

2002

Jau-Fei Chen, Chi Wei Zhang, E. Lei Zhang, and E.
E. Zhang v. Jau Hwa Stewart, E. Excel International,
Inc. and Does I-X : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Daniel L. Berman; Stephen R. Waldron; Berman, Tomsic & Savage; H. Thomas Stevenson; Stevenson & Smith, P.C.; Attorneys for Apellant.

Michael D. Zimmerman; Todd M. Shaughnessy; Snell & Wilmer; Michael R Carlston; Snow, Christensen & Martineau; Attorneys for Apellee.

Recommended Citation

Reply Brief, *Chen v. Stewart*, No. 20020927.00 (Utah Supreme Court, 2002).
https://digitalcommons.law.byu.edu/byu_sc2/2304

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

grey 1

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.

Supreme Court 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.

**REPLY BRIEF OF APPELLANT HWAN LAN CHEN
TO BRIEF OF APPELLEE JAU-FEI CHEN**

INTERLOCUTORY APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH, THE HONORABLE FRED D. HOWARD
PRESIDING

Michael D. Zimmerman
Todd M. Shaughnessy
Snell & Wilmer
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

Michael R. Carlston
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Salt Lake City, Utah 84145-5000
Attorneys for Plaintiff/
Appellee Jau-Fei Chen

Daniel L. Berman (0304)
Stephen R. Waldron (6810)
BERMAN, TOMSIC & SAVAGE
50 South Main, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

H. Thomas Stevenson (6803)
STEVENSON & SMITH, P.C.
3986 Washington Blvd.
Ogden, Utah 84403
(801) 394-4573
Attorneys for Third Party Defendant/Appellant
Hwan Lan Chen

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,)	Supreme Court No. 20020927 SC
vs.)	
)	
JAU-HWA STEWART, E. EXCEL INTERNATIONAL, INC., a Utah corporation, and Does I through X,)	
)	
Defendants/Appellant.)	
)	
<hr/>		
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.)	

**REPLY BRIEF OF APPELLANT HWAN LAN CHEN
TO BRIEF OF APPELLEE JAU-FEI CHEN**

INTERLOCUTORY APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH, THE HONORABLE FRED D. HOWARD
PRESIDING

Michael D. Zimmerman
Todd M. Shaughnessy
Snell & Wilmer
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

Michael R. Carlston
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Salt Lake City, Utah 84145-5000
Attorneys for Plaintiff/
Appellee Jau-Fei Chen

Daniel L. Berman (0304)
Stephen R. Waldron (6810)
BERMAN, TOMSIC & SAVAGE
50 South Main, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

H. Thomas Stevenson (6803)
STEVENSON & SMITH, P.C.
3986 Washington Blvd.
Ogden, Utah 84403
(801) 394-4573
Attorneys for Third Party Defendant/Appellant
Hwan Lan Chen

TABLE OF CONTENTS

ARGUMENT	1
I. SUMMARY OF REPLY	1
II. JUDGE HOWARD WAS WITHOUT POWER – HE LACKED JURISDICTION – TO ADJUDICATE THE MERITS OF HWAN LAN CHEN’S EQUITABLE OWNERSHIP CLAIM	4
III. HWAN LAN CHEN UNQUESTIONABLY HAS STANDING TO CHALLENGE THE SPECIAL MASTER’S UNLAWFUL EMPOWERMENT AND ACTIONS AS AN ADVERSELY AFFECTED PARTY LITIGANT	9
IV. HWAN LAN CHEN HAS STANDING TO CHALLENGE THE SPECIAL MASTER’S UNLAWFUL EMPOWERMENT AND ACTIONS BASED ON HER VERIFIED ASSERTION OF EQUITABLE OWNERSHIP IN THE ACTION BELOW AND HER ALLEGATIONS OF EQUITABLE OWNERSHIP IN HER PENDING INDEPENDENT ACTION	10
V. AS A MATTER OF LAW, JUDGE HOWARD COULD NOT DECIDE HWAN LAN CHEN’S EQUITABLE OWNERSHIP CLAIM BY DECIDING TITLE TO E. EXCEL STOCK AND STOCK CERTIFICATES BECAUSE IT IS WELL ESTABLISHED THAT TRUE CORPORATE OWNERSHIP IS BASED ON THE SURROUNDING FACTS AND CIRCUMSTANCES	14
VI. HWAN LAN CHEN HAD NO DUTY TO BRING HER EQUITABLE OWNERSHIP CLAIM AS A COMPULSORY COUNTERCLAIM OR TO OTHERWISE INTERVENE	19
VII. JAU-FEI CHEN PUTS FORTH A RECORD OF A PROCEEDING THAT WAS NOT AN ADJUDICATION OF HWAN LAN CHEN’S OWNERSHIP CLAIM AND NEGLECTS TO CITE THE ONLY RELEVANT RECORD BELOW	22

VIII.	HWANLAN CHEN HAS NO OBLIGATION TO MARSHAL EVIDENCE REGARDING A CLAIM THAT THE DISTRICT COURT LACKED JURISDICTION TO DECIDE; SHE MARSHALED THE RECORD REGARDING JUDGE HOWARD’S LACK OF JURISDICTION AND HER STANDING	24
IX.	CONCLUSION	25

AUTHORITIES

<i>Alemite Mfg. Corp. v. Staff</i> , 42 F.2d 832 (2d Cir. 1930)	5, 7
<i>Atwood v. Cox</i> , 55 P.2d 377 (Utah 1936)	5, 11
<i>Baggett v. Cyclopss Medical Sys.</i> , 935 P.2d 1265 (Utah Ct. App. 1997)	15, 16
<i>Baxter v. Utah Dep't of Trans.</i> , 705 P.2d 1167 (Utah 1985)	20
<i>Combe v. Warren's Family Drive-Inns, Inc.</i> , 680 P.2d 733 (Utah 1984)	4, 8
<i>Davis v. Passman</i> , 442 U.S. 228 (1979)	10
<i>Epstein v. Abrams</i> , 57 Cal. App. 4th 1159 (Cal. Ct. App. 1997)	22
<i>Estate of Davenport v. C.I.R.</i> , 184 F.3d 1176 (10th Cir. 1999)	14, 16
<i>Ex parte</i> , 74 U.S. 506, 514 74 U.S. 506, 514 (1896)	11
<i>Fireplace Shop, Inc. v. Fireplace Shop of Lafayette, Inc.</i> , 400 So.2d 702 (La. Ct. App. 1981)	14
<i>Frazier v. Oklahoma Gas & Electric Co.</i> , 63 P.2d 11 (Okla. 1936)	15, 17
<i>Goben v. Barry</i> , 676 P.2d 909 (Kan. 1984)	16
<i>Hazeltine Research, Inc.</i> , 395 U.S. 100 (1969)	5, 7
<i>In re H.J.</i> , 1999 UT App. 238, ¶ 46, 986 P.2d 115	6, 7
<i>Martin v. Wilks</i> , 490 U.S. 755 (1989)	20
<i>Mr. Furniture Warehouse, Inc. v. Barclays Am./Comm. Inc.</i> , 919 F.2d 1517 (11th Cir. 1990)	10
<i>O'Donnell v. Fletcher</i> , 681 P.2d 1074 (Kan. Ct. App. 1984)	4
<i>Oldroyd v. McCrea</i> , 235 P. 580 (Utah 1925)	5, 8
<i>PGM, Inc. v. Westchester Investment Partners, Ltd.</i> , 2000 UT App. 20, ¶¶ 6-8, 995 P.2d 1252	5, 7

<i>Plumb v. State</i> , 809 P.2d 734 (Utah 1990)	5, 7
<i>Retirement Bd. of the Police Ret. Sys. of Kan. City v. Noel</i> , 652 S.W.2d 874 (Mo. Ct. App. 1983)	22
<i>Robey v. Hardy</i> , 224 P. 889 (Utah 1924)	15
<i>Searle Bros. v. Searle</i> , 588 P.2d 689 (Utah 1978)	20
<i>Society of Prof. Journalists v. Bullock</i> , 743 P.2d 1166 (Utah 1987)	-9-, 10
<i>State v. Stobie</i> , 92 S.W. 191 (Mo. 1906)	5
<i>Timm v. Dewsnap</i> , 851 P.2d 1178 (Utah 1993)	5
<i>United States v. Marx</i> , 844 F.2d 1303 (7th Cir. 1988)	16, 23
<i>Wardley Better Homes and Gardens v. Cannon</i> , 2002 UT 99	24
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	10
<i>Young v. Young</i> , 393 S.E.2d 398 (Va. 1990)	15-17

STATE STATUTES

Utah Code Ann. § 16-10a-625	14
-----------------------------------	----

OTHER AUTHORITIES

Teemu Ruskola, <i>Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective</i> , 52 Stan. L. Rev. 1599 (2000)	17
---	----

Appellant Hwan Lan Chen respectfully submits the following brief in reply to the appellee brief of appellee/plaintiff Jau-Fei Chen.

ARGUMENT

I. SUMMARY OF REPLY

Plaintiff Jau-Fei Chen, under the guise of standing, attempts to try on appeal claims for relief against her mother, Hwan Lan Chen, regarding ownership of E. Excel International, Inc. (“E. Excel”) that neither Jau-Fei Chen nor any other party ever made below and which are not the subject of this appeal. Jau-Fei Chen attempts to prove that Hwan Lan Chen is not an owner of E. Excel and argues that, as a result, Hwan Lan Chen lacks standing to assert “**most**” of the “claims” allegedly asserted in her Motion to Vacate and Set Aside.

There is no basis for Jau-Fei Chen’s core assertion that Hwan Lan Chen is not an owner of E. Excel. Judge Howard’s purported adjudication of Hwan Lan Chen’s equitable ownership claim is void as without jurisdiction. Assertion of a claim for relief under Utah Rule of Civil Procedure 8 against a party is an absolute prerequisite to a court’s jurisdiction – its power – to decide the merits of the claim. Hwan Lan Chen categorically was not a party to any Rule 8 claim for relief below that involved her claim to ownership of E. Excel. There is no basis for this Court, as urged by Jau-Fei Chen, to hold that Hwan Lan Chen is not an owner of E. Excel and Jau-Fei Chen’s entire argument fails.

The question raised by Jau-Fei Chen’s motion to strike was only of standing. Hwan Lan Chen unquestionably has standing to challenge the District Court’s Rule 53 Special

Master's unlawful empowerment and actions as an adverse party litigant, regardless of ownership of E. Excel. Jau-Fei Chen concedes her mother's standing as an adversely impacted party litigant.

Hwan Lan Chen also has standing to challenge the Special Master's unlawful empowerment and actions based on her verified assertion below, and her allegations in her pending independent action, of equitable ownership of E. Excel.¹ Standing is determined by accepting allegations as true. Judge Howard had to accept as true Hwan Lan Chen's verified assertion and independent allegations of equitable ownership to decide her standing to challenge the Special Master's unlawful empowerment and actions. Jau-Fei Chen's motion to strike that raised the standing issue did not provide Judge Howard the power to adjudicate – the jurisdiction to decide the merits of – Hwan Lan Chen's claim to equitable ownership of E. Excel.

In addition to lacking jurisdiction to adjudicate Hwan Lan Chen's equitable ownership claim, Judge Howard was wrong as a matter of law in ruling in his January 24, 2003 Ruling that he already decided Hwan Lan Chen was not an E. Excel owner when he decided who held title to the outstanding stock of E. Excel with his August 12, 2002 Order. Judge Howard incorrectly assumed that title to stock or stock certificates preclusively

¹ Hwan Lan Chen asserts claims for relief in her independent action to establish her legal and beneficial ownership of E. Excel, as noted in the first sentence of her complaint. [See Addendum, Tab A at ¶ 1 (“Madame Chen brings this action to establish her legal and beneficial ownership in a close family corporation, E. Excel International, Inc. . . .”).] Hwan Lan Chen's ownership claim is not based on being a title owner of stock or stock certificates of E. Excel and, as such, is referred to as her “equitable ownership claim.”

establishes ownership of a corporation. It is well established that true or actual corporate ownership depends on the surrounding facts and circumstances rather than title to stock or stock certificates. Hwan Lan Chen's equitable ownership claim is based on an established legal theory that does not depend on her being a title owner of E. Excel stock.

Hwan Lan Chen's assertion of Rule 8 claims for relief to establish her equitable ownership in an independent action rather than as a counterclaim below provides no basis for Jau-Fei Chen's argument that Hwan Lan Chen is not an owner of E. Excel. A claim must be asserted as a compulsory counterclaim only against an opposing party and only if the claim arises out of the same transaction or occurrence that gives rise to the opposing party's Rule 8 claims for relief. Hwan Lan Chen's equitable ownership claim did not arise out of the occurrences that gave rise to the Rule 8 claims for relief of the Special Master/E. Excel, who is the only party opposing her. Nor did Hwan Lan Chen have a duty to intervene to assert her equitable ownership claim. The opposite is the rule – Jau-Fei Chen had to join her mother if she wanted an adjudication of her mother's ownership claim.

Jau-Fei Chen puts forth a record as if it were a record of an adjudication of Hwan Lan Chen's equitable ownership claim, when there is no such record. Jau-Fei Chen's record only goes to the ownership of E. Excel stock, not the true ownership of E. Excel. She fails to marshal the only evidence below that is relevant to the true ownership of E. Excel, which is her own testimony that Hwan Lan Chen controlled E. Excel profits. Jau-Fei Chen's argument that Hwan Lan Chen contradicted her equitable ownership claim below is categorically false.

Finally, Hwan Lan Chen had no duty to marshal evidence regarding the merits of her ownership claim when Judge Howard lacked jurisdiction to decide the claim. Hwan Lan Chen marshaled the record regarding Judge Howard's lack of jurisdiction. She also fully marshaled the record regarding her standing to challenge the Special Master's unlawful empowerment and actions, which is based on her being an adversely affected party litigant and her verified assertion and independent allegations of equitable ownership.

II. JUDGE HOWARD WAS WITHOUT POWER – HE LACKED JURISDICTION – TO ADJUDICATE THE MERITS OF HWAN LAN CHEN'S EQUITABLE OWNERSHIP CLAIM

Jau-Fei Chen argues that Hwan Lan Chen is not an E. Excel owner based on Judge Howard's assertion in his January 24, 2003 Ruling that he already decided Hwan Lan Chen is not an E. Excel owner with his August 12, 2002 Order granting Jau-Fei Chen's motion for partial summary judgment. [R. 12756.] Judge Howard, however, lacked jurisdiction to decide whether Hwan Lan Chen is an E. Excel owner because no Rule 8 claim for relief to which Hwan Lan Chen was a party was ever asserted below that involved her equitable ownership claim.

Absent the filing of a Rule 8 claim for relief, courts are without jurisdiction to decide the merits of a claim, whether by summary judgment or trial. The filing of a Rule 8 claim for relief is an absolute prerequisite to a court's power to hear and decide the claim (*i.e.*, its subject matter jurisdiction). *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733, 736 (Utah 1984) ("In law or in equity, a judgment must be responsive to the issues framed by the pleadings, and a trial court has no authority to render a decision on issues not presented for

determination.”); *Atwood v. Cox*, 55 P.2d 377, 381 (Utah 1936) (“It takes a pleading to invoke the jurisdiction of the court ‘Jurisdiction is authority to hear and determine a cause.’” (quoting *State v. Stobie*, 92 S.W. 191, 197 (Mo. 1906))); *Oldroyd v. McCrea*, 235 P. 580, 588 (Utah 1925) (“To grant such an order required a petition stating a case within the appropriate jurisdiction of the court. Such a petition was essential to invoke action and clothe the court with power to act.”); *O’Donnell v. Fletcher*, 681 P.2d 1074, 1076 (Kan. Ct. App. 1984) (“It is well established that a trial court has jurisdiction to decide only such issues as are raised by the pleadings or defined at pretrial conference”). A summary judgment grants relief only on the Rule 8 claim for relief referenced in the motion or a mutually exclusive Rule 8 claim for relief that is asserted in the action. Utah R. Civ. P. 56(a); *Timm v. Dewsnap*, 851 P.2d 1178, 1182 (Utah 1993).

A Rule 8 claim for relief against a party is a necessary predicate to an adjudication against that party in order to satisfy fundamental requirements of due process, including the minimal due process requirements of notice and the opportunity to be heard. Absent joining a person to an action by service of process of a Rule 8 claim for relief, that person cannot be bound by any findings or judgment. *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (“[N]o court can make a decree which will bind anyone but a party.”); *Plumb v. State*, 809 P.2d 734, 743 (Utah 1990); *PGM, Inc. v. Westchester Investment Partners, Ltd.*, 2000 UT App. 20, ¶¶ 6-8, 995 P.2d 1252 (“We conclude that the Paria’s court’s findings are not binding on PGM” because PGM was not a party to the Paria court proceeding).

Under these fundamental rules of American jurisprudence, Judge Howard lacked jurisdiction to decide whether Hwan Lan Chen is an owner of E. Excel. Contrary to Jau-Fei Chen's assertion that the "ownership and control of E. Excel were at the center of this case," Jau-Fei Chen **never asserted any Rule 8 claim for relief** against Hwan Lan Chen relating in any manner to the ownership of E. Excel and **no other party** ever asserted any such claim for relief. [R. 24; 4214.] Hwan Lan Chen's equitable ownership of E. Excel was categorically never the subject of any Rule 8 claim for relief to which Hwan Lan Chen was a party in the action below. [*Id.*] The August 12, 2002 Order granted Jau-Fei Chen's motion for partial summary judgment on only one of her Rule 8 claims for relief against defendant Jau-Hwa Stewart – not on any Rule 8 claim for relief against Hwan Lan Chen. [R. 6448; 7959.]

Reflecting the lack of a Rule 8 claim for relief, Hwan Lan Chen was never served summons or any other notice that her equitable ownership was at issue or being decided, Judge Howard never held a hearing on the claim, and Hwan Lan Chen was never provided the opportunity to be heard on her equitable ownership claim. Jau-Fei Chen argues that Hwan Lan Chen was not entitled to notice because she is not an E. Excel owner. Astonishingly, Jau-Fei Chen wants it determined that Hwan Lan Chen is not an E. Excel owner without Hwan Lan Chen having any notice or opportunity to be heard. Just the opposite, however, is the absolute rule. The absolute requirement of notice and opportunity to be heard for there to be an adjudication means there is no adjudication absent notice and

opportunity to be heard, as was the case here. *See Alemite*, 42 F.2d at 832-33; *Plumb*, 809 P.2d at 743; *PGM*, 2000 UT App. 20, ¶¶ 6-8, 995 P.2d 1252.

In addition to being without power, Judge Howard did not purport to adjudicate Hwan Lan Chen's equitable ownership claim **at the time** he heard and entered the August 12, 2002 Order. Jau-Fei Chen moved for summary judgment only on her fourth claim for relief, which sought a declaratory judgment that defendant Jau-Hwa Stewart lacked authority to vote the E. Excel stock issued in the name of Jau-Fei Chen's children. [R. 10-11; 6448.] Judge Howard dismissed Hwan Lan Chen's counsel from the June 26, 2002 hearing on Jau-Fei Chen's motion for partial summary judgment, which he could not have done had he been deciding her ownership claim.² [R. 14276 at 81.] The argument on the motion was limited to the issue of whether Jau-Hwa Stewart was authorized to vote the children's stock. [*Id.* at 94-124.] In granting the motion at that hearing, Judge Howard expressly stated that he was only granting the motion as to the "status of the stock But only to that extent." [*Id.* at 123-124.] Finally, the August 12, 2002 Order by its terms only decided who were the record owners of the issued E. Excel stock and that Jau-Hwa Stewart lacked authority to vote the children's stock because their stock had never been placed in a trust. [R. 7956-57.] Hwan Lan Chen's equitable ownership claim does not depend on her being a record owner

² Jau-Fei Chen argues that Judge Howard's excusing Hwan Lan Chen's counsel from the hearing on the motion for partial summary judgment supports her assertion that the August 12, 2002 Order adjudicated Hwan Lan Chen's ownership claim. Jau-Fei Chen has it backwards. Judge Howard's excusing of Hwan Lan Chen's counsel shows that the August 12, 2002 Order did not adjudicate Hwan Lan Chen's equitable ownership claim because, as a result, he did not provide her notice and opportunity to be heard.

of stock. Judge Howard's assertion in his January 24, 2003 Ruling that he had already decided Hwan Lan Chen was not an E. Excel owner with the August 12, 2002 Order was merely a post hoc, baseless attempt to justify his unlawful empowerment of the Special Master.

In sum, Judge Howard categorically lacked jurisdiction to decide whether Hwan Lan Chen is an owner of E. Excel. Nor did he purport to do so with his August 12, 2002 Order until his post hoc re-characterization of that Order in his January 24, 2003 Ruling. Any purported adjudication of Hwan Lan Chen's equitable ownership claim was absolutely void as without jurisdiction. *Combe*, 680 P.2d at 736 ("Any findings rendered outside the issues are a nullity."); *Oldroyd*, 235 P. at 588 (holding that, absent jurisdiction, "the error is fatal in every stage, rendering all decretal orders a nullity. . . .") There categorically is no valid basis for Jau-Fei Chen's assertion that Hwan Lan Chen is not an owner of E. Excel.³

³ Because the District Court lacked jurisdiction to decide Hwan Lan Chen's equitable ownership claim due to the absence of any Rule 8 claim for relief directed at that claim, this Court lacks jurisdiction to hold Hwan Lan Chen is not an E. Excel owner. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900))). This Court lacks jurisdiction to decide Hwan Lan Chen's equitable ownership claim in the first instance. Utah Code Ann. § 78-2-2 (2001) (providing that the Supreme Court's original jurisdiction is limited to "answer questions of state law certified by a court of the United States" and to issue writs and process necessary to carry out its orders, judgments, or decrees).

III. HWAN LAN CHEN UNQUESTIONABLY HAS STANDING TO CHALLENGE THE SPECIAL MASTER'S UNLAWFUL EMPOWERMENT AND ACTIONS AS AN ADVERSELY AFFECTED PARTY LITIGANT

Notwithstanding her attempt to try ownership, Jau-Fei Chen's motion to strike raised only an issue of standing. Regardless of Hwan Lan Chen's equitable ownership of E. Excel, there is no question that Hwan Lan Chen has standing to challenge the Special Master's unlawful empowerment and actions as an adversely impacted party litigant. Jau-Fei Chen concedes this.

A party who is adversely affected by court rulings or actions has standing to challenge those rulings or actions. *Society of Prof. Journalists v. Bullock*, 743 P.2d 1166, 1170-72 (Utah 1987). Hwan Lan Chen has been adversely affected as a party litigant as a result of the Special Master's unlawful empowerment and actions. She was made a party to the action below and had the Preliminary Injunction entered against her only because the Special Master directed that the Amended Third Party Complaint and Motion for Preliminary Injunction be filed against her. [R. 3721; 4205 at ¶ 3.] She faces the dominating trial court's "representative" – the Special Master – as a party adversary. [R. 14236 at 71.]

Jau-Fei Chen conceded in the District Court Hwan Lan Chen's standing as a party litigant by only contesting Hwan Lan Chen's standing as an E. Excel owner. In her motion to strike, Jau-Fei Chen asserted only that Hwan Lan Chen "has no standing to make **most of the assertions** and claims of damages" – unspecified assertions and claims relating to ownership of E. Excel – set forth in the Motion to Vacate and Set Aside. [R. 10273 (emphasis added).] Jau-Fei Chen makes the same concession in this Court. [See Jau-Fei

Chen's Appellee Brief at 31 ("[T]he Motion to Vacate is predicated **in large part** upon an ownership interest in [E. Excel]. . . . **Certain of the relief** Madame Chen seeks in her Motion to Vacate and this appeal is predicated upon having an ownership in E. Excel USA.") (Emphasis added).]

IV. HWAN LAN CHEN HAS STANDING TO CHALLENGE THE SPECIAL MASTER'S UNLAWFUL EMPOWERMENT AND ACTIONS BASED ON HER VERIFIED ASSERTION OF EQUITABLE OWNERSHIP IN THE ACTION BELOW AND HER ALLEGATIONS OF EQUITABLE OWNERSHIP IN HER PENDING INDEPENDENT ACTION

In addition to having standing as a party litigant, Hwan Lan Chen has standing to challenge the Special Master's unlawful empowerment and actions based on her verified assertion of equitable ownership in the action below and her independent allegations of equitable ownership. Contrary to the January 24, 2003 Ruling, Jau-Fei Chen's motion to strike did not provide Judge Howard with jurisdiction to decide the merits of Hwan Lan Chen's equitable ownership claim. The motion to strike – which was directed only at Hwan Lan Chen's standing to challenge certain aspects of the Special Master's unlawful empowerment and actions – had to be decided by accepting as true Hwan Lan Chen's verified assertion and independent allegations of equitable ownership.

Standing is based on allegations alone and is decided by accepting the allegations as true. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."); *Bullock*, 743 P.2d at 1170 n.3

(“It is not necessary or appropriate for us to consider the merits of the petitioners’ claim in deciding whether they have standing.”). Standing is based on allegations alone because it is a threshold jurisdictional issue that must be decided before deciding the merits of a claim; absent jurisdiction, a court has no power to decide the merits. *Steel Co.*, 523 U.S. at 102 (“[W]e . . . arrive at the threshold jurisdictional question: whether respondent, the plaintiff below, has standing to sue.”); *Ex parte McCardle*, 74 U.S. 506, 514 (1896) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law”); *Atwood*, 55 P.2d at 381 (“Jurisdiction can never depend upon the merits of the case brought before the court, but only upon its right to hear and decide at all.”).

Under this well established rule, Judge Howard had to accept as true, rather than purport to adjudicate, Hwan Lan Chen’s verified assertion and independent allegations of equitable ownership to decide Jau-Fei Chen’s motion to strike. The motion to strike was filed in response to and was directed at Hwan Lan Chen’s Motion to Vacate and Set Aside.⁴ [R. 9238; 10273.] The motion to strike raised only the jurisdictional issue of Hwan Lan Chen’s standing to challenge certain aspects of the Special Master’s unlawful empowerment and actions with her Motion to Vacate and Set Aside. At the time the motion to strike was made and decided, Hwan Lan Chen had made a verified assertion and independent

⁴ Although Jau-Fei Chen styled her motion as a motion to strike claims, there was no Rule 8 claim for relief by Hwan Lan Chen in the action below to strike. Hwan Lan Chen’s Motion to Vacate and Set Aside was not a pleading and did not assert any Rule 8 claim for relief. [R. 9238.]

allegations of equitable ownership of E. Excel, which Jau-Fei Chen had never – ever – taken the opportunity to attempt to negate:

- In May 2002, months before Judge Howard ruled on Jau-Fei Chen’s motion for partial summary judgment and motion to strike claims, Hwan Lan Chen served her interrogatory responses, which unequivocally asserted that she is an equitable owner of E. Excel. [R. 14332, Reply Memo. at Ex. B (Interr. No. 5).] The Special Master/E. Excel’s Interrogatory No. 5 asked her to identify every “entity” (including corporations) in which she “own[s], hold[s], or control[s] a pecuniary, equitable, or beneficial interest.” [*Id.*] In response, Hwan Lan Chen clearly and unequivocally answered, “E. Excel International, Inc.” [*Id.*] None of her other interrogatory responses in any manner equivocate on or negate her clear and unequivocal answer to Interrogatory No. 5.⁵ [R. 14332, Reply Memo. at Ex. B.] Jau-Fei Chen never took any action after the interrogatory response to attempt to negate her mother’s verified assertion, including attempting to take her mother’s deposition.

- In October 2002, Hwan Lan Chen filed an affidavit that clearly and unequivocally asserted that she is an equitable owner of E. Excel.⁶ [R. 9256.] Jau-Fei Chen never submitted an affidavit in response in an attempt to negate her mother’s verified

⁵ None of the other interrogatories were directed at Hwan Lan Chen’s claims to corporate ownership or are in any manner relevant to her equitable ownership claim. [R. 14332, Reply Memo. at Ex. B.]

⁶ Judge Howard struck portions of Hwan Lan Chen’s affidavit on motion by the Special Master/E. Excel as part of his purported adjudication of her equitable ownership claim. [R. 12781.] However, the filing of the affidavit is its significance and the affidavit does not alone establish Hwan Lan Chen’s standing as an equitable owner of E. Excel. Judge Howard never cited to his striking portions of Hwan Lan Chen’s affidavit as a basis for his January 24, 2003 Ruling on standing. [R. 12755-58.]

assertion. **Jau-Fei Chen never submitted an affidavit saying “my mother is not an owner of E. Excel.”** If she was going to do so, her motion to strike was the opportunity to do so. Hwan Lan Chen’s verified assertion of equitable ownership in her affidavit has never been negated.

- Finally, in December 2002, Hwan Lan Chen initiated against Jau-Fei Chen and Jau-Hwa Stewart an independent action in the Fourth Judicial District Court to assert Rule 8 claims for relief based on her equitable ownership claim. [Appendix, Tab A.] That independent action was **not assigned** to Judge Howard under the Fourth Judicial District’s assignment rules and remains pending. Judge Howard, however, was provided a copy of Hwan Lan Chen’s complaint at the January 10, 2003 hearing on the Motion to Vacate and Set Aside, but never acknowledged it in his January 24, 2003 Ruling. [Appendix, Tab B; R. 14287 at 89, 92; 12756.] A copy of that complaint is enclosed in the attached Appendix at Tab A; the record of Judge Howard being provided the complaint is at Tab B.

In sum, Judge Howard was without power to use Jau-Fei Chen’s motion to strike to decide that Hwan Lan Chen was not an owner of E. Excel. Instead, he had to accept as true her verified assertion and independent allegations of equitable ownership to decide Hwan Lan Chen’s standing to challenge the Special Master’s unlawful empowerment and actions – the only issue raised by the motion to strike. Based on her verified assertion and independent allegations of equitable ownership, in addition to her status as an adversely affected party, Hwan Lan Chen manifestly has such standing.

V. **AS A MATTER OF LAW, JUDGE HOWARD COULD NOT DECIDE HWAN LAN CHEN'S EQUITABLE OWNERSHIP CLAIM BY DECIDING TITLE TO E. EXCEL STOCK AND STOCK CERTIFICATES BECAUSE IT IS WELL ESTABLISHED THAT TRUE CORPORATE OWNERSHIP IS BASED ON THE SURROUNDING FACTS AND CIRCUMSTANCES**

In addition to lacking a jurisdictional basis to decide Hwan Lan Chen's equitable ownership claim, Judge Howard lacked a legal basis for purporting to decide her claim. Judge Howard asserted in his January 24, 2003 Ruling that he already decided Hwan Lan Chen is not an E. Excel owner when he decided with his August 12, 2002 Order title to the outstanding stock and stock certificates of E. Excel. [R. 12756.] However, Judge Howard's assertion is based on the categorically false legal theory that title to stock or stock certificates preclusively determines corporate ownership. Hwan Lan Chen's equitable ownership claim is based on a valid legal theory that does not depend on her being the title owner of any outstanding stock or stock certificates of E. Excel.

It is well established that title to stock or stock certificates is not the same thing as true or actual ownership of a corporation. True or actual corporate ownership depends upon the facts and circumstances of the case; stock or stock certificates are merely prima facie evidence of true corporate ownership. Utah Code Ann. § 16-10a-625 ("Shares may but need not be represented by certificates."); *Estate of Davenport v. C.I.R.*, 184 F.3d 1176, 1184 (10th Cir. 1999) ("[T]he fact that a person does not possess legal title to stock does not prevent the person from owning it."); *Fireplace Shop, Inc. v. Fireplace Shop of Lafayette, Inc.*, 400 So.2d 702, 703 (La. Ct. App. 1981) ("Although a stock certificate is prima facie evidence of corporate ownership, it is to be distinguished from actual ownership which may

be determined from all of the facts and circumstances of a case.”); *Robey v. Hardy*, 224 P. 889 (Utah 1924) (“The fact that he does not hold certificate in no manner affects his ownership of the stock.”); *Baggett v. Cyclopss Medical Sys.*, 935 P.2d 1265, 1268 (Utah Ct. App. 1997) (“[T]he certificate of the corporation for the shares, or the stock certificate, is not necessary to the existence of the shares or their ownership. . . . As a result, stock ‘certificates’ are not the same as stock ‘shares’ and, in fact, shareholders need not actually possess share certificates to assert their shareholder rights.”); *Young v. Young*, 393 S.E.2d 398, 400-01 (Va. 1990) (holding that legal title to certificates is only evidence of ownership and that actual corporate ownership must be determined by the facts); *Fletcher Cyc. Corp.* § 5091 (perm ed.) (“Any ownership presumption raised by evidence of a share certificate is rebuttable.”).

The numerous authorities recognizing nominal stockholder status are based on this settled rule. *See, e.g., Frazier v. Oklahoma Gas & Electric Co.*, 63 P.2d 11, 14 (Okla. 1936).

As explained by the court in *Frazier*:

[I]t is quite possible, as often happens, for reasons of convenience or otherwise, that the stock held in the name of one person really belongs to another. In such a case the certificate, though prima facie evidence of ownership in the person who it has been issued, possesses no such magic or sacredness as to prevent an inquiry into the facts. Sometimes the transferee is merely a nominal holder, or ‘dummy,’ and in that event, although the transfer may be perfectly regular and complete on its face, the true ownership remains in the transferor, and that fact may be shown.

Id.

Under this settled rule, Judge Howard did not decide the actual ownership of E. Excel when he determined who were the record owners of E. Excel’s issued stock with his August

12, 2002 Order. Hwan Lan Chen's equitable ownership of E. Excel is a claim to true or actual ownership of E. Excel that does not depend on title to the outstanding stock or stock certificates of E. Excel.

Hwan Lan Chen's equitable ownership claim is a legally valid claim that deserves adjudication in her pending independent action. A claim to true or actual corporate ownership is based on either a contract or equitable right to corporate shares, typically under a constructive trust theory, rather than title to stock or stock certificates. *See, e.g., Davenport*, 184 F.3d at 1184; *United States v. Marx*, 844 F.2d 1303, 1308 (7th Cir. 1988) ("A constructive trust is an appropriate equitable remedy when title [to stock] is held in the name of another party."); *Goben v. Barry*, 676 P.2d 90, 99 (Kan. 1984); *Baggett*, 935 P.2d at 1268 (Utah Ct. App. 1997) (recognizing legal contract right to ownership regarding wrongfully withheld or canceled stock);⁷ *Young*, 393 S.E.2d at 400-01; *Kennell v. Kennell*, No. 42032-1-I, 1999 Wash. App. LEXIS 1234, at *12-18 (Wash. App. Ct. July 6, 1999). True or actual corporate ownership arises from such factors as providing corporate funding or the means to acquire corporate assets, oral and implied acknowledgments or agreements of actual or beneficial ownership, actual belief of true corporate ownership, having control over corporate profits, and/or the existence of a fiduciary relationship based on trust and confidence. *Davenport*, 184 F.3d at 1184-85; *Marx*, 844 F.2d at 1304-08; *Goben*, 676 P.2d

⁷ Unlike the situation in *Baggett*, one of the factors giving rise to Hwan Lan Chen's equitable ownership claim is a contract amongst the incorporators of E. Excel, and not a contract with E. Excel.

at 98-99; *Frazier*, 63 P.2d at 12-15; *Young*, 393 S.E.2d at 400-01; *Kennell*, 1999 Wash. App. LEXIS 1234, at * 9-18.

These factors are particularly relevant regarding a closely held corporation of a traditional Chinese family – such as the Chen family – that adheres to the Chinese traditions of respect of and deference to family elders. *See, e.g.*, Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 Stan. L. Rev. 1599 (2000). Such a family situation provides a clear basis for finding the factors that give rise to true or actual corporate ownership by the family elders, including a relationship of trust and confidence between the children and their parents, the elders providing corporate funding and acting as incorporators, agreements within the family of true ownership by the elders, acknowledgments of the elders' true ownership, control of profits by the family elders, and actual belief by the elders of true corporate ownership. *Id.*; *see also Frazier*, 63 P.2d at 14-15 (holding that while children held legal title to stock certificates, the facts established that the parents, and not the children, were the true owners of the stock); *Kennell*, 1999 Wash. App. LEXIS 1234, at *12-18 (holding that a brother and sister, who did not possess legal title to stock, had an equitable interest in family corporation).

Hwan Lan Chen asserted in her October 2002 affidavit and alleges in her independent action that all of these factors are present regarding the Chen family and E. Excel and give rise to her true, equitable ownership of E. Excel, particularly the agreement within the Chen family (including by Jau-Fei Chen) as to Hwan Lan Chen's true ownership. [R. 9256;

Appendix, Tab A.] **Indeed, Judge Howard expressly found that many of the factors giving rise to Hwan Lan Chen's true corporate ownership are present regarding the Chen family and E. Excel.** Judge Howard expressly found that:

[Jau-Fei Chen] is a member of a Chinese family that adheres to traditional deferring to decision making authority of the elder member of the family [which is Hwan Lan Chen] **Part of the Chinese tradition observed by [the Chen] family was to respect the wishes of and take instructions from elders. Another Chinese tradition was to share profits in business between and among family members**

[R. 14317, at 5-6 (¶ 1) (emphasis added).] Judge Howard's express findings are based on the testimony below of Jau-Fei Chen herself. Jau-Fei Chen testified in reference to E. Excel:

In the operation of a business, many times in big decisions we will always go to the elder, the parents of the family and ask them. Okay. **And also it don't matter whether the elder is a shareholder or not. In profit sharing the elder would have the say.**

[R. 14230 at 14 (emphasis added).]

In sum, in addition to being without power, Judge Howard's purported adjudication of Hwan Lan Chen's equitable ownership claim by the August 12, 2002 Order was absolutely without legal basis. As a matter of law, Judge Howard could not decide Hwan Lan Chen's equitable ownership claim by deciding title to the outstanding stock and stock certificates of E. Excel. Hwan Lan Chen's equitable ownership claim is a legally valid claim to true corporate ownership that does not depend on title to stock or stock certificates and which deserves adjudication.

VI. HWAN LAN CHEN HAD NO DUTY TO BRING HER EQUITABLE OWNERSHIP CLAIM AS A COMPULSORY COUNTERCLAIM OR TO OTHERWISE INTERVENE

Contrary to Jau-Fei Chen's argument, Hwan Lan Chen had no duty to assert her equitable ownership claim as a compulsory counterclaim or to otherwise intervene in the action below. Instead, it was Jau-Fei Chen's burden to join her mother if she wanted an adjudication below of Hwan Lan Chen's ownership claim.

A claim must be brought as a compulsory counterclaim only if it "arises out of the transaction or occurrence that is the subject matter of" any opposing party's Rule 8 claim for relief. Utah R. Civ. P. 13(a). The only party opposing Hwan Lan Chen below was the Special Master/E. Excel – only the Special Master/E. Excel, and not Jau-Fei Chen, filed any Rule 8 claims for relief against Hwan Lan Chen.⁸ [R. 24; 4214.] Hwan Lan Chen's equitable ownership claim, however, did not arise out of the occurrences that gave rise to the Special Master/E. Excel's Rule 8 claims for relief against Hwan Lan Chen. The Special Master/E. Excel's claims for relief arose out of Jau-Fei Chen's removal from E. Excel, the subsequent management of E. Excel, the attempts to replace the Territorial Owners with new distributorships, and Hwan Lan Chen's involvement with Apogee, Inc. [R. 4214.] In stark contrast, Hwan Lan Chen's ownership claim arises out of, among other factors, her funding

⁸ Hwan Lan Chen, as a third-party defendant, had no obligation to file a compulsory counterclaim against plaintiff Jau-Fei Chen because Jau-Fei Chen never filed a claim against Hwan Lan Chen. Utah R. Civ. P. 13(a), 14(a); 3 *Moore's Federal Practice* § 14.26[1] (3d ed. 2003) ("Because no affirmative claim is pending between [the plaintiff] and [the third-party defendant], they are not 'opposing parties.' Thus, there can be no counterclaims between the two."); 6 Charles Alan Wright et al., *Federal Practice and Procedure* §§ 1458-60 (2d ed. 1990).

and serving as an incorporator of E. Excel, the agreement within the family regarding Hwan Lan Chen's true ownership, including the agreement of Jau-Fei Chen, and the relationship of trust and confidence that existed between Hwan Lan Chen and her daughters. [R. 9256; Appendix, Tab A.]

Jau-Fei Chen argues that Hwan Lan Chen's failure to intervene below to assert her equitable ownership claim shows that the claim is without merit. This argument incorrectly assumes Hwan Lan Chen had a duty to intervene. It was Jau-Fei Chen's duty to join her mother if she wanted to obtain an adjudication of her mother's equitable ownership claim.

"[A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined." *Martin v. Wilks*, 490 U.S. 755, 763 (1989). *See also Baxter v. Utah Dep't of Trans.*, 705 P.2d 1167, 1168-69 (Utah 1985) ("[W]e have held that where a party has a right to intervene but fails to do so he is not bound by the judgment."); *Searle Bros. v. Searle*, 588 P.2d 689, 692 (Utah 1978) ("The right to intervene as a party in the prior suit does not bind the party in the subsequent suit where he failed to so intervene."). This rule applies even if the person who did not intervene had knowledge of the lawsuit and an opportunity to intervene. *Martin*, 490 U.S. at 765.

In fact, Jau-Fei Chen acknowledged her duty to join her mother in order to obtain an adjudication of her mother's ownership claim. Early in this case, Jau-Fei Chen raised with Judge Howard whether she should join Hwan Lan Chen as a result of Jau-Hwa Stewart's assertion that Hwan Lan Chen had funded E. Excel with \$3 million, and Judge Howard left the joinder issue up to Jau-Fei Chen. [R. 14226 at 136-37; 140.] The following dialogue

occurred at the February 2, 2001 evidentiary hearing in the original preliminary injunction proceeding:

MR. CARLSTON [JAU-FEI CHEN'S COUNSEL]: So the first problem, I need a little time to think about it, Your Honor, is whether in light of that problem that we have, we should have other parties before the Court. This person that now claims interest in [E. Excel] based on the representations that were made by Mr. Orton's associate [Jau-Hwa Stewart's counsel] last night, their position is that even though the certificate has not been issued –

THE COURT: The party being the mother [Hwan Lan Chen]?

MR. CARLSTON: The mother, uh-huh. That is the one issue, we reserve our right to file motions or seek other relief based on those facts.

...

THE COURT [TO MR. ORTON, JAU-HWA STEWART'S COUNSEL]: Let me ask you about the mother. If they determine to adjoin the mother do you object?

MR. ORTON: We don't object. . . . [I]f that's their decision, they can make that decision themselves.

[*Id.*]

Jau-Fei Chen never joined her mother. Instead, the parties expressly reserved all claims relating to the \$3 million cash infusion in the February 21, 2001 Interim Order. [R. 628-29 at ¶ 8.] There is absolutely no valid basis for the assertion that Hwan Lan Chen is not an E. Excel owner given Jau-Fei Chen's failure to join Hwan Lan Chen and the express reservation of the \$3 million claim in a court order.

Hwan Lan Chen, rather than intervene in the action below, initiated an independent action in the Fourth Judicial District to assert her equitable ownership claim. [Appendix, Tab A.] This made sense, given the prejudice resulting from the domination of the action

below by the unlawfully acting Special Master. Hwan Lan Chen's pending independent action underscores Judge Howard's lack of jurisdiction to decide her equitable ownership claim. *See Epstein v. Abrams*, 57 Cal. App. 4th 1159, 1166 (Cal. Ct. App. 1997) (holding that the trial court had no jurisdiction to decide independently pending claim and that claim was not properly before the appeals court; "That issue remains to be determined in appellant's independent action.").

VII. JAU-FEI CHEN PUTS FORTH A RECORD OF A PROCEEDING THAT WAS NOT AN ADJUDICATION OF HWAN LAN CHEN'S OWNERSHIP CLAIM AND NEGLECTS TO CITE THE ONLY RELEVANT RECORD BELOW

Jau-Fei Chen puts forth a record to argue that Hwan Lan Chen is not an E. Excel owner as if it were a record of an adjudication of Hwan Lan Chen's ownership claim, when there is no such record. Jau-Fei Chen fails to marshal the only evidence below that is relevant to Hwan Lan Chen's equitable ownership claim, which is Jau-Fei Chen's testimony that Hwan Lan Chen controlled E. Excel profits. Hwan Lan Chen never contradicted below her equitable ownership claim.

Hwan Lan Chen's equitable ownership claim, much less her standing to challenge the Special Master's unlawful empowerment and actions, cannot be determined based on a record of a proceeding to which she was not a party or that did not involve her equitable ownership claim. *See, e.g., Retirement Bd. of the Police Ret. Sys. of Kan. City v. Noel*, 652 S.W.2d 874, 878 (Mo. Ct. App. 1983) (holding that a person is "not bound by the record of an earlier proceeding to which he was not a party . . .").

Jau-Fei Chen's document record in her Appendix is from the original January-February 2001 preliminary injunction proceeding between only Jau-Fei Chen and defendant Jau-Hwa Stewart. [R. 638; 14338.] Hwan Lan Chen was not even a party to the action at that time. [R. 4214.] Moreover, Jau-Fei Chen's document record is directed only at title to the outstanding stock and stock certificates of E. Excel and not Hwan Lan Chen's claim to true, equitable ownership of E. Excel. *See, e.g., Marx*, 844 F.2d at 1308 ("[T]he fact that the corporate records do not show [claimant] as owning any share is the reason why she is attempting to establish ownership through a constructive trust.").

The testimony of Hwan Lan Chen's deceased husband which Jau-Fei Chen cites was not given in the case below. That testimony was given in a 1991 action to which Hwan Lan Chen was not a party, and only became part of the record below as an exhibit to Jau-Fei Chen's motion to strike. [R. 14336 at Ex. A.] The testimony also is not directed at Hwan Lan Chen's equitable ownership claim.

Indeed, Jau-Fei Chen invites this Court to hold that Hwan Lan Chen is not an E. Excel owner without marshaling the only evidence received below relevant to Hwan Lan Chen's equitable ownership claim. Jau-Fei Chen fails to cite the Court to her own testimony below that her parents had control over E. Excel profits – a clear incident of equitable ownership of a corporation. [R. 14230 at 14.]

Jau-Fei Chen's assertion that Hwan Lan Chen contradicted her equitable ownership below is categorically false. None of Hwan Lan Chen's filings below, including her affidavit in support of defendant Jau-Hwa Stewart's opposition to Jau-Fei Chen's motion

for partial summary judgment, was in any manner inconsistent with her equitable ownership claim. That affidavit was only directed at Jau-Hwa Stewart's stockholder status and whether Jau-Fei Chen's children's stock certificates were held in trust. [R. 7126.]

VIII. HWAN LAN CHEN HAS NO OBLIGATION TO MARSHAL EVIDENCE REGARDING A CLAIM THAT THE DISTRICT COURT LACKED JURISDICTION TO DECIDE; SHE MARSHALED THE RECORD REGARDING JUDGE HOWARD'S LACK OF JURISDICTION AND HER STANDING

Jau-Fei Chen argues that Hwan Lan Chen failed to marshal alleged "evidence" that allegedly "overwhelmingly contradicts" her ownership claim. However, Hwan Lan Chen has no obligation to marshal evidence regarding a claim that the District Court never had jurisdiction to decide, and Jau-Fei Chen's purported "evidence" does not contradict Hwan Lan Chen's equitable ownership claim.

Only an appellant who appeals adverse findings of fact has a duty to marshal. *Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶ 14, 61 P.3d 1009; *Dishinger v. Potter*, 2001 UT App 209, ¶ 14, 47 P.3d 76. Hwan Lan Chen does not appeal adverse findings entered on an adjudication of her equitable ownership claim and, as a result, has no obligation to marshal regarding that claim. Judge Howard lacked jurisdiction to decide the merits of Hwan Lan Chen's equitable ownership claim. Hwan Lan Chen marshaled the record that shows this lack of jurisdiction. Moreover, the record that Jau-Fei Chen argues Hwan Lan Chen failed to marshal is not directed at the true ownership of E. Excel, but only to title to the outstanding stock and stock certificates of E. Excel.


Hwan Lan Chen also marshaled the record that shows she has standing to challenge the Special Master's unlawful empowerment and actions as a party litigant and as an equitable owner of E. Excel. Because her standing as an equitable owner of E. Excel is based on her verified assertion and independent allegations of equitable ownership, the complete record with regard to her standing as an E. Excel owner is her answers to interrogatories, her affidavit, and her complaint in her independent action.


IX. CONCLUSION

For the foregoing reasons, and for the reasons stated in her Appellant Brief, Hwan Lan Chen respectfully submits that Judge Howard's Orders relating to the Special Master's appointment, empowerment, and actions must be vacated and set aside and the case remanded with instructions that it be returned to its status before the Special Master's unlawful appointment, empowerment, and actions.

DATED: December 17, 2003.

BERMAN, TOMSIC & SAVAGE


Daniel L. Berman


Stephen R. Waldron

50 South Main, Suite 1250
Salt Lake City, Utah 84144
Attorneys for Appellant Hwan Lan Chen

CERTIFICATE OF SERVICE

I hereby certify that on 12/17/03, 2003 true and correct copies of **REPLY BRIEF OF APPELLANT HWAN LAN CHEN TO BRIEF OF APPELLEE JAU-FEI CHEN** were mailed, postage prepaid, unless otherwise noted, to:

Michael R. Carlston
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
P. O. Box 45000
Salt Lake City, Utah 84145-5000

Patrick Hoog
1198 North Spring Creek Place
Springville, Utah 84663

James S. Lowrie
Jones Waldo Holbrook & McDonough
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84101

Raymond Scott Berry
9 Exchange Place, Suite 900
Salt Lake City, Utah 84111

Clark Sessions
Clyde Snow Sessions & Swensen
201 South Main, Suite 1300
Salt Lake City, Utah 84111

Paul T. Moxley
Christine T. Greenwood
Holme, Roberts & Owen, LLP
299 South Main, #1800
Salt Lake City, UT 84111-2219

Mark A. Larsen
Jon K. Stewart
Larsen & Gruber, LLC
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Jerome H. Mooney
Mooney Law Firm
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Shannon Heaton
3312 Antigua Drive
Eugene, Oregon 97408

Beverly Ann Warner
2611 East Canyon Crest Drive
Spanish Fork, Utah 84660

Angela Barclay
7442 South Spruce Street
Midvale, Utah 84047

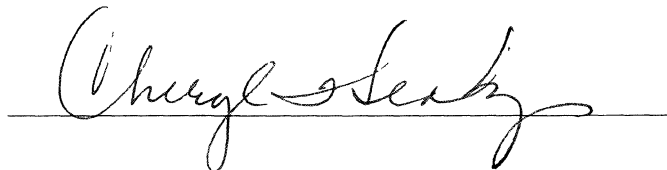
Apogee, Inc.
c/o Scott E. Tawzer, Registered Agent
6958 East 1255 North
Huntsville, Utah 84317

Sheue Wen Smith
c/o Ms. Stewart
1929 South 180 West
Orem, Utah 84058

Dale Stewart
199 North 1350 East
Springville, Utah 84663

Jeffrey J. Hunt
Jonathan O. Hafen
Justin P. Matkin
Parr, Waddoups, Brown, Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Michael D. Zimmerman
Todd M. Shaughnessy
James D. Gardner
Snell & Wilmer
15 West South Temple, Suite 1200
Salt Lake City, UT 84101



APPENDIX

Tab A

Dec 31 4 05 PM '02

BERMAN, GAUFIN, TOMSIC & SAVAGE

Daniel L. Berman (0304)

Samuel O. Gaufin (1170)

Stephen R. Waldron (6810)

50 South Main Street, Suite 1250

Salt Lake City, Utah 84144

Telephone: (801) 328-2200

STEVENSON & SMITH, P.C.

H. Thomas Stevenson (6803)

3986 Washington Blvd.

Ogden, Utah 84403

Telephone: (801) 394-4573

Attorneys for Hwan Lan Chen

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

HWAN LAN CHEN, an individual;

Plaintiff,

vs.

JAU-FEI CHEN, both as an individual,
and as purported natural guardian of her
children, CHI WEI ZHANG, E. LEI
ZHANG, and E. E. ZHANG; RUI-KANG
ZHANG, an individual; JAU-HWA
STEWART, an individual; and DOES 1-
20,

Defendants.

COMPLAINT
(JURY TRIAL DEMANDED)

Civil No. 020405767

Div 9 Devs

NATURE OF THE ACTION PARTIES, JURISDICTION, AND VENUE (Allegations Common to All Claims For Relief)	4
BACKGROUND FACTS (Allegations Common to All Claims For Relief)	8
A. MADAME CHEN AND THE CHEN FAMILY	8
B. MADAME CHEN'S PRINCIPAL OWNERSHIP OF E. EXCEL	10
C. THE WRONGFUL AND UNLAWFUL CONDUCT OF DEFENDANTS JAU-FEI CHEN, RUI KANG ZHANG, AND DOES 1-20	15
<u>Early Diversion of E. Excel's Business</u>	16
<u>The Unlawful Double Invoicing Scheme</u>	17
<u>Usurpation of E. Excel's Asia Markets</u>	18
<u>Unreasonably Exposing E. Excel To Potential Liabilities</u>	20
<u>Concealment of Wrongful Activities</u>	23
<u>Rui Kang Zhang's Assault on Madame Chen</u>	24
<u>Defendants' Denial of Madame Chen's Ownership Interests</u>	24
<u>Wrongful Institution of Litigation and Denial of Support</u>	26
FIRST CLAIM FOR RELIEF (Claim for Declaratory Relief, Constructive Trust, and Accounting Against Defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, and Does 1-20 With Respect to Madame Chen's Ownership in E. Excel)	27
SECOND CLAIM FOR RELIEF (Claim for Breach of Fiduciary Duty Against Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 With Respect to Madame Chen's Ownership in E. Excel and in Her Home and in the Provo Orchard Property)	31
THIRD CLAIM FOR RELIEF (Claim for Pattern of Unlawful Activity (Racketeering) Against Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20)	36

A.	CORE ALLEGATIONS	36
B.	PREDICATE ACTS	39
	<u>Criminal Tax Fraud</u>	39
	<u>Communications, Wire, and Mail Fraud</u>	40
	<u>Deceptive Trade Practices</u>	42
	<u>Theft</u>	45
	<u>Unlawful Dealing In Property By A Fiduciary</u>	45
	<u>Assault And Battery</u>	45
	FOURTH CLAIM FOR RELIEF (Claim for Declaratory Judgment, Quiet Title and Constructive Trust Against Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart With Respect to Madame Chen's Home and Other Real Property)	46
	SIXTH CLAIM FOR RELIEF (Alternative Claim for Breach of Contract Against Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20)	49
	DEMAND FOR JURY TRIAL	51

Plaintiff, Hwan Lan Chen ("Madame Chen"), through counsel, complains and alleges of defendants as follows:

**NATURE OF THE ACTION
PARTIES, JURISDICTION, AND VENUE**
(Allegations Common to All Claims For Relief)

1. Madame Chen brings this action to establish her legal and beneficial ownership in a close family corporation, E. Excel International, Inc. ("E. Excel"), to assert her rights attributable to her status as the principal owner of E. Excel and as the matriarch of her traditional Chinese family against two of her natural daughters, defendants Jau-Hwa Stewart and Jau-Fei Chen, against defendant Jau-Fei Chen's husband, defendant Rui Kang Zhang, and Does 1-20, and to establish her ownership of her home in which she has resided for more than 7 years. Madame Chen asserts claims against defendant Jau-Hwa Stewart for declaratory relief, an accounting, and a constructive trust and asserts claims against defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 for declaratory relief, an accounting, a constructive trust, and for damages for racketeering and egregious breaches by defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 of fiduciary duties owed by defendants Jau-Fei Chen and Rui Kang Zhang directly to Madame Chen with regard to their operation and control of E. Excel and their management of the interest and investment of Madame Chen and Yung Yeuan Chen in E. Excel and to their appropriation, diversion and usurpation of E. Excel's business, revenues, and operations.

2 Madame Chen is a citizen of Taiwan and has been a permanent resident of the United States for more than 25 years. She resides in her home at 1929 South 180 West, Orem, Utah County, State of Utah. Madame Chen is the widow and the sole surviving heir of Yung Yeuan Chen ("Father Chen"), who died on December 11, 1995. Madame Chen and Father Chen are the natural parents of defendants Jau-Hwa Stewart and Jau-Fei Chen. Madame Chen is now the matriarch of the Chen family, including defendants Jau-Fei Chen and Jau-Hwa Stewart.

3 Defendants Jau-Fei Chen and Rui Kang Zhang are married and presently reside in Singapore with their three minor children, Chi Wei Zhang, E Lei Zhang, and E E Zhang.

4 Prior to late 2000, defendants Jau-Fei Chen and her children were each residents of Orem, Utah County, State of Utah and lived with Madame Chen in her home. Prior to early June, 2002 defendant Rui Kang Zhang was also a resident of Orem, Utah County, State of Utah, and lived with defendant Jau-Fei Chen and his children with Madame Chen in her home.

5 Defendant Jau-Fei Chen is sued herein individually and as purported natural guardian of her children.

6 Defendant Jau-Hwa Stewart is a resident of Orem, Utah County, State of Utah.

7 E Excel was a Utah corporation incorporated in the State of Utah on July 20, 1987. E Excel principally has engaged in the business of manufacturing and

distributing herbal based health-related products, including dietary supplements and skin care products, through a multi-level marketing ("MLM") distribution system. E. Excel is headquartered in Springville, Utah County, State of Utah. The vast majority of E. Excel's distribution occurred in markets in Asia, including Taiwan, Malaysia, Korea, the Philippines, the People's Republic of China, and Singapore.

8. In January, 2001, Jau-Fei Chen filed an action against Jau-Hwa Stewart in this Court relating to E. Excel, Civil No. 010400098. Jau-Hwa Stewart later filed an action against Jau-Fei Chen in this Court relating to E. Excel, Civil No. 010400201. The two actions were subsequently consolidated and are pending in this Court as Civil Nos. 010400098 and 010400201.

9. E. Excel was placed under the control of Special Master Larry C. Holman ("Special Master Holman") in Civil No. 040100098 on March 13, 2001.

10. In August, 2002, E. Excel was acquired by E. E. Acquisitions, Inc., a Utah corporation incorporated in the State of Utah on August 13, 2002 and controlled by Special Master Holman and defendants Jau-Fei Chen and Rui Kang Zhang. E. Excel was acquired by E. E. Acquisitions, Inc. pursuant to a freeze out merger undertaken pendente lite by Special Master Holman. Following the merger, E. E. Acquisitions, Inc. changed its name to E. Excel International, Inc. As a result of the merger, E. E. Acquisitions, Inc., now known as E. Excel International, Inc., succeeded to the liabilities of the former E. Excel International, Inc. For purposes of this Complaint, references to E. Excel include the present E. Excel International, Inc.

11 E Excel is not a party to this action and the claims asserted in this action are not asserted derivatively on behalf of E Excel, but are asserted directly by Madame Chen against the defendants based on duties owed by defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart directly to Madame Chen in their individual capacities

12 Madame Chen was not a party to Civil Nos 010400098 and 010400201 when Special Master Holman was appointed and was not made a party in Civil Nos 010400098 and 010400201 until service was accepted on her behalf in January, 2002 of an Amended Third Party Complaint filed by Special Master Holman through E Excel. Madame Chen's ownership in E Excel was not considered or adjudicated in Civil Nos 010400098 and 010400201 and the claims that Madame Chen alleges in this Complaint were not asserted or adjudicated in Civil Nos 010400098 and 010400201

13 Does 1-20 are individuals and/or entities whose full identities are unknown at this time, but who are believed to be liable to Madame Chen with regard to matters which are the subject of this Complaint either as primary actors, co-conspirators, aiders and abettors, or substantial participants in the wrongful and unlawful conduct alleged herein. Madame Chen will amend her complaint to identify Does 1-20 by name when their identities are ascertained

14 This Court has jurisdiction over the subject matter of this action

15 This Court has personal jurisdiction over defendants that reside in the State of Utah and has personal jurisdiction over the non-resident defendants under the

Utah Long Arm Statute, Utah Code Annotated Section 78-27-22, et. seq. The non-resident defendants are subject to personal jurisdiction under the Utah Long Arm Statute because they transacted business within the State of Utah, contracted to supply goods or services in this State, and caused tortious injury within this State, either by their personal acts or through the acts of agents. Madame Chen's claims arise out of or relate to such conduct by the non-resident defendants. Additionally, Madame Chen's claims against the non-resident defendants arise out of or relate to the ownership, use, or possession of real estate situated in this State.

16. Venue is proper in this Court.

BACKGROUND FACTS

(Allegations Common to All Claims For Relief)

A. MADAME CHEN AND THE CHEN FAMILY

17. Madame Chen is a seventy-six year old Taiwanese woman who neither speaks nor reads English. Madame Chen speaks Taiwanese and reads Mandarin Chinese.

18. Madame Chen and Father Chen moved to the United States from Brazil in about 1973, having resided in Brazil for several years.

19. Prior to their living in Brazil, Madame Chen and Father Chen resided in Taiwan, where both of them were born and raised.

20. The Chen family at all times was a traditional Chinese family. As such, the Chen family and defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart recognized and adhered to established Chinese custom and tradition in which family

relationships and the seniority of family members was accorded great significance and authority.

21. In accordance with established Chinese custom and tradition, Madame Chen and Father Chen provided for the support and education of their children and afforded their children and their children's families the opportunity to secure income through work in businesses established, financed, and principally owned by Madame Chen and Father Chen. In connection with these family businesses, it was Madame Chen and Father Chen's prerogative to determine which family members would participate in the profits, and to what degree, in the event the businesses became profitable.

22. In accordance with established Chinese custom and tradition, the children of Madame Chen and Father Chen and their children's families recognized and were obligated to recognize and accord Madame Chen and Father Chen duties of the highest loyalty and respect. The children of Madame Chen and Father Chen and their children's families also recognized and were obligated to defer to the decision making authority of Madame Chen or Father Chen, when Madame Chen or Father Chen so desired, as to matters pertinent to the interests of Madame Chen or her Father Chen, including businesses that Madame Chen and Father Chen established, funded and financed.

23. In accordance with established Chinese custom and tradition, Madame Chen and Father Chen supported and financed the education of their children, including

defendants Jau-Fei Chen and Jau-Hwa Stewart, who each graduated from Brigham Young University ("BYU").

24. In accordance with established Chinese custom and tradition, Madame Chen and Father Chen supported defendant Jau-Fei Chen's husband, Rui Kang Zhang, after his marriage to defendant Jau-Fei Chen and while he was attending BYU.

25. In accordance with established Chinese custom and tradition, Madame Chen and Father Chen established and funded various businesses in which Madame Chen and Father Chen were the principal owners, but which provided a source of income to various of their children and their children's families over the years.

26. In accordance with established Chinese custom and tradition, Madame Chen and Father Chen allowed their children and their children's families to live in their home, not only while they were pursuing their education, but also after they had completed school and were working in a family business.

27. During his lifetime, Father Chen was the patriarch of the Chen family. Madame Chen became the matriarch of the Chen family upon the death of Father Chen and, as such, is entitled to the highest loyalty, respect, and deference from her children and their families.

B. MADAME CHEN'S PRINCIPAL OWNERSHIP OF E. EXCEL

28. Madame Chen and Father Chen established and formed E. Excel as a traditional Chinese family business such that, as the survivor of Father Chen, Madame Chen is the principal legal and beneficial owner of E. Excel.

29. Madame Chen and Father Chen were incorporators and initial directors of E. Excel at the time that E. Excel was incorporated in July, 1987.

30. Madame Chen and Father Chen provided substantially all of the funding for E. Excel, including approximately \$2,000,000 in funding at the time of E. Excel's entry into the MLM business of distributing health products, its present line of business. Madame Chen and Father Chen established and formed E. Excel and contributed financial support and assistance to E. Excel on the basis and with the belief that they were the principal owners of E. Excel.

31. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart did not provide any substantial funding for the establishment and operations of E. Excel and, upon information and belief, they could not have provided such funding. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart were students and had had no substantial business experience or income when E. Excel was established. Defendants Jau-Fei Chen and Rui Kang Zhang acquired whatever business experience they have while employed with E. Excel.

32. Father Chen served as Chairman of the Board of Directors of E. Excel from 1987 until approximately 1992.

33. Father Chen assisted in developing E. Excel's products, and in obtaining equipment necessary for the manufacture and packaging of the product.

34. Father Chen also negotiated on behalf of E. Excel to establish an essential relationship with the Taiwanese company which was responsible for

distributing E. Excel's products in Taiwan. Establishing this distribution relationship in Taiwan was critical to the success of E. Excel, which historically has generated the great bulk of its revenues from markets in Asia.

35. To assist in marketing E. Excel's products, Madame Chen and/or Father Chen have been featured as speakers at E. Excel distributor meetings. Madame Chen and Father Chen have also been featured in E. Excel's promotional literature.

36. In accordance with established Chinese custom and tradition, it was always agreed and understood within the Chen family that Madame Chen and Father Chen were the principal owners of E. Excel.

37. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart each expressly recognized, acknowledged and agreed that Madame Chen and Father Chen were principal owners in E. Excel.

38. Madame Chen and Father Chen initially entrusted their daughter, defendant Jau-Fei Chen, with the operation and control of E. Excel and with the management of their investment and interest in E. Excel, and defendant Jau-Fei Chen agreed to act as the agent for Madame Chen and Father Chen in the operation and conduct of E. Excel and in the management of their investment and interest in E. Excel.

39. Defendant Jau-Fei Chen's husband, defendant Rui Kang Zhang, agreed to assume and undertake duties and obligations to Madame Chen and Father Chen in the operation and control of E. Excel and in the management of their investment and interest in E. Excel, along with his wife.

40 Beginning in about 1990, Madame Chen and Father Chen also entrusted their daughter, defendant Jau-Hwa Stewart, with the operation and control of E Excel and with the management of their investment and interest in E Excel under the direction and control of defendant Jau-Fei Chen. Defendant Jau-Hwa Stewart agreed to act as agent for Madame Chen and Father Chen under the direction and control of defendant Jau-Fei Chen in the operation and management of E Excel and in the management of Madame Chen's and Father Chen's investment in E Excel.

41 Madame Chen and Father Chen justifiably reposed trust and confidence in defendants Jau-Fei Chen, Rui Kang Zhang and Jau-Hwa Stewart because, among other things, of the familial and other relationships existing among them.

42 Defendants Jau-Fei Chen and Rui Kang Zhang and defendant Jau-Hwa Stewart expressly and repeatedly assured Madame Chen and Father Chen that they would operate E Excel for the benefit of Madame Chen and Father Chen as principal owners of E Excel and that the ownership rights of Madame Chen and Father Chen and their rights attributable to their ownership in E Excel would be protected and preserved.

43 Defendants Jau-Fei Chen and Rui Kang Zhang and defendant Jau-Hwa Stewart also repeatedly assured Madame Chen and Father Chen that Madame Chen and Father Chen could rely upon defendants Jau-Fei Chen and Rui Kang Zhang and defendant Jau Hwa Stewart to operate E Excel for the benefit of Madame Chen and Father Chen as principal owners and to manage and protect the investment and

interest of Madame Chen and Father Chen in E. Excel, the interests of Madame Chen and Father Chen in their home at 1929 South 180 West in Orem, Utah County, State of Utah, approximately 3.5 acres of land located at 1700 North 2200 West in Provo, Utah County, State of Utah, and other interests and investments of Madame Chen and Father Chen entrusted to defendants Jau-Fei Chen and Rui Kang Zhang and defendant Jau-Hwa Stewart for the benefit of Madame Chen and Father Chen.

44. Madame Chen and Father Chen were unable to read or write English, and were consequently dependent upon defendants Jau-Fei Chen and Rui Kang Zhang and defendant Jau-Hwa Stewart for assistance in their personal banking, paying bills, and protecting their legal and financial interests. Father Chen held personal funds in joint accounts with defendants Jau-Fei Chen and Rui Kang Zhang and with defendant Jau-Hwa Stewart to facilitate their assistance in his financial affairs.

45. Madame Chen has never written a check, does not know how to do so, and is dependent upon the assistance of others to conduct financial transactions.

46. Madame Chen's and Father Chen's existing ownership in E. Excel was not evidenced by the issuance of shares in E. Excel, and share ownership never reflected the true ownership of E. Excel.

47. In her testimony in the hearing held on February 9, 2001 in Civil No. 010400098 (subsequently consolidated with Civil No. 010400201), with regard to her initial motion for a temporary restraining order, Jau-Fei Chen expressly recognized that

share ownership is not determinative of Madame Chen's and Father Chen's ownership
in E Excel Defendant Jau-Fei Chen testified

Q And I believe the question was asked your sister about whether there was any cultural or traditions of your heritage that your family still adhere to?

A We are still a very traditional Chinese family

Q And with respect to your mother, is there any tradition regarding the role of the elders in the operation, or of a business, or give advice of the monies received in a business?

A In the operation of a business, many times in big decision we will always go to the elder, the parents of the family and ask them Okay **And also it don't matter whether the elder is a shareholder or not. In profit sharing the elder would have the say**

Q And the business that is involved in this proceeding, has that tradition been followed?

A Yes

[2/9/01 Preliminary Injunction Hearing Transcript at 12-14 (emphasis added)]

C THE WRONGFUL AND UNLAWFUL CONDUCT OF DEFENDANTS JAU-FEI CHEN, RUI KANG ZHANG, AND DOES 1-20

48 Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 unlawfully, blatantly and repeatedly took advantage of the trust and confidence reposed by Madame Chen and Father Chen and engaged in wholly disrespectful, wrongful and unlawful conduct that was and is designed to and did appropriate, divert and usurp the business, revenues, and business opportunities attributable to Madame Chen's and

Father Chen's ownership of E Excel for their benefit, to the detriment of Madame Chen and Father Chen

Early Diversion of E Excel's Business

49 Throughout the 1990's, defendants Jau-Fei Chen and Rui Kang Zhang diverted and usurped the business, revenues, and business opportunities attributable to Madame Chen and Father Chen's ownership of E Excel for their benefit

50 Throughout the 1990's, defendants Jau-Fei Chen and Rui Kang Zhang falsely and deceitfully represented to Madame Chen and Father Chen that, while E Excel's business was growing, E Excel and defendants Jau-Fei Chen and Rui Kang Zhang were not making significant money

51 In fact, E Excel and several separate entities set up and controlled by defendants Jau-Fei Chen, Rui Kang Zhang and Does 1-20 were flourishing

52 During the 1990's, defendants Jau-Fei Chen, Rui Kang Zhang and Does 1-20 deceitfully set up and controlled several separate entities both overseas and in the United States with the design, purpose and effect of diverting business, business opportunities, and revenues attributable to Madame Chen's and Father Chen's ownership and investment in E Excel for their own use and benefit and to persons other than Madame Chen and Father Chen

53 During the 1990's, defendants Jau-Fei Chen, Rui Kang Zhang and Does 1-20 deceitfully set up and controlled separate entities to, for example, divert business,

revenues, and business opportunities to members of defendant Rui Kang Zhang's family, including his sisters, brothers and mother

54 All of the revenues from the distribution of E Excel's products in Japan, for example, were systematically and deceitfully diverted to accounts owned by defendant Rui Kang Zhang's mother

55 Defendant Rui Kang Zhang also diverted substantial revenues from the distribution of E Excel's products to his mistress in California

56 In the early 1990's, defendants Jau-Fei Chen and Rui Kang Zhang used funds held in joint account with Father Chen to finance and support E Excel's operations, including the formation of separate business entities used to divert business, business opportunities and revenues attributable to Madame Chen's and Father Chen's ownership of E Excel

The Unlawful Double Invoicing Scheme

57 As part of their scheme to appropriate, divert and usurp the business, revenues, and business opportunities attributable to Madame Chen and Father Chen's ownership of E Excel to their benefit, since at least 1989, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 created a double invoicing system involving E Excel's foreign distributors

58 Under the defendants' double invoicing scheme, E Excel's foreign distributors ordered E Excel product from an E Excel related entity located in Hong Kong at a higher price than the amount the E Excel related entity paid to E Excel for

the product, with defendants retaining for their benefit the difference between the higher and lower prices.

59. Defendants Jau-Fei Chen and Rui Kang Zhang devised the unlawful double billing scheme and oversaw its implementation and the diversion and usurpation of business, revenues, and business opportunities.

60. Upon information and belief, a purpose of the unlawful double invoicing scheme was to defraud the United States Internal Revenue Service, the United States Custom Service, the Utah State Tax Commission, and the customs and/or revenue collection in various foreign countries.

Usurpation of E. Excel's Asia Markets

61. In furtherance of their scheme to appropriate, divert and usurp the business, revenues and business opportunities attributable to Madame Chen and Father Chen's ownership of E. Excel to their benefit, defendants Jau-Fei Chen and Rui-Kang Zhang and Does 1-20 have appropriated, usurped and diverted E. Excel's Asia market, its historically largest market, and diverted and usurped E. Excel's revenue from its Asia markets to themselves.

62. E. Excel's Asia market historically consisted of sales to foreign distributors, which, in turn, distributed E. Excel products they purchased from E. Excel on a MLM basis. These distributors were located in, and respectively controlled the distribution of E. Excel products in, Taiwan, Malaysia, the Phillippines and Korea. Upon

information and belief, E. Excel's revenue from sales to the foreign distributors historically accounted for approximately 90% of E. Excel's total revenues.

63. Beginning by at least 2000, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 usurped and diverted E. Excel's Asia market for their own benefit.

64. Upon information and belief, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 secretly assumed positions and acquired ownership in E. Excel's distributors in markets in Asia, including E. Excel's distributors in Taiwan, Malaysia, the Philippines, and Korea.

65. In addition, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20, secretly established and assisted in the establishment of manufacturing entities and acquired positions in and became owners of manufacturing entities in competition with E. Excel in, among other locations, California, Singapore, Taiwan, and the People's Republic of China. These manufacturing entities manufactured E. Excel products without authorization, using E. Excel trade secrets. As a result, defendants were able to obtain and sell E. Excel products without purchasing the products from E. Excel, thereby appropriating and diverting the revenue from the sale of E. Excel products in Asia attributable to Madame Chen's ownership in E. Excel for their benefit.

66. Upon information and belief, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 continue to conduct the business of E. Excel in markets in Asia. However, since the filing of Civil No. 010400098, defendants Jau-Fei Chen, Rui Kang Zhang and Does 1-20 have, upon information and belief, wrongfully and unlawfully

diverted all of the revenues from the distribution of the products of E Excel in markets in Asia

67 Upon information and belief, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have not, since the filing of Civil No 010400098 returned funds from E Excel's foreign distribution to the United States to support or fund E Excel in the United States

Unreasonably Exposing E Excel To Potential Liabilities

68 Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have not only appropriated, diverted, and usurped the business, revenues, and business opportunities attributable to Madame Chen's ownership of E Excel, but have done so in a manner which unreasonably exposed E Excel to potential liability

69 Upon information and belief, defendants Jau Fei Chen and Rui Kang Zhang, E Excel, and Does 1-20 have, among other things, created related business entities that are directly or indirectly controlled by defendants, serve no legitimate independent business purpose, and have been intentionally and willfully set up to minimize tax reporting requirements Pursuant to Utah Code § 59-7-113 and 26 U S C § 482, income from these separate entities is properly attributed to E Excel for determining income tax liability of E Excel

70 Upon information and belief, defendants Jau-Fei Chen and Rui Kang Zhang, E Excel, and Does 1-20 also have routinely overstated the inventories of E Excel, misstating the profits, assets, and operating expenses of E Excel

71. Upon information and belief, defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 have, for years, engaged in a systematic practice and scheme of making false representations regarding E. Excel's products. The false representations were published through the use of the United States mail and or telephone/wire systems.

72. Upon information and belief, this scheme has included the intentional practice of false labeling regarding the origin and contents of products.

73. Upon information and belief, the false labeling has routinely included claiming that certain products were made in the United States, when they were not.

74. Upon information and belief, the false labeling has also included routinely omitting to disclose the presence of certain contents such as fructose, psyllium husk, and vitamin and mineral supplements, and by representing that certain ingredients such as royal jelly, cactus extract and barley leaves were present when they were not.

75. Upon information and belief, defendants Jau-Fei Chen, Rui Kang Zhang, E. Excel, and Does 1-20 have also routinely misidentified imported products.

76. Upon information and belief, defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 have made false representations regarding the researchers employed by E. Excel.

77. Specifically, in volumes 14 and 17 of E. Excel's magazine the "The Excellent Word", defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-

20 published photographs of a group of individuals who were falsely portrayed as E. Excel's researchers.

78. In fact, the individuals portrayed in the photographs were primarily friends and neighbors of E. Excel's then employee Jean Jacobs who were paid to pose for the photographs wearing lab coats provided by E. Excel. The individuals who were paid to pose for the photographs wearing E. Excel lab coats included truck drivers, janitors and office workers.

79. Similarly, in volume 14 of "The Excellent Word", defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 published a photograph that depicted defendant Jau Fei Chen and two alleged researchers inspecting the progress of herbs being grown by E. Excel.

80. In fact, defendant Jau Fei Chen and purported researchers are standing in an alfalfa field located in Utah County that was neither owned nor operated by E. Excel.

81. In addition, photographs published by defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 in the "The Excellent Word" depicted alleged researchers using various machinery and lab equipment. In fact, the photographs were taken at local laboratories and medical facilities unrelated to E. Excel and with equipment that was neither owned nor utilized by E. Excel.

Concealment of Wrongful Activities

82. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have wrongfully concealed from Madame Chen and Father Chen their scheme and activities to wrongfully appropriate, divert and usurp the business, revenues, and business opportunities attributable to Madame Chen's and Father Chen's ownership of E. Excel to their benefit.

83. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 misrepresented and fraudulently concealed E. Excel's true financial status, their creation and use of separate entities, and their diversion of business, revenues, and business opportunities from Madame Chen and Father Chen.

84. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 fraudulently concealed the unlawful double billing scheme and their diversion and usurpation of business, revenues, and business opportunities pursuant to the scheme from Madame Chen and Father Chen.

85. Madame Chen was unaware of the unlawful double billing scheme employed by defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 until she learned about it subsequent to the filing of Civil Nos. 010400098 and 010400201.

86. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 fraudulently concealed their positions and ownership in E. Excel's distributors in markets in Asia and their positions and ownership in manufacturing entities in competition with E. Excel.

87. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 fraudulently concealed their activities which unreasonably exposed E. Excel to potential liabilities.

Rui Kang Zhang's Assault on Madame Chen

88. In 1997, defendant Rui Kang Zhang intentionally and maliciously assaulted and battered Madame Chen in her own home. Defendant Rui Kang Zhang knocked Madame Chen to the floor, both injuring and humiliating her.

89. Later in 1997, defendants Jau-Fei Chen and Rui Kang Zhang told Madame Chen that they had opened a bank account for Madame Chen in Hong Kong in order to provide recompense for defendant Rui Kang Zhang's actions and in recognition of Madame Chen's status as the senior member of the Chen family.

90. Madame Chen never knew the amount in the account and had no knowledge of the amounts deposited until after defendants Jau-Fei Chen and Rui Kang Zhang had moved to Singapore with their children and litigation ensued.

Defendants' Denial of Madame Chen's Ownership Interests

91. Upon information and belief, since the filing of Civil No. 010400098, defendants Jau-Fei Chen and Rui Kang Zhang have wrongfully denied and disputed that Madame Chen is the principal owner of E. Excel.

92. In about early 2001, Madame Chen provided \$3,000,000 to E. Excel at a time when the company was in serious financial difficulty. Madame Chen and E. Excel entered into a subscription agreement for Madame Chen's acquisition of shares in E. Excel.

93. The Interim Order dated February 21, 2001 in Civil No. 010400098 recognized Madame Chen's \$3,000,000 investment in E. Excel. Paragraph 8 of the Interim Order provided:

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.

94. Notwithstanding that defendant E. Excel has recognized Madame Chen's \$3,000,000 contribution as a capital contribution, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have now disputed not only Madame Chen's longstanding ownership interest in the company, but have failed or otherwise refused to return the funds to Madame Chen or issue the stock in E. Excel to Madame Chen.

95. Upon information and belief, defendants Jau-Fei Chen and Rui Kang Zhang now also wrongfully deny Madame Chen's ownership of her home at 1929 South 180 West in Orem, Utah.

96. Madame Chen's home was built pursuant to Father Chen's design and specifications as Madame Chen's and Father Chen's home and has been continuously occupied for many years as Madame Chen's and/or Father Chen's home.

97. Over extended periods, defendants Jau-Fei Chen and Rui Kang Zhang lived in Madame Chen's home.

98. Many of the wrongful and unlawful acts of defendants Jau-Fei Chen and Rui Kang Zhang and of Does 1-20 were disrespectfully and deceitfully planned and

carried out while defendants Jau-Fei Chen and Rui Kang Zhang were living under Madame Chen's roof.

99. Upon information and belief, defendants Jau-Fei Chen and Rui Kang Zhang have also denied and disputed Madame Chen's ownership in approximately 3.5 acres of real property located at 1700 North 2200 West in Provo (the "Provo orchard"), in Utah County, State of Utah. Madame Chen and Father Chen deeded the Provo orchard property to defendants Jau-Fei Chen and Rui Kang Zhang in 1991 as agents, to hold the same in trust for them. Defendants Jau-Fei Chen and Rui Kang Zhang failed, however, to inform Madame Chen that they had improperly added the name of their minor child, E. E. Zhang, to the title to the property.

Wrongful Institution of Litigation and Denial of Support

100. Defendants Jau-Fei Chen and Rui Kang Zhang have caused E. Excel to wrongfully bring suit against Madame Chen in Civil Nos. 010400098 and 010400201.

101. Defendant Jau-Fei Chen has personally brought suit in this Court falsely claiming ownership to an office building in Shanghai owned by Madame Chen through Southwick Limited in order to assist Jau-Fei Chen's tenant in its continued failure ever to pay rent, Civil No. 020400257.

102. Defendant Jau-Fei Chen now wrongfully claims to hold legal title to Madame Chen's home contrary to and in derogation of Madame Chen's ownership, threatening Madame Chen's continuing ability to live in her own home.

103. Defendants Jau-Fei Chen and Rui Kang Zhang have, moreover, denied financial support to Madame Chen.

FIRST CLAIM FOR RELIEF

(Claim for Declaratory Relief, Constructive Trust, and Accounting Against Defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, and Does 1-20 With Respect to Madame Chen's Ownership in E. Excel)

104. Madame Chen incorporates the allegations of paragraphs 1 through and including 103 as if fully set forth herein.

105. An actual and justiciable case in controversy exists between the Madame Chen and defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, and Does 1-20 with respect to E. Excel and the ownership of E. Excel and of the revenues attributable to Madame Chen's ownership in E. Excel.

106. Madame Chen claims that she is the principal owner of E. Excel and that she is entitled to the revenues attributable to her ownership in E. Excel.

107. Upon information and belief, defendants Jau-Fei Chen and Rui Kang Zhang deny and dispute that Madame Chen is the principal owner of E. Excel and assert claims to the ownership of E. Excel and to the revenues attributable to Madame Chen's ownership in E. Excel that are in conflict with and in derogation of Madame Chen's claims of ownership.

108. Defendant Jau-Hwa Stewart may assert a claim of ownership in E. Excel or in the revenues attributable to Madame Chen's claim of ownership in E. Excel. Defendant Jau-Hwa Stewart is joined as a defendant on this claim for relief in order that Madame Chen's claims of ownership in E. Excel may be determined as against

defendant Jau-Hwa Stewart and in order to obtain an accounting from defendant Jau-Hwa Stewart.

109. Does 1-20 include persons who have or have had involvement with assets or revenues attributable to Madame Chen and Father Chen's ownership in E. Excel.

110. Madame Chen rightfully is the principal owner of E. Excel and of the revenues attributable to her ownership of E. Excel.

111. Madame Chen and Father Chen established and formed E. Excel as a traditional Chinese family business.

112. In accordance with established Chinese custom and tradition, Madame Chen and Father Chen were the principal owners of E. Excel.

113. Madame Chen and Father Chen established and formed E. Excel and contributed financial support and assistance to E. Excel on the basis and with the belief that they were the principal owners of E. Excel.

114. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart acknowledged and agreed to the ownership of Madame Chen and Father Chen in E. Excel.

115. Madame Chen and Father Chen stood in a confidential relationship with defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart and justifiably reposed trust and confidence in them.

116. Madame Chen and Father Chen justifiably imposed trust and confidence in defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart because of the

duties established by Chinese custom and tradition, because of the familial relationship existing among them, because defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart managed the interests and investment of Madame Chen and Father Chen in E. Excel for their benefit and as their agents, and because of defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart's superior knowledge and position as persons controlling the operations of E. Excel.

117. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart have acted as the officers and/or directors of E. Excel at a time when they were aware of Madame Chen and/or Father Chen's legal or beneficial ownership interest in the company.

118. Madame Chen and Father Chen were necessarily reliant on defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart for conducting their financial affairs.

119. As a result of Father Chen's death, Madame Chen holds both her own ownership interest in E. Excel and Father Chen's ownership interest in E. Excel.

120. Defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, and Does 1-20 own no interest in E. Excel contrary to the claims of Madame Chen or should be required to allege and prove their interest.

121. Further, if defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, and Does 1-20 own or claim to own any interest in E. Excel contrary to the claims of Madame Chen, defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, and

Does 1-20 should be adjudged to hold such interest in a constructive trust for the benefit of Madame Chen subject to an equitable duty to convey such interest to Madame Chen on the ground that defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart and Does 1-20 would be unjustly enriched if they or any of them were permitted to retain such interest.

122. Madame Chen is entitled to a full accounting from defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, and Does 1-20 for the attributes of her ownership in E. Excel, including, but not limited, to an accounting for revenues realized in markets in Asia.

WHEREFORE, Madame Chen prays:

- a. For a declaratory judgment that she is the principal owner of E. Excel and that she is entitled to the revenues attributable to her ownership in E. Excel;
- b. For imposition and enforcement of a constructive trust;
- c. For a full accounting from defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, and Does 1-20 for the revenues attributable to Madame Chen's ownership in E. Excel, including, but not limited to, an accounting for revenues realized in markets in Asia;
- d. For supplemental relief, including but not limited to, damages, a reasonable attorneys fee, interest, and costs as the Court may order; and
- e. For such other and further relief to which Madame Chen may prove to be entitled.

SECOND CLAIM FOR RELIEF

(Claim for Breach of Fiduciary Duty Against Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 With Respect to Madame Chen's Ownership in E. Excel and in Her Home and in the Provo Orchard Property)

123. Madame Chen incorporates and realleges the allegations of paragraphs 1 through and including 122 as if fully set forth herein.

124. Madame Chen and Father Chen established and formed E. Excel as a traditional Chinese family business.

125. In accordance with established Chinese custom and tradition, Madame Chen and Father Chen were and it was always understood and agreed between the Chen family that Madame Chen and Father Chen were the principal owners of E. Excel.

126. Madame Chen and Father Chen established and formed E. Excel and contributed financial support and assistance to E. Excel on the basis and with the belief that they were the principal owners of E. Excel.

127. Defendants Jau-Fei Chen and Rui Kang Zhang recognized, acknowledged, and agreed that Madame Chen and Father Chen were the principal owners of E. Excel and in other assets and investments entrusted to them by Madame Chen and Father Chen and repeatedly assured Madame Chen and Father Chen that the ownership and right to revenues in E. Excel and such other rights were being and would be protected and preserved for the benefit of Madame Chen and Father Chen.

128. Defendants Jau-Fei Chen and Rui Kang Zhang specifically acknowledged the ownership of Madame Chen and Father Chen in Madame Chen's home at 1929

South 180 West, Orem, Utah, notwithstanding that legal title to the home was not held in the name of Madame Chen or Father Chen

129 Defendants Jau-Fei Chen and Rui Kang Zhang also acknowledged ownership of Madame Chen in the Provo orchard property located in Utah County, State of Utah

130 The fiduciary duties in this case arise out of the Chen family relationship and the fact that Madame Chen and Father Chen established, funded, and financed E Excel. Madame Chen and Father Chen always understood and defendants Jau-Fei Chen and Rui Kang Zhang explicitly recognized that Madame Chen and Father Chen were the principal owners in accordance with their investment and their status as the senior members of the Chen family. The fiduciary duties are owed on the basis of the family relationship, the investment, the status, and defendants' express recognition and acknowledgment that Madame Chen and Father Chen were the principal owners, defendants' agreement to act as the agents of Madame Chen and Father Chen with regard to the operation and control of the business activities of E Excel, and defendants' status as the controlling persons and officers of E Excel with superior knowledge concerning its affairs.

131 Defendants Jau-Fei Chen and Rui Kang Zhang owed Madame Chen and Father Chen the highest fiduciary duties by reason of their status as the senior members of the Chen family and by reason of Father Chen's and Madame Chen's

establishing, funding, and financing E. Excel as a family enterprise of the Chen family in which the parents were and were acknowledged to be the principal owners.

132. Defendants Jau-Fei Chen and Rui Kang Zhang and defendant Jau-Hwa Stewart owed Madame Chen and Father Chen the highest fiduciary duties by reason of their agreeing to act and acting as their parents' agents with regard to the control and operation of E. Excel and the control and operation of the Chen family enterprise that was conducted in the form of E. Excel.

133. Defendants Jau-Fei Chen and Rui Kang Zhang and defendant Jau-Hwa Stewart each directly owed the highest fiduciary duties to Madame Chen and Father Chen as the controlling persons and officers of E. Excel and as the controlling persons and officers of the Chen family enterprise conducted in the form of E. Excel.

134. Madame Chen and Father Chen were necessarily dependent on defendants Jau-Fei Chen and Rui Kang Zhang for conducting their financial affairs.

135. As a result of Father Chen's death, Madame Chen holds both her own ownership interest in E. Excel, in her home, and in the Provo orchard property and Father Chen's ownership interest in E. Excel, in her home, and in the Provo orchard property.

136. The fiduciary duties which defendants Jau-Fei Chen and Rui Kang Zhang owed to Madame Chen include:

- a. Fiduciary duties of undivided loyalty and complete candor;

- b. Fiduciary duties to hold Madame Chen's interests paramount and not favor their own interests over Madame Chen's interests;
- c. Fiduciary duties of the utmost good faith, honesty, and fair dealing; and
- d. Fiduciary duties of due care, including duties not to unreasonably subject E. Excel to liabilities.

137. Defendants Jau-Fei Chen and Rui Kang Zhang intentionally, blatantly, and repeatedly breached their fiduciary duties to Madame Chen.

138. Defendants Jau-Fei Chen and Rui Kang Zhang intentionally and repeatedly breached their fiduciary duties to Madame Chen by, among other things:

- a. Setting up and establishing separate businesses with the design, purpose, and effect of usurping business, revenues, and business opportunities rightfully attributable to the ownership of Madame Chen and Father Chen in E. Excel for their own benefit;
- b. Diverting profits attributable to Madame Chen's and Father Chen's ownership in E. Excel for their own benefit;
- c. Engaging in a double billing scheme to facilitate their usurpation of business, revenues, business opportunities, and other unlawful activities;
- d. Deceitfully concealing the financial condition and performance of E. Excel;
- e. Assaulting and battering Madame Chen in her own home;
- f. Secretly obtaining positions and ownership in E. Excel's foreign distributors;

g. Secretly establishing and obtaining positions and ownership in manufacturers of E. Excel product in competition with E. Excel, diverting and usurping E. Excel's business, revenues, and business opportunities;

h. Failing to safeguard and protect Madame Chen's ownership and investment in E. Excel, in Madame Chen's home, and in her real property;

i. Denying Madame Chen's ownership and interest in E. Excel, in her home, and in her real property;

j. Asserting claims of ownership in E. Excel and in Madame Chen's home contrary to and in derogation of Madame Chen's ownership; and

k. Operating E. Excel in an unlawful manner, unreasonably subjecting E. Excel to liabilities.

139. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 engaged in these wrongful and tortious acts in concert with one another and pursuant to a common design with one another.

140. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 each knew that the other's conduct constituted a breach of duty and gave substantial assistance or encouragement to the other to so conduct themselves.

141. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 each gave substantial assistance to the other in accomplishing a tortious result under circumstances where such defendant's conduct, separately considered, constitutes a breach of duty to Madame Chen.

142. Madame Chen has been damaged as the direct and proximate result of the breaches of fiduciary duty by defendants Jau-Fei Chen and Rui Kang Zhang and the conduct of Does 1-20 and through their wrongful and unlawful diversion and usurpation of E. Excel's business, revenues, and business opportunities.

143. Defendants Jau-Fei Chen's and Rui Kang Zhang's breaches of fiduciary duty and the conduct of Does 1-20 were willful and malicious, entitling Madame Chen to punitive damages.

WHEREFORE, Madame Chen prays:

- a. For compensatory damages in an amount to be proven at trial;
- b. For punitive damages;
- c. For a reasonable attorney's fees, interest, and costs of Court; and
- d. For such other and further relief as the Court deems just and proper.

THIRD CLAIM FOR RELIEF

(Claim for Pattern of Unlawful Activity (Racketeering) Against Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20)

144. Plaintiff incorporates the allegations of paragraphs 1 through 143 as if fully set forth herein.

A. CORE ALLEGATIONS

145. Madame Chen brings this claim under Utah's Pattern of Unlawful Activity Act, Utah Code Annotated § 76-10-1601, et. seq. pursuant to Utah Code Annotated § 76-10-1605 to recover for injuries to her business and property caused by reason of

violations by defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 of Utah Code Annotated § 1603

146 Upon information and belief, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have engaged in conduct in violation of Utah Code Annotated § 76-10-1603(1), (2), (3) and (4) under Utah's Pattern of Unlawful Activity Act

147 Upon information and belief, in violation of Utah Code Annotated § 76-10-1603(1), defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have received income derived directly and indirectly from a pattern of unlawful activity in which defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have participated as principals and have used and invested such income to acquire an interest in, establish and operate the enterprise consisting of their association in fact with each other, E Excel, and Does 1-20

148 Upon information and belief, in violation of Utah Code Annotated § 76-10-1603(2), defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have acquired and maintained, directly and indirectly, an interest in or control of the enterprise consisting of their association in fact with each other, E Excel, and Does 1-20

149 Upon information and belief, in violation of Utah Code Annotated § 76-10-1603(3) defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have been employed by or associated with the enterprise consisting of E Excel and have directly and indirectly conducted and participated in the affairs of E Excel through a pattern of unlawful activity

150. Upon information and belief, in violation of Utah Code Annotated § 76-10-1603(4), defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have conspired to violate the provisions of Utah Code Annotated § 76-10-1603(1), (2) and (3).

151. Upon information and belief, the pattern of unlawful activity in which defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 engaged constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes demonstrate continuing unlawful conduct and are related each to the other and to the enterprise.

152. Defendants' episodes of unlawful activity are related as particular episodes in their unlawful schemes and actions to divert and usurp the business, revenues, and business opportunities rightfully attributable to the ownership of Madame Chen and Father Chen in E. Excel for their own benefit.

153. Defendants' schemes and actions to usurp the business, revenues, and business opportunities rightfully attributable to the ownership of Madame Chen and Father Chen in E. Excel for their own benefit constitutes long-term activity, having begun more than a decade ago. Moreover, defendants' schemes and acts giving rise to Madame Chen's complaint involve long-term unlawful activity in the future because defendants continue to engage in such conduct and Madame Chen continues to be injured thereby.

154. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 each knew that the other's conduct constituted a breach of duty and gave substantial assistance or encouragement to the other to so conduct themselves.

155. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 each gave substantial assistance to the other in accomplishing a tortious result under circumstances where such defendant's conduct, separately considered, constitutes a breach of duty to plaintiff.

156. As the direct and proximate result of such acts and violations of Utah's Pattern of Unlawful Activity Act, plaintiff's property and business has been damaged in an amount to be proven at trial.

B. PREDICATE ACTS

Criminal Tax Fraud

157. In violation of Utah Code Annotated § 59-1-401, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have engaged in repeated acts of criminal tax fraud.

158. Upon information and belief, defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 have created related business entities that are directly or indirectly controlled by defendants, serve no legitimate independent business purpose, and have been intentionally and willfully set up to minimize tax reporting requirements.

159 Upon information and belief, since at least 1989, defendants Jau Fei Chen and Rui Kang Zhang, E Excel, and Does 1-20 have set about to systematically engage in an unlawful scheme of creating double invoices to conceal the true value of exported products or imported raw materials

160 Upon information and belief, a purpose of the unlawful double invoicing scheme was to defraud the United States Internal Revenue Service, the United States Custom Service, the Utah State Tax Commission, and the customs and/or revenue collection in various foreign countries

161 Upon information and belief, defendants Jau-Fei Chen, Rui Kang Zhang, E Excel, and Does 1-20 also have routinely overstated the inventories of E Excel, misstating the profits, assets, and operating expenses of E Excel in an effort to evade or defeat taxes and the payment thereof

Communications, Wire, and Mail Fraud

162 In violation of Utah Code Annotated § 76-10-1805 and 18 U S C § 1341 and 1342, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have engaged in repeated acts of communications fraud, wire, fraud, and mail fraud

163 Upon information and belief, since at least 1989, defendants Jau-Fei Chen, Rui Kang Zhang, E Excel, and Does 1-20 have set about to systematically engage in an unlawful scheme of creating double invoices to conceal the true value of exported products and imported raw materials and have extensively employed the mails and wires in the perpetration of the double invoicing scheme

164 Upon information and belief, a purpose of the unlawful double invoicing scheme was to defraud the United States Internal Revenue Service, the United States Custom Service, the Utah State Tax Commission, and the customs and/or revenue collection in various foreign countries

165 Upon information and belief, the double invoicing scheme has had the effect of adversely impacting trade statistics kept by the United States Government Defendants Jau Fei Chen, Rui Kang Zhang, E Excel, and Does 1-20 used the United States mail and telephone/wire systems to facilitate their fraudulent enterprise

166 Upon information and belief, defendants Jau Fei Chen and Rui Kang Zhang and E Excel purchased rubber gloves manufactured in the Peoples Republic of China Notwithstanding their knowledge that the gloves had been manufactured in China, defendants Jau Fei Chen, Rui Kang Zhang, E Excel, and Does 1-20 intentionally and fraudulently labeled the gloves as being made in the USA They also unlawfully failed to mark the actual country of origin on the gloves

167 In 1993, pursuant to a plea bargain, defendant Jau Fei Chen and E Excel pled guilty to a lesser charge of 19 U S C 1304 (failure to properly note country of origin) in United States District Court in and for the District of Utah

168 Upon information and belief, in 1995, defendant Rui Kang Zhang and E Excel were caught unlawfully transporting \$531,457 out of the United States Following an investigation, defendant Rui Kang Zhang and E Excel were charged with a civil

violation of 31 U.S.C. § 5316 and were required to pay a forfeiture penalty in the amount of \$53,145.76.

169. Upon information and belief, as part of the United States Customs Service's investigation into the matter, defendant Rui Kang Zhang, E. Excel, and Does 1-20 made certain representations in an attempt to mitigate the forfeiture of the unlawfully transported funds. In violation of 18 U.S.C § 1001, defendant Rui Kang Zhang and E. Excel falsely represented the purpose, status, and use of the funds. Defendant Rui Kang Zhang and E. Excel and Does 1-20 also provided the United States Customs Service with invoices that purported to reflect the funds seized.

170. Upon information and belief, defendants Jau Fei Chen, Rui Kang Zhang, and E. Excel failed to inform the United States Customs Service that the invoices that were provided were part of an unlawful double invoicing scheme and that the actual recipient of the seized funds (E. Excel International, Inc. (Hong Kong)) was a mere shell that was entirely controlled by defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20.

Deceptive Trade Practices

171. In violation of Utah Code Annotated § 76-6-507, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have engaged in repeated acts of deceptive trade practices.

172. Upon information and belief, defendants Jau-Fei Chen, Rui Kang Zhang, E. Excel, and Does 1-20 have for years engaged in a systematic practice and scheme

of making false representations regarding E Excel's products The false representations were published through the use of the United States mail and telephone/wire systems

173 Upon information and belief, defendants Jau Fei Chen and Rui Kang Zhang and E Excel purchased rubber gloves manufactured in the Peoples Republic of China Notwithstanding their knowledge that the gloves had been manufactured in China, defendants Jau Fei Chen, Rui Kang Zhang, E Excel, and Does 1-20 intentionally and fraudulently labeled the gloves as being made in the USA They also unlawfully failed to mark the actual country of origin on the gloves

174 Defendants' scheme has included the intentional practice of false labeling regarding the origin and contents of products Upon information and belief, defendants Jau-Fei Chen and Rui Kang Zhang, E Excel, and Does 1-2 have falsely labeled product as having been made in the United States, when it was not

175 Upon information and belief, defendants Jau-Fei Chen and Rui Kang Zhang, E Excel, and Does 1-20 have also falsely labeled product by routinely omitting to disclose the presence of certain contents such as fructose, psyllium husk, and vitamin and mineral supplements, and by representing that certain ingredients such as royal jelly, cactus extract and barley leaves were present, when they were not

176 Upon information and belief, defendants Jau-Fei Chen and Rui Kang Zhang, E Excel, and Does 1 20 have routinely misidentified product which they import

177. Defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 have also made false representations regarding the researchers employed by E. Excel.

178. Specifically, in volumes 14 and 17 of E. Excel's magazine the "The Excellent Word", defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 published photographs of a group of individuals who were falsely portrayed as E. Excel's researchers.

179. In fact, the individuals portrayed in the photographs were primarily friends and neighbors of E. Excel's then employee Jean Jacobs who were paid to pose for the photographs wearing lab coats provided by E. Excel. The individuals who were paid to pose for the photographs wearing E. Excel lab coats included truck drivers, janitors and office workers.

180. Similarly, in volume 14 of "The Excellent Word", defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 published a photograph that depicted defendant Jau Fei Chen and two alleged researchers inspecting the progress of herbs being grown by E. Excel.

181. Upon information and belief, defendant Jau Fei Chen and the purported researchers are, in fact, standing in an alfalfa field located in Utah County that was neither owned nor operated by E. Excel.

182. In addition, photographs published by defendants Jau Fei Chen and Rui Kang Zhang, E. Excel, and Does 1-20 in the "The Excellent Word" depicted alleged researchers using various machinery and lab equipment. In fact, the photographs were

taken at local laboratories and medical facilities unrelated to E Excel and with equipment that was neither owned nor utilized by E Excel

Theft

183 In violation of Utah Code Annotated § 76-6-404, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have engaged in repeated acts of theft. Specifically, defendants have usurped and exercised unauthorized control over Madame Chen's ownership in E Excel and the attributes of her ownership, her home, and the Provo orchard property.

Unlawful Dealing In Property By A Fiduciary

184 In violation of Utah Code Annotated § 76-6-513, defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have unlawfully dealt with property by a fiduciary. Specifically, defendants, while fiduciaries, dealt in, usurped and exercised unlawful control over Madame Chen's ownership and investment in E Excel and the attributes of her ownership, her home, and the Provo orchard property.

Assault And Battery

185 In violation of Utah Code Annotated § 76-5-102, defendant Rui Kang Zhang, in 1997, intentionally assaulted and battered Madame Chen in her home.

WHEREFORE, plaintiff prays

- a For compensatory damages in an amount to be proven at trial,
- b For double damages as allowed by law,
- c For costs of Court and attorney's fees as allowed by law,

d For such other and further relief as the Court deems just and proper

FOURTH CLAIM FOR RELIEF

(Claim for Declaratory Judgment, Quiet Title and Constructive Trust Against Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart With Respect to Madame Chen's Home and Other Real Property)

186 Madame Chen incorporates and realleges the allegations of paragraphs 1 through and including 185 as if set forth herein

187 An actual and justiciable case in controversy exists between Madame Chen and defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart with regard to ownership of Madame Chen's home at 1929 South 180 West, Orem, Utah and the approximately 3 5 acres of Provo orchard in Utah County, State of Utah

188 Madame Chen claims that she is the sole owner of her home

189 Upon information and belief, defendant Jau-Fei Chen claims to be the owner of Madame Chen's home and defendant Rui Kang Zhang as her husband may claim an interest with regard to Madame Chen's home, which claims are in conflict with and in derogation of Madame Chen's claims of ownership

190 Defendant Jau-Hwa Stewart may assert a claim of ownership in Madame Chen's home and is joined as a defendant on this claim for relief in order that Madame Chen's claims of ownership in her home be determined as against defendant Jau-Hwa Stewart

191 Beginning in approximately 1993, Father Chen designed and constructed a home located at 1929 South 180 West, Orem, Utah The home was designed and constructed to be the home of Madame Chen and Father Chen and Madame Chen

and/or Father Chen have continuously occupied the home as their home since the home was completed.

192. On numerous occasions, defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart acknowledged and represented to Madame Chen and Father Chen that the home belonged to Madame Chen and/or Father Chen.

193. Defendant Jau-Fei Chen also represented to third parties that the home was being built for the benefit of Madame Chen and Father Chen during the time that the home was being designed and constructed.

194. At periods, defendants Jau-Fei Chen, Rui Kang Zhang, Jau-Hwa Stewart, her husband, and their children have occupied the home as guests of Madame Chen and/or her husband.

195. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart did not contribute any personal financial resources for the construction of the home. Further, at the time that the home was being constructed defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart lacked the personal financial resources to cause the home to be constructed.

196. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart have no right, title and interest in Madame Chen's home superior to that of Madame Chen or should be required to allege and prove their interest.

197. Further, if defendants Jau-Fei Chen, Rui Kang Zhang and Jau-Hwa Stewart own or claim to own any interest in Madame Chen's home contrary to the

claims of Madame Chen, defendants Jau-Fei Chen, Rui Kang Zhang and Jau-Hwa Stewart should be adjudged to hold such interest in a constructive trust for the benefit of Madame Chen subject to an equitable duty to convey such interest to Madame Chen on the ground that defendants Jau-Fei Chen, Rui Kang Zhang and Jau-Hwa Stewart would be unjustly enriched if they or any of them were permitted to retain such interest.

198. Madame Chen is the sole owner of the approximately 3.5 acres of Provo orchard in Utah County, State of Utah. Defendant Jau-Fei Chen as purported natural guardian for her minor daughter, E. E. Zhang, may claim some interest in the said property.

199. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart did not contribute any personal financial resources for the purchase of the Provo orchard. Further, at the time that the Provo orchard was purchased defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart lacked the personal financial resources to cause the purchase of the Provo orchard.

200. Defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart have no right, title and interest in the Provo orchard superior to that of Madame Chen or should be required to allege and prove their interest.

201. Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 each knew that the other's conduct constituted a breach of duty and gave substantial assistance or encouragement to the other to so conduct themselves.

202 Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 each gave substantial assistance to the other in accomplishing a tortious result under circumstances where such defendant's conduct, separately considered, constitutes a breach of duty to plaintiff

203 Madame Chen is entitled to a lis pendens on and with regard to Madame Chen's home and the Provo orchard pending determination of her claims to quiet title

WHEREFORE, Madame Chen prays

a For a declaratory judgment that she is the sole owner of her home at 1929 South 180 West, Orem, Utah and of her 3 5 acres of real property in Utah County, State of Utah,

b For judgment quieting title to her home and her real property in her favor against any and all conflicting claims of defendants Jau-Fei Chen, Rui Kang Zhang, and Jau-Hwa Stewart,

c For a constructive trust,

d For supplemental relief, including but not limited to, damages, a reasonable attorneys fee, interest, and costs as the Court may order, and

e For such other and further relief to which Madame Chen may prove to be entitled

SIXTH CLAIM FOR RELIEF

(Alternative Claim for Breach of Contract Against Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20)

204 Madame Chen incorporates the allegations of paragraphs 1 through 203

as if fully set forth herein

205 Defendant Jau-Fei Chen has testified in Civil Nos 010400098 and 010400201, and the trial court in those cases has entered findings, that an agreement was entered into whereby the Chen and Zhang families agreed to divide profits earned by E Excel and its related entities Pursuant to Jau-Fei Chen's testimony, these profits were to have been divided equally between the Chen and Zhang families

206 Upon information and belief, Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 were parties to this alleged agreement

207 Madame Chen was not a party to this alleged agreement and denies and disputes its existence However, if this alleged agreement existed, Madame Chen alleges, upon information and belief, that the parties to the agreement intended that Madame Chen be a third party beneficiary of the agreement

208 Upon information and belief, defendant Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 have breached the agreement by failing to adequately compensate the Chen family of whom Madame Chen is the senior member

209 Upon information and belief, Madame Chen has been damaged in an amount to be proven at trial

210 Defendants Jau-Fei Chen, Rui Kang Zhang, and Does 1-20 should be required to provide a full accounting

WHEREFORE, Madame Chen prays

a For damages in an amount to be proven at trial,

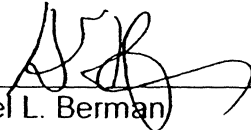
- b. For an accounting;
- c. For costs of court and attorney's fees as allowed by law; and
- d. For such other and further relief as the court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Utah Rule of Civil Procedure 38, Madame Chen demands jury trial of all claims and issues which are triable as of right by a jury.

DATED: December 31, 2002.

BERMAN, GAUFIN, TOMSIC & SAVAGE



Daniel L. Berman
Samuel O. Gaufin
50 South Main, Suite 1250
Salt Lake City, Utah 84144
Attorneys for Hwan Lan Chen

Tab B

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

2003 JAN 16 PM 1:25

_____)	
JAU-FEI CHEN,)	
)	
Plaintiff,)	
)	
VS.)	CASE NO. 010400098
)	
JAU-HWA STEWART,)	
JOHN DOES 1-10,)	
E. EXCEL INTERNATIONAL INC.,)	
Et al.)	
Defendants.)	
_____)	

BEFORE THE HONORABLE FRED D. HOWARD

FOURTH DISTRICT COURT
125 NORTH 100 WEST
PROVO, UTAH 84601

REPORTER'S TRANSCRIPT OF PROCEEDINGS
EVIDENTIARY HEARING
JANUARY 10, 2003

ORIGINAL

Reported by: Tasha Taylor, RPR, CSR

14287

1 in her affidavit filed in connection with the motion to
2 vacate. Judge, Madame Chen does not assert or claim to be a
3 shareholder of E.~Excel. She does not assert or claim to be a
4 direct owner of shares, of stock certificates, of shares in
5 E.~Excel. She claims to be the principal owner of E.~Excel by
6 reason of her status as the elder member of the Chen family.
7 E.~Excel was a Chinese family enterprise that she and her
8 husband financed and funded from its inception, literally,
9 Your Honor, literally, before this dispute, before the fight
10 between the sisters arose, they had put in pretty close to
11 \$2 million to get the business up and running.

12 She claims to be a principal owner because her two
13 daughters agreed to run the business for their parents, and
14 each of them agreed and acknowledged before this litigation
15 commenced that their mother was the principal owner of
16 E.~Excel. The merits of Madame Chen's claim as principal
17 owner, which is now, Your Honor, on file in this district
18 court, the Fourth District, through a complaint filed on
19 December 31, 2002, and assigned to Judge Davis, is not before
20 this Court, and cannot be summarily adjudicated on a motion to
21 strike for lack of standing or any purported inconsistency.
22 Your Honor, I would like to give the Court -- and by the
23 way --

24 THE COURT: Can I interrupt, Mr. Berman? I have a
25 question.

1 They served on the board of directors of E.~Excel until 1992.
2 She has a claim of equitable ownership and legal ownership as
3 a matter of the traditions that govern this family. By the
4 way, in which --

5 THE COURT: I'm not interested in their traditions.
6 My question goes to the legal authority. Are you suggesting
7 that by virtue of their relationship, their understanding
8 about this company, that she has an equitable ownership in
9 this company that gives her a separate, special, legal
10 standing?

11 MR. BERMAN: I am --

12 THE COURT: Under our authority, Utah authority?

13 MR. BERMAN: I am arguing, Your Honor, can I give you
14 this, first, just so we have a record on it? This is the
15 complaint we'd ask the Court to take judicial notice of it.

16 THE COURT: You filed a complaint?

17 MR. BERMAN: Yes.

18 MR. HIMONAS: Do you have one for me?

19 MR. BERMAN: Yes, we're passing them out.

20 THE COURT: Is it in this lawsuit or a separate --

21 MR. BERMAN: It's a separate lawsuit, Your Honor.

22 And we told the Court, by the way, in our briefing on this
23 motion to vacate that we were going to file this complaint. I
24 am now giving the Court the complaint. If you have any
25 question about that, Your Honor, you can look at page 22 of