

2002

Jau-Fei Chen, Chi wei Zhang, E. Lei Zhang, and E.
E. Zhang v. Jau-Hwa Stewart, E. Excel International,
Inc. and Does 1-10 : Brief of Appellant

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; attorneys for appellant.

Michael D. Zimmerman; Snell & Wilmer; James S. Lowie; Jones Waldo Holbrook & McDonough; Attorneys for Defendant.

Recommended Citation

Brief of Appellant, *Chen v. Stewart*, No. 20020927.00 (Utah Supreme Court, 2002).
https://digitalcommons.law.byu.edu/byu_sc2/2310

This Brief of Appellant 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

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.

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

Supreme Court No. 20020927 SC

BRIEF OF APPELLANT HWAN LAN CHEN

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

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

James S. Lowrie
Jones Waldo Holbrook & McDonough
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for Defendant/Third-Party
Plaintiff/Appellee Special Master Holman and E.
Excel International, Inc.

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

FILED
UTAH SUPREME COURT

SEP 22 2003

PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE UTAH SUPREME COURT

| | | |
|--|---|-------------------------------|
| JAU-FEI CHEN, individually and as the natural guardian of CHI WEI ZHANG, E. LEI ZHANG, and 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. |) | |
| |) | |
| E. EXCEL INTERNATIONAL, INC., a Utah corporation, |) | |
| |) | |
| Third-Party Plaintiff. |) | |
| vs. |) | |
| |) | |
| TAIG STEWART; BEVERLY WARNER; ANGELA BARCLAY; DALE STEWART; HWAN LAN CHEN, et al. |) | |
| |) | |
| Third Party Defendants/Cross Appellants |) | |

BRIEF OF APPELLANT HWAN LAN CHEN

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

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

James S. Lowrie
Jones Waldo Holbrook & McDonough
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for Defendant/Third-Party Plaintiff/Appellee Special Master Holman and E. Excel International, Inc.

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

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

Pursuant to Utah Rule of Appellate Procedure 24(a)(1), all parties to the action below are listed as follows:

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

DEFENDANT, CROSS-DEFENDANT AND CROSS-CLAIMANT: Jau-Hwa Stewart.

THIRD-PARTY PLAINTIFF AND CROSS-DEFENDANT: E. Excel International.

THIRD-PARTY DEFENDANTS: Hwan Lan Chen; Taig Stewart; Beverly Warner; Angela Barclay; Dale Stewart; Sam Tzu; Richard Hu; Apogee, Inc., a Utah corporation; Apogee Essence International Philippines, Inc., a Philippines corporation; Excellent Essentials International Corporation, a Philippines corporation; USA Apogee, Ltd., a Hong Kong corporation; Shannon River, Inc., a Utah corporation; Shannon Heaton; Sheue Wen Smith; Bryan Hymas; Paul Cooper; Tim O'Neil; and Bryan Murray.

TABLE OF CONTENTS

| | |
|--|----|
| APPELLATE JURISDICTION | 1 |
| ISSUES PRESENTED | 2 |
| A. The Trial Court's January 24, 2003 Ruling | 2 |
| B. The Preliminary Injunction | 4 |
| CONTROLLING RULE | 6 |
| STATEMENT OF THE CASE | 6 |
| I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW | 6 |
| II. STATEMENT OF FACTS | 15 |
| A. The Special Master Was Unlawfully Empowered With, Exercised, And Continues to Exercise, Pendente Lite, Non- Judicial Powers Beyond and in Direct Conflict With the Judicial Power Authorized by Rule 53 | 15 |
| 1. Judge Howard Appointed Mr. Holman As Special Master And CEO Of E. Excel And Empowered Him To Exercise The "Complete Executive Authority" Of E. Excel As Special Master | 15 |
| 2. Judge Howard Expanded The Special Master's Powers By Order Dated May 11, 2001 And Authorized Him To Act As An Active Party Litigant, and the Special Master Proceeded To Act As An Active Party Litigant And Be Represented By Counsel | 16 |
| 3. The Special Master Entered Into A Master Settlement Agreement Pursuant To The Powers Granted By Judge Howard, And Judge Howard Approved The Agreement At The Special Master's Request | 18 |

| | | |
|----|---|----|
| 4. | The Special Master Orchestrated A Freeze-Out Merger That Eliminated Defendant Jau-Hwa Stewart As An E. Excel Shareholder | 21 |
| 5. | The Special Master Unquestionably Participated As An Active Party Litigant In The Action Below As A Special Master And Continues To Participate As An Active Party Litigant, Including In This Appeal | 22 |
| 6. | The Special Master Obtained The Preliminary Injunction As An Active Party Litigant In The Action Below | 27 |
| B. | The Preliminary Injunction Ruling Violated Hwan Lan Chen's Constitutional Right To Due Process Of Law | 28 |
| C. | Judge Howard's January 24, 2003 Ruling Merely Attempted to Justify The Special Master's Unlawful Empowerment and Actions | 29 |
| D. | The Scope Of The Preliminary Injunction Is Facially Invalid Because It Enjoins Hwan Lan Chen From All Competition With E. Excel And All Competition In Several Entire Industries Worldwide | 37 |
| E. | The Special Master/E. Excel Never Established A Prima Facie Case On The Key Predicate Findings Against Hwan Lan Chen, In Support Of The Preliminary Injunction, That She Was A Crook, Conspirator, And Corporate Wrongdoer | 39 |
| | SUMMARY OF ARGUMENT | 46 |
| | ARGUMENT | 53 |
| I. | JUDGE HOWARD'S ORDERS RELATING TO THE SPECIAL MASTER'S APPOINTMENT, EMPOWERMENT, AND ACTIONS MUST BE VACATED AND SET ASIDE BECAUSE THE SPECIAL MASTER WAS EMPOWERED WITH AND EXERCISED NON-JUDICIAL POWERS THAT ARE BEYOND AND IN DIRECT CONFLICT WITH THE JUDICIAL POWER AUTHORIZED BY RULE 53 | 53 |

| | | |
|----|--|----|
| A. | Judge Howard's Orders Relating To The Special Master's Appointment, Empowerment, and Actions Are Contrary To The Law, Exceed The Power Of A Court And Special Master Under Rule 53, Violate And Are Contrary To The Provisions And Purpose Of Rule 53 And, As A Matter Of Law, Must Be Vacated And Set Aside | 53 |
| 1. | A Special Master Is Limited To Judicial Powers Because Rule 53 Does Not Authorize A Judge To Empower A Special Master With Powers That The Judge Does Not Have | 54 |
| 2. | Judge Howard's Orders With Respect To The Special Master's Appointment, Empowerment, And Actions Must Be Vacated And Set Aside Because The Special Master Was Empowered With And Exercised Unprecedented And Pervasive Non-Judicial Powers | 58 |
| B. | Judge Howard Merely Whitewashed The Special Master's Blatantly Unlawful Empowerment And Actions With His January 24, 2003 Ruling | 63 |
| 1. | Contrary To Judge Howard's January 24, 2003 Ruling, The Special Master's Unlawful Empowerment And Actions Cannot Be Sheltered Under The Waiver Doctrine | 63 |
| 2. | Contrary To Judge Howard's January 24, 2003 Ruling, The Special Master's Unlawful Empowerment And Actions Cannot Be Shielded Under The Doctrine Of Standing | 67 |
| a. | Hwan Lan Chen Has Standing as an Aggrieved Party Litigant and an Aggrieved Principal Owner of E. Excel | 68 |
| b. | Judge Howard's Rejection Of Hwan Lan Chen's Ownership Claim Based On The August 12, 2002 Order Is Pure Error | 70 |

| | | |
|------|--|----|
| 3. | Contrary To The January 24, 2003 Ruling, The Special Master's Unlawful Empowerment And Actions Cannot Be Shielded By The Doctrine Of Harmless Error | 71 |
| II. | THE PRELIMINARY INJUNCTION WAS GRANTED IN CLEAR VIOLATION OF HWAN LAN CHEN'S DUE PROCESS RIGHTS BECAUSE IT WAS BASED ON 18 DAYS OF EVIDENTIARY HEARINGS HELD BEFORE SHE WAS JOINED AS A PARTY | 72 |
| III. | THE PRELIMINARY INJUNCTION IS FACIALLY INVALID IN SCOPE BECAUSE IT UNLAWFULLY ENJOINS HWAN LAN CHEN FROM ALL COMPETITION WITH E. EXCEL AND FROM ALL COMPETITION IN SEVERAL ENTIRE INDUSTRIES WORLDWIDE | 74 |
| IV. | THE SPECIAL MASTER/E. EXCEL FAILED TO ESTABLISH A PRIMA FACIE CASE ON THE KEY PREDICATE FINDINGS AGAINST HWAN LAN CHEN ON WHICH THE PRELIMINARY INJUNCTION IS BASED .. | 77 |
| | CONCLUSION | 83 |

TABLE OF AUTHORITIES

CASES

| | |
|---|----------------|
| <i>Allen v. Rose Park Pharm.</i> , 237 P.2d 823 (Utah 1951) | 52, 76 |
| <i>Alta Indus. Ltd. v. Hurst</i> , 846 P.2d 1282 (Utah 1993) | 78 |
| <i>American Bd. of Psychiatry & Neurology, Inc. v. Johnson-Powell</i> , 129 F.3d 1 (1st Cir. 1997) | 52, 76, 82 |
| <i>Atwood v. Cox</i> , 55 P.2d 377 (Utah 1936) | 58, 64 |
| <i>Barnard v. Wasserman</i> , 855 P.2d 243 (Utah 1983) | 64 |
| <i>Branch v. Western Factors, Inc.</i> , 502 P.2d 570 (Utah 1972) | 62 |
| <i>Case v. Murdock</i> , 528 N.W.2d 386 (S.D. 1995) | 57 |
| <i>Cockran v. Cal-Zona Corp.</i> , 373 S.W.2d 573 (Tex. Civ. App. 1963) | 66 |
| <i>Coggins v. New England Patriots Football Club, Inc.</i> , 492 N.E.2d 1112 (Mass. 1986) | 62 |
| <i>Combe v. Warren's Family Drive-Inns, Inc.</i> , 680 P.2d 733 (Utah 1984) | 50, 70 |
| <i>Cornish Town v. Koller</i> , 798 P.2d 753 (Utah 1990) | 73, 74 |
| <i>Commercial Ins. Co. v. Burnquist</i> , 105 F. Supp. 920 (N.D. Iowa 1952) | 65 |
| <i>Crane v. Dahle</i> , 576 P.2d 870 (Utah 1978) | 52, 76, 79, 81 |
| <i>Cruz v. Hauck</i> , 515 F.2d 322 (5th Cir. 1975) | 48, 55, 64 |
| <i>Davis v. Passam</i> , 442 U.S. 228 (1979) | 50, 69 |
| <i>E.W. Bliss Co. v. Struthers-Dunn, Inc.</i> , 408 F.2d 1108 (8th Cir. 1969) | 75, 77 |
| <i>Eakins v. Reed</i> , 710 F.2d 184 (4th Cir. 1983) | 51, 73 |
| <i>F.D.I.C. v. Faulkner</i> , 991 F.2d 262 (5th Cir. 1993) | 6 |

| | |
|--|------------|
| <i>First of Denver Mortgage Investors v. C.N. Zundel & Assocs.</i> , 600 P.2d 521 (Utah 1979) | 66 |
| <i>Hagemeyer Chem. Co. v. Insect-O-Lite Co.</i> , 291 F.2d 696 (6th Cir. 1961) | 82 |
| <i>Handy v. Union P. R.R. Co.</i> , 841 P.2d 1210 (Utah Ct. App. 1992) | 6 |
| <i>Hansen v. Granite Holding Co.</i> , 218 P.2d 274 (Utah 1950) | 62 |
| <i>Hardy v. Meadows</i> , 264 P. 968 (Utah 1928) | 65 |
| <i>Hunsaker v. Kersh</i> , 1999 UT 106, 991 P.2d 67 | 52, 77 |
| <i>In re Bituminous Coal Operators' Ass'n</i> , 949 F.2d 1165 (D.C. Cir. 1981) | 55, 63 |
| <i>In re Gilbert</i> , 276 U.S. 6 (1928) | 55, 63 |
| <i>In re H.J.</i> , 1999 UT App. 238, 38, 986 P.2d 115 | 70, 71 |
| <i>In re Lemire-Courville Assocs.</i> , 499 A.2d 1328 (N.H. 1985) | 80 |
| <i>In re TMJ Implants Prods. Liab. Litig.</i> , 113 F.3d 1484 (8th Cir. 1997) | 78 |
| <i>Israel Pagan Estate v. Cannon</i> , 746 P.2d 785 (Utah Ct. App. 1987) | 78 |
| <i>Kozera v. Spirito</i> , 723 F.2d 1003 (1st Cir. 1983) | 69 |
| <i>LaBuy v. Howe Leather Co.</i> , 352 U.S. 249 (1957) | 55, 63 |
| <i>Lobato v. Pay Less Drug Stores, Inc.</i> , 261 F.2d 406 (10th Cir. 1958) | 82 |
| <i>Malstrom v. Consolidated Theatres, Inc.</i> , 290 P.2d 689 (Utah 1955) | 79 |
| <i>Maryland Metals, Inc. v. Metzner</i> , 382 A.2d 564 (Md. 1978) | 81 |
| <i>Microbiological Research Corp. v. Muna</i> , 625 P.2d 690 (Utah 1981) | 52, 74, 82 |
| <i>Montgomery v. Aetna Plywood, Inc.</i> , 39 F. Supp.2d 915 (N.D. Ill. 1998) | 62 |
| <i>Mr. Furniture Warehouse, Inc. v. Barclays Am./Comm. Inc.</i> , 919 F.2d 1517 (11th Cir. 1990) | 69 |

| | |
|--|--|
| <i>Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.</i> , 526 U.S. 344 (1999) | 73 |
| <i>Nelson v. Jacobsen</i> , 669 P.2d 1201 (Utah 1983); | 73, 74 |
| <i>Nestlé Food Co. v. Miller</i> , 836 F. Supp. 69 (D. R.I. 1993) | 75 |
| <i>Nicholson v. Evans</i> , 642 P.2d 727 (Utah 1982) | 62, 81 |
| <i>Oldroyd v. McCrea</i> , 235 P. 580 (Utah 1925) | 48, 58, 64 |
| <i>Pepper v. Litton</i> , 308 U.S. 195 (1939) | 62 |
| <i>Plumb v. State</i> , 809 P.2d 734 (Utah 1990) | 4, 6, 47, 50, 51, 54, 56, 57, 63, 64, 73 |
| <i>Regional Sales Agency, Inc. v. Reichert</i> , 830 P.2d 252 (Utah 1992) | 49, 58, 67 |
| <i>Resolution Trust Corp v. Scaletty</i> , 810 F. Supp. 1505 (D. Kan 1992) | 75 |
| <i>Robbins v. Finlay</i> , 645 P.2d 623 (Utah 1982) | 75, 76 |
| <i>Salt Lake County v. Murray City Redevelopment</i> , 598 P.2d 1339 (Utah 1979) | 51, 73 |
| <i>Schraft v. Leis</i> , 686 P.2d 865 (Kan. 1984) | 65 |
| <i>Smith v. McKnight</i> , 240 S.W.2d 368 (Tex. Civ. App. 1951) | 67 |
| <i>Society of Prof'l Journalists v. Bullock</i> , 743 P.2d 1166 (Utah 1987) | 68 |
| <i>State v. Hubbard</i> , 2002 UT 45 | 6 |
| <i>State v. Pena</i> , 869 P.2d 932 (Utah 1994) | 4 |
| <i>System Concepts, Inc. v. Dixon</i> , 669 P.2d 421 (Utah 1983) | 76 |
| <i>Timm v. Dewsnup</i> , 851 P.2d 1178 (Utah 1993) | 71 |
| <i>U.S. Realty 86 Assocs. v. Security Inv. Ltd.</i> , 2002 UT 14 | 48, 66 |
| <i>United Aircraft Corp. v. Boreen</i> , 413 F.2d 694 (3d Cir. 1969) | 75, 81, 82 |
| <i>United States v. O'Connor</i> , 291 F.2d 520 (2d Cir. 1961) | 56, 63 |

| | |
|--|----------------------|
| <i>Van Der Stappen v. Van Der Stappen</i> , 815 P.2d 1335 (Utah Ct. App. 1991) | 57 |
| <i>Water & Energy Sys. Tech., Inc. v. Keil</i> , 1999 UT 16, 974 P.2d 821 | 6, 52, 77 |
| <i>Webster Eisenlohr, Inc. v. Kalodner</i> , 15 F.2d 316 (3d Cir. 1944) .. | 46-48, 55-57, 63, 64 |
| <i>Weinberger v. UOP, Inc.</i> , 457 A.2d 701 (Del. 1983) | 62 |
| <i>Wilver v. Fisher</i> , 387 F.2d 66 (10th Cir. 1967) | 65 |
| <i>Wolff v. Wolff</i> , 490 N.E.2d 532 (N.Y. 1986) | 77 |

STATUTES

| | |
|---|--------|
| Utah Code Ann. § 16-10a-740 | 25 |
| Utah Code Ann. § 16-10a-832(4) | 80 |
| Utah Code Ann. § 16-10a-840 | 62, 81 |
| Utah Code Ann. § 76-10-1603(1) | 77 |
| Utah Code Ann. § 76-10-1605 | 77 |
| Utah Code Ann. §§ 78-2-2(3)(j), 78-2a-3 | 2 |

APPELLATE JURISDICTION

This consolidated appeal arises from this Court's grant of two sets of petitions for interlocutory appeal under Utah Rule of Appellate Procedure 5. On January 13, 2003, this Court granted appellant Hwan Lan Chen's petition in Case No. 20020927-SC for interlocutory appeal of a Preliminary Injunction entered against her below, which consisted of an October 16, 2002 Order of Preliminary Injunction based on August 20, 2002 Preliminary Injunction findings. [See accompanying Addendum, Tab V.] On April 2, 2003, the Court granted appellant's petition in Case No. 20030115-SC, along with three other petitions (Case Nos. 20030116-SC, 20030117-SC and 20030118-SC), for interlocutory appeal of the January 24, 2003 Ruling entered in the same action below denying appellant's Motion to Vacate and Set Aside the trial court's orders relating to the *pendente lite* appointment, empowerment, and actions of a Rule 53 special master. [See Addendum, Tab W.]

This Court's April 2, 2003 Order further ordered that: (1) all of the appeals of the January 24, 2003 Ruling were consolidated with each other and with Case No. 20020927-SC, with all pleadings to be filed under Case No. 20020927-SC, and (2) all further proceedings in the action below and all related actions were stayed pending the issuance of a decision on this consolidated appeal. [*Id.*]

An August 20, 2002 Contempt Ruling entered in the action below is the subject of a separate appeal, Case No. 2002077-SC, pursuant to defendant Jau-Hwa Stewart's and appellant Hwan Lan Chen's Notices of Appeal. The present appeal, Case No. 2002097-SC,

and the Contempt Ruling appeal, Case No. 20020777-SC, both involve the same record on appeal, but raise different issues.

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2-2(3)(j), 78-2a-3 and this Court's Orders pursuant to Utah Rule of Appellate Procedure 5.

ISSUES PRESENTED

A. The Trial Court's January 24, 2003 Ruling

The issues relating to the trial court's January 24, 2003 Ruling denying Hwan Lan Chen's Motion to Vacate and Set Aside the trial court's orders with respect to the Special Master's appointment, empowerment, and actions [R. 9238; 12770] are:

1. Whether the trial court's orders conferring non-judicial powers on a Rule 53 special master *pendente lite* and the actions of the Special Master pursuant to those powers were wholly beyond and in direct conflict with the judicial powers authorized by Rule 53?
2. Whether, under Rule 53, a special master can be empowered, *pendente lite*, to:
(1) serve as a corporate CEO; (2) participate as an active party litigant in the action in which he was appointed as special master, with the power to investigate, initiate, and prosecute claims; (3) pursue and obtain the preliminary injunctive relief that is the subject of this appeal; (4) negotiate and consummate a master settlement agreement that restructures a corporate enterprise, E. Excel International, Inc. ("E. Excel"), releases claims of that corporation, including claims against the plaintiff below and her husband, and settles

litigation beyond the case below; and (5) orchestrate a freeze-out merger against the defendant below with regard to the same corporation.

3. Whether the trial court's justification of its orders with respect to the empowerment and actions of the Special Master in its January 24, 2003 Ruling based on the doctrine of waiver is contrary to law and the record in that:

- a. The waiver doctrine cannot be used to shield the fundamental unlawfulness of a trial court's empowerment of a Rule 53 special master to exercise non-judicial powers *pendente lite*, including the power to act as an active party litigant, any more than the waiver doctrine could shield a trial court's own exercise of such blatantly non-judicial powers;
- b. The trial court's determination that there was a stipulation or agreement to the empowerment of the Rule 53 Special Master with non-judicial powers ten months before appellant Hwan Lan Chen was made a party to the case is categorically untrue and without support in the record; and
- c. Hwan Lan Chen never stipulated or agreed at any time to any of the trial court's orders pertaining to the Special Master and timely moved to have the orders vacated and set aside within ten days of the entry of the Preliminary Injunction against her?

4. Whether the trial court's justification of its orders with respect to the empowerment and actions of the Special Master in its January 24, 2003 Ruling based on the harmless error doctrine and the standing doctrine, including the trial court's claim that it

already had adjudicated against Hwan Lan Chen a claim by her to ownership of E. Excel, is contrary to law and the record in that:

- a. But for the Special Master's unlawful empowerment and actions, Hwan Lan Chen would not have been a party to the action below, would not have been the subject of a preliminary injunction below, and would not be the subject of a pending motion for contempt below that seeks her total default on her defense to claims that assert damages of approximately \$17 million; and
- b. No claim of any type (whether claim, counterclaim, cross claim or third-party claim) to which Hwan Lan Chen was a party and which involved her ownership of E. Excel, was ever made, pled or adjudicated in the action below?

The issues regarding the Special Master's empowerment and actions are questions of law that are reviewed for correctness. *Plumb v. State*, 809 P.2d 734, 741-43 (Utah 1990); *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). The issues raised by the trial court's January 24, 2003 Ruling are questions of law that are reviewed for correctness. *Pena*, 869 P.2d at 936.

B. The Preliminary Injunction

The issues relating to the trial court's August 20, 2002 Preliminary Injunction findings and October 16, 2002 Order of Preliminary Injunction against appellant Hwan Lan Chen [R. 7141; 8578; 9238; 14276 at 4-17] are:

1. Whether the Preliminary Injunction against Hwan Lan Chen must be vacated and set aside on the ground that it was based solely on the third-party claims and motion of a Rule 53 special master unlawfully exercising the power of a party litigant in the case, beyond and contrary to the judicial powers that can be conferred under Rule 53?

2. Whether Hwan Lan Chen was fundamentally denied her right to due process under the United States and Utah Constitutions when the trial court granted the Preliminary Injunction against her based on 18 days of evidentiary hearings conducted before she was joined as a party in the case below?

3. Whether the Preliminary Injunction is facially invalid in scope in that it wrongfully enjoins Hwan Lan Chen from all competition with E. Excel and all competition in several entire industries worldwide during the pendency of the case, when Hwan Lan Chen is not and never has been a party to a non-compete agreement with E. Excel, and was only a director of E. Excel between September 1, 2000 and February 21, 2001?

4. Whether the evidence fails to establish a prima facie case on the key predicate findings against Hwan Lan Chen that she is a crook, conspirator, and corporate wrongdoer, which underlie the Preliminary Injunction, when there is no evidence that Hwan Lan Chen, a 76-year old, non-English speaking, Chinese widow who never testified in the action below, ever agreed to any wrongful agreement, or ever engaged in or had knowledge of any of the wrongful or criminal predicate acts?

The Special Master issue with regard to the Preliminary Injunction is a subset of the general issues presented above regarding the Special Master's unlawful empowerment and

actions, and is a question of law that is reviewed for correctness. *Plumb*, 809 P.2d at 741-43. The due process issue is a question of law and is reviewed for correctness. *State v. Hubbard*, 2002 UT 45, ¶ 22, 48 P.3d 953, 962; *In re J.B.*, 2002 UT App. 268, ¶ 7, 53 P.3d 968, 970. The lawfulness of the scope of the Preliminary Injunction is a question of law that is reviewed for correctness. *F.D.I.C. v. Faulkner*, 991 F.2d 262, 267 (5th Cir. 1993). Whether appellee failed to establish a prima facie case on the predicate findings of the Preliminary Injunction, as required, is a question of law that is reviewed for correctness. *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶8, 974 P.2d 821, 822 (“To meet the requirements of subsection four [of Rule 65A(e)], an applicant [for a preliminary injunction] must, at the very least, make a prima facie showing that the elements of its underlying claim can be proved.”); *Handy v. Union P. R.R. Co.*, 841 P.2d 1210, 1215 (Utah Ct. App. 1992).

CONTROLLING RULE

Utah Rule of Civil Procedure 53 is of central importance to this appeal and is set out verbatim in Tab A of the accompanying Addendum.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case involves a Rule 53 special master who, by law, is a judicial officer limited to exercising judicial power to assist a court, but who, *pendente lite*, was empowered by the trial court to exercise the powers of the chief executive officer (“CEO”) of E. Excel, an active party litigant, and a master claims settler. In exercise of these blatantly non-judicial powers, the Special Master: (1) initiated and prosecuted claims against Hwan Lan Chen; (2)

sought and obtained the Preliminary Injunction against Hwan Lan Chen; (3) entered into a “Master Settlement Agreement” that settled litigation beyond this case, released the plaintiff and her allies from all of E. Excel’s claims, and divested E. Excel of over 90% of its business; (4) orchestrated a freeze-out merger that eliminated the defendant as an E. Excel shareholder for the benefit of the plaintiff and her allies; and (5) submitted admittedly “partisan” special master reports under Rule 53 that became part of the record and were used against Hwan Lan Chen. The Special Master continues to exercise his unlawful non-judicial powers, including his participation and direction in this appeal.

The corporate subject of this case is E. Excel, a multi-level marketer of herbal, dietary supplement, and personal care products. [R.14318 at 4 (¶ 1).] Historically, over 90% of E. Excel’s revenue came from sales in several Asian countries. [R. 14342, Ex. 280 at 4.] E. Excel’s distribution in these Asian countries historically consisted of sales to foreign distributors, called “Territorial Owners,” which, in turn, distributed E. Excel products to individual distributors on a multi-level marketing basis. [R. 14317 at 8 (¶ 10); 14318 at 4 (¶ 1).] E. Excel reported sales of over \$20 million to the Territorial Owners in the first eight months of 2000. [R. 14265 at 179-80; 14300 at 8.]

E. Excel is a closely-held family business of the Chen family, a traditional Chinese family. [R. 14230 at 12-14; 14317 at 5-6 (¶¶ 1, 5)]. As the trial court found:

[The Chen family is a] Chinese family that adheres to traditional deferring to decision making authority of the elder member of the family. . . . Part of the Chinese tradition observed by [the] family was to respect the wishes of and to take instruction from elders. Another Chinese tradition was to share profits in business between and among family members

[R. 14317 at 5-6 (¶ 1).] Appellant Hwan Lan Chen, a third-party defendant below, is the 76-year old matriarch of the Chen family, who claims by affidavit and answers to interrogatories in the case below to be the principal owner of E. Excel. [R. 9254; 14332, Reply Memo. at Ex. B (Interr. No. 5).] The plaintiff, her daughter, 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.]

Plaintiff Jau-Fei Chen, the President of E. Excel prior to September 1, 2000, commenced the action below in the Fourth Judicial District Court on January 9, 2001 against her sister, defendant Jau-Hwa Stewart, the then-acting President of E. Excel. [R. 24.] The action was brought as a derivative action and, therefore, the plaintiff joined E. Excel as a putative defendant. [R. 97.]

Plaintiff Jau-Fei Chen asserted derivative claims for breach of fiduciary duties, corporate waste, and corporate wrongdoing regarding her sister's attempt to assert shareholder control over E. Excel and take over the management of E. Excel. [R. 24.] Defendant Jau-Hwa Stewart, purporting to vote 100% of the outstanding shares of E. Excel, had acted on September 1, 2000 to remove the plaintiff and the plaintiff's husband, Rui-Kang Zhang, from the E. Excel Board of Directors and replace them with her mother, Hwan Lan Chen, and her husband, Taig Stewart.¹ [R. 14338, Ex. 22.] The new Board had removed the

¹ Ms. Stewart owned 25% of the outstanding shares and voted the remaining 75% of
(continued...)

plaintiff and Mr. Zhang as E. Excel officers and installed defendant Jau-Hwa Stewart as E. Excel's President. [R. 14338, Ex. 23.]

Plaintiff Jau-Fei Chen has never asserted any claim against her mother, Hwan Lan Chen, or been a party to a claim in the case to which her mother was a party. [R. 24.]

The case was assigned to the Honorable Fred D. Howard. Judge Howard commenced a proceeding on plaintiff Jau-Fei Chen's motion for preliminary injunction against defendant Jau-Hwa Stewart and held ten days of evidentiary hearings on the motion between January 19, 2001 and February 20, 2001. [R. 14221-23, 14226; 14228; 14230-35; 14293-94.]

On February 21, 2001, Judge Howard entered a stipulated "Interim Order" in connection with the pending preliminary injunction proceeding. [R. 632 (*see* Addendum, Tab Q).] The Interim Order provided that an "independent, neutral" interim CEO of E. Excel would be appointed, who would be selected by plaintiff Jau-Fei Chen and defendant Jau-Hwa Stewart, or, if they could not agree, by Judge Howard. [R. 631-32 at ¶ 1.] The Interim Order did not provide for the appointment of a special master. It said nothing about a special master. [R. 626-32.] The Interim Order proscribed the intended interim CEO from participating in the case below as an active party litigant by expressly limiting E. Excel to a putative defendant role in a derivative action. [R. 628 at ¶ 9.] The Interim Order removed

¹(...continued)

the outstanding shares, which were owned by plaintiff Jau-Fei Chen's children, on the claim that the children's shares were held in a trust controlled by Ms. Stewart. [R. 14338, Ex. 22.] The trial court ultimately ruled that, although there was evidence of the trust, the children's shares had not been transferred to the trust, such that the trust was dry and Ms. Stewart's vote of their shares was "void ab initio." [R. 7956-57.]

defendant Jau-Hwa Stewart as an officer and employee of E. Excel and changed the E. Excel Board back to plaintiff Jau-Fei Chen, her husband, and Ms. Stewart. [R. 630-31 at ¶¶ 2, 3.]

Pursuant to plaintiff Jau-Fei Chen's request, Judge Howard appointed Larry Holman as Special Master and interim CEO of E. Excel by Order dated March 13, 2001. [R. 704 (*see* Addendum, Tab D); 14274 at 7.] The plaintiff first requested that Mr. Holman serve as Special Master at a March 5, 2001 hearing. [R. 14274 at 7, 21 (*see* Addendum, Tab C).] Plaintiff Jau-Fei Chen made that request and obtained the Special Master's appointment without the stipulation or agreement of defendant Jau-Hwa Stewart, the only party adverse to the plaintiff at that time. [*Id.*; R. 704.]

On May 11, 2001, at the Special Master's request and over objection, Judge Howard entered an Order that authorized the Special Master to exercise the powers of a party litigant and master claims settler. [R. 762 (*see* Addendum, Tab G); 14298 at 2.] He explicitly authorized the Special Master to "direct and control" E. Excel as an active party litigant and conferred on the Special Master the power to settle all of E. Excel's litigation, all without further order of the court. [R. 762.]

On June 1, 2001, at the Special Master's request and over objection, Judge Howard approved the Special Master's decision to enter a "Master Settlement Agreement" with plaintiff Jau-Fei Chen, her husband, and their allies, and authorized the Special Master to execute that Agreement. [R. 2033-32 at ¶¶ 3, 4 (*see* Addendum, Tab I); 14239 at 19-23, 75-82; 14300 at 25 (*see* Addendum, Tab H).] The Master Settlement Agreement settled all litigation between E. Excel and the plaintiff, her husband, and their allies, released them from

all of E. Excel's claims, and restructured E. Excel by divesting its Asian sales – over 90% of its business – to the exclusive benefit of the plaintiff, her husband, and their allies. [R. 14344, Ex. 534 at ¶¶ 3.1, 4.1; 14342, Ex. 280 at 4.]

In June and August 2001, plaintiff Jau-Fei Chen made two motions for civil and criminal contempt against defendant Jau-Hwa Stewart, and Judge Howard commenced a proceeding on the two contempt motions in October 2001. [R. 2074; 14306.]

At the outset of the contempt proceeding, the Special Master, exercising the power of a party litigant, authorized and directed E. Excel to file an Amended Cross-Claim/Third Party Complaint and Motion for Preliminary Injunction against defendant Jau-Hwa Stewart, Hwan Lan Chen, and the other third-party defendants. [R. 3721; 4214 (*see* Addendum, Tabs J, K).] Paragraph 3 of the Amended Third Party Complaint specifically alleges that its filing was at the direction of the Special Master. Paragraph 3 states:

After commencing an investigation of [E. Excel's] finances and operations, Special Master Holman has determined that E. Excel should initiate litigation against the cross-defendant, Jau-Hwa Stewart, and the third party defendants [including Hwan Lan Chen]

[R. 4205 at ¶ 3.]

Hwan Lan Chen was first and only named as a party to the case by the Amended Third Party Complaint. [R. 4204 at ¶ 9.] The Amended Third Party Complaint asserted, *inter alia*, claims for breach of fiduciary duty, unfair competition, usurpation of corporate opportunity, waste, civil conspiracy, conversion, and violation of Utah's Pattern of Unlawful Activity Act ("UPUAA") against Hwan Lan Chen, based on her status as a director of E. Excel between September 1, 2000 and February 21, 2001 and her funding of Apogee, Inc., a company

formed in May 2001 that was intended to compete with E. Excel. [R. 4171-206; 14250 at 39.] The Special Master/E. Excel has told this Court that it seeks approximately \$17 million in damages against Hwan Lan Chen.² [5/21/03 Mtn. to Modify Stay and Require a Bond at 18 n.11.]

On October 31, 2001, Judge Howard, without notice to Hwan Lan Chen, combined the contempt proceeding with the proceeding on the Special Master/E. Excel's Motion for Preliminary Injunction. [R. 14243 at 64.] Judge Howard also incorporated the ten evidentiary hearings that had been held on January 19, 23 and 24, and February 1, 2, 7, 8, 9, 13 and 20, 2001 in connection with plaintiff Jau-Fei Chen's original motion for preliminary injunction, by taking "judicial notice" of those hearings. [R. 14317 at 4 (*see* Addendum, Tab O).] Judge Howard also incorporated the evidentiary hearings that were held on October 25 and 26, 2001 in connection with the plaintiff's contempt motion before he combined the contempt proceeding with the Preliminary Injunction proceeding. [*Id.*] In summary, the evidentiary record ended up consisting of 34 days of evidentiary hearings held on January 19, 23 and 24, 2001, February 1, 2, 7, 8, 9, 13 and 20, 2001, October 25 and 26, 2001, November 27 and 28, 2001, December 10, 11, 12, and 13, 2001, February 21 and 22, 2002, March 13, 15, 18 and 19, 2002, April 17, 2002, May 7, 8, 10 and 31, 2002, and June 4, 5, 7,

² After March 13, 2001, E. Excel was under the direction of the Special Master. [R. 704.] Accordingly, appellee is referred to as "the Special Master/E. Excel," which reflects the express representation of its counsel, Jones Waldo Holbrook & McDonough, in the case below. *See, e.g.*, the Amended Third Party Complaint. [R. 4214 (*see* Addendum, Tab K).]

25 and 26, 2002. [*Id.*] This was the evidentiary record that Judge Howard expressly adopted and cited to in granting the Preliminary Injunction. [*Id.*]

Counsel first appeared in the action below for Hwan Lan Chen on December 17, 2001, after having told Judge Howard on December 12 that he would be appearing for Hwan Lan Chen. [R. 5000; 14248 at 182.] After counsel stated he would be appearing for Hwan Lan Chen but before he actually appeared, the Special Master's counsel told Judge Howard on December 13, 2001 that the Special Master/E. Excel was not seeking "injunctive relief" against Hwan Lan Chen at that time. [R. 14249 at 180-81 (*see* Addendum, Tab L).]

On August 20, 2002, Judge Howard granted the Special Master/E. Excel's Motion for Preliminary Injunction against Hwan Lan Chen based on 110 pages of Preliminary Injunction findings that were adopted virtually verbatim from the Special Master/E. Excel's proposed findings. [R. 14316; 14318.] On the same date, Judge Howard also granted plaintiff Jau-Fei Chen's two contempt motions against defendant Jau-Hwa Stewart and ordered Ms. Stewart's total default on the plaintiff's claims by adopting virtually verbatim 127 pages of Contempt findings proposed by the plaintiff. [R. 14315; 14317.] As requested by the Special Master/E. Excel, the Preliminary Injunction findings entered by Judge Howard adopted and incorporated by reference all of the Contempt findings. [R. 14316 at 90 (¶ 258); 14318 at 89 (¶ 258) (*see* Addendum, Tab N).]

Judge Howard entered the Preliminary Injunction findings against Hwan Lan Chen based on 18 days of evidentiary hearings that were held before she was joined as a party to the case. [R. 5000; 14317 at 4.] Over 50% of the evidence cited in the Preliminary

Injunction and Contempt findings was received during the 18 days of evidentiary hearing that were conducted in the absence of Hwan Lan Chen. [See Addendum, Tab U.]

In July and August 2002, the Special Master orchestrated a freeze-out merger eliminating defendant Jau-Hwa Stewart as a shareholder of E. Excel, over her objection. [R. 14320, Mtn. and Memo. at Ex. 1.] The Special Master proposed the freeze-out merger to E. Excel's Board – which by then was only the plaintiff and her husband – and signed the merger agreement on behalf of both E. Excel and the acquisition company. [R. 14320, Memo. at Ex. 1.]

On October 16, 2002, Judge Howard entered an Order of Preliminary Injunction based on the August 20, 2002 Preliminary Injunction findings. [R. 9145 (*see* Addendum, Tab P).] The Preliminary Injunction, *inter alia*, enjoined Hwan Lan Chen from all competition with E. Excel and from all competition in the entire dietary supplement, herbal, personal care, cosmetic, and hygiene products industries worldwide. [R. 9140 at ¶ 13.]

On October 24, 2002, within ten days of the entry of the Preliminary Injunction Order, Hwan Lan Chen filed her Motion to Vacate and Set Aside Judge Howard's orders relating to the Special Master's appointment, empowerment, and actions. [R. 9238.] The action below had been re-assigned in July 2002 to the Honorable Lynn W. Davis of the Fourth Judicial District Court pursuant to that District's normal rotation rules regarding case assignments. On reference from Judge Davis, Judge Howard heard and ruled on the Motion to Vacate and Set Aside. [R. 12049; 14287.] Judge Howard denied the Motion in a written ruling entered on January 24, 2003. [R. 12770 (*see* Addendum, Tab B).]

II. STATEMENT OF FACTS

This Statement of Facts is divided into five sections. The first section relates to the unlawful empowerment and actions of the Special Master. The second section relates to the grant of the Preliminary Injunction against Hwan Lan Chen based on 18 days of evidentiary hearings held when she was not a party to the case in fundamental violation of her due process rights. The third section relates to Judge Howard's attempt to justify the Special Master's unlawful empowerment and actions in his January 24, 2003 Ruling. The fourth section relates to the facially invalid scope of the Preliminary Injunction, which enjoins Hwan Lan Chen from all competition with E. Excel and in several entire industries worldwide. The fifth section relates to the Special Master/E. Excel's failure to establish a prima facie case on the key predicate findings against Hwan Lan Chen underlying the Preliminary Injunction – findings that she was a crook, conspirator, and corporate wrongdoer.

A. **The Special Master Was Unlawfully Empowered With, Exercised, And Continues to Exercise, Pendente Lite, Non-Judicial Powers Beyond and in Direct Conflict With the Judicial Power Authorized by Rule 53**

Judge Howard empowered the Special Master *pendente lite* with the unprecedented, non-judicial powers of a corporate CEO, active party litigant, and master claims settler, and the Special Master has exercised and continues to exercise these blatantly unlawful powers.

1. **Judge Howard Appointed Mr. Holman As Special Master And CEO Of E. Excel And Empowered Him To Exercise The "Complete Executive Authority" Of E. Excel As Special Master**

On March 13, 2001, Judge Howard appointed Larry Holman by written order as Special Master and CEO of E. Excel. [R. 703 (*see* Addendum, Tab D).] The March 13,

2001 Order provided that Mr. Holman was appointed as the “interim [CEO] of [E. Excel], and as special master for and on behalf of the Court,” and was empowered with “complete executive authority in his role as chief executive officer and special master.” [*Id.* at ¶ 3.]

There was absolutely no stipulation or agreement between the only parties to the action at that time – plaintiff Jau-Fei Chen, defendant Jau-Hwa Stewart, and E. Excel as a putative defendant in the derivative action – for the appointment of a special master or the appointment of a special master and CEO. The first request for and reference to a special master was at the March 5, 2001 hearing. [R. 14274 at 7.] At that hearing, Judge Howard ruled, at the request of the plaintiff’s counsel, that Mr. Holman would have “master status.” [*Id.* at 7, 20-21 (*see* Addendum, Tab C).]

2. Judge Howard Expanded The Special Master’s Powers By Order Dated May 11, 2001 And Authorized Him To Act As An Active Party Litigant, and the Special Master Proceeded To Act As An Active Party Litigant And Be Represented By Counsel

In May 2001, Judge Howard expanded the powers of the Special Master and authorized him to act as an active party litigant. By order dated May 11, 2001, at the request of the Special Master and over objection, Judge Howard authorized the Special Master as special master and CEO to “**direct and control, initiate, dismiss, settle or otherwise determine [E. Excel’s] . . . disputes or lawsuits . . . all without further Order of this Court.**” [R. 762 (*see* Addendum, Tab G) (emphasis added); 14298 at 2.]

The Special Master requested the May 11, 2001 Order because E. Excel had been limited to a passive, putative party role in the derivative litigation under the February 21, 2001 Interim Order. [R. 14298 at 2.] Paragraph 9 of the Interim Order provided:

The Company shall not be required to pursue or pay for the pursuit of claims against the Parties or other persons that are of a shareholder derivative nature, and the Parties may pursue such derivative claims in their own names. Neither the Company's board of directors nor the interim CEO/President shall cause to be dismissed, settled, or otherwise compromised, any lawsuit pending purportedly on behalf of or against the Company

[R. 628 at ¶ 9 (*see* Addendum, Tab Q).]

The Special Master, having been given the new power to act as an active party litigant, proceeded to participate as an active party litigant in the action below. The Special Master retained litigation counsel, Jones, Waldo, Holbrook & McDonough, with Judge Howard's approval.³ [R. 14298 at 2.] Jones Waldo filed a notice of appearance for the Special Master – the notice stated that Jones Waldo “hereby makes [its] appearance as counsel of record for Special Master Larry C. Holman” – and proceeded to represent him as an active party litigant in the action. [R. 751 (*see* Addendum, Tab F.) **Of the first 160 filings by Jones Waldo in the action below, 131 expressly identify Jones Waldo as counsel for the Special Master.** [See Addendum, Tab S.] Jones Waldo expressly appeared for the Special Master in the combined Preliminary Injunction/Contempt proceeding. [R. 14244 at 5.] Jones Waldo is listed as appearing for both the Special Master and E. Excel in 21 of the 23 transcripts

³ Judge Howard approved of the Special Master's retention of litigation counsel by adopting the Special Master's “Report No. 2 of Special Master,” where the Special Master had reported his retention of Jones Waldo. [R. 2033 at ¶ 2; 14298 at 2.]

prepared from the evidentiary hearings held in that proceeding after the Special Master's appointment. [See Addendum, Tab T.] In addition, the Special Master's "Special Counsel," Patrick Hoog, represents the Special Master as an active party litigant and supervises for the Special Master all of Jones Waldo's work in the case. [R. 751, 8673 at ¶ 6.]

3. The Special Master Entered Into A Master Settlement Agreement Pursuant To The Powers Granted By Judge Howard, And Judge Howard Approved The Agreement At The Special Master's Request

In April and May 2001, pursuant to the powers granted by Judge Howard, the Special Master negotiated and entered into a comprehensive "Master Settlement Agreement" with plaintiff Jau-Fei Chen, her husband, and their allies with respect to all claims and litigation between them and E. Excel. [R. 14300 at 2-3 (*see* Addendum, Tab H); 14344, Ex. 534.] The Special Master used the same counsel as did the plaintiff and her husband to negotiate and draft the agreement. [R. 9379; 14344, Ex. 534.]

The Master Settlement Agreement released plaintiff Jau-Fei Chen, her husband, and their allies of all conceivable claims that E. Excel had against them. [R. 14344, Ex. 534 at ¶ 4.1(a).] It settled with prejudice all of E. Excel's litigation other than the action below, including a Hong Kong derivative action against the plaintiff, her husband, and their allies

regarding their embezzlement of approximately \$75 million of E. Excel revenue.⁴ [*Id.* at ¶ 4.1.]

The Master Settlement Agreement also restructured E. Excel by giving almost all its business to plaintiff Jau-Fei Chen, her husband, and their allies. [*Id.* at ¶¶ 3.1, 3.2.] Under the Master Settlement Agreement, the Territorial Owners (which are affiliated with the plaintiff and her husband) have the right to manufacture and obtain E. Excel products using their own manufacturer, Extra Excellence (or its contract manufacturers). [*Id.* at Sch. 5 (¶ 3); Sch. 8 (¶ 4.1); R. 14222 at 99-102, 141, 164; 14235 at 42-44, 48.] By giving the Territorial Owners the right to obtain E. Excel product from their own manufacturer, the Special Master divested E. Excel of its sales to the historic Territorial Owners, the historic source of over 90% of its revenues.⁵ [R. 14265 at 174-76; 14318 at 54 (¶ 159); 14342, Ex. 280 at 4.]

⁴ The embezzlement was by means of a double invoicing scheme that involved E. Excel Limited, a Hong Kong company controlled by the plaintiff, her husband, and her husband's family. [R. 1255-1866.] When Territorial Owners ordered E. Excel products, E. Excel employees created two invoices. [*Id.*] The lower invoice, which was on E. Excel letterhead, was used for shipping and customs purposes. [*Id.*] The higher invoice, which was typically 2-3 times higher and on E. Excel Limited letterhead, was submitted to the Territorial Owners for payment to E. Excel Limited. [*Id.*] E. Excel Limited only paid to E. Excel the amount of the lower invoice. [*Id.*] A different variation of this scheme was used in Taiwan. [*Id.*]

⁵ In return, the Special Master agreed that E. Excel would receive a mere 1.5% royalty on the historic Territorial Owners' sales, with a minimum annual royalty of \$500,000, plus a \$2.5 million minimum annual purchase commitment of E. Excel products made by E. Excel. [R. 14344, Ex. 534 at Sch. 8 (¶¶ 5.2, 5.4, 5.5).] This guaranteed amount equaled a mere 5-10% of E. Excel's historical Asian revenues. [R. 14265 at 174-76; 14267 at 44.]

As acknowledged by Judge Howard and the Special Master, the Master Settlement Agreement could not have been approved by E. Excel. [R. 14844 (*see* Addendum, Tab R).] Plaintiff Jau-Fei Chen and her husband – who comprised 2/3 of the E. Excel Board and controlled 3/4 of its outstanding stock at the time – were parties to and the direct beneficiaries of the Agreement. [R. 14344, Ex. 534.] There was no disinterested board or shareholder constituency available to approve the Agreement. [R. 630-31 at ¶ 3; 7957.] Moreover, by the Special Master’s own admissions, the Agreement would have a “devastating impact” on and “severely damage” E. Excel. [R. 14270 at 31; 14324, Holman Aff. at 3 (¶¶ 3-4).]

Consequently, the Special Master, relying on his position as a special master, recommended and requested that Judge Howard approve the Master Settlement Agreement as an exercise of the Special Master’s “best business judgment.” [R. 14300 at 25 (*see* Addendum, Tab H).] The Special Master’s recommendation and request was made in “his capacity as Special Master” under Rule 53(e)(2), and was set forth in his “Report No. 3 of Special Master” to Judge Howard, which stated:

The Special Master has concluded in his best business judgment that the only logical course to [restore value to E. Excel] is through the Master Settlement Agreement, and recommends its approval by the Court.

[*Id.*; R. 1885; 2033 at ¶ 1; 2721.]

At the Special Master’s request and over objection, Judge Howard approved the Master Settlement Agreement by a June 1, 2001 “Order on Motion by Special Master.” [R. 2032-33 at ¶¶ 3-4 (*see* Addendum, Tab I); 14239 at 19-23, 75-82.] Judge Howard approved

the Master Settlement Agreement as an exercise of the Special Master's business judgment, stating in the June 1, 2001 Order that **"this Court accepts the conclusion of the business judgment made by the Special Master . . ."** [R. 2033 at ¶ 3 (emphasis added).] The June 1, 2001 Order authorized the Special Master to enter into and effectuate the Master Settlement Agreement terms. [R. 2032 at ¶ 4.]

4. The Special Master Orchestrated A Freeze-Out Merger That Eliminated Defendant Jau-Hwa Stewart As An E. Excel Shareholder

In July and August 2002, the Special Master orchestrated a freeze-out merger that eliminated defendant Jau-Hwa Stewart as an E. Excel shareholder for the benefit of plaintiff Jau-Fei Chen, her husband, and their allies.⁶ [R. 14320, Memo., Ex. 1; 14324, Holman Aff.]

The Special Master presented the proposal for the freeze-out merger to the E. Excel Board (which by then consisted of only the plaintiff and her husband), which approved the proposal. [R. 14320, Memo., Ex. 1 at 014-020.] The Special Master signed the merger agreement, dated August 13, 2002, for both E. Excel and the acquisition company. [*Id.* at 010-012.] The Special Master signed and issued the August 14, 2002 notice for the E. Excel shareholders' meeting that was required to approve the merger. [*Id.* at 02-03.] The Special Master placed the value of Ms. Stewart's eliminated 25% outstanding shareholder interest in E. Excel at a mere \$75,000, even though E. Excel's revenues in the first eight months of

⁶ Pursuant to the freeze-out merger, E. Excel was merged into an acquisition company with plaintiff Jau-Fei Chen and her children owning 100% of the outstanding shares of the acquisition company, which then changed its name to E. Excel. [R. 14320, Memo., Ex. 1 at 010 (¶¶ 2(a), 2(c)).]

2000 were \$20 million, reflecting the negative impact of the Master Settlement Agreement.

[*Id.* at 06 (¶ 2(a)(ii)).]

Coordinating with the Special Master, plaintiff Jau-Fei Chen obtained an order from Judge Howard, dated August 12, 2002, that repealed the Interim Order's ban of E. Excel shareholders' meetings. [R. 630 at ¶ 4; 7954.] The repeal allowed the plaintiff to vote the E. Excel shares she controlled – 75% of the outstanding shares – in favor of the freeze-out merger. [R. 7957.] On August 26, 2002, Judge Davis denied defendant Jau-Hwa Stewart's motion for a TRO to stop the shareholders' meeting at which the plaintiff voted for the freeze-out merger. [R. 14270 at 50-51; 14320, Mtn.] The Special Master supported the plaintiff's opposition to Ms. Stewart's motion for a TRO with an affidavit, in which the Special Master stated that the freeze-out merger was at the Territorial Owners' insistence. [R. 14324, Holman Aff.]

5. The Special Master Unquestionably Participated As An Active Party Litigant In The Action Below As A Special Master And Continues To Participate As An Active Party Litigant, Including In This Appeal

Filing after filing, appearance after appearance, and order after order graphically demonstrate that the Special Master was empowered to exercise the powers of an active party litigant, participated as an active party litigant in the action below, and continues to participate as an active party litigant. Judge Howard and the Special Master have consistently and uniformly recognized that the Special Master was and is acting as a Rule 53 special master:

- Jones Waldo filed a notice of appearance for the Special Master, expressly appeared for the Special Master at the Rule 26(f) Attorney's Planning Meeting, and expressly appeared as counsel for the Special Master in 82% of its first 160 filings in the case. [R. 751; 2162-63; *see* Addendum, Tabs F, S.] The Special Master participates as an active party litigant both directly and through E. Excel. [*E.g.*, R. 1886; 2139; 2177; 2199; 2253; 2576; 2631; 5991; 14314.]

- The Special Master directed and authorized E. Excel to file the Amended Third Party Complaint against defendant Jau-Hwa Stewart, Hwan Lan Chen, and the other third-party defendants. [R. 4205 at ¶ 3 (*see* Addendum, Tab K).] Paragraph 3 of the Special Master/E. Excel's Amended Third Party Complaint expressly alleges the Special Master's participation as a party litigant:

After commencing an investigation of [E. Excel's] finances and operations, **Special Master Holman has determined that E. Excel should initiate litigation against the cross-defendant, Jau-Hwa Stewart, and the third party defendants [including Hwan Lan Chen]**

[*Id.* (emphasis added).] Jones Waldo filed the Amended Third Party Complaint expressly as counsel for the Special Master and E. Excel. [R. 4172; 4214.]

- Jones Waldo issued and filed summonses expressly as counsel for the Special Master and E. Excel. [*E.g.*, R. 2746-58; 4345-48; 4493.] Jones Waldo served and filed innumerable discovery requests expressly as counsel for the Special Master and E. Excel. [*E.g.*, R. 4250-53; 4305-11; 4427-31; 4451-80.] Jones Waldo issued trial subpoenas in connection with the combined Preliminary Injunction/Contempt proceeding expressly as counsel for the Special Master and E. Excel. [*E.g.*, R. 4796; 4801.]

- The Special Master expressly acknowledged to Judge Howard that he is a judicial officer. At a March 26, 2001 hearing, Mr. Hoog on behalf of the Special Master raised the issue of the Special Master's intent to engage in ex parte communications with regard to the negotiation of the Master Settlement Agreement. [R. 14236 at 70-71 (*see* Addendum, Tab E).] Mr. Hoog stated:

Your Honor, it's an ethical [issue] . . . **[Mr. Holman] is the Special Master . . . [H]e is bound by the [Rules of] Judicial Conduct as a Special Master. And as the Special Master he has to follow the duties of the Judge.** . . . And one such duty, he is prohibited from having ex parte communication[s] . . . [Mr. Holman] wants to make it clear for every one that . . . in fact he has met, and the parties by their participation, he is meeting with every one on an ex parte basis and separately to conduct his business. At the same time, as a Special Master he has contemplated that he is free to have open communication with the Court, without the participation of the parties, because **he is, in effect, is a Judge and is the Judge's representative.**

[*Id.* (emphasis added).] Counsel for the plaintiff responded that "Mr. Holman is a Special Master and we acknowledge his authority and his capacity with the Court." [*Id.* at 73.] Although defendant Jau-Hwa Stewart did not object to the Special Master's intent to have ex parte communications, she expressly reserved the right to object in the future and have the communications stopped. [*Id.* at 72.]

- The Special Master testified as a special master in the combined proceeding against Hwan Lan Chen. [R. 14256 at 77-143.] During the Special Master's testimony, his counsel acknowledged that "the basis for [the Special Master's] power came from the Court's order empowering him as the special master." [R. 14267 at 17.]

- Jones Waldo sought a partial protective order with respect to the Special Master's deposition on the ground that, as a judicial officer, his mental processes were protected from discovery. [R. 2721.]

- Judge Howard, referring to the Master Settlement Agreement as the "Master's Settlement Agreement," dismissed derivative claims against the plaintiff, her husband, and their allies on the basis that the Special Master, in entering into his "Master's Settlement Agreement," had acted as an "independent decision maker" under Utah Code § 16-10a-740 – a role no CEO can occupy – and had determined that the claims were not in E. Excel's best interest. [R. 14846-47 (*see* Addendum, Tab R).]

- The Special Master was admittedly "**PARTISAN**" and submitted "**CLEARLY PARTISAN**" Reports under Rule 53, which were used against Hwan Lan Chen. The Special Master submitted five Reports to Judge Howard pertaining to the litigation, which Judge Howard adopted or "received" verbatim to make them part of the record and which were subsequently cited in findings that supported the grant of the Preliminary Injunction. [R. 2033 at ¶ 2; 2043; 2294; 2953; 14297; 14298; 14300; 14302; 14309-10; 14317 at 47-48 (¶¶ 71-72), 109-117 (¶¶ 187-90, 192-93); 14318 at 89 (¶ 258).] The Reports were submitted by the Special Master in "his capacity as Special Master" under Rule 53 and made recommendations under Rule 53(e)(2), including the Special Master's request for the May 11, 2001 Order and for approval of the Master Settlement Agreement. [R. 1885; 2033 at ¶ 1; 2721; 14298 at 2; 14300 at 25.] Even though the Reports were submitted by a special

master, the Special Master/E. Excel's counsel told Judge Howard during the January 10, 2003 hearing that:

[T]he Special Master's reports . . . **were clearly partisan reports by Mr. Holman. . . . I just want to be clear for the record. To the extent that I said Mr. Holman was partisan, I stand by that.**

[R. 14287 at 117, 125 (emphasis added).]

- In September 2002 and onward, the Special Master was identifying himself to the world on E. Excel's website as the trial court's "independent Special Master" who allegedly had been appointed "[a]s a result of the wrongful conduct of Mrs. Jau-Hwa Stewart." [R. 11380.]

- In September 2002, the Special Master/E. Excel moved for contempt against Hwan Lan Chen and the other third-party defendants – seeking Hwan Lan Chen's default on the Special Master/E. Excel's claims allegedly worth \$17 million – on the assertion that they should be subject to the same sanction as was defendant Jau-Hwa Stewart under the Contempt Ruling. [R. 8943.] The Special Master/E. Excel asserted that its claims against Hwan Lan Chen should proceed directly to damages based on the Preliminary Injunction and Contempt findings, rather than allow her a trial on the issue of her liability. [*Id.*] The contempt motion remains pending, subject to this Court's stay of all proceedings below.

- Judge Howard never denied any – not one – of the Special Master's significant motions, requests, or recommendations. [*E.g.*, R. 762; 2034; 8167; 9145.]

- The Special Master has neither resigned his appointment as a special master nor ceded any of his powers. Jones Waldo has never filed a withdrawal of appearance for

the Special Master. In late August 2002, the Special Master submitted an affidavit as a party litigant in which he stated that he “continue[s] to serve” as both Special Master and CEO of E. Excel. [R. 14324, Holman Aff. at ¶ 1.] The Special Master still directs and controls E. Excel’s participation in this case. [*Id.*; R. 8673 at ¶ 6.]

6. The Special Master Obtained The Preliminary Injunction As An Active Party Litigant In The Action Below

Judge Howard granted the Preliminary Injunction against Hwan Lan Chen based on the Special Master’s participation as an active party litigant in the action.

The Preliminary Injunction was entered on the Special Master/E. Excel’s October 25, 2001 Motion for Preliminary Injunction and was based on the Special Master/E. Excel’s claims asserted in the Amended Third Party Complaint. [R. 3721; 4214 (*see* Addendum, Tabs J, K).] The Motion for Preliminary Injunction was filed by Jones Waldo expressly as counsel for the Special Master and E. Excel. [R. 3721; 3719.] Jones Waldo expressly appeared on behalf of the Special Master in the combined Preliminary Injunction/Contempt proceeding. [R. 14244 at 5; *see* Addendum, Tab T.] The Special Master testified in the combined proceeding against Hwan Lan Chen. [R. 14256 at 77-143.]

The Preliminary Injunction was based, in part, on the testimony and Reports of the Special Master. Ten of the Preliminary Injunction findings are based on the testimony of the Special Master, which typically was cited as the determinative evidence. [R. 14318 at 52-56 (¶¶ 153-54, 156-61), 68 (¶ 205), 79 (¶ 236).] Eight of the Contempt findings (which were incorporated by reference into the Preliminary Injunction findings) are based on the Special Master’s Reports, which had been submitted in “his capacity as Special Master.” [R. 2721;

14317 at 47-48 (¶¶ 71-72), 109-117 (¶¶ 187-90, 192-93); 14318 at 89 (¶ 258).] The Contempt findings quote, verbatim and at length, from the Special Master's Reports Nos. 3 and 4. [R. 14317 at 109-17 (¶¶ 187, 190, 193).]

B. The Preliminary Injunction Ruling Violated Hwan Lan Chen's Constitutional Right To Due Process Of Law

In addition to being the product of the Special Master's unlawful exercise of the powers of an active party litigant, the Preliminary Injunction was granted without due process to Hwan Lan Chen.

The Preliminary Injunction was granted against Hwan Lan Chen based on 18 days of evidentiary hearings that were conducted before she was made a party to the action and without notice to her. [R. 3718; 5000; 5333; 14317 at 4.] The January 19, 23 and 24, February 1, 2, 7, 8, 9, 13 and 20, October 25 and 26, November 27 and 28, and December 10, 11, 12 and 13, 2001 evidentiary hearings on which the Preliminary Injunction and Contempt findings were based were held before Hwan Lan Chen was made a party and without notice to her.⁷ [R. 14221-223; 14226; 14228; 14230-235; 14244-250; 14252; 14293-95; 14317 at 4.] Ten of those evidentiary hearings – the January and February 2001 hearings – were held almost a year before Hwan Lan Chen was even named as a party. [R. 4214.]

During the 18 days of evidentiary hearings that were conducted without Hwan Lan Chen, **50% of the total testimony and 42% of the total exhibits cited in the Preliminary**

⁷ Hwan Lan Chen first made an appearance in the case on December 17, 2001, after counsel stated on December 12, 2001 that he would be appearing for her. [R. 5000; 14284 at 182.] She was not served summons until January 15, 2002, when her counsel accepted service on her behalf. [R. 5333.]

Injunction findings were admitted into evidence. [See Addendum, Tab U.] During those 18 days of evidentiary hearings, 80% of the testimony and 72% of the exhibits cited in the Contempt findings (which were incorporated by reference into the Preliminary Injunction findings) were admitted into evidence. [*Id.*]

The Preliminary Injunction was granted against Hwan Lan Chen even though, between the time counsel stated he would be appearing for Hwan Lan Chen and the time he actually made that appearance, the Special Master/E. Excel's counsel told Judge Howard at the December 13, 2001 evidentiary hearing that he was not "seeking injunctive relief against [Hwan Lan] Chen" at that time, claiming "we would like to do some more discovery with respect to her." [R. 14249 at 180-81 (*see* Addendum, Tab L).] The Special Master/E. Excel did not serve its Motion for Preliminary Injunction on Hwan Lan Chen, and Judge Howard ordered that the Motion would be heard with the pending Contempt motions without notice to Hwan Lan Chen. [R. 3718; 14243 at 64.] In fact, as late as May 8, 2002, Judge Howard did not have an understanding that the Special Master/E. Excel was seeking injunctive relief against Hwan Lan Chen. [R. 14264 at 96.]

C. Judge Howard's January 24, 2003 Ruling Merely Attempted to Justify The Special Master's Unlawful Empowerment and Actions

Judge Howard, in his January 24, 2003 Ruling on Hwan Lan Chen's Motion to Vacate and Set Aside, attempted to justify the Special Master's unlawful empowerment and actions by accepting virtually every argument made by the Special Master/E. Excel.

On October 24, 2002, within ten days of the entry of the Preliminary Injunction, Hwan Lan Chen filed her Motion to Vacate and Set Aside Judge Howard's orders relating to the

Special Master's appointment, empowerment, and actions. [R. 9238.] Judge Howard denied the Motion to Vacate and Set Aside in his January 24, 2003 Ruling (*see* Addendum, Tab B) on multiple grounds that were contrary to the record:

1. Judge Howard Erroneously Ruled That Rule 53 Does Not Limit A Special Master To Judicial Powers. Judge Howard ruled that the Special Master had not exceeded "the parameters of Rule 53(c)." [R. 12765.] Judge Howard ruled that Rule 53 does not limit a special master to judicial powers, and made no attempt to analyze whether the Special Master's empowerment and exercise of the powers of a CEO, party litigant, and master claims settler were lawful. [R. 12764-65.]

2. Judge Howard Ruled, Contrary To The Record, That Hwan Lan Chen Was Bound By An Alleged Stipulation to the Special Master's Appointment. Judge Howard ruled that Hwan Lan Chen was bound by the alleged "lawful and binding" stipulation between the plaintiff, the defendant, and E. Excel that "Mr. Holman would act as CEO/President of E. Excel and as special master." [R. 12764.]

He so ruled even though Hwan Lan Chen never entered into any such stipulation. She was not even a party to the action when the Special Master was appointed and empowered. [R. 704; 4214.] In fact, no party ever stipulated or agreed to the Special Master's appointment. There was absolutely no stipulation or agreement to the appointment of a special master or Mr. Holman's appointment as Special Master and CEO. Judge Howard's March 5, 2001 ruling that Mr. Holman would have "master status" – the first reference to a special master by Judge Howard – was not the result of a stipulation, but was solely based

on a request by plaintiff Jau-Fei Chen's counsel. [R. 14274 at 7, 20-21 (*see* Addendum, Tab C).] The March 13, 2001 Order appointing the Special Master was not a stipulated order. [R. 704.] The Interim Order did not even mention a "special master," much less constitute an agreement to the appointment of the Special Master. [R. 626-32.] Instead, the Interim Order provided for the appointment of only an "independent, neutral" interim CEO, who would be limited to maintaining E. Excel as a putative party defendant. [*Id.* at ¶¶ 1, 9.]

3. Judge Howard Ruled, Contrary To The Record, That Hwan Lan Chen's Challenge Was Waivable And Had Been Waived. Judge Howard ruled that Hwan Lan Chen's challenge to the Special Master's unlawful empowerment and actions was "barred by the doctrine of waiver." [R. 12761.]

He so ruled even though Hwan Lan Chen challenged the Special Master's empowerment and actions as being in excess of Judge Howard's and the Special Master's jurisdiction. She did not challenge the Special Master's empowerment and actions on any claim that he was erroneously empowered with or exercised judicial power. [R. 9238.]

Judge Howard ruled that Hwan Lan Chen had waived her challenge even though she was not a party when the Special Master was appointed and took most of his actions, once she became a party she timely filed her Motion to Vacate and Set Aside within the ten-day time period allowed by Utah Rule of Civil Procedure 52(b) for challenging findings, and the Special Master continues to exercise non-judicial powers as a special master. [R. 704; 4214; 9145; 9238; 14324, Holman Aff. at ¶ 1.]

4. Judge Howard Ruled, Contrary To The Record, That Hwan Lan Chen Lacked Standing On The Basis That She Allegedly Is Not An Owner Of E. Excel. Judge Howard ruled that Hwan Lan Chen lacked standing to challenge the Special Master's unlawful empowerment and actions. [R. 12756-57.] Judge Howard never considered Hwan Lan Chen's standing as a party litigant, even though the Special Master conceded her standing as a party litigant. [R. 14287 at 109.] Instead, he ruled that she lacked standing on the basis that Hwan Lan Chen allegedly is not an owner of E. Excel. [R. 12757.] Judge Howard asserted that he had already "determined the ownership interests of E. Excel" with his August 12, 2002 Ruling on plaintiff Jau-Fei Chen's "Motion for Partial Summary Judgment Regarding Stock Ownership" and that his determination did "not include any ownership interest by" Hwan Lan Chen.⁸ [*Id.*]

Judge Howard ruled that Hwan Lan Chen lacked standing even though Hwan Lan Chen has been substantially aggrieved as a party litigant as a direct result of the Special Master's unlawful empowerment and action. The Special Master's empowerment and actions as an active party litigant are the foundation of Hwan Lan Chen's joinder as a party to the litigation and the Preliminary Injunction against her, and is the basis for the Special Master's pending efforts to hold her in contempt and strike her pleadings. [R. 3721; 4205 at ¶ 3; 8943; 9145.] The Special Master alleges this in his Amended Third Party Complaint:

⁸ Judge Howard also asserted that Hwan Lan Chen had "failed to file compulsory or affirmative claims to assert her ownership in E. Excel." [R. 12756.] He so ruled even though plaintiff Jau-Fei Chen has never asserted any claims against Hwan Lan Chen, as necessary for Hwan Lan Chen to have any compulsion to file any counterclaim. [R. 24.]

“Special Master Holman has determined that E. Excel should initiate litigation against . . . the third party defendants” [R. 4205 at ¶ 3.]

Judge Howard ruled that Hwan Lan Chen lacked standing on the basis that she allegedly is not an E. Excel owner even though Hwan Lan Chen alleges and has sworn in interrogatory answers that she is the principal owner of E. Excel and standing is based on allegations alone. [R. 9256; 14287 at 89, 92; 14332, Reply Memo. at Ex. B (Interr. No. 5) (*see* Addendum, Tab M).] Without Judge Howard’s orders with respect to the Special Master’s empowerment and actions, Hwan Lan Chen’s principal ownership interest in E. Excel would not have been impacted by the Master Settlement Agreement, the cost of the Special Master acting as an active party litigant, or the freeze-out merger. [R. 2032-33 at ¶¶ 3-4; 8674; 8770; 14300 at 2-3, 25; 14318 at 54-55 (¶¶ 159-60); 14320 Memo. at Ex. 1.]

Judge Howard rejected Hwan Lan Chen’s claim to principal ownership of E. Excel on the basis that he already had adjudicated the stock ownership of E. Excel with his August 12, 2002 Ruling, even though no claim to which she is a party and which was directed at her claim of principal ownership of E. Excel (neither a claim, counterclaim, cross-claim, nor third-party claim) has been asserted by pleading in the case. [R. 24; 4214.] Instead, Hwan Lan Chen has asserted by pleading her claim to principal ownership of E. Excel against her daughters Jau-Fei Chen and Jau-Hwa Stewart in a separate case, Civil No. 020405767, currently pending in the Fourth Judicial District Court. [R. 14287 at 89, 92.] Judge Howard was provided a copy of Hwan Lan Chen’s complaint in that separate case, but still asserted that Hwan Lan Chen had failed to assert her claim. [*Id.*; R. 12756.]

Hwan Lan Chen's claim to principal ownership is not based on the issued stock of E. Excel, but – as recognized by Judge Howard – is primarily an equitable, beneficial claim of ownership. [R. 12756.] Such ownership arrangements are common with traditional Chinese families such as the Chen family and are supported by law. *See, e.g.,* Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 Stan. L. Rev. 1599 (2000). Plaintiff Jau-Fei Chen testified that E. Excel profits were shared without regard to issued stock, with deference to the family elders. [R. 14230 at 13-14.] Judge Howard found that E. Excel was a family business as to which profits were shared by family members, with deference to senior family members. [R. 14317 at 5-6 (¶ 1).]

Judge Howard rejected Hwan Lan Chen's claim to principal ownership of E. Excel on the basis of his August 12, 2002 Order, even though that Order was entered on plaintiff Jau-Fei Chen's motion for summary judgment on her fourth claim for relief against only defendant Jau-Hwa Stewart. [R. 6449; 7959.] The plaintiff's fourth claim for relief alleged only that her children's E. Excel shares were not held in trust and that "any purported voting or action taken with respect to such shares by Jau-Hwa Stewart as a purported trustee is void." [R. 6448.] Reflecting the limited nature of the plaintiff's motion, the August 12, 2002 Order was limited to stating the ownership of the outstanding shares of E. Excel and deciding that trust issue.⁹ [R. 7959.]

⁹ Judge Howard also expressly noted the limited nature of his ruling on the partial summary judgment motion at the June 26, 2002 hearing on the motion. [R. 14276 at 123-24 (continued...)]

Moreover, the August 12, 2002 Order was entered **after** the parties and Judge Howard had notice of Hwan Lan Chen's ownership claim, but never mentions her claim. Judge Howard had expressly preserved Hwan Lan Chen's claim of an interest in E. Excel in the Interim Order. [R. 628-29 at ¶ 8 ("Hwan Lan Chen claims to have advanced 3 million dollars to the Company . . . The Parties reserve all rights with respect to this issue.").] Well prior to the August 12, 2002 Order, Hwan Lan Chen had identified in interrogatory responses her claim to "beneficial" ownership of E. Excel, and Judge Howard had heard the plaintiff's testimony regarding the Chen elders' prerogative as to E. Excel's profits. [R. 14230 at 13-14; 14332, Reply Memo. at Ex. B (Interr. No. 5) (*see* Addendum, Tab M).]

5. Judge Howard Ruled, Contrary To The Record, That Any Error Was Harmless Error. Judge Howard ruled that, even if the Special Master's empowerment and actions were error, it was **harmless error** on the claimed basis that the Preliminary Injunction was based only in small part on the participation of the Special Master. [R. 12760.]

Judge Howard attempted to bolster his harmless error ruling by altering the record regarding his reliance upon the Special Master's "clearly partisan" Reports. [*Id.*] The Contempt findings cited to and quoted extensively from the Special Master's Reports, and had been expressly incorporated by reference into the Preliminary Injunction findings. [R. 14317 at 47-48 (¶¶ 71-72), 109-117 (¶¶ 187-90, 192-93); 14318 at 89 (¶ 258).] At the

⁹(...continued)

("For that reason, the motion for partial summary judgment is granted as to the status of the stock and as to Ms. Stewart's conduct thereafter in an attempt to reissue the stock shares. But only to that extent.".)]

January 10, 2003 hearing, the Special Master/E. Excel asked Judge Howard to **undo** that express incorporation, even though it was the Special Master/E. Excel who had requested the incorporation. [R. 14287 at 74; 14316 at 90 (¶ 258).] In his January 24, 2003 Ruling, Judge Howard acceded to the Special Master/E. Excel's request, and ruled, "as a matter of clarification," that the Contempt and Preliminary Injunction findings "stand independent of each other" and that the Preliminary Injunction findings' express incorporation by reference of the Contempt findings "was not essential." [R. 12760.]

Judge Howard ruled that any error was harmless error even though the Special Master alone joined Hwan Lan Chen and sought and obtained relief against her and remains an adverse active party litigant. [R. 3721; 4205 at ¶ 3; 9145.] The Special Master restructured E. Excel's business, released its valuable claims, and settled its litigation. [R. 14344, Ex. 534.] The Special Master attempted to cede complete ownership of E. Excel's outstanding stock to plaintiff Jau-Fei Chen and her children. [R. 14320, Memo. at Ex. 1.] He submitted "clearly partisan" reports that became part of the record and were used to support findings that supported the Preliminary Injunction. [R. 14287 at 117, 125; 14318 at 89 (¶ 258).] Judge Howard ruled that the Special Master's unlawful empowerment and actions were harmless error even though he never denied any significant order, power, or finding that the Special Master put forth. [E.g., R. 762; 2034; 8167; 9145; 14316.]

In sum, in his January 24, 2003 Ruling, Judge Howard, contrary to the record, summarily adopted the Special Master/E. Excel's opposition arguments to the Motion to

Vacate and Set Aside in an attempt to justify the Special Master's unlawful empowerment and actions.

D. The Scope Of The Preliminary Injunction Is Facially Invalid Because It Enjoins Hwan Lan Chen From All Competition With E. Excel And All Competition In Several Entire Industries Worldwide

The scope of the Preliminary Injunction is facially unlawful. It invalidly enjoins Hwan Lan Chen from all competition with E. Excel and all competition in the entire herbal, dietary, hygiene, cosmetic, and personal care product industries worldwide.

The Special Master/E. Excel moved for a preliminary injunction to prevent competition with E. Excel indefinitely rather than to enforce any non-compete agreement. The Special Master/E. Excel moved to enjoin Hwan Lan Chen, Jau-Hwa Stewart, and the other third-party defendants from "competing with E. Excel in any manner until such time as E. Excel has completely rebuilt its business" [R. 3720 (*see* Addendum, Tab J).]

The Preliminary Injunction not only completely enjoins Hwan Lan Chen from all competition with E. Excel, it also enjoins her from all competition in several entire industries worldwide. In its main prohibitive provision, the Preliminary Injunction provides:

Jau-Hwa Stewart, [Hwan Lan Chen, and the other] Third-Party Defendants . . . are hereby **enjoined from competing, or preparing to compete with E. Excel or otherwise engaging or preparing to engage in the worldwide manufacture or marketing of herbal and dietary consumer products, and personal care, cosmetic, or hygiene products.**

[R. 9140 at ¶ 13 (emphasis added) (*see* Addendum, Tab P).] The Order of Preliminary Injunction limits the duration of the Preliminary Injunction as to Hwan Lan Chen to the

duration of the action below, but expressly leaves open the possibility of its being extended indefinitely. [R. 9138 at ¶ 19.]

Judge Howard so enjoined Hwan Lan Chen even though she had no continuing duty not to compete with E. Excel. There is no evidence that Hwan Lan Chen was ever a party to a non-compete agreement with E. Excel. Hwan Lan Chen was never an officer or employee of E. Excel and was never at E. Excel's facilities during the relevant time period. Moreover, even though Hwan Lan Chen was a director of E. Excel, her directorship ended on February 21, 2001. [R. 630-31 at ¶ 3.]

Judge Howard so enjoined Hwan Lan Chen even though he made no finding of any **continuing** irreparable harm, E. Excel does not compete worldwide or in the entire dietary, herbal, cosmetic, hygiene, or personal care product industries, and there is no basis for the duration of the Preliminary Injunction.¹⁰ [R. 14317 at 8 (¶ 10); 14318 at 108-09 (¶¶ 75-79).] An entire year passed between the Special Master/E. Excel's Motion for Preliminary Injunction and Judge Howard's entry of the Preliminary Injunction, almost a year has passed since the entry of the Preliminary Injunction, and, unless vacated, the Preliminary Injunction will be in place for well over an additional year as the case proceeds. [R. 3721; 9138 at ¶ 19.] The Preliminary Injunction has such duration even though E. Excel's standard non-

¹⁰ The Preliminary Injunction findings determined only that there was **past** irreparable harm. [R. 14318 at 108 (¶ 75) (*see* Addendum, Tab N) ("E. Excel **has been** irreparably harmed by the conduct of Jau-Hwa Stewart and the Third-Party Defendants.") (emphasis added).]

compete agreement with its employees is limited to one-year's duration. [R. 14341, Ex. 238 (Ex. A, ¶ 5.3), Ex. 246 (Ex. C, ¶ 5.3); 14344, Ex. 505 (¶ 5.3), Ex. 506 (¶ 5.3).]

E. The Special Master/E. Excel Never Established A Prima Facie Case On The Key Predicate Findings Against Hwan Lan Chen, In Support Of The Preliminary Injunction, That She Was A Crook, Conspirator, And Corporate Wrongdoer

E. Excel failed to establish a prima facie case, as required, on the key predicate findings that Hwan Lan Chen was a crook, conspirator, and corporate wrongdoer which serve as the basis for the Preliminary Injunction.

1. The Key Predicate Findings Against Hwan Lan Chen. The Preliminary Injunction was granted on the key predicate findings that Hwan Lan Chen is a crook, conspirator, and corporate wrongdoer (*see* Addendum, Tab N):

(1) The Preliminary Injunction findings determined that: (a) Hwan Lan Chen was associated with a criminal “enterprise” under UPUAA; (b) the “enterprise” consisted of an association of Hwan Lan Chen, Jau-Hwa Stewart and the other third-party defendants, and included activities with respect to Apogee, Inc.; and (c) the association engaged in a “pattern of unlawful activity” under UPUAA.¹¹ [R. 14318 at 102-03 (¶¶ 50-52).] There are **no findings** that Hwan Lan Chen (or any other defendant) funded, acquired, or controlled an

¹¹ The Preliminary Injunction findings determined that the association engaged in the “unlawful” or predicate acts of: (1) theft of E. Excel’s products, files and other assets, (2) receiving of stolen property consisting of the same property, (3) unlawful dealing of the same property by a fiduciary, (4) making false or inconsistent statements, (5) making false written statements, and (6) dealing in trademarked goods with intent to defraud. [R. 14318 at 103-06 (¶¶ 53-65).]

“enterprise” through a pattern of unlawful activity so as to have committed a substantive UPUAA violation.

(2) The Preliminary Injunction findings determined that: (a) the association that was a criminal “enterprise” under UPUAA also was a civil conspiracy among the association members, including Hwan Lan Chen; (b) the conspiracy members “have been working toward the object of unlawfully disabling E. Excel in order to enhance their own competitive prospects”; and (c) in furtherance of the conspiracy, the conspirators committed several unlawful overt acts against E. Excel. [R. 14318 at 106-07 (¶ 68).]

(3) The Preliminary Injunction findings determined that Hwan Lan Chen had breached fiduciary duties owed to E. Excel as an E. Excel director by: (a) “cutting off [E. Excel’s] highly successful relationships with its territorial distributors”; (b) causing E. Excel to take other, unspecified actions “that were not done for legitimate business purposes”; (c) seeking to destroy E. Excel; (d) establishing Apogee, Inc. and soliciting E. Excel employees while serving as an E. Excel director; and (e) “crippling E. Excel’s operations at the time of [her] departure.” [R. 14318 at 97, 99 (¶¶ 30, 36).] The Preliminary Injunction findings determined that Hwan Lan Chen had pursued, for her own benefit, unspecified opportunities which should have been E. Excel’s. [R. 14318 at 100 (¶ 40).]

(4) The Preliminary Injunction findings determined that Hwan Lan Chen had engaged in acts of unfair competition consisting of stealing E. Excel’s “product, files, and other items,” and “using those items to compete unfairly with E. Excel.” [R. 14318 at 101 (¶ 43).] The Preliminary Injunction findings also determined that the unfair competition

included distributors in Asia passing off E. Excel product under the Apogee name. [R. 14318 at 68-69, 77 (¶¶ 204, 206, 207, 231).]

2. The Evidence on Which the Preliminary Injunction was Granted Against Hwan Lan Chen. Hwan Lan Chen recognizes her obligation to marshal the evidence upon which the key predicate findings against her were based. That marshaling shows that the Special Master/E. Excel failed to make a prima facie case against Hwan Lan Chen on those findings.

Critically, Hwan Lan Chen is her own person, whose liability must be judged based on her actions and knowledge. Her prima facie liability cannot be established based on the actions and knowledge of others or guilt by association. The wrongful conduct, if any, of defendant Jau-Hwa Stewart or others is not the conduct of Hwan Lan Chen.

It is undisputed that Hwan Lan Chen is a 76-year old widow. She does not read, speak or write English. [R. 9254 at ¶ 1.] It is undisputed that Hwan Lan Chen was never an employee or officer of E. Excel, was never at E. Excel's offices or facilities during the relevant time period, and was never involved in E. Excel's daily management or operations. [R. 14252 at 63.] She never signed a non-compete agreement with E. Excel or participated in E. Excel's business operations, other than serving as a director of E. Excel from September 1, 2000 until February 21, 2001. [R. 631 at ¶ 3.]

There is no evidence of any agreement by Hwan Lan Chen to act in violation of UPUAA or to wrongfully impair E. Excel so as to enhance her ability to compete, or that she ever had any knowledge of the claimed wrongful conduct of others. There is no evidence that she ever funded, acquired, or controlled an "enterprise" through a "pattern of unlawful

activities” in violation of UPUAA. There is no evidence that she committed any of the alleged predicate acts of the alleged UPUAA “enterprise.”

There is no evidence that Hwan Lan Chen ever acted to cripple E. Excel, stole any of its assets, solicited any of its employees while she was an E. Excel director, or even had knowledge of any such conduct. There is no evidence that she used stolen E. Excel products to compete with E. Excel or had knowledge of any such activity. There is no evidence that she in any manner directed, was involved in, or had knowledge of any distribution of E. Excel products under the Apogee name.

A full marshaling of the evidence on which the Preliminary Injunction was granted against Hwan Lan Chen shows that, sometime in the summer of 2000, Hwan Lan Chen learned of her son-in-law’s, Rui-Kang Zhang’s, affair and his diversion of funds belonging to E. Excel to his mistress. [R. 14230 at 7-9; 14245 at 123-24.] There is no question that Mr. Zhang’s mother-in-law strongly disapproved of his conduct. Hwan Lan Chen demanded that her daughter, plaintiff Jau-Fei Chen, divorce Mr. Zhang and remove him from E. Excel so that he no longer could control E. Excel funds. When the plaintiff resisted, Hwan Lan Chen demanded that both she and Mr. Zhang remove themselves from E. Excel. [*Id.*] On September 1, 2000, defendant Jau-Hwa Stewart voted 100% of the shares of E. Excel stock to remove the plaintiff and Mr. Zhang as E. Excel directors and install her mother and Ms. Stewart’s husband, Taig Stewart, in their place. [R. 14338, Ex. 23.]

The evidence shows that Hwan Lan Chen took four – and only four – actions as an E. Excel director. [R. 14338, Exs. 23, 29, 32; R. 14343, Ex. 402).] She voted to remove

plaintiff Jau-Fei Chen and Mr. Zhang as officers of E. Excel and install defendant Jau-Hwa Stewart as the President, twice voted for the issuance of 3,200 new shares of E. Excel stock, and voted to retain Hong Kong counsel for E. Excel to pursue claims there against E. Excel Limited. [*Id.*] The 3,200 shares in fact were not issued. Hwan Lan Chen provided \$3 million of her funds to E. Excel in January 2001. [R. 14247 at 46; 14256 at 134-35.] There was no showing that the \$3 million funding was in any way adverse to E. Excel. There were no other director actions or meetings between September 1, 2000 and February 21, 2001.

The evidence establishes that defendant Jau-Hwa Stewart sent \$2.3 million to Sam Tzu and \$400,000 to Richard Hu (who had defected from the Territorial Owners) in November and December 2000 to help them set up new distributorships **for E. Excel**. [R. 14245 at 78-81; 14247 at 119-21; 14250 at 24.] Ms. Stewart intended that the new distributorships would distribute E. Excel product on behalf of E. Excel in place of the Territorial Owners. [R. 14245 at 24-25, 34-35, 78-81; 14250 at 174; 14293 at 107-08.] Ms. Stewart had cut off the Territorial Owners, which had remained allied with plaintiff Jau-Fei Chen, from obtaining E. Excel products sometime in the fall of 2000. [*Id.*]

There is no question that Hwan Lan Chen was the source of the funds that Ms. Stewart sent to Messrs. Hu and Tsu in November and December 2000. [R. 14245 at 78-81; 14247 at 119-21; 14250 at 24.] However, there is no evidence that Hwan Lan Chen had any involvement with the Territorial Owners being cut off from obtaining E. Excel products.

There is no evidence that Hwan Lan Chen was in any way responsible for or had knowledge of any E. Excel files or product being taken from E. Excel in February 2001 or

kept in the house where she lived along with defendant Jau-Hwa Stewart and Ms. Stewart's husband. Indeed, the house was a very large home – the house has three levels and the basement alone where the E. Excel files and products were kept was 7,000 square feet. [R. 14255 at 25-29.]

Hwan Lan Chen was removed as an E. Excel director on February 21, 2001 pursuant to the Interim Order. [R. 631 at ¶ 3.] After February 21, 2001, she never held any position with E. Excel.

The evidence shows that, after she was removed as an E. Excel director, Hwan Lan Chen was involved in Apogee, Inc., which was formed in May 2001 and intended to compete with E. Excel.¹² [R. 14250 at 37-39; 14255 at 18-21, 111; 14262 at 8-12; 14295 at 36, 44-45.] She funded the acquisition of a 12-acre parcel where Apogee's facility would be built, the construction of that facility, the purchase of equipment for Apogee, and the purchase of some raw materials for Apogee. [R. 14250 at 37-39, 67, 80-82; 14264 at 11-17, 64-65; 14295 at 36-38, 44-45.]

The evidence establishes that Ms. Stewart sent funds to Messrs. Hu and Tsu to help them establish Apogee, Inc. distributorships. [R. 14247 at 158; 14264 at 11-17, 64-65.] This funding was separate from the funding that defendant Jau-Hwa Stewart sent to Messrs. Hu and Tsu in November and December 2000 to help them establish E. Excel distributorships.

¹² Judge Howard entered conflicting findings on whether the idea of forming Apogee, Inc. and/or competing with E. Excel originated with defendant Jau-Hwa Stewart or Hwan Lan Chen. The Contempt findings determined that Ms. Stewart was solely responsible for Apogee, Inc. [R. 14317 at 65 (¶ 99), 99 (¶ 159).] The Preliminary Injunction findings determined that Hwan Lan Chen and Ms. Stewart were responsible. [R. 14318 at 47 (¶ 137).]

The separate funding for Apogee, Inc. purposes occurred after February 21, 2001 – after Hwan Lan Chen was removed as an E. Excel director. [See R. 14245 at 98-100.] There is no question that Hwan Lan Chen was the source of the funds for Ms. Stewart's second funding of Messrs. Hu and Tsu.¹³ [Id.]

There is no showing that any of Hwan Lan Chen's actions with regard to Apogee, Inc. were in any way wrongful. The actions all took place after she had been removed as an E. Excel director and when she had no duty not to compete with E. Excel.

The Preliminary Injunction findings determined that Hwan Lan Chen instructed her oldest daughter, Sheue Wen Smith, to lease space at the ATL warehouse for use to compete with E. Excel on February 17, 2001, five days before Hwan Lan Chen was removed as an E. Excel director. [R. 14318 at 31-33 (¶¶ 81, 83).] This finding is not based on any evidence. The uncontroverted evidence was that Hwan Lan Chen did not instruct Ms. Smith to lease the ATL warehouse. [R. 14257 at 38, 49, 51.] The finding was based on Ms. Smith's unverified Answer to the Amended Third Party Complaint. [R. 14318 at 32-33 (¶ 83).] Regardless, this is the only indication of any intent to compete by Hwan Lan Chen while she was an E. Excel director. There is absolutely no evidence that Hwan Lan Chen was ever at

¹³ The evidence shows that Hwan Lan Chen used a nominee bank account as the source of the funds that she supplied for Apogee, Inc. purposes, as well as the source of the funds that Jau-Hwa Stewart supplied to Messrs. Hu and Tzu in November and December 2000 for E. Excel purposes and the \$3 million that Hwan Lan Chen funded to E. Excel in January 2001. [R. 14247 at 158; 14250 at 24-25; 14256 at 134-35; 14264 at 11-17, 64-65.] However, Hwan Lan Chen readily acknowledged her investment in Apogee, Inc. in her interrogatory responses in the case, her funding of \$3 million to E. Excel was acknowledged in the Interim Order, and there is no evidence that any of the funding was wrongful. [R. 628-29 at ¶ 8; 14332, Reply Memo. at Ex. B (Interr. No. 5).]

the ATL warehouse space, much less involved in or had knowledge of any activities occurring there.

In sum, there is no evidence that Hwan Lan Chen was a conspirator who agreed to pursue an unlawful purpose, that she funded, acquired or controlled an “enterprise” through a “pattern of unlawful conduct” in violation of UPUAA, that she committed any action against E. Excel’s interests while she was an E. Excel director in violation of her fiduciary duties, or that she committed or ever had knowledge of any acts of unfair competition. The marshaling shows only that Hwan Lan Chen acted to remove her daughter from the family business after the daughter remained loyal to her husband despite his affair and diversion of family money, she voted to retain Hong Kong counsel for E. Excel and for a stock issuance that never occurred, she provided \$3 million in funding to E. Excel, she funded new distributorships for E. Excel, and she took actions to become a competitor of E. Excel after she was removed as an E. Excel director when she had absolutely no duty not to compete.

SUMMARY OF ARGUMENT

The Special Master Was Unlawfully Empowered With and Exercised Non-Judicial Powers. The integrity of the proceedings below has been compromised by a dominating Rule 53 special master who was authorized by Judge Howard to act far beyond and in direct conflict with his lawful judicial role under Rule 53, and who has and continues to unlawfully exercise extensive non-judicial powers to the prejudice of Hwan Lan Chen.

A *pendente lite* special master is a judicial officer who can only be empowered with and exercise judicial power. Utah R. Civ. P. 53; *Webster Eisenlohr, Inc. v. Kalodner*, 145

F.2d 316, 319 (3d Cir. 1944); *Plumb*, 809 P.2d at 742-43. A simple but accurate statement of the settled rule is that if a judge can't do it, a special master can't do it. *Webster Eisenlohr*, 145 F.2d at 319. Because a special master is a judicial officer limited to judicial power, a special master is bound by the Code of Judicial Conduct. *Plumb*, 809 P.2d at 743. Orders relating to a special master's empowerment with and exercise of non-judicial powers are entered without authority and must be vacated and set aside. *Webster Eisenlohr*, 145 F.2d at 320; *Plumb*, 809 P.2d at 744.

Under the settled rule regarding a special master's lawful power, Judge Howard's orders relating to the Special Master's appointment, empowerment and actions must be vacated and set aside – the entire pervasive participation of the Special Master in the case must be terminated and reversed. The Special Master, *pendente lite*, was given the powers of a CEO, party litigant, and master claims settler. The Special Master exercised those powers as a special master to: (1) investigate and initiate claims, (2) join Hwan Lan Chen as a party, (3) seek and obtain the Preliminary Injunction against her, (4) bring contempt motions against her that seek her default on claims allegedly worth \$17 million, (5) restructure E. Excel by giving away to plaintiff Jau-Fei Chen, her husband, and their allies 90% of its business, (6) provide comprehensive releases to the plaintiff, her husband, and their allies, (7) settle litigation beyond the case below, (8) eliminate defendant Jau-Hwa Stewart as an E. Excel shareholder for the benefit of the plaintiff, her husband, and their allies, and (9) submit admittedly “clearly partisan” special master reports which were used against Hwan Lan Chen.

Powers of a CEO, active party litigant, and master claims settler are not judicial powers – they are the antithesis of judicial power. *See Webster Eisenlohr*, 145 F.2d at 320. The Special Master could not have lawfully exercised the powers of E. Excel's CEO, active party litigant, or master claims settler any more than Judge Howard lawfully could have. *Id.* As a result, all of Judge Howard's orders relating to the Special Master's appointment, empowerment, and actions must be vacated and set aside, and the case below returned to its status before the blatantly unlawful appointment, empowerment, and actions of the Special Master.

Contrary to Judge Howard's January 24, 2003 Ruling, the Special Master's empowerment with and exercise of patently unlawful non-judicial powers cannot be justified or sheltered by the doctrine of waiver. The waiver doctrine does not allow a judicial officer to cast off the limitations of his or her judicial office and exercise non-judicial powers. Hwan Lan Chen's challenge to the Special Master's empowerment and actions is not subject to waiver because his non-judicial empowerment and actions are fundamentally beyond and in conflict with the lawful Rule 53 subject matter jurisdiction of a special master. They are without lawful authority. *See Cruz v. Hauck*, 515 F.2d 322, 327 (5th Cir. 1975); *Oldroyd v. McCrea*, 235 P. 580, 588 (Utah 1925). Hwan Lan Chen's challenge could not be waived any more that Hwan Lan Chen could have consented to Judge Howard expanding his jurisdiction to exercise the powers of E. Excel's CEO, a party litigant, and a master claims settler.

Hwan Lan Chen, moreover, did not waive her challenge to the Special Master's unlawful empowerment and actions. *See U.S. Realty 86 Assocs. v. Security Inv. Ltd.*, 2002

UT 14, ¶ 16, 40 P.3d 586, 589. Hwan Lan Chen could not have expressly waived her challenge because she was not even a party to the litigation when the Special Master was appointed and empowered. Indeed, no party ever stipulated or agreed to the appointment of a special master, much less to the Special Master's appointment as special master and CEO. The March 13, 2001 Order was not stipulated or agreed to. The Interim Order did not even mention, much less agree to the appointment of, a special master.

Once Hwan Lan Chen was joined as a party she did not explicitly or implicitly waive her challenge. She made her Motion to Vacate and Set Aside within ten days of the entry of the Preliminary Injunction, as required under Utah R. Civ. P. 52(b). Moreover, as a matter of law, the Special Master, not Hwan Lan Chen, had a duty to raise the issue of his unlawful empowerment and pendent conflicts of interest. *See Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 257 n.7 (Utah 1992). Finally, there could be no waiver because the Special Master continues to pursue his unlawful powers. He is here now as a party litigant in this appeal. He has never relinquished his office.

Judge Howard's justification of the Special Master's empowerment and actions in his January 24, 2003 Ruling on the grounds of Hwan Lan Chen's lack of standing was pure error. Judge Howard never considered Hwan Lan Chen's standing as a party litigant. She manifestly has been aggrieved as a party litigant by the Special Master's participation as a party litigant – indeed, the Special Master is solely responsible for her being a party. The Special Master and the plaintiff conceded Hwan Lan Chen's standing as a party litigant.

Judge Howard's ruling that Hwan Lan Chen lacked standing because she was not an E. Excel owner was contrary to the rule that standing is based on allegations alone. *See Davis v. Passam*, 442 U.S. 228, 239 n.18 (1979). This rule required Judge Howard to assume Hwan Lan Chen's ownership to determine her standing, because she alleges and swore in answers to interrogatories that she is an owner. Correctly assuming that she is the principal owner of E. Excel, Hwan Lan Chen manifestly has been aggrieved by the Special Master's unlawful empowerment and actions.

Judge Howard's rejection of Hwan Lan Chen's ownership claim in his January 24, 2003 Ruling on the basis that he already adjudicated the ownership of E. Excel with his August 12, 2002 Order violated the rule that a claim must be pleaded before it can be adjudicated. *See Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733, 735-36 (Utah 1984). Hwan Lan Chen's ownership claim has never been presented by way of any pleading in the action below. The August 12, 2002 Order was entered on and only decided the plaintiff's claim against defendant Jau-Hwa Stewart that she had no authority to vote the plaintiff's children's E. Excel shares under a trust.

Lastly, Judge Howard's justification of the Special Master's unlawful empowerment and actions in his January 24, 2003 Ruling on the grounds of harmless error is untenable. *See Plumb*, 809 P.2d at 744. The pervasive adverse impact of the Special Master's unlawful empowerment and actions was plainly harmful to Hwan Lan Chen. The Court need look no further than paragraph 3 of the Amended Third Party Complaint to see that this is true.

Hwan Lan Chen Was Fundamentally Denied Due Process Under The United States and Utah Constitutions. The Preliminary Injunction was granted against Hwan Lan Chen in fundamental denial of her constitutional right to due process of law. The Preliminary Injunction was granted against Hwan Lan Chen based on 18 days of evidentiary hearings held before she was made a party to the case and provided notice. During those 18 days of evidentiary hearings – when Hwan Lan Chen was unrepresented by counsel, had no opportunity to cross-examine, and had not been served the Motion for Preliminary Injunction – over 50% of the evidence cited in the Preliminary Injunction and Contempt findings was received into evidence.

Hwan Lan Chen manifestly was not provided the notice or opportunity to be heard required by the United States and Utah Constitutions. Hwan Lan Chen's constitutional right to due process of law requires that the evidence used against her be taken **after** she had notice and the opportunity to be heard, **not before**. She had a right to notice, participation as a party, and the opportunity to be heard from the commencement of the proceeding on which the Preliminary Injunction against her was based. *See Plumb*, 809 P.2d at 743; *Salt Lake County v. Murray City Redevelopment*, 598 P.2d 1339, 1345 n.12 (Utah 1979); *Eakins v. Reed*, 710 F.2d 184, 187 (4th Cir. 1983).

The Scope Of The Preliminary Injunction Is Facially Invalid. The Preliminary Injunction is facially invalid in scope because it enjoins Hwan Lan Chen from all competition with E. Excel and from all competition in several entire industries worldwide. Judge Howard could not lawfully enjoin Hwan Lan Chen from any competition with E. Excel because she

had absolutely no continuing duty not to compete with E. Excel. *See Microbiological Research Corp. v. Muna*, 625 P.2d 690, 700 (Utah 1981). She never had a non-compete agreement. She was only a director from September 1, 2000 to February 21, 2001. Enjoining Hwan Lan Chen from all competition in several industries worldwide is unprecedented in American jurisprudence, constitutes involuntary servitude, and in no manner serves to protect any legitimate interest of E. Excel. *See Allen v. Rose Park Pharm.*, 237 P.2d 823, 826 (Utah 1951); *Crane v. Dahle*, 576 P.2d 870, 872-73 (Utah 1978).

Judge Howard's injunction against Hwan Lan Chen was simply an improper sanction rather than preliminary relief to any legally protected interest of E. Excel. *See American Bd. of Psychiatry & Neurology, Inc. v. Johnson-Powell*, 129 F.3d 1, 4 (1st Cir. 1997); *Hunsaker v. Kersh*, 1999 UT 106, ¶ 8, 991 P.2d 67, 69.

The Special Master/E. Excel Never Established A Prima Facie Case That Hwan Lan Chen Was A Crook, Conspirator, Or Corporate Wrongdoer. The Special Master/E. Excel did not even come close to establishing a prima facie case on the key predicate findings against Hwan Lan Chen supporting the Preliminary Injunction. At minimum, a prima facie case is required. *See Keil*, 1999 UT 16 at ¶ 8, 974 P.2d at 822. Yet, there simply is no basis in the evidence for the key predicate findings that Hwan Lan Chen is a crook, conspirator, and corporate wrongdoer.

Hwan Lan Chen has marshaled the evidence on which the Preliminary Injunction was granted against her, as required. That evidence only shows that Hwan Lan Chen acted as a mother, exercised her prerogatives as a matriarch of the Chen family, took limited action as

an E. Excel director, provided funds to E. Excel, and was a potential competitor after she stopped being an E. Excel director. These actions do not make Hwan Lan Chen a crook, conspirator, or corporate wrongdoer. There is no evidence that Hwan Lan Chen agreed to a conspiracy, or committed or even knew about any predicate acts, any thefts, any acts to cripple E. Excel, or any acts of unfair competition.

ARGUMENT

I. JUDGE HOWARD'S ORDERS RELATING TO THE SPECIAL MASTER'S APPOINTMENT, EMPOWERMENT, AND ACTIONS MUST BE VACATED AND SET ASIDE BECAUSE THE SPECIAL MASTER WAS EMPOWERED WITH AND EXERCISED NON-JUDICIAL POWERS THAT ARE BEYOND AND IN DIRECT CONFLICT WITH THE JUDICIAL POWER AUTHORIZED BY RULE 53

A. Judge Howard's Orders Relating To The Special Master's Appointment, Empowerment, and Actions Are Contrary To The Law, Exceed The Power Of A Court And Special Master Under Rule 53, Violate And Are Contrary To The Provisions And Purpose Of Rule 53 And, As A Matter Of Law, Must Be Vacated And Set Aside

In compromise of the integrity of the proceedings below, the Special Master was empowered with, exercised, and continues to exercise extensive non-judicial powers unprecedented in the history of American jurisprudence. With pervasive impact and prejudice, the Special Master was empowered with and exercises powers that are not only far beyond the lawful judicial power of a special master authorized by Rule 53, but which are antithetical to the purpose and exercise of judicial power. All of Judge Howard's unlawful orders relating to the Special Master's appointment, empowerment, and actions must be vacated and set aside under settled, controlling authority. The extensive unlawful

participation of the Special Master in the case must be terminated and the impact of that participation reversed.

1. **A Special Master Is Limited To Judicial Powers Because Rule 53 Does Not Authorize A Judge To Empower A Special Master With Powers That The Judge Does Not Have**

Fundamentally, a *pendente lite* special master is a judicial officer whose lawful authority is limited, the same as a judge's, to the exercise of judicial power. A special master, like a judge, cannot be empowered to exercise the powers of a CEO, party litigant, or master claims settler.

This Court clearly established the rule in *Plumb*. As this Court determined in *Plumb*:

[A] special master has “the duties and obligations of a judicial officer.”
.... We think they are most analogous to commissioners when acting in the performance of their duties. Therefore, they owe similar ethical obligations to the court, the parties, and the public. . . . **[W]e conclude that he or she is . . . bound by the ethical obligations and restraints of a judicial officer.**

809 P.2d at 742-43 (emphasis added) (citations omitted). Under *Plumb*, a special master is a judicial officer who is limited to the exercise of judicial power and who has the obligations of a judge.¹⁴ *Id.* Critically, as held in *Plumb*, a special master cannot be empowered to “fulfill an adversary role.” *Id.* at 743-44.

¹⁴ See also Utah R. Prof. Conduct 1.12 cmt. (“The term ‘adjudicative officer’ includes such officials as judges pro tempore, referees, **special masters**, hearing officers and other parajudicial officers . . .”) (emphasis added).

This is not only the rule in Utah, it is the accepted federal rule as well.¹⁵ *LaBuy v. Howe Leather Co.*, 352 U.S. 249, 256 (1957) (“The use of masters is ‘to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,’ and not to displace the court.” (citations omitted)); *In re Gilbert*, 276 U.S. 6, 9 (1928) (“When respondent accepted the appointment as master he assumed the duties and obligations of a judicial officer.”); *In re Bituminous Coal Operators’ Ass’n*, 949 F.2d 1165, 1168 (D.C. Cir. 1981) (“Rule 53 . . . authorizes the appointment of special masters to *assist*, not to replace, the adjudicator”); *Cruz*, 515 F.2d at 327; 9 *Moore’s Federal Practice*, § 53.11[5][a] (Mathew Bender 3d ed.) (“The Code of Judicial Conduct for United States Judges is applicable to special masters.”).

The decision in *Webster Eisenlohr*, 145 F.2d at 318-20, illustrates the rule. In *Webster Eisenlohr*, the Third Circuit Court of Appeals, on petition for a writ, directed the trial court to vacate and set aside the appointment of a special master whom the trial court had charged with investigating possible claims of corporate wrongdoing with respect to a corporation that was the object of the action before it. *Id.* at 318-20. The court held that, because a judge is limited to the exercise of judicial power – the power to “decide controversies” presented by the parties – Rule 53 does not authorize a judge to empower a

¹⁵ This Court recognized in *Plumb* that Federal Rule of Civil Procedure 53 is “nearly identical” to Utah Rule of Civil Procedure 53 and, therefore, held that Utah courts are to “freely look” to federal case law in applying Utah Rule of Civil Procedure 53. 809 P.2d at 740 n.9.

special master with “administrative or investigative” powers. *Id.* The court’s analysis is on point:

It is clear, we think, that a master is appointed only to help the court in a case where the help is needed. His appointment and activities are only for the purpose of assisting the court to get at the facts and arrive at a correct result in a complicated piece of litigation pending before the court. **The master operates as an arm of the court. Surely he has no wider scope of activity than the court itself.** If the court is limited in its judicial duties, to deciding the issues presented in the litigation before it, the master’s function can go no further than to aid in the court’s discharge of its duties.

Id. at 319 (emphasis added).

As both *Plumb* and *Webster Eisenlohr* establish, the rule can be stated simply: **a special master can do no more than a judge can do; if a judge has no lawful power or jurisdiction to do an act, then a special master cannot do it.** *Plumb*, 809 P.2d at 743; *Webster Eisenlohr*, 145 F.2d at 319-20.

Under the rule that a judge may not authorize a special master with powers that the judge does not possess, a special master cannot be empowered to exercise the powers of a CEO, party litigant, or master claims settler because a judge does not possess those powers. The executive authority of a CEO is antithetical to judicial power and empowering a special master to act as a CEO creates impossible conflicts of interest that no judge or special master may have. *Webster Eisenlohr*, 145 F.2d at 320; *United States v. O'Connor*, 291 F.2d 520, 528 (2d Cir. 1961) (holding that special master cannot also have an interest in the lawsuit, which is inimical to lawful neutral role of special master). The powers of a party litigant – to investigate, initiate, and prosecute claims, and obtain judicial relief (*i.e.*, to be an adversary) – are strictly reserved to the parties, not a judge or special master. *Plumb*, 809

P.2d at 743 (stating that special master is “bound by the . . . restraints of a judicial officer” and may not “fulfill an adversary role.”); *Webster Eisenlohr*, 145 F.2d at 318, 320. The powers of a master claims settler – to settle multiple actions and provide comprehensive releases – cannot be a judge’s or special master’s because judges, with the assistance of special masters, are limited to deciding claims presented by the parties and may not act on claims that are not before them. *See Case v. Murdock*, 528 N.W.2d 386, 389 (S.D. 1995) (“Even the trial court judge would not have the power to decide conflicting claims among stockholders in the absence of a trial. . . . The trial court would not have had authority to dictate the settlement of a case”); *Webster Eisenlohr*, 145 F.2d at 319-20. A special master exercising the powers of a CEO, active party litigant, and master claims settler necessarily acts in violation of most of the Canons of the Code of Judicial Conduct, because such a special master is not impartial and unbiased, lacks propriety, and does not provide the parties a fair opportunity to be heard. Utah Code of Judicial Conduct, Canons 2.B, 3.B(1), (5), (7) and (8).

Under the rule of *Plumb* and *Webster Eisenlohr*, it is fundamentally beyond and contrary to the subject matter jurisdiction of a special master under Rule 53 for him or her to be empowered with or exercise non-judicial powers – such powers are *ultra vires* for a special master. There is only one possible remedy for such empowerment or action – to vacate and set aside all orders with respect to the special master’s unlawful empowerment and actions. *Plumb*, 809 P.2d at 744 (stating that based on the impermissible actions of a special master, “[i]t would be appropriate to vacate.”); *Webster Eisenlohr*, 145 F.2d at 320 (directing trial court to vacate unlawful appointment of special master); *Van Der Stappen v.*

Van Der Stappen, 815 P.2d 1335, 1337 (Utah Ct. App. 1991) (“[A] judgment is void when entered by a court that lacks subject matter jurisdiction over the controversy, and must be set aside”); *Oldroyd*, 235 P. at 588 (holding that order entered in excess of jurisdiction is void and can be attacked at any time); *Atwood v. Cox*, 55 P.2d 377, 384, 386 (Utah 1936) (same); *Reichert*, 830 P.2d at 257-58 (adopting “bright line proscription” of automatically vacating and setting aside a decision or order involving judicial misconduct).

In sum, Judge Howard committed pure error by ruling in his January 24, 2003 Ruling that Rule 53 does not limit a special master to the exercise of judicial power. His ruling was directly contrary to the Utah and federal rule that a special master is a judicial officer who can only do what a judge can do. There is absolutely **no authority** to the contrary of this rule. **None.**

2. **Judge Howard’s Orders With Respect To The Special Master’s Appointment, Empowerment, And Actions Must Be Vacated And Set Aside Because The Special Master Was Empowered With And Exercised Unprecedented And Pervasive Non-Judicial Powers**

Judge Howard’s orders with respect to the Special Master’s appointment, empowerment, and actions simply cannot stand because the Special Master was empowered with, exercised, and continues to exercise unprecedented non-judicial powers that no judge or other judicial officer could ever conceivably possess.

Judge Howard appointed the Special Master as special master and CEO of E. Excel. He granted the Special Master the power to be an active party litigant and master claims settler – to “direct and control, initiate, dismiss, settle, or otherwise determine [E. Excel’s] interests in all . . . disputes or lawsuits . . . all without further Order of this Court.” [R. 762.]

The Special Master retained litigation counsel with the approval of Judge Howard. Jones Waldo appeared and litigated under the direction and control of the Special Master. Jones Waldo filed a notice of appearance for the Special Master and appeared expressly for the Special Master in 82% of its first 160 filings in the action. The Special Master through E. Excel was the only party to file claims against Hwan Lan Chen.

The Amended Third Party Complaint expressly alleges the Special Master's participation as an active party litigant and responsibility for Hwan Lan Chen being a party to the action and having the Preliminary Injunction granted against her. The Amended Third Party Complaint alleges that "Special Master Holman has determined that E. Excel should initiate litigation against [Hwan Lan Chen]" [R. 4205 at ¶ 3.]

The Special Master sought and obtained the Preliminary Injunction based on claims that he directed be filed. He authorized and directed E. Excel to file the Motion for Preliminary Injunction. The Motion was filed by Jones Waldo expressly as counsel for the Special Master and E. Excel. Jones Waldo expressly appeared for the Special Master in the combined Preliminary Injunction/Contempt proceeding. The Special Master testified in the combined proceeding against Hwan Lan Chen. The Special Master's "Reports of Special Master," which had been submitted under Rule 53(e) in "his capacity as Special Master," but which were the "clearly partisan" reports of a "partisan" special master, were cited as support for findings on which the Preliminary Injunction was based.

The Special Master's participation as an active party litigant dominates the action. The Special Master considerably expanded the scope of the action as to both claims and parties and replaced the plaintiff – under whose control he acts – as the dominant party

litigant. The Special Master caused E. Excel to bear over \$1 million in litigation costs for the plaintiff's benefit. [R. 8674; 8770.] Because the Special Master participates as an active party litigant, Hwan Lan Chen, defendant Jau-Hwa Stewart, and the other third-party defendants face the trial court's "representative" as a litigation adversary. [R. 14236 at 71.] As a result, Judge Howard could not impartially assess the credibility and testimony of adverse parties, but had to assess the credibility and testimony of private parties on one side and his "representative" on the other side.

Taking advantage of his status as Judge Howard's "representative," the Special Master has litigated, through E. Excel, by multiple sanction and contempt motions, rather than allow the private parties a jury trial. [R. 8167; 8943; 14329, Mtn. and Memo.] Judge Howard has **never denied** the Special Master any relief he sought. Before this Court's stay of proceedings below, the Special Master/E. Excel was seeking Hwan Lan Chen's default on claims allegedly worth \$17 million based on the incredible assertion that her liability was determined by the Preliminary Injunction and Contempt findings.

Judge Howard accommodated his "representative" by mechanically adopting virtually **verbatim** 110 pages of findings proposed by the Special Master/E. Excel. When his "representative" requested that Judge Howard incorporate by reference all of the Contempt findings into the Preliminary Injunction findings, Judge Howard did so. When his "representative" requested that Judge Howard "undo" that incorporation by reference to bolster his harmless error ruling, Judge Howard did so.

Could Judge Howard ever have acted in a matter before him as has the Special Master? Could any judicial officer ever have acted as has the Special Master consistent with

the Code of Judicial Conduct? The answers are plainly “NO.” Judge Howard’s empowerment of the Special Master to be CEO and an active party litigant, and the Special Master’s pervasive actions pursuant to those powers, were fundamentally far beyond and directly contrary to the judicial power that can be exercised by a Rule 53 special master.

But there is more. In addition to dominating the action below as an active party litigant, the Special Master negotiated and entered into his “Master’s Settlement Agreement” with plaintiff Jau-Fei Chen, her husband, and their allies, and orchestrated the freeze-out merger on their behalf. The Special Master restructured E. Excel’s business by giving it to the plaintiff, her husband, and her allies. He released them from all of E. Excel’s claims, including the claims that they had embezzled approximately \$75 million of E. Excel revenue and had produced counterfeit E. Excel products (which the Special Master reported to Judge Howard was occurring). [R. 14300 at 9 (*see* Addendum, Tab H).] The Special Master settled all of E. Excel’s litigation. He did all of this while using the same counsel as the plaintiff and her husband.

He did so only under the cloak of his judicial office because, absent his status as a special master, his “Master’s Settlement Agreement” was not worth the paper it was written on. The “Master’s Settlement Agreement” was beyond the lawful powers of a CEO, in breach of a CEO’s fiduciary duties, and had an admittedly “devastating” impact on E. Excel.¹⁶ Judge Howard approved of his “representative’s” actions with regard to the Master

¹⁶ The Master Settlement Agreement was beyond the lawful powers of a CEO because the transaction was: (1) a “conflicting interest transaction” under the Utah Corporate Code, because the plaintiff and her husband were corporate insiders as well as parties and

(continued...)

Settlement Agreement without jurisdiction.¹⁷ He unlawfully deferred to his Special Master's "business judgment" to enter into the Master Settlement Agreement – treatment lawfully reserved for corporate decision makers. Utah Code § 16-10a-840 (providing that corporate officers and directors' actions are shielded by business judgment rule).

After giving the plaintiff, her husband, and their allies almost all of E. Excel's business, the Special Master attempted to cede all of E. Excel's outstanding shares to the plaintiff and her children by orchestrating the freeze-out merger. The Special Master admitted his actions were at the behest of the plaintiff, her husband, and their allies. [R. 14324, Holman Aff.] He not only attempted to manipulate E. Excel's ownership, but

¹⁶(...continued)

direct beneficiaries of the agreement; (2) not approved, as required, by either a majority of disinterested directors or shareholders; and (3) manifestly "unfair" to E. Excel, which is emphasized by the Preliminary Injunction finding that the Master Settlement Agreement was "suboptimal." See Utah Code Ann. §§ 16-10a-850 to 853; *Pepper v. Litton*, 308 U.S. 295, 306 (1939); *Branch v. Western Factors, Inc.*, 502 P.2d 570, 571 (Utah 1972); *Hansen v. Granite Holding Co.*, 218 P.2d 274, 280 (Utah 1950); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983); *Coggins v. New England Patriots Football Club, Inc.*, 492 N.E.2d 1112, 1117-19 (Mass. 1986). Moreover, the transaction was a breach of a CEO's fiduciary duties because the transaction manifestly favored the plaintiff over the principal owner, Hwan Lan Chen, and another minority owner, Ms. Stewart, without their consent, and sacrificed E. Excel's interests in favor of enhancing the plaintiff's personal interests. See *Montgomery v. Aetna Plywood, Inc.*, 39 F. Supp. 2d 915, 936 (N.D. Ill. 1998) ("It thus has long been the law that directors' actions to . . . favor one shareholder unequally over another, are illegal and invalid breaches of the fiduciary duties."); *Nicholson v. Evans*, 642 P.2d 727, 730 (Utah 1982).

¹⁷ Judge Howard had no jurisdiction to approve a settlement that restructured E. Excel for the benefit of the plaintiff, her husband, and their allies, without trial, and which settled litigation not before him. *Case*, 528 N.W.2d at 389 ("The trial court would not have had authority to dictate the settlement of a case triable to a jury or factfinder under any circumstances."); *Webster Eisenlohr*, 145 F.2d at 320 (observing that judicial power is limited to deciding controversies presented by party litigants).

attempted to implement the plaintiff's litigation strategy by trying to eliminate defendant Jau-Hwa Stewart's standing as an E. Excel shareholder.

Just as Judge Howard could not have lawfully, *pendente lite*, been a CEO of a corporation before him and an active party litigant, investigated, initiated and prosecuted claims, sought and obtained a preliminary injunction, submitted partisan reports, released the plaintiff, her husband, and their allies of claims, divested E. Excel of most of its business to the plaintiff, her husband, and her allies, and eliminated the defendant as a shareholder of E. Excel for the benefit of the plaintiff and her allies – all clearly non-judicial powers and actions – neither could have the Special Master. Utah R. Civ. P. 53; *LaBuy*, 352 U.S. at 256; *In re Gilbert*, 276 U.S. at 9; *Webster Eisenlohr*, 145 F.2d at 319-20; *O'Connor*, 291 F.2d at 528; *Bituminous Coal*, 949 F.2d at 1168; *Plumb*, 809 P.2d at 743. The Special Master's appointment and empowerment must be vacated and set aside, and the entire unlawful role of the Special Master terminated and reversed.

B. Judge Howard Merely Whitewashed The Special Master's Blatantly Unlawful Empowerment And Actions With His January 24, 2003 Ruling

Upon the invitation of the Special Master/E. Excel, Judge Howard merely whitewashed the blatantly unlawful empowerment and actions of the Special Master in his January 24, 2003 Ruling under the doctrines of waiver, standing, and harmless error.

1. Contrary To Judge Howard's January 24, 2003 Ruling, The Special Master's Unlawful Empowerment And Actions Cannot Be Sheltered Under The Waiver Doctrine

In his January 24, 2003 Ruling, Judge Howard ruled that Hwan Lan Chen had impliedly waived her challenge to the Special Master's empowerment and actions and was

bound by an alleged stipulation between plaintiff Jau-Fei Chen, defendant Jau-Hwa Stewart, and E. Excel to the Special Master's appointment as special master and CEO. This attempt by Judge Howard to shield the Special Master's unlawful empowerment and actions under the doctrine of waiver is pure error.

First, Hwan Lan Chen's challenge to the Special Master's empowerment and actions is not subject to the claim of waiver. Her challenge does not raise error; it raises the issue of subject matter jurisdiction. A challenge to subject matter jurisdiction cannot be waived and can be raised at any time.

The settled rule that a judge is not authorized by Rule 53 to empower a special master with non-judicial powers that the judge does not possess establishes that the Special Master's appointment, empowerment, and actions far exceeded the lawful subject matter jurisdiction of a judge or special master under Rule 53. *Plumb*, 809 P.2d at 722-23; *Webster Eisenlohr*, 145 F.2d at 319-20; *Cruz*, 515 F.2d at 327. Just like any challenge to subject matter jurisdiction, a challenge to a special master's empowerment with and exercise of non-judicial powers in excess of its and the judge's subject matter jurisdiction is not subject to waiver, but can be raised at any time. *See, e.g., Atwood*, 55 P.2d at 384, 386; *Oldroyd*, 235 P. at 588; *Cruz*, 515 F.2d at 327 ("An order without power is void; a challenge, therefore, to subject matter jurisdiction may be raised for the first time on appeal."); *Barnard v. Wasserman*, 855 P.2d 243, 248 (Utah 1983) ("This court has made clear that challenges to subject matter jurisdiction can be raised at any time and cannot be waived by the parties."); 60 C.J.S. *Motions and Orders* § 75 (2000) ("[A]n order entered by a court which lacks inherent power

to make or enter the particular order is void. . . . A void order is not made valid by lapse of time . . . ; it cannot be enlivened by waiver. . . .”).¹⁸

Hwan Lan Chen’s challenge could no more be waived than she could have consented to Judge Howard exercising the powers of E. Excel’s CEO, an active party litigant, or a master claims settler so as to create jurisdiction.¹⁹ Fundamentally, parties may not create jurisdiction by consenting to a court or special master acting in excess of their subject matter jurisdiction – such as a special master being empowered with and exercising non-judicial powers. *Wilver v. Fisher*, 387 F.2d 66, 69 (10th Cir. 1967) (“Here the Master was given the power to restate [interrogatory] questions and to recommend the answers. **The fact that the parties agreed to such anomalous procedure does not make it permissible.**” (emphasis added)); *Hardy v. Meadows*, 264 P. 968, 972 (Utah 1928) (“[S]ubject matter jurisdiction of a cause may not be conferred by consent or waiver where the court or tribunal is without such jurisdiction.”). Jurisdiction cannot be created under the doctrine of waiver so as to permit

¹⁸ *Atwood* and *Oldroyd* explain the concept of a court acting in excess of its jurisdiction by entering void interlocutory orders. *Atwood*, 55 P.2d at 384, 386 (“[E]xcess of jurisdiction is lack of jurisdiction in regard to that judicial action which exceeds jurisdiction. . . . [E]xcess of jurisdiction means a case in which the court has initially proceeded properly within its jurisdiction but steps out of the jurisdiction in the making of some [interlocutory] order.”); *Oldroyd*, 235 P. at 588.

¹⁹ A challenge to actions of a court or a special master may be waived only where the parties could have lawfully consented to the action. *See, e.g., Commercial Ins. Co. v. Burnquist*, 105 F. Supp. 920, 938 (N.D. Iowa 1952) (stating that waiver “is consensual in nature”); *Schraft v. Leis*, 686 P.2d 865, 873 (Kan. 1984) (same); 31 C.J.S. *Estoppel and Waiver* § 74 at 450 (1996) (stating that waiver “necessarily assumes the existence of an opportunity for choice between the relinquishment and enforcement of a right”).

a judicial officer to cast off the limitations of its judicial office and exercise the powers of a CEO, active party litigant, and master claims settler.

Second, Hwan Lan Chen never either expressly or implicitly waived her challenge. *See U.S. Realty 86 Assocs.*, 2002 UT 14, ¶ 16, 40 P.3d at 589 (“Waiver is the intentional relinquishment of a known right”; a waiver can be express or implied, but does not occur “unless the totality of the circumstances demonstrates an unambiguous intent to waive.”). Hwan Lan Chen in no manner expressly waived her challenge. She was not even a party when the Special Master was appointed and empowered so as to have been able to expressly waive her challenge. *See First of Denver Mortgage Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521, 527-28 (Utah 1979) (holding that non-parties to a stipulation “are in no way bound” by it); *Cockran v. Cal-Zona Corp.*, 373 S.W.2d 573, 575-76 (Tex. Civ. App. 1963) (“Not being before the court, and not knowing of the defect, he could not waive it.”).

Contrary to Judge Howard’s January 24, 2003 Ruling, no party ever stipulated or agreed to the appointment of a special master, much less to the Special Master’s appointment as special master and CEO. The Interim Order did not even mention a special master, much less provide for the appointment of either a special master or the Special Master. The March 13, 2001 Order was not a stipulated order. Judge Howard’s March 5, 2001 ruling that Mr. Holman would have “master status” was not a stipulated ruling.

Hwan Lan Chen, moreover, never impliedly waived her challenge once she was joined as a party. Hwan Lan Chen did not appear as a party in the case until 10 months after the Special Master’s appointment, after proceedings had commenced on the Special Master/E. Excel’s Motion for Preliminary Injunction, and after the Special Master/E. Excel announced

that it was not yet seeking injunctive relief against Hwan Lan Chen. Hwan Lan Chen filed her Motion to Vacate and Set Aside within the 10 day period permitted under Rule 52 for filing a motion to vacate or modify a judgment or injunction. Utah R.Civ.P. 52(b).

There was no implied waiver because the Special Master – not Hwan Lan Chen – had the obligation to raise the unlawfulness of his empowerment and actions (which obligation he acknowledged on March 26, 2001). *See Reichert*, 830 P.2d at 257 n.7 (“It was Judge Billings’ responsibility to identify her relationship with Fabian & Clendenin and take appropriate measures to recuse herself . . .”).

Lastly, Hwan Lan Chen did not impliedly waive her challenge because the Special Master’s exercise of patently unlawful powers **is ongoing** and, therefore, is not subject to waiver. *See, e.g., Smith v. McKnight*, 240 S.W.2d 368, 371 (Tex. Civ. App. 1951) (“A person cannot waive a right before he is in a position to assert it.”). The Special Master has neither resigned as the Special Master nor ceded any of his powers and, instead, continues to exercise the powers of a CEO and active party litigant.

2. Contrary To Judge Howard’s January 24, 2003 Ruling, The Special Master’s Unlawful Empowerment And Actions Cannot Be Shielded Under The Doctrine Of Standing

In his January 24, 2003 Ruling, Judge Howard ruled that Hwan Lan Chen lacked standing to challenge the Special Master’s unlawful empowerment and actions because she was not an owner of E. Excel. This ruling was pure error.

a. **Hwan Lan Chen Has Standing as an Aggrieved Party Litigant and an Aggrieved Principal Owner of E. Excel**

Judge Howard's ruling that Hwan Lan Chen lacked standing is pure error in the first instance because, although never considered by Judge Howard, she plainly has standing as an aggrieved party litigant. *See, e.g., Society of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1170 (Utah 1987) (a party has standing who has suffered "some distinct and palpable injury that gives him or her a personal stake in the outcome of the legal dispute." (internal quotation marks omitted)).

The Special Master/E. Excel is the only party who has brought claims and obtained relief against Hwan Lan Chen. But for the Special Master, Hwan Lan Chen would not have even been joined as a party, would not have a Preliminary Injunction entered against her, would not be litigating against the trial court's "representative," and would not have pending motions for contempt against her that seek her total default on claims alleged to be worth \$17 million. One need look no further than paragraph 3 of the Amended Third Party Complaint to see that this is true: "Special Master Holman has determined that E. Excel should initiate litigation against [Hwan Lan Chen]" [R. 4205 at ¶ 3.]

Indeed, the Special Master/E. Excel and the plaintiff conceded Hwan Lan Chen's standing as a party litigant. At the January 10, 2003 hearing, the Special Master/E. Excel's counsel conceded that Hwan Lan Chen has standing regarding "litigation matters in which she's affected as a party." [R. 14287 at 109.] Similarly, the plaintiff's Motion to Strike Claims that raised the standing issue merely raised Hwan Lan Chen's standing as the principal owner of E. Excel, thereby conceding her standing as a party litigant. [R. 10275.]

Moreover, Judge Howard's standing ruling violated the rule that standing is determined based on allegations alone. *Davis*, 442 U.S. at 239 n.18; *Kozera v. Spirito*, 723 F.2d 1003, 1006 n.2 (1st Cir. 1983); *Mr. Furniture Warehouse, Inc. v. Barclays Am./Comm. Inc.*, 919 F.2d 1517, 1520 n.2 (11th Cir. 1990). Rather than reject her ownership claim and then deny her standing because she was not an owner of E. Excel, this rule required Judge Howard to assume that Hwan Lan Chen was the principal owner of E. Excel to determine her standing because she alleges and swore in interrogatory answers and her affidavit that she is the principal owner of E. Excel.

Correctly assuming that she is the principal owner of E. Excel, Hwan Lan Chen plainly has standing to challenge the Special Master's empowerment and actions because the Special Master's unlawful exercise of the powers of a CEO, party litigant, and master claims settler manifestly aggrieved Hwan Lan Chen regarding her interest in E. Excel. But for the Special Master's unlawful exercise of those non-judicial powers, E. Excel would not have (1) been divested of over 90% of its business, (2) released the plaintiff, her husband, and their allies of valuable claims, or (3) dismissed valuable litigation. Indeed, the Preliminary Injunction Ruling lays out the harm to E. Excel's owners – it specifically finds that the Special Master “caused” the Master Settlement Agreement and that the Agreement was “suboptimal” and allowed the Territorial Owners to “take over” E. Excel's profits. [R. 14318 at 54-55 (¶¶ 159-60).] Finally, but for the Special Master, there would have been no attempt to cede all of E. Excel's outstanding stock ownership to the plaintiff and her children with the freeze-out merger.

b. Judge Howard's Rejection Of Hwan Lan Chen's Ownership Claim Based On The August 12, 2002 Order Is Pure Error

In his January 24, 2003 Ruling, Judge Howard rejected Hwan Lan Chen's claim to ownership of E. Excel based on his August 12, 2002 Order entered on plaintiff Jau-Fei Chen's motion for partial summary judgment. He ruled that he already had adjudicated the stock ownership of E. Excel with the August 12, 2002 Order and that Hwan Lan Chen was not found to be one of the stock owners. This ruling is pure error.

Judge Howard's ruling violated the simple rule that there can be no adjudication of a claim absent the claim being asserted in a pleading in the case. *See Combe*, 680 P.2d at 736 (“[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.”); *In re H.J.*, 1999 UT App. 238, ¶ 38, 986 P.2d 115, 124 (stating that one element of claim preclusion is assertion of claim by a pleading). No claim of any type has ever been asserted by way of pleading in the action below that is directed at Hwan Lan Chen's claim to ownership of E. Excel.

She has asserted her claim – which is not based on stock ownership – in pleading in a separate action that has not been adjudicated.²⁰ Well prior to the August 12, 2002 Order,

²⁰ Contrary to Judge Howard's January 24, 2003 Ruling, Hwan Lan Chen, a third-party defendant below, had no obligation to file compulsory counterclaims because the plaintiff, Jau-Fei Chen, never asserted any claims against her mother. Utah R. Civ. P. 13(a), 14(a); 3 *Moore's Federal Procedure*, § 14.26[1] (“Because no affirmative action is pending between [the plaintiff] and [the third-party defendant], they are not ‘opposing parties.’ Thus, there can be no counterclaims between the two.”); Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* §§ 1458-50 (West 2d ed.).

Hwan Lan Chen swore to her ownership interest in interrogatory answers in the action below. Judge Howard had notice of her claim, but never addressed it in the August 12, 2002 Order. Instead, that Order was limited to adjudicating plaintiff Jau-Fei Chen's fourth claim for relief against defendant Jau-Hwa Stewart – and not any claim of ownership by Hwan Lan Chen – because the Order was entered on the plaintiff's motion for summary judgment only on her fourth claim for relief against defendant Jau-Hwa Stewart. *See Timm v. Dewsnap*, 851 P.2d 1178, 1182 (Utah 1993) (holding that partial summary judgment only grants relief on claim referenced in the motion); *H.J.*, 1999 UT App. 238, ¶ 46, 986 P.2d at 126 (“[D]ue process concerns are implicated when a hearing for one purpose serves a second purpose involving different issues.”).

3. **Contrary To The January 24, 2003 Ruling, The Special Master's Unlawful Empowerment And Actions Cannot Be Shielded By The Doctrine Of Harmless Error**

Judge Howard ruled in his January 24, 2003 Ruling that, even if the Special Master's empowerment and actions were error, they were harmless error. Judge Howard focused on his reliance upon the Special Master's evidence in granting the Preliminary Injunction. This ruling is absolutely untenable as it ignores the pervasive adverse impact of the Special Master's unlawful empowerment and actions.

The pervasive adverse impact of the Special Master was plainly harmful to Hwan Lan Chen. He was and remains an adverse party litigant. **He was the only party who sought and obtained relief against her.** He directed his lawyers, Jones Waldo, against Hwan Lan Chen. The Special Master restructured, released, and dealt away claims of E. Excel against

the plaintiff, her husband, and their allies. He shared lawyers with the plaintiff and her husband to negotiate his “Master’s Settlement Agreement.”

The Special Master attempted to cede total ownership in E. Excel to the plaintiff and her children. He obtained approval from Judge Howard for his actions. He filed “clearly partisan” Reports under Rule 53 that were approved and adopted by Judge Howard. The Reports were made part of the record and used against Hwan Lan Chen. He testified at the combined Preliminary Injunction/Contempt proceeding against Hwan Lan Chen. Judge Howard never denied any order, power, relief, or finding requested by the Special Master. The Special Master did all of this *pendente lite*, while the Preliminary Injunction was being entered, and in the face of the Interim Order’s preservation of Hwan Lan Chen’s claim regarding her \$3 million investment into E. Excel and her interrogatory answer as to her beneficial ownership of E. Excel. Lastly, he got Judge Howard to attempt to whitewash all of these actions in the January 24, 2003 Ruling. Judge Howard’s assertion of harmless error is simply untenable.

II. THE PRELIMINARY INJUNCTION WAS GRANTED IN CLEAR VIOLATION OF HWAN LAN CHEN’S DUE PROCESS RIGHTS BECAUSE IT WAS BASED ON 18 DAYS OF EVIDENTIARY HEARINGS HELD BEFORE SHE WAS JOINED AS A PARTY

The Preliminary Injunction must be vacated and set aside because it was granted in fundamental denial of Hwan Lan Chen’s constitutional right to due process of the law.

The right to due process under Article I, Section 7 of the Utah Constitution and Amendment XIV of the United States Constitution requires that Hwan Lan Chen have been joined as a party by service of process and served the Motion for Preliminary Injunction

before the commencement of the Preliminary Injunction proceeding against her. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (“[Absent] service of process . . . a court may not exercise power over a party [defendant]. . . . Accordingly, one becomes a party officially, and is required to take action in that capacity, only upon service of a summons”); *Murray City*, 598 P.2d at 1345 n.12 (stating rule that proper notice to a non-party requires satisfaction of formal requirements for notice); *Plumb*, 809 P.2d at 743; *Nelson v. Jacobsen*, 669 P.2d 1201, 1212 (Utah 1983); *Cornish Town v. Koller*, 798 P.2d 753, 756 (Utah 1990).

Due process under the Utah and United States Constitutions requires that no evidence against Hwan Lan Chen be received without her participation and that the **entire Preliminary Injunction proceeding** be held while she had an opportunity to fully participate. *See Eakins*, 710 F.2d at 187 (holding that late-joined party was denied due process; “Although he appeared as a defense witness, he was not given the opportunity . . . to make an opening statement . . . , to cross-examine the witnesses, and to have counsel then representing his interests participate in the proceedings.”); *Plumb*, 809 P.2d at 743.

The Preliminary Injunction, in direct contravention of Hwan Lan Chen’s constitutional right to due process of law, was granted based on 18 days of evidentiary hearings that were conducted before she was joined as a party to the case. During those 18 days of evidentiary hearings: (1) Hwan Lan Chen had not been served process, and had not appeared in the case; (2) over 50% of the evidence cited in the Preliminary Injunction and Contempt findings was received in evidence; (3) the Special Master/E. Excel’s counsel told Judge Howard that it was not seeking “injunctive relief” against Hwan Lan Chen; (4) Hwan Lan Chen was

unrepresented by counsel and had no opportunity to object to the admission of evidence or cross-examine any witness; and (5) she was not served the Special Master/E. Excel's Motion for Preliminary Injunction (she was never served the Motion), had no opportunity to make opening arguments, and had no notice that the Motion was being heard along with the Contempt motions.

Given that over half of the Preliminary Injunction proceeding was conducted before she was joined as a party and without notice to her, Hwan Lan Chen plainly and fundamentally was denied due process. The Preliminary Injunction must be vacated and set aside for this reason alone. *See, e.g., Nelson*, 669 P.2d at 1214; *Cornish*, 798 P.2d at 756.

III. THE PRELIMINARY INJUNCTION IS FACIALLY INVALID IN SCOPE BECAUSE IT UNLAWFULLY ENJOINS HWAN LAN CHEN FROM ALL COMPETITION WITH E. EXCEL AND FROM ALL COMPETITION IN SEVERAL ENTIRE INDUSTRIES WORLDWIDE

The scope of the Preliminary Injunction is facially invalid. It enjoins Hwan Lan Chen from all competition with E. Excel and from all competition in the entire herbal, dietary, cosmetic, hygiene, and personal care product industries worldwide without basis and, indeed, without precedent in American jurisprudence.

The Preliminary Injunction is facially invalid because Judge Howard enjoined Hwan Lan Chen from all competition with E. Excel even though she had no continuing duty not to compete with E. Excel. Hwan Lan Chen was not a party to any non-compete agreement with E. Excel and, after February 21, 2001, she was no longer obligated as an E. Excel director not to compete. *See Muna*, 625 P.2d at 695 ("When a corporate officer ceases to act as such, . . . the fiduciary relationship ceases."). A defendant cannot be lawfully enjoined from

competing with the plaintiff absent a valid continuing duty not to compete. *See Muna*, 625 P.2d at 700 (“In the absence of express agreement . . . courts . . . should not enjoin an ex-employee from engaging in fair and open competition with his former employer.”); *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1113 (8th Cir. 1969) (“[A]n employer may not restrict an employee’s future employment except by an agreement embodying reasonable terms.”); *United Aircraft Corp. v. Boreen*, 413 F.2d 694, 699 (3d Cir. 1969) (holding that a former director may compete absent a non-compete agreement); *Resolution Trust Corp v. Scaletty*, 810 F. Supp. 1505, 1513 (D. Kan 1992) (same); *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982) (holding that injunction which “serve[s] no purpose other than restricting an employee from competing with a former employer” is invalid). E. Excel had no legitimate interest in having Hwan Lan Chen enjoined from any competition and there was no basis for enjoining her from competition with E. Excel. *Id.*; *Nestlé Food Co. v. Miller*, 836 F. Supp. 69, 75 n.19 (D. R.I. 1993) (“The desire to be free from competition, by itself, is not a protectable interest.”).

The Preliminary Injunction also is facially invalid because Judge Howard enjoined Hwan Lan Chen from all competition in the entire herbal, dietary supplement, cosmetic, hygiene, and personal care product industries worldwide. Under no circumstances can a person be preliminarily enjoined from competition in entire multiple industries worldwide. This scope of the Preliminary Injunction is unprecedented in American jurisprudence, clearly against the principles of free enterprise and individual liberties, and does not protect any

legitimate interest of E. Excel, as required.²¹ See *Crane*, 576 P.2d at 872-73 (“Under our system of free enterprise and individual freedoms, there is no serfdom.”); Restatement (Third) of Unfair Competition § 1 cmt. a (1995) (“The freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system.”); *Allen*, 237 P.2d at 826 (holding that injunction against competition must be limited to protecting legitimate interests of plaintiff).

Judge Howard plainly granted the Preliminary Injunction as a sanction rather than to protect any legitimate interest of E. Excel. He granted the Preliminary Injunction even though the Special Master had moved to enjoin all competition “until such time as E. Excel has completely rebuilt its business,” over a year passed between that Motion and its grant (which eliminated any claim of imminent irreparable harm), E. Excel’s legitimate interest in being protected from competition from even its ex-employees who were bound by a non-compete was limited to one year, and Judge Howard made absolutely **no finding** of any continuing irreparable harm and entered a Preliminary Injunction that was unprecedented and facially invalid in scope. Under no circumstances may a preliminary injunction be granted simply to sanction or punish a defendant. *American Bd. of Psychiatry*, 129 F.3d at 4 (“The purpose of interlocutory injunctive relief is to preserve the status quo pending final relief and

²¹ E. Excel has no legitimate interest because E. Excel does not compete worldwide and does not compete in the entire dietary, herbal, personal care, cosmetic or hygiene product industries, and Hwan Lan Chen was not responsible for any of E. Excel’s goodwill. See *Allen*, 237 P.2d at 826 (holding that restraint on competition must be limited to where the plaintiff competes); *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425-26 (Utah 1983) (holding that restraint on competition must protect the legitimate interests of the plaintiff and can be imposed on only a person who was responsible for the plaintiff’s goodwill); *Robbins*, 645 P.2d at 627; Restatement (Second) of Contracts § 188(1) (1981).

to prevent irreparable injury to the plaintiff – not simply to punish past misdeeds or set an example.”); *Hunsaker*, 1999 UT 106, ¶ 8, 991 P.2d at 69 (stating that preliminary injunction “purpose is preventative in nature”); *Wolff v. Wolff*, 490 N.E.2d 532, 533 (N.Y. 1986) (“[T]he purpose of an injunction [is] remedial and not punitive.”).

The scope of the Preliminary Injunction is unprecedented and invalid. The Preliminary Injunction, therefore, must be reversed. *See, e.g., E.W. Bliss Co.*, 408 F.2d at 1117 (setting aside preliminary injunction that was invalid in scope).

IV. THE SPECIAL MASTER/E. EXCEL FAILED TO ESTABLISH A PRIMA FACIE CASE ON THE KEY PREDICATE FINDINGS AGAINST HWAN LAN CHEN ON WHICH THE PRELIMINARY INJUNCTION IS BASED

“[A]t the very least,” the Special Master/E. Excel had to “make a prima facie showing that the elements of its underlying claims can be proved” to obtain the Preliminary Injunction. *See Keil*, 1999 UT 16, ¶ 8, 974 P.2d at 822. The Special Master/E. Excel did not come close to doing so. The evidence against Hwan Lan Chen shows only that she was a mother, a matriarch of a Chinese family that defers to its elders, a director for a limited time, and a potential competitor. This evidence simply is not evidence that she was a crook, conspirator or corporate wrongdoer.

1. UPUAA and Civil Conspiracy Claims. The Special Master/ E. Excel failed to establish a prima facie case on the key predicate findings that Hwan Lan Chen was a criminal who violated UPUAA or was part of a conspiracy against E. Excel.

First, there is no evidence, **or even a finding**, that Hwan Lan Chen either funded, acquired, or controlled an “enterprise” through a “pattern of unlawful activity” so as to have committed a substantive violation of UPUAA. Utah Code Ann. § 76-10-1603(1) - (3). There

is no substantive UPUAA claim to support the Preliminary Injunction because there is no evidence or findings of a substantive violation of Section 76-10-1603 of UPUAA. Utah Code § 76-10-1605 (providing that plaintiff on UPUAA claim must have been injured “by a person engaged in conduct forbidden by any provision of Section 76-10-1603”). There is no evidence that Hwan Lan Chen committed any of the alleged predicate acts under UPUAA.

Second, there is no evidence that Hwan Lan Chen conspired to violate UPUAA or “unlawfully disabl[e] E. Excel.” Fundamentally, the Special Master/E. Excel needed, but failed, to prove that Hwan Lan Chen agreed to accomplish an unlawful purpose. *See Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1290 n.17 (Utah 1993) (stating that agreement to accomplish an unlawful objective is essential element of civil conspiracy); *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah Ct. App. 1987) (same); *In re TMJ Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1498 (8th Cir. 1997) (holding that civil conspiracy claim fails “[w]ithout evidence of **specific facts** tending to show an agreement or a ‘meeting of the minds’ and concerted action”).

There is no direct evidence of any agreement by Hwan Lan Chen to violate UPUAA or unlawfully act against E. Excel. There is not “substantial proof of circumstances from which it reasonably follows, or at least may be reasonably inferred” that Hwan Lan Chen agreed to violate UPUAA or unlawfully act against E. Excel. *See Israel Pagan*, 746 P.2d at 791 (quotations omitted). Indeed, any inference that Hwan Lan Chen made such an agreement or committed any predicate act is belied by the facts that Hwan Lan Chen does not speak, read or write English (whereas all but two of the other alleged conspirators only speak, read and write English), is 76 years old, was never an E. Excel employee or officer, was

never at E. Excel's facilities during the relevant time period, was not involved in the daily management or operation of E. Excel, and claims to be E. Excel's principal owner.

The evidence shows only that Hwan Lan Chen (the Chen family matriarch) acted to remove plaintiff Jau-Fei Chen (her daughter) from E. Excel (the family business). Hwan Lan Chen served as an E. Excel director for five and a half months (during which time she only took four director actions, two of which related to a transaction that did not occur). She invested funds into E. Excel. After she was removed from E. Excel as a director, she funded and was involved with Apogee, Inc., a potential competitor, when she was under no duty to refrain from any competition.

Hwan Lan Chen's actions relating to E. Excel were lawful actions and, therefore, are not evidence that she was a conspirator. *See Israel Pagan*, 764 P.2d at 792-93 (holding that lawful participation in financing of otherwise lawful transaction is insufficient to support conclusion that the defendant was a co-conspirator). Her Apogee, Inc. related activities after she ceased to be a director likewise were lawful and are not evidence that she was a conspirator. *See id.*; *Crane Co.*, 576 P.2d at 872 (holding that there was no conspiracy to violate plaintiff's rights and "pirate away its business" when defendants had no non-compete agreement, even though defendants prepared to compete while still employees).

In addition to a complete absence of evidence, the Preliminary Injunction findings regarding Hwan Lan Chen being a conspirator are **directly contradicted** by the Contempt findings regarding the conspiracy, even though both sets of findings were entered on the same day based on the same record, such that the Preliminary Injunction findings are capricious and invalid. *See Malstrom v. Consolidated Theatres, Inc.*, 290 P.2d 689, 690-91

(Utah 1955) (“[I]f, on the same evidence, the trial court should make findings of fact necessarily contrary to each other, such action would be capricious and . . . such inconsistent findings should not be permitted to stand.”); *In re Lemire-Courville Assocs.*, 499 A.2d 1328, 1336 (N.H. 1985). The Contempt findings specifically determined who was a co-conspirator, **but do not include Hwan Lan Chen**. [R. 14317 at 80-81 (¶ 115); 119 (¶¶ 2-4).] Moreover, the Contempt Ruling findings determined that only defendant Jau-Hwa Stewart was the central figure of the conspiracy, that Apogee, Inc. was defendant Jau-Hwa Stewart’s idea alone, and that third-party defendant Beverly Warner, who allegedly took key action to enable the predicate acts, never had any business discussions with Hwan Lan Chen – all directly contrary to the Preliminary Injunction findings that Hwan Lan Chen was part of the conspiracy. [*Id.* at 20 (¶ 27), 26 (¶ 39), 65-66 (¶¶ 99-100), 99 (¶ 159).]

2. Breach of Fiduciary Duty and Usurpation of Corporate Opportunity

Claims. The Special Master/E. Excel failed to establish a prima facie case on the key predicate findings that Hwan Lan Chen breached fiduciary duties or usurped any of E. Excel’s corporate opportunities. There is no evidence that Hwan Lan Chen acted to cripple E. Excel, stole any of its assets, solicited any of its employees while she was an E. Excel director, or had any involvement with Jau-Hwa Stewart’s cutting off the Territorial Owners from obtaining E. Excel products..

Hwan Lan Chen’s four actions as an E. Excel director – voting for the removal of plaintiff Jau-Fei Chen as President, voting to retain Hong Kong counsel for E. Excel, and twice voting for a new stock issuance – were not acts in breach of her fiduciary duties. Acting to remove an officer regardless of reason is well within the authorized actions of a

corporate director. Utah Code § 16-10a-832(4) (“[D]irectors may remove any officer at any time with or without cause.”). Voting for a new stock issuance was inconsequential to E. Excel’s interests and became moot when the issuance did not occur. *See Nicholson*, 642 P.2d at 730 (holding that action in breach of fiduciary duty must be against corporation’s interests). There is no evidence that Hwan Lan Chen’s vote for E. Excel to retain Hong Kong counsel to pursue claims there against E. Excel Limited was fraudulent or in bad faith so as to fall outside the business judgment rule. Utah Code § 16-10a-840.

Hwan Lan Chen’s non-director action taken with regard to E. Excel when she was an E. Excel director – funding new distributorships for E. Excel in November and December 2000 – also was not a breach of her fiduciary duty. It is uncontroverted that those new distributorships were intended to act for the benefit of E. Excel and, therefore, the funding was not against E. Excel’s interests.

Even accepting Judge Howard’s finding that Hwan Lan Chen instructed her daughter to lease the ATL warehouse five days before she was removed as a director, it is not a breach of fiduciary duty to prepare to compete while serving as a corporate director absent a non-compete agreement. *See Crane Co.*, 576 P.2d at 872-73 (“[I]ndividual liberties includes the right to advise customers of the fact that he is going to quit; and that thereafter he will be working for a competitor; even while he is still working for the employer.”); *United Aircraft Corp.*, 413 F.2d at 700 (“Even before termination of the agency, [an agent] is entitled to make arrangements to compete, except that he cannot properly use confidential information” (citing Restatement (Second) of Agency § 393 cmt. e)); *Maryland Metals, Inc. v. Metzner*, 382 A.2d 564, 569 (Md. 1978).

Hwan Lan Chen's directorship ceased on February 21, 2001 and, therefore, she cannot be liable for breach of fiduciary duty based on her involvement with Apogee, Inc. after February 21, 2001. *See Muna*, 625 P.2d at 695; *Crane Co.*, 576 P.2d at 872-73; *United Aircraft Corp.*, 413 F.2d at 700; *Metzner*, 283 A.2d at 569.

Moreover, there is no evidence that any of Hwan Lan Chen's actions that allegedly were in breach of her fiduciary duties were continuing, as required to support the Preliminary Injunction. *See Utah R. Civ. P. 65A(e)(1)* (providing that applicant for preliminary injunction must show it "will suffer irreparable harm") (emphasis added); *American Bd. of Psychiatry*, 129 F.3d at 4 (holding there must be likelihood of further wrongful conduct to support grant of preliminary injunction).

3. Unfair Competition Claim. The Special Master/E. Excel failed to establish a prima facie case on the key predicate findings that Hwan Lan Chen engaged in unfair competition against E. Excel. There is no evidence that Hwan Lan Chen committed or had any knowledge of any theft of E. Excel assets or their use to compete with E. Excel. Hwan Lan Chen was never at E. Excel's facilities after September 1, 2000. There is no evidence that Hwan Lan Chen was in any manner connected with, directed, or was otherwise responsible for the Asian distributors' sales of E. Excel products under the name of Apogee.

The mere fact that Hwan Lan Chen was involved with Apogee Inc. does not make her responsible for all actions taken by others under the name "Apogee" or on Apogee, Inc.'s behalf. *See e.g., Hagemeyer Chem. Co. v. Insect-O-Lite Co.*, 291 F.2d 696, 698-99 (6th Cir. 1961) (holding that investor may not be liable for acts of unfair competition committed by the corporation unless the investor perpetrated or promoted such acts); *Lobato v. Pay Less*

Drug Stores, Inc., 261 F.2d 406, 409 (10th Cir. 1958) (“[M]erely being an officer or agent of a corporation does not render one personally liable for a tortious act of the corporation.”).

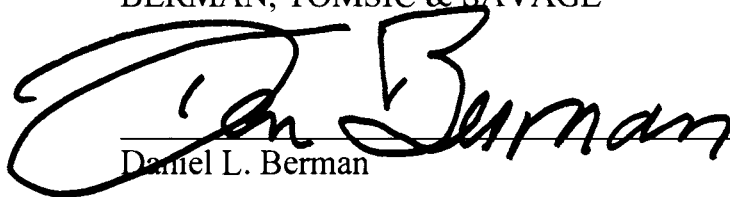
In sum, the Special Master/E. Excel wholly failed to establish a prima facie case on any of the key predicate findings against Hwan Lan Chen – that she was a crook, conspirator, or corporate wrongdoer – on which the Preliminary Injunction was based. The Preliminary Injunction must be reversed on this ground alone.

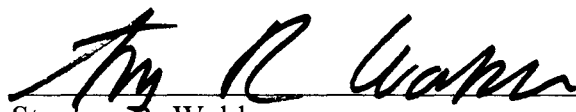
CONCLUSION

For the foregoing reasons, appellant 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, the Preliminary Injunction findings and Order 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: September 16, 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 ²²~~Sept. 18~~, 2003 true and correct copies of BRIEF OF APPELLANT HWAN LAN CHEN were mailed, postage prepaid, unless otherwise noted, to:

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

