you were asked questions about that in court. You
25 agreed to that, didn't you?

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1 A. I don't remember.

2 Q. Okay. You also agreed in that telephone conversation
3 with Richard and Sam, that if they were asked questions that
4 they did not want to answer, they would say, I cannot remember
5 now, but then they could choose to remember whenever they
6 wanted to thereafter. You guys agreed to that, didn't you?

7 A. I don't remember that has been said, but I remember
8 that they have never had any experience of testifying, and I
9 was concerned that they -- when they are put in the situation
10 sometimes they don't remember something exactly, they would
11 answer wrong. So I was trying to let them know that they
12 could -- it's better to say not remembering rather than saying
13 yes or no, because sometimes the things I don't remember
14 sometimes would come back to me later.

15 Q. Okay.

16 A. So it's better later to give a correct answer rather
17 than at that time because I thought, oh, that was the
18 situation.

19 Q. Okay. But the context of the conversation was Mr. Hu
20 was inquiring, what if there's something that they ask me that
21 I don't want to answer? Wasn't that the context of the
22 conversation in which you said, then say you don't remember,
23 and whenever you want thereafter you can remember. Wasn't
24 that the context?

25 A. No. I don't remember that has been said that way.