

2003

Jau-Fei Chen v. Jau-Hwa Stewart : Brief of Appellee

Utah Supreme Court

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Mark A. Larsen; David S. Hill; Jon K. Stewart; Stacy J. McNeill; Daniel L. Berman; Stephen R. Waldron; H. Thomas Stevenson; Attorneys for Appellant.

Michael D. Zimmerman; Todd M. Shaughnessy; James S. Lowrie; Michael R. Carlston; Richard A. Van Wagoner; David L. Pinkston; Snow; Christensen & Martineau; Attorneys for Appellee.

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IN THE UTAH SUPREME COURT

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

Plaintiffs/Appellees,

vs.

Case No. 20020927-SC

JAU-HWA STEWART, et al.,

Defendants/Appellants.

BRIEF OF APPELLEE JAU-FEI CHEN

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

Mark A. Larsen
David S. Hill
Jon K. Stewart
Stacy J. McNeill
50 West Broadway, Suite 100
Salt Lake City, Utah 84101
Telephone: (801) 364-6500
Attorneys for Defendants/Appellants

MICHAEL R. CARLSTON (0577)
RICHARD A. VAN WAGONER (4690)
DAVID L. PINKSTON (6630)
SNOW, CHRISTENSEN & MARTINEAU
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Attorneys for Plaintiffs/Appellees

Daniel L. Berman
Stephen R. Waldron
50 South Main, Suite 1250
Salt Lake City, Utah 84144
and
H. Thomas Stevenson
3986 Washington Boulevard
Ogden, Utah 84403
Attorneys for Third-Party Defendant/Appellant
Hwan Lan Chen

Michael D. Zimmerman
Todd M. Shaughnessy
15 West South Temple, Suite 1200
Salt Lake City, Utah 84111
and
James S. Lowrie
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorneys for Special Master Larry Holman
and E. Excel International, Inc.

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CLERK OF THE COURT

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Jon K. Stewart
Stacy J. McNeill
50 West Broadway, Suite 100
Salt Lake City, Utah 84101
Telephone: (801) 364-6500
Attorneys for Defendants/Appellants

MICHAEL R. CARLSTON (0577)
RICHARD A. VAN WAGONER (4690)
DAVID L. PINKSTON (6630)
SNOW, CHRISTENSEN & MARTINEAU
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Attorneys for Plaintiffs/Appellees

Daniel L. Berman
Stephen R. Waldron
50 South Main, Suite 1250
Salt Lake City, Utah 84144
and
H. Thomas Stevenson
3986 Washington Boulevard
Ogden, Utah 84403
Attorneys for Third-Party Defendant/Appellant
Hwan Lan Chen

Michael D. Zimmerman
Todd M. Shaughnessy
15 West South Temple, Suite 1200
Salt Lake City, Utah 84111
and
James S. Lowrie
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorneys for Special Master Larry Holman
and E. Excel International, Inc.

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III. JURISDICTION

This Court's jurisdiction is pursuant to Rule 5, Utah Rules of Appellate Procedure, and Utah Code Ann. § 78-2-2(3)(j).

IV. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

A. Was the trial court correct in holding that Hwan Lan Chen (or "Madam Chen") lacked standing to assert claims because she had no ownership interest in E. Excel International, Inc. (or "Excel USA")?

1. Have appellants failed to marshal the evidence in connection with the issue of Madam Chen's standing to assert claims because she owned no interest in Excel USA?

2. Was the trial court correct in holding that Madam Chen owned no interest in Excel USA?

STANDARD OF REVIEW: "[T]he question of whether a given individual or association has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue. [The Court] will review such factual determinations made by a trial court with deference." *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994).

B. Was the trial court correct in holding that Madam Chen was not entitled to formal notice of proceedings affecting ownership interests in Excel USA?

STANDARD OF REVIEW: This issue is subject to the same standard of review as Issue A, above.

C. Is Madam Chen's claim of ownership of Excel USA barred under the doctrine of waiver, estoppel or laches?

STANDARD OF REVIEW: The Court reviews the trial court's legal conclusions for correctness and its factual findings for clear error. *Nunley v. Westates Casing Services, Inc.*, 989 P.2d 1079 (Utah 2000); *Angelos v. Russell*, 671 P.2d 774 (Utah 1983) (granting "considerable deference" to trial court's findings).

D. Was Madam Chen's Petition for Interlocutory Appeal untimely?¹

V. STATEMENT OF THE CASE

Ownership and control of Excel USA were at the center of this case. The case began January 10, 2001, when Jau-Fei Chen (or "Dr. Chen") filed a Verified Complaint against Ms. Stewart. R. 24. She also filed a Motion for Temporary Restraining Order on that date, R. 25, which the trial court granted. R. 58. On January 18, 2001, Dr. Chen amended the Verified Complaint to add Excel USA as a defendant. R. 97. Evidentiary hearings began on Dr. Chen's Motion for Preliminary Injunction on January 19, 2001, and concluded with the entry of a stipulated Order of February 21, 2001. R. 633. During the summer of 2001, Dr. Chen filed two contempt motions against Ms. Stewart. R. 2074;

¹Dr. Chen's brief addresses her Motion to Strike Claims and related aspects of that Motion set forth in Hwan Lan Chen's Motion to Vacate. With respect to the remaining issues in the Motion to Vacate and the matter of the propriety of granting the Preliminary Injunction, it is assumed that Excel USA, as either the moving party or the party most directly affected, will address these issues in its brief which apparently will be filed subsequently. To the extent, however, that either this Court or other parties take the position that those remaining issues do apply to her, Dr. Chen does not waive those issues but reserves the right to join in and/or adopt by reference Excel USA's briefing and argument related to those issues, consistent with Rule 24(h), Utah R. App. P.

R. 14305-07. Evidentiary hearings on those motions began October 25, 2001. R. 14244.

During latter October 2001, at about the time evidentiary hearings began on the contempt motions, Excel USA filed an Amended Answer, Cross-Claim and Third-Party Complaint naming Hwan Lan Chen as a Third-Party Defendant. R. 4214; R. 14336: Ex. G, and Motions for Temporary Restraining Order and Preliminary Injunction against Ms. Stewart, Madam Chen and others. R. 3721; R. 41709. Madam Chen was eventually served through counsel, R. 5333, and joined issue. R. 5585. Proceedings on Excel USA's Motion for Preliminary Injunction commenced November 27, 2001, R. 14250, and were combined with the evidentiary hearings on Dr. Chen's contempt motions in the interest of judicial economy. R. 14243: 63-64. Those evidentiary hearings concluded June 7, 2002. Dr. Chen had also filed a Motion for Partial Summary Judgment Regarding Stock Ownership in April 2002. R. 6449. The matter was fully briefed, and the trial court heard argument on that Motion on June 26, 2002, and granted Dr. Chen's Motion on that date. R. 14276: 121-22. The trial court entered the Order granting the Motion for Partial Summary Judgment on August 12, 2002. R. 7954; R. 14336: Ex. T.

On August 20, 2002, the trial court entered separate sets of Findings of Fact and Conclusions of Law in connection with the contempt motions and Excel USA's Motion for Preliminary Injunction. R. 14317; R. 14318. The trial court entered the Order of Preliminary Injunction on October 16, 2002. R. 9145. On October 24, 2002, Madam Chen filed a Motion to Vacate certain Orders the trial court had entered. R. 9238. On January 24, 2003, the trial court denied the Motion to Vacate. R. 12770.

VI. STATEMENT OF FACTS

A. EXCEL USA AND ITS OWNERSHIP.

Dr. Chen was born in Taiwan. She is the youngest of five children born to Yung-Yeuan Chen (deceased) and Hwan Lan Chen (or “Madam Chen”). R. 14293: 170. She is married to Mr. Rui Kang Zhang (or “Mr. Zhang”). R. 14293: 172. Dr. Chen and Mr. Zhang are the natural parents of three minor children, E. E. Zhang, a daughter, E. Lei Zhang, a daughter, and Chi Wei Zhang, a son. R. 14293: 169.

At age 26 Dr. Chen received her Ph.D in microbiology with an emphasis in immunology. R. 14293: 170. Her goal was to utilize her education to successfully promote the development of products that would enhance people’s health through what was called “nutritional immunology.” R. 14293: 172. She caused Excel USA’s Articles of Incorporation to be filed with the State of Utah on July 20, 1987. R. 14338: Ex. 18. Dr. Chen was appointed as the Registered Agent. *Id.* The initial directors of Excel USA were Dr. Chen, Mr. Zhang, Hwan Lan Chen and Yung-Yeuan Chen, “until the first meeting of the stockholders, or until their successors be elected and qualify.” Dr. Chen, Mr. Zhang, Hwan Lan Chen and Yung-Yeuan Chen served as incorporators. *Id.*

Dr. Chen was Excel USA’s only shareholder when it was incorporated. Consistent with Article VI, ¶ 1 of Excel USA’s Bylaws, R. 14338: Ex. 37, Excel USA issued six thousand (6,000) shares of stock to Dr. Chen as Excel USA’s only shareholder, represented by Stock Certificate 0001, dated July 28, 1987. R. 14338: Ex. 19.

Dr. Chen’s father, Yung-Yeuan Chen, confirmed that Excel USA was solely

owned by his daughter, explained the role her parents had played in the organization of Excel USA, and acknowledged that he gave funds to assist her in getting the Company started. Dr. Chen's father, on December 20, 1991, testifying under oath, explained:

Q. Mr. Marks, in his opening statement, indicated to the jury that you have an ownership interest in a company, E-Excel; is that true?

A. It's a company that is my daughter's company. I was only an agent.

Q. Okay. Do you own any stock in the company?

A. No. I do not.

Q. Do you receive any salary from the company?

A. No. I do not.

R. 14336: Ex. A.

He further testified about gifting the start up money for Excel USA to Dr. Chen:

Q. Where did E. Excel get the money to start the business?

A. The major portion, I provided the major portion of that.

Q. How much was that approximately? . . .

A. [P]robably \$200,000 . . . I don't really remember that clearly now because basically all of my children, if they want money, and I just give them the money.

R. 14336: Ex. A. In the same litigation in which Dr. Chen's father testified, Ms. Stewart confirmed that Excel USA was owned by Dr. Chen, and confirmed their father's testimony by her sworn affidavit that stated: "E. Excel is owned and headed by Jau-Fei Chen" R. 14343: Ex. 401, at 2.

Excel USA became a successful company distributing and selling health products.

Initially it manufactured and marketed approximately 20 product lines, and grew to eventually manufacture and market well over 100 product lines. R. 14293: 184. Outside of the United States and Canada, Excel USA sold its products exclusively to independently-owned distributors known as Territorial Owners that were located in strategic marketing areas such as Korea, Taiwan, The Phillippines, Hong Kong, Malaysia, Singapore, and France. Excel USA marketed its products in Canada through a wholly-owned affiliate. R. 14293: 173-75, 184-85.

From inception, Dr. Chen served as president of Excel USA and chairperson of its board of directors. R. 14230: 83. At a point during the early 1990s, the composition of Excel USA's officers and board of directors was revamped. Dr. Chen was and remained the president of Excel USA and chairperson of the board, and Mr. Zhang remained a director and was secretary of Excel USA. Dr. Chen's sister Jau-Hwa Stewart (or "Ms. Stewart"), however, became the vice-president of Excel USA and the company's third director. Dr. Chen's parents were removed as directors. R. 14293: 30, 63; R. 14245: 5-6.

Excel USA's vigorous growth and success resulted in large part from the actions of Dr. Chen as Excel USA's charismatic founder and leader. Her involvement as the Excel USA spokesperson and symbolic representative of its products was essential to the company's success under the terms of its overall public relations and marketing plan. This plan required Dr. Chen to be closely identified with Excel USA and its products throughout the distribution channels in the countries in which Excel USA sold its

products. Photographs and articles featuring her as the founder of Excel USA, and her association with Excel USA products, were prominently displayed in the Territorial Owners' publications and promotional materials as well as those of Excel USA.

R. 14230: 86-90. Consumers and distributors of Excel USA products associated Dr. Chen with these products. This loyalty to Excel USA and utilization of Excel USA's products was closely related to the trust and confidence reposed in Dr. Chen. R. 14226: 37-40. The Territorial Owners also considered Dr. Chen to be the leader of Excel USA marketing and product sales. She traveled frequently and extensively, promoting "nutritional immunology" through use of Excel USA products, by speaking at conventions sponsored by Territorial Owners and offering seminars and training sessions in the countries where Excel USA products were sold. R. 14222: 18-19, 67-68, 152-53; R. 14293: 185; R. 14230: 62-63; R. 14339: Ex. 76; R. 14344: Ex. 547.

By the time this dispute developed, the long-term course of dealing and performance and exclusive contracts with certain Territorial Owners extended for more than ten years: R. 14226 32-34, 36-37, 99-101, 105, 109; R. 14293: 158-59, 175-78; R. 14339: Ex. 38, 39; R. 14222: 13-18, 110, 147, 152; R. 14293: 158-59; R. 14230: 56-59; R. 14338: Ex. 1. Ms. Stewart, in her role as officer, director and employee of Excel USA, was fully aware of and involved with these relationships. R. 14293: 158-59, 180. The relationships were important to and profitable for Excel USA and the Territorial Owners. For example, in the first eight months of 2000, Excel USA sold approximately \$20 million worth of product (at least \$100 million at retail) on an annualized basis to the

historical distributors in Asia. R 14277: 90. For 1999, the Territorial Owner in Taiwan, E. Excel International (Taiwan), Inc., (“Excel Taiwan”), had retail sales of approximately US \$40 million, and approximately the same amount for the period from January through September 2000. R. 14226: 40-42, 125. The Territorial Owner in Malaysia and Singapore, Extra Excel (Malaysia)Sdn. Bhd. (“Excel Malaysia”), had annual sales in 1997 of approximately US \$70 million, in 1998 of approximately US \$45 million, in 1999 of approximately US \$45 million, and in 2000 through October 31 of approximately US \$47 million. R. 14222: 19-22.

While much of Dr. Chen’s time was spent traveling to market Excel USA’s products and to develop Excel USA’s marketing capabilities, Ms. Stewart’s responsibilities were focused on the day-to-day ministerial operation of the company. Ms. Stewart’s duties included the financial aspects of the business, ordering ingredients and products, physical production, and the import of materials and the export of products. R. 14223: 70; R. 14228: 66; R. 14255: 10, 11-12,14.

In late 1995, Dr. Chen elected to transfer her ownership of Excel USA to her three children and also elected to give her sister Ms. Stewart a minority ownership interest. Dr. Chen did so as an expression of appreciation to Ms. Stewart for her work with Excel USA and for her sister’s help with the Zhang Children while Dr. Chen was traveling. R. 14230: 54-56. In accordance with Excel USA’s bylaws, R. 14338: Ex. 37, Art. VI, R. 14338: Ex. 37, on December 30, 1995, Dr. Chen endorsed her Stock Certificate 0001 for the transfer of her 6,000 shares to “various individuals.” R. 14338: Ex. 19. On the

same date, Excel USA issued four new Stock Certificates 0002-0005, 1,500 shares to Ms. Stewart and 1,500 shares to each of Dr. Chen's three minor children in their individual names. R. 14338: Ex. 20. The Zhang Children collectively then owned the control shares of Excel USA as of December 30, 1995. R. 14338: Ex. 19, 20.² Each of the newly issued Stock Certificates, numbers 0002-0005, was placed in the possession of Lynn Gilbert, a C.P.A. who performed certain accounting services for Excel USA. R. 14293: 39-40; R. 14228: 53-54.

Prior to the transfer of the ownership of Excel USA and thereafter until sometime in the earlier part of the year 2000, Dr. Chen enjoyed a close relationship with her mother and Ms. Stewart. Unfortunately, this relationship changed dramatically as a result of a private family dispute. R. 14222: 49, 63; R. 14228: 73. Ms. Stewart and her mother, Madam Chen, tried to force Dr. Chen to divorce Mr. Zhang. The intensity of the dispute and the methods which Madam Chen and Ms. Stewart used to seek dominion over Dr. Chen had no limits. Just as one example, her mother and sister threatened Dr. Chen that if she did not do as they demanded, they would cause Dr. Chen certain unspecified problems with the Internal Revenue Service and that Dr. Chen would likely be incarcerated. R. 14230:6-13, 73-75; 14235: 17-18; 14255: 86-88. Dr. Chen did not capitulate, choosing to be with her husband and children. R. 14230: 12.

²Certain trust documents were prepared for the Zhang Children but they remained unfunded and the property schedules remained blank. R. 14338: Ex. 21, 24.

Beginning some time in the second half of the year 2000, for reasons having nothing to do with the business of Excel USA, but ostensibly to punish Dr. Chen for disobeying Madam Chen's and Ms. Stewart's demands to terminate her marriage, Ms. Stewart embarked upon a scheme and course of dealing (1) to remove Dr. Chen as the charismatic leader of Excel USA, (2) to unilaterally terminate the exclusive contractual relationships and long-term courses of dealing and performance with the Territorial Owners who were loyal to Excel USA and Dr. Chen, and (3) to establish competitive and replacement distributors in violation of the exclusive contracts Excel USA had with the Territorial Owners. R. 14339: Ex. 5, 10, 45, 53; R. 14345: Ex. 571; R. 14223: 82-83; R. 14226: 61-63, 69-70, 111, 131; R. 14245: 20-34, 37-41.

As her first official step to carry out her scheme and while Dr. Chen and her husband were out of the United States in the fall of 2000, Ms. Stewart, falsely claiming to have the right of control over the shares owned by her nieces and nephew, purported to remove Dr. Chen and her husband Mr. Zhang as directors of Excel USA. The "Action by Written Consent" set forth Ms. Stewart's assertion of Excel USA's ownership:

THE UNDERSIGNED, constituting all of the shareholders of E Excel International, Inc. . . . Jau-Hwa Stewart, individually, and in her capacity as Trustee of the E.E. Zhang Trust, the Chi-Wei Zhang Trust, and the E. Lei Zhang Trust, all of which trusts are dated December 30, 1995.

R. 14338: Ex. 22. Ms. Stewart signed as Excel USA's sole shareholder of the 6,000 shares the Company had issued. *Id.* As her next step, Ms. Stewart purported to appoint her husband, Taig Stewart, and her mother, Madam Chen, as new directors (or, collectively, including Ms. Stewart, "rogue board of directors"). R. 14338: Ex. 22. The

rogue board of directors, despite having no legal authority, took action to replace Excel USA's leadership. As of September 1, 2000, the rogue board of directors, through "Action by Written Consent," purported to remove Dr. Chen as president and her husband, Mr. Zhang, as secretary, and to install Ms. Stewart as president and her husband, Taig Stewart, as secretary. Hwan Lan Chen signed the Action by Written Consent as a director of Excel USA. R. 14338: Ex 23. Thereafter, Ms. Stewart exercised and usurped control of all operations of Excel USA as its president and chief executive officer, until she was removed pursuant to the trial court's Interim Order of February 21, 2001.

R. 14293: 63-64, 124; 14244: 104; R. 14245: 5-9; R. 14255: 10-12.³

³Having seized control of Excel USA, Ms. Stewart and her mother proceeded to attack Excel USA's historical distributors in Asia. The attack consisted of three parts. First, Ms. Stewart, acting as president, cut off the flow of product to the historical distributors, R. 14222: 24-25, 32-36, 56-57, 61-64; R. 14338: Ex. 2, 3, 4; R. 14226: 54-55, 58-61; R. 14339: Ex. 41, 43, 44, 48; R. 14244: 87-89; 121-23; R. 14245: 20-34, 37-41; R. 14250: 41-44; R. 14295: 154-56, which devastated their network distribution systems. R. 14341: 22; R. 14294: 47, 191; R. 14245: 38-39. *See also* R. 14345: Ex. 571, at 2 (establishing Ms. Stewart's refusal to give existing distributor "the opportunity to enter into the new distributorship agreement . . ."). This caused Excel USA to breach its exclusive contracts with Excel Malaysia and Excel Taiwan; *see* R. 14338: Ex. 1; R. 14229: Ex. 38, distributors which accounted for 90% of Excel USA's worldwide sales. Second, Hwan Lan Chen and Ms. Stewart arranged for the transfer of millions of dollars to Asia to pay Richard Hu and Sam Tzu, former managers of Territorial Owners, to establish new, competing distribution networks. R. 14245: 20-34, 37-41; R. 14247: 35; R. 14341: Ex. 228, at 6, 22; R. 14342: Ex. 274 (attachments B and C); R. 14230: 51-53; R. 14250: 21-25, 30-33; R. 14247: 38-39, 119-21; R. 14342: Ex. 274A; R. 14247: 41-43, 35, 38-39. Finally, Ms. Stewart caused millions of dollars in stolen Excel USA product to be shipped to the new, competing distribution networks in order to assure their survival, which depleted Excel USA's assets and cash-flow, undercut Excel USA's sales and damaged Excel USA's and the Territorial Owners' good will. R. 14244: 66-77, 82-83; R. 14250: 41-44; R. 14341: Ex. 205, 207, 214, 216 and 217; R. 14342: Ex. 274; R. 14245: 9-15, 17, 20-34, 37-41, 58-59, 79-81; R. 14247: 35-42. The trial court found Ms. Stewart's conduct was in violation of the January 10, 2001 TRO, which had been

In late October or early November 2000, to facilitate seizing the Zhang Children's control shares of Excel USA, Ms. Stewart obtained the Stock Certificates 0002-0005 from Mr. Gilbert. Mr. Gilbert personally delivered the children's Certificates along with Ms. Stewart's stock Certificate directly to her. R. 14228: 56-64. No more than a month and a half later, Ms. Stewart claimed to have "lost" her nieces' and nephew's Certificates. Even though Ms. Stewart was not the "holder of record of the [stock] certificate[s]," as required by Excel USA's Bylaws, R. 14338: Ex. 37, Art. VI, ¶ 4(a),⁴ Ms. Stewart executed three separate Affidavits, each bearing the date December 15, 2000, in which Ms. Stewart falsely stated she had lost or misplaced Certificates 0003-0005--the Zhang Children's Stock Certificates which constituted the control shares of the Company. R. 14338: Ex. 25, 26, 27; *see* 14338: Ex. 20. Under Ms. Stewart's direction, Excel USA then purported to issue replacement Stock Certificates, each bearing the date December

continued without objection, and the court's Interim Order of February 21, 2001, resulting in findings of contempt. R. 14317: 118-26.

⁴Article VI, ¶ 4 (a) and (c) of Excel USA's Bylaws provided:

The Corporation shall issue a new stock certificate in the place of any certificate where the *holder of record* of the certificate:

Claim. *Makes proof in affidavit form that it has been lost, destroyed, or wrongfully taken; . . .*

Bond. Gives a bond in such form, and with such surety or sureties, with fixed or open penalty, as the Corporation may reasonable [sic] direct, to indemnify the corporation against any claim that may be made on account of the alleged loss, destruction, or theft of the certificates

R. 14338: Ex. 37 (emphasis supplied).

15, 2000. The replacement Certificates were not issued in the same names as the so-called “lost Certificates,” but were issued separately instead in the name of Ms. Stewart as a purported trustee. R. 14338: Ex. 28. Now having record ownership of the stock of Excel USA under her direct control, Ms. Stewart took whatever action she pleased to undermine Excel USA.

Wresting ownership and voting control of Excel USA did not satisfy Ms. Stewart and Hwan Lan Chen, nor give them sufficient assurance that the control of Excel USA would not be reclaimed by the children. After all, the grandchildren/nieces and nephew still had 75% ownership. To permanently solve this “problem,” a “Special Meeting of the Board of Directors” was purportedly held December 15, 2000. R. 14338: Ex. 29. At this time Ms. Stewart and Madam Chen caused Excel USA to enter into a Stock Subscription Agreement by the terms of which it was to issue an additional 3,200 shares of common stock to Ms. Stewart (giving her 4,700 total shares, or 51.1% ownership, as compared with a combined 4,500 owned by the Zhang Children, or 48.9 % ownership). *Id.* The Minutes also provided:

Next, the Chairman indicated that the Corporation had both requested and received Lost Stock Affidavits from Jau-Hwa Stewart with respect to certificates 0003, 0004, and 0005, which were erroneously issued. After discussing the matter, the following resolution, upon motion duly made and seconded was unanimously adopted:

WHEREAS, on or about December 30, 1995 the Corporation issued stock certificates 0003, 0004, and 0005 to each of E. E. Zhang, E. Lei Zhang, and Chi-Wei Zhang, respectively, all of whom are minors; and

WHEREAS, it has come to the attention of the Corporation that the shares represented by said certificates were in fact transferred to three separate

irrevocable trusts for each of said individuals on or about the same date, and therefore the certificates issued were issued in error;

WHEREAS, the Corporation is authorized to issue replacement certificates pursuant to Article VI, Section 4 of the Corporation's Bylaws, as well as the Utah Revised Business Corporation Act; and

WHEREAS, the Corporation has received a Lost Stock Affidavit with respect to each of the aforementioned certificates, as required by the Corporation's Bylaws, and has determined that it is in the best interest of the Corporation to waive the requirement to submit a bond in connection therewith;

NOW THEREFORE BE IT RESOLVED, that the President and Secretary of the Corporation be, and they hereby are authorized and directed to cancel certificates 0003, 0004, and 0005 and to issue new certificates 0006, 0007, and 0008 in favor of the trustee.⁵

Id. Madam Chen signed the minutes as both a Director of Excel USA and Secretary for the meeting. *Id.* The information in the minutes contradicted Ms. Stewart's sworn Affidavits where she "[made] proof . . . that [the Certificates] ha[d] been lost." R. 14338: Ex. 37; R. 14338: Ex. 25, 26, 27. The Stock Subscription Agreement, also dated December 15, 2000, that Madam Chen authorized in her capacity as a Director, once again confirmed the total validly issued and outstanding shares of Excel USA was 6,000. Tr. 14338: Ex. 30. Ms. Stewart signed this document on behalf of both herself and Excel USA. Tr. 14338: Ex. 30. Excel USA then issued Stock Certificate number 0006, for 3,200 shares, to Ms. Stewart, on December 15, 2000, R. 14338: Ex. 31, purporting to give her voting control of the Company separate and apart from the illegal issuance of

⁵The new Certificates were numbered 0003, 0004 and 0005, the same as the original Certificates, R. 14338: Ex. 20, 28, rather than as "authorized" by the December 15, 2000 "Special Meeting." R. 14338: Ex. 29.

“replacement” Stock Certificates in Ms. Stewart’s name as a “Trustee” (and therefore fiduciary) on behalf of the children.

Belated recognition apparently took place that Ms. Stewart’s putative fiduciary duties to her nieces and nephew would raise questions. Ms. Stewart caused Excel USA to rescind the December action. In a “Special Meeting of the Board of Directors,” purportedly held January 6, 2001, Excel USA released Ms. Stewart from her obligations under the December 15, 2000 Stock Subscription Agreement. R. 14338: 32, 33. In substitution, it was decided that the children’s grandmother would be the one to take control of Excel USA from the grandchildren/nieces and nephew. Accordingly, a new agreement was made between Excel USA and Madam Chen proposing that 3,200 shares would be issued to her. R. 14338: Ex. 32, 33. Thus, if the shares were issued, Ms. Stewart and Madam Chen would then own a combined total of 4,700 shares, as compared with a combined 4,500 owned by the Zhang Children. Upon implementation of the second Stock Subscription Agreement, the control of Excel USA would be transferred from the children to the grandmother. The January 6, 2001 Stock Subscription Agreement once again acknowledged:

WHEREAS, E. Excel is authorized pursuant to Article IV of its Articles of Incorporation to issue one hundred thousand (100,000) shares of voting common stock, no par, six thousand (6,000) shares of which are currently issued and outstanding; . . .

Ms. Stewart and Madam Chen acknowledged this and signed the agreement. R. 14338: Ex 34.

Despite an ample opportunity and every reason to do so, neither Madam Chen nor Ms. Stewart submitted credible evidence that either of them delivered the subscription funds to Excel USA in connection with either of the Stock Subscription Agreements. The trial court properly ruled that corporate actions taken pursuant to exercise of control over the children's shares were illegal and without effect. R. 7954; R. 14228: 26-27.⁶

On January 10, 2001, Dr. Chen filed a Verified Complaint against Excel USA and Ms. Stewart. R. 24. This Complaint was filed to bring to an end the oppressive and illegal activities under the wrongful operation of Excel USA. Dr. Chen also filed a Motion for Temporary Restraining Order (or "TRO"). R. 25. The Court granted the Motion on January 10, 2001. Part of the TRO provided:

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

R. 58.

Ms. Stewart, and Madam Chen by signing the Minutes of the December 15, 2000 meeting and the January 6, 2001 Stock Subscription Agreement as well as through her putative directorship, acknowledged the children's ownership of Excel USA. Consistent

⁶Excel USA's balance sheet as of March 31, 2001, revealed that Excel USA had received \$2,999,995 from Sam Tzu, a resident of Taiwan. R. 14336: Ex. B, 1 and 2.

with the Stock Subscription Agreement, Ms. Stewart also acknowledged her nieces' and nephew's ownership of Excel USA in pleadings filed on January 12, 2001. She represented to the court and counsel that Excel USA was owned one-fourth by Ms. Stewart individually and three-fourths by the children through trusts. R. at 60, 83-85. Her January 12, 2001 pleadings failed to mention the Stock Subscription Agreements.

On January 11 and 12, 2001, while Hwan Lan Chen was a putative director, Excel USA submitted pleadings in two cases in which Excel USA asserted there were four shareholders of the company, "each owning twenty-five percent of the outstanding stock: Jau-Hwa Stewart . . . , and three separate trusts established for the benefit of each of [Dr. Chen's] three children." R. 14336: Ex. C at 3, ¶ 9, and D at 3, ¶ 9. On January 29, 2001, while Hwa Lan Chen was a putative director, Excel USA submitted a pleading in which it admitted that prior to December 1995, Dr. Chen was the sole shareholder of Excel USA. R. 14336: Ex. E at 2, ¶ 4. On February 2, 2001, while Hwan Lan Chen was a putative director, Excel USA filed a pleading in which it alleged Ms. Stewart "owned 25% of the outstanding stock, as did each of the three separate trusts established for the benefit of Dr. Chen's three children." R. 14336: Ex. F at 4, ¶ 16.

On February 7, 2001, the parties argued defendants' Motion to Dismiss for Lack of Standing. *See* R. 245, 252. On the standing issue, the Court ordered as follows:

All your pleadings taken together, and the evidence that I've heard to date cause this Court to conclude that this is a case involving a claim by the children. I am persuaded in this case that the shareholdings, the stock share certificates were never delivered to the trust; that the trust remained unfunded; and the shareholdings remained in the names of the children; and that action taken by the defendant, Ms. Stewart, thereafter in attempt to invoke those shares--subsequent

actions were actions that are void ab initio. As such, the children remain shareholders of the corporation, and the guardian, the natural mother of the children, has brought this action for and in behalf of those shareholders, and this is an action of the children. It's my opinion, therefore, that they have standing.

R. 14228: 26-27.

In the extensive evidence concerning ownership of Excel USA during the initial Preliminary Injunction hearing, the testimony was undisputed that Excel USA was owned 25% by Ms. Stewart and 75% by the minor children of Dr. Chen. On February 1, 2001, Taig Stewart testified that Excel USA was owned 25% by Ms. Stewart and 75% in trusts for the Zhang Children. R. 14223: 22-27. On February 8, 2001, Lynn Gilbert likewise testified concerning ownership. R.14226: 53-58, 88, 101, 106. On February 8, 2001, Ms. Stewart testified concerning her understanding of ownership, and made no claim that Hwan Lan Chen owned any interest in Excel USA. R. 14226: 53-58, 88, 101, 106. Ms. Stewart testified that she owned 25% of the stock and she was the "trustee" for the remaining 75% on behalf of Dr. Chen's children. R. 14293: 24-25, 53-59. On February 8, 9, and 13, 2001, Dr. Chen testified concerning her ownership and transfer of ownership to her three children and to Ms. Stewart. R. 14293: 173; R. 14230: 54-56; R. 14232/14233: 9-31.

As the first Preliminary Injunction hearing was coming to a conclusion, the parties stipulated to the principal relief Dr. Chen sought. On February 21, 2001, the trial court entered an Order to which the parties had stipulated ("Interim Order"). R. 633. Among other things, the Interim Order provided:

4. The stock of the Company, will be deemed to be held by Jau-Hwa Stewart (25%) and by the minor children of Jau-Fei Chen (75%). There is a dispute between the Parties concerning whether the 75% of the stock of the children is owned by the children individually or is held in trust for the children.

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

Id.

B. EXCEL USA'S THIRD-PARTY COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION; MADAM CHEN'S PURPOSEFUL AVOIDANCE OF SERVICE.

On October 29, 2001, Excel USA filed an Amended Answer, Cross-Claim and Third-Party Complaint naming Hwan Lan Chen as a Third-Party Defendant. R. 4214; 14336: Ex. G. Several other individuals were also named as Third-Party Defendants, including Apogee, Inc., an entity Ms. Stewart and Madam Chen established in order to compete with Excel USA. R. 4214; 14336: Ex. G. Four days earlier, Excel USA had filed a Motion for Preliminary Injunction seeking injunctive relief against Ms. Stewart, Hwan Lan Chen, Apogee, Inc., and others. R. 3721. Madam Chen's efforts to avoid service of process were initially successful. R. 14336: Ex. I. The process server unsuccessfully attempted to serve Hwan Lan Chen on November 7, 2001, November 8, 2001, November 10, 2001, November 13, 2001, and November 14, 2001. *Id.* On November 29, 2001, Excel USA filed an Ex Parte Motion for Alternative Service in which it provided:

Through its agents, E. Excel has made substantial, repeated efforts to serve Hwan Lan Chen at her home, including one occasion when Ms. Chen's neighbor confirmed that she was indeed home. However, Ms. Chen's home is equipped with a video surveillance system, which has enabled her to avoid E. Excel's process server. E. Excel therefore requests that the Court issue an order allowing Hwan Lan Chen to be served by mail at her home address of 1920 South, 180 West, Orem, Utah, 84058.

Id. These attempts to personally serve Madam Chen occurred prior to commencement of evidentiary hearings on Excel USA's Motion for Preliminary Injunction. *Id.*; R. 14250.⁷

Madam Chen, however, was prompted to have an attorney announce on December 12, 2001, that he would make an entry of appearance for her. This occurred when counsel for Excel USA represented to the court that a Default Certificate would soon be filed against Apogee, Inc. R. 14248:117-18. Just two hours later, an attorney that had been representing a number of the Third-Party Defendants, represented to the court that his law firm was "filing a notice of appearance on behalf of two third-party defendants, Hwan Lan Chen, also known as Madam Chen, and the corporation Apogee, Incorporated." R. 14248: 182-83.

⁷During the summer of 2001, Dr. Chen filed two contempt motions against Ms. Stewart. R. 2074; R. 14305-07. Evidentiary hearings on those two motions commenced on October 25, 2001, R. 14244, and were also heard on October 26, 2001, R. 14245; November 27 and 28, 2001, R. 14250 and 14247; December 10, 11, 12, and 13, 2001, R. 14295, 14252, 14248, 14249, 14263 and 14283; February 21 and 22, 2002, R. 14254 and 14286; March 13, 15, 18 and 19, 2002, R. 14255, 14264, 14257 and 14256; May 7, 8, 10 and 31, 2001, R. 14265, 14265, 14279, 14289, 14289 and 14267; and June 4, 5 and 7, 2002, R. 14268 and 14277, for a total of 21 days of evidence. The October 25 and 26, 2001 hearings were devoted solely to the Contempt Motions. R. 14244 and 14245. In the interests of judicial economy, however, the court later combined evidentiary hearings on the Contempt Motions with Excel USA's Motion for Preliminary Injunction, beginning November 27, 2001. R. 14243: 63-64; R. 14250. The contempt motions are the subject of a separate appeal.

The next day, on December 13, 2001, the court again asked the attorney whether he would “be representing Apogee and Madam Chen.” He responded in the affirmative. R. 14249: 172. Four days later, on December 17, 2001, “Clark W. Sessions and Matthew A. Steward of and for CLYDE SNOW SESSIONS & SWENSON, attorneys at law, . . . enter[ed] an appearance as counsel of record for the Third-Party Defendants Hwan Lan Chen and Apogee, Inc., a Utah corporation.” R. 14336: Ex. J. Hwan Lan Chen was named as a party in October 2001, was represented by counsel in the Preliminary Injunction proceedings no later than the afternoon of December 12, 2001, and could have appeared in the action in November 2001 when hearings on the Preliminary Injunction began on November 27, 2001, R. 14250, but for her consistent and purposeful avoidance of service. R. 14336: Ex. I. The trial judge explained:

What’s troublesome and disturbing to me is this stonewalling in light of the rather involved injunctive TRO proceeding that is before this Court. I have reason to believe that the parties with the ability to retain counsel and to secure legal assistance had information available to them such that they could have acted more expeditiously.

R. 14258: 35.

C. HWAN LAN CHEN’S JOINDER OF OWNERSHIP-RELATED ISSUES.

Hwan Lan Chen was served through her attorney of record with Excel USA’s Third-Party Complaint that named her as a Third-Party Defendant. R. 5333-35. She filed her Answer to the Third-Party Complaint on March 4, 2002. R. 5585. The Third-Party Complaint alleged and Madam Chen answered as follows:

1. . . . E. Excel was incorporated on July 20, 1987, and is currently 75% owned by Dr. Chen's children. R. 4214.

[In her Answer filed on February 28, 2002, Hwan Lan Chen said as to ¶ 1 that she was "without knowledge or information necessary to form a belief as to the truth of the allegations and on that basis, denies the same." R. 5585.]

24. On September 1, 2000, defendant Jau-Hwa Stewart purported to vote 100% of the Company stock to remove Dr. Chen and Dr. Chen's husband, Rui-Kang Zhang, as directors of E. Excel; to appoint herself, her husband, defendant Taig Stewart, and her mother, defendant Hwan Lan Chen, as the new board of directors. The new board then purported to remove Dr. Chen and her husband as officers of the Company, and to replace them with defendant Jau-Hwa Stewart as President and defendant Taig Stewart as secretary. . . . R. 4214.

[In her Answer, Hwan Lan Chen said as to ¶ 24 that she was "without knowledge or information necessary to form a belief as to the truth of the allegations and on that basis, denies the same." R. 5585.]

62. Defendant Hwan Lan Chen also claims that she has made a loan of \$3,000,000 to E. Excel. On information and belief, no documentation of such loan has ever been produced and no such loan was ever made. . . . R. 4214.

[In her Answer, Hwan Lan Chen said as to ¶ 62: Third-Party Defendant admits that Defendant Jau-Hwa Stewart's attorney's recommended that she put \$3,000,000 into E. Excel for the purchase of shares of stock and admits these funds were wired to the company for the payment of shares. Third-Party Defendant alleges that she never saw the stock certificates for the shares and understood that the Court ordered that she could not purchase any stock and she was then informed that the \$3,000,000 would be treated as a loan. . . . R. 5585.]

155. Hwan Lan Chen has alleged that she loaned \$3,000,000 to the Company. Upon information and belief, no such loan was ever made and the Company never received such sums from defendant Chen. R. 4214.

[In her Answer, Hwan Lan Chen claimed as to ¶ 155 "that she loaned \$3 million to the company but denies the remaining allegations." R. 5585.]

Her Answer asserted no ownership interest in Excel USA, and made no affirmative claims. R. 5585.

D. DISPOSITION OF ISSUES CONCERNING EXCEL USA'S OWNERSHIP.

The court had unequivocally ruled in denying Ms. Stewart's and Excel USA's Motion to Dismiss for lack of standing, and stated that the actions of Ms. Stewart, purporting to exercise control over the children's stock, were "void ab initio." The court also noted that its ruling was only for the purpose of the standing motion, and so when the court entered the Interim Order of February 21, 2001, the question whether the children's 75% ownership of Excel USA was held in trust was noted as unresolved. R. 633. On April 25, 2002, Dr. Chen filed a Motion for Partial Summary Judgment Regarding Stock Ownership, R. 6449, and served by hand delivery the Motion and Memorandum in Support on counsel for Hwan Lan Chen. R. 14336: Ex. N. On May 20, 2002, counsel for Ms. Stewart served by United States mail her Memorandum in Opposition to Chen's Motion for Partial Summary Judgment Regarding Stock Ownership. R. 6756; R. 14336; Ex. O. On May 31, 2002, Dr. Chen filed her Reply Memorandum in Support of her Motion for Partial Summary Judgment Regarding Stock Ownership, R. 6977, and served counsel for Hwan Lan Chen that day by United States mail. R. 14336: Ex. P. (At no time prior to the filing of Dr. Chen's Motion for Partial Summary Judgment or the entry of the trial court's August 12, 2002 Order granting the motion did Madam Chen ever assert an ownership interest in Excel at the time the issue of ownership of the shares was before the Court in an action to which she was a party.) At about this time, Madam Chen

signed Answers to Excel USA's Interrogatories in which she made an oblique reference to ownership in these entities, including Excel USA, but which was contradicted by other Answers in the same set. R. 14336: Ex. L. Madam Chen, in essence, objected to the discovery of any interest she had in Excel USA with any specificity as being simply irrelevant in this action. *Id.*

As a party to the litigation, Madam Chen was on clear notice of the ownership issues. In fact, on June 4, 2002, Hwan Lan Chen signed an Affidavit in Opposition to Dr. Chen's Motion for Partial Summary Judgment Regarding Stock Ownership. In the Affidavit, Hwan Lan Chen testified:

Hwan Lan Chen, after being first duly sworn, deposes and says as follows:

1. I am a third-party defendant in the above-referenced action and have personal knowledge of the facts stated in this affidavit.
2. Early in 1995, I became increasingly concerned about the distribution of shares of E. Excel International, Inc., which did not include an ownership interest for my daughter, Jau-Hwa Stewart ("Mrs. Stewart").
3. Given Mrs. Stewart's involvement in the corporation, I felt that it was crucial that she be included in the ownership structure of the corporation.
4. On several occasions, I expressed my concern to my daughter, Jau-Fei Chen ("Ms. Chen"), who assured me that she would redistribute her shares of E. Excel International, Inc., in a manner that would include an interest for Mrs. Stewart.
5. Following the issuance of E. Excel Stock certificates, and the implementation of trust agreements in the names of E.E. Zhang, E. Lei Zhang and Chi Wei Zhang, on December 30, 1995, Ms. Chen assured me that Ms. Stewart's interest in the corporation was preserved and that Mrs. Stewart effectively controlled all of the shares formerly held by Ms. Chen.

R. 7126; R. 14336: Ex. Q.

The court scheduled oral argument on Dr. Chen's Motion for Partial Summary Judgment Regarding Stock Ownership for June 26, 2002. Other matters were heard first. After the other matters had been heard and before the commencement of argument on the stock ownership motion, counsel for Hwan Lan Chen made the following request to the court:

Final thing, then, Your Honor: We've looked over the motions to be argued this afternoon. They don't involve our clients. With Your Honor's permission, Mr. Stewart and I would like to be excused for this afternoon's session.

The Court said:

Any objection, counsel? . . . You're excused, sir.

R. 14276: 78-79. After counsel for Hwan Lan Chen left the courtroom, counsel for Dr. Chen and counsel for Jau-Hwa Stewart argued the Motion for Partial Summary Judgment Regarding Stock Ownership. R. 14276: 78. Following argument, the Court granted the Motion and instructed Dr. Chen's counsel to prepare the Order. R. 14276: 121-22.

On July 22, 2002, Dr. Chen's attorneys submitted to all counsel, at the Court's request, a proposed Order Granting Plaintiff's Motion for Partial Summary Judgment Regarding Stock Ownership. The proposed Order specifically recited a finding that the shareholders and total shares validly issued and outstanding were as follows: Chi Wei Zhang 1,500; E. Lei Zhang 1,500; E. E. Zhang 1,500; Jau-Hwa Stewart 1,500. R. 14336: Ex. S. Hwan Lan Chen did not object to this form of Order.

On August 12, 2002, the Court entered its Order granting Dr. Chen's Motion for Partial Summary Judgment concerning her children's ownership of the stock, as follows:

There are no genuine issues of material fact in connection with plaintiff's Fourth Claim for Relief, and plaintiff is entitled to judgment as a matter of law. Based upon the undisputed facts, plaintiff transferred 1,500 shares to each of her three children in their individual names and individual capacities on December 30, 1995. Specifically, the plaintiff's three children--Chi Wei Zhang, E. Lei Zhang, and E. E. Zhang--each own 1,500 shares of the 6,000 total issued and outstanding shares of E. Excel International, Inc. The shareholders and total shares validly issued and outstanding are as follows:

1.	Chi Wei Zhang	1,500 shares
2.	E. Lei Zhang	1,500 shares
3.	E. E. Zhang	1,500 shares
4.	Jau-Hwa Stewart	<u>1,500 shares</u>
Total shares issued and outstanding:		<u>6,000 shares</u>

The shares of stock and the stock certificates were never placed in or delivered to any trust as to which Ms. Stewart served as trustee. Therefore, at no time, including on September 1, 2000, did Ms. Stewart have the right to take action with respect to the title or voting of the three children's shares of stock. Ms. Stewart's conduct with respect to replacing the children's stock certificates and placing them in her name as a trustee is void ab initio.

R. 7954; R. 14336: Ex. T.

On August 25, 2002, Ms. Stewart moved the Court under Rule 60(b), Utah Rules of Civil Procedure, for reconsideration of Dr. Chen's Motion for Partial Summary Judgment Regarding Stock Ownership. R. 14326. In support of that Motion, Ms. Stewart advanced the following "facts": "In January 2001, on behalf of Ms. Stewart, Hwan Lan Chen facilitated the transfer of approximately \$3 million to E. Excel International, Inc.,"

R. 14326, even though Excel USA's records reveal no evidence that Hwan Lan Chen or Ms. Stewart put \$3,000,000 into Excel USA. R: 14336: Ex. B, 1 and 2. Hence, up to this time, an affirmative claim of ownership of Excel USA by Madam Chen was not on anyone's radar screen, including Hwan Lan Chen's.

E. HWAN LAN CHEN'S ASSERTION OF OWNERSHIP, ALBEIT UNTIMELY, AS LITIGATION STRATEGY.

After events in the litigation did not go well for Madam Chen, she elected to attempt to change her strategy. After directly participating in litigation where ownership of Excel USA was a central issue, *e.g.* R. 14338: Ex. 22, 23, 29, 30, 32, 34; R. 14336: Ex. C at 3, D at 3, E at 2, F at 4, but also having elected not to intervene, the trial court concluded Madam Chen had played an integral role in the organization, funding, and operation of a criminal enterprise that was engaged in pattern of unlawful activity, R. 14318: 101-06. On October 24, 2002, utilizing new counsel, Hwan Lan Chen filed a Motion to Vacate and Set Aside Judge Howard's Orders through her newly retained counsel. R. 9238.

The motion was predicated in large part on a claim of ownership of Excel USA — a belated attempt to assert ownership herself and a belated attack of the trial court's June 26, 2002 ruling and the August 12, 2002 Order concerning ownership of Excel USA. R. 9238. In connection with this motion, Hwan Lan Chen signed an Affidavit that is written in Chinese, dated October 24, 2002. R. 9239-48. In translation of that Affidavit, Hwan Lan Chen asserted:

2. . . . My daughters Jau-Fei Chen and Jau-Hwa Stewart always told us we were the owners of E. Excel [sic] USA and based upon our investments and the statements of my daughters, my husband and I were and I, as my husband's sole heir, am the principal owner of E. Excel. . . .

7. In 2001, I personally advanced \$3,000,000 to E. Excel USA. I advanced this \$3,000,000 with the belief that I was the principal owner of E. Excel USA. I understand that E. Excel USA has taken the position that this \$3,000,000 was an investment in E. Excel USA. . . .

16. My husband and I reposed trust and confidence in both our daughters Jau-Fei Chen and Jau-Hwa Stewart and relied upon each of them to properly conduct the operations of E. Excel USA and to manage and protect our ownership and investments in E. Excel USA.

17. My husband and I were the principal owners of E. Excel USA as acknowledged by our daughters. Prior to the lawsuit between Jau-Fei Chen and Jau-Hwa Stewart, neither Jau-Fei Chen or [sic] Jau-Hwa Stewart ever denied that my husband and I were the principal owners of E. Excel USA.

18. At the time that Jau-Hwa Stewart returned to Utah to assist at E. Excel USA, my husband and I had conversations with both Jau-Fei Chen and Jau-Hwa Stewart concerning their participation in the profits of E. Excel USA should E. Excel USA experience profits. As a result of these discussions, my husband and I agreed that Jau-Fei Chen and Jau-Hwa Stewart should each have 25% of the profits of E. Excel USA, with my husband and I owning 50% of the profits of E. Excel USA, but retaining the dominant ownership in E. Excel USA.

19. After my husband's death in December, 1995, Jau-Fei Chen and Jau-Hwa Stewart repeatedly acknowledged to me that I was the principal owner of E. Excel USA, including 50% of the profits of E. Excel USA. To the best of my knowledge, neither Jau-Fei Chen or [sic] Jau-Hwa Stewart hav [sic] ever denied that I was the owner of E. Excel USA, including 50% of the profits of E. Excel USA.

R. 9249-53.

F. THE TRIAL COURT’S RULING ON MADAM CHEN’S STANDING AND DUE PROCESS CLAIM.

On November 8, 2002, Dr. Chen filed a Motion to Strike Claims of Hwan Lan Chen for Lack of Standing, based upon her lack of ownership in Excel USA, and hence her inability to assert a “distinct and palpable” injury to her. R. 14336; R. 10275. In its January 24, 2003 Ruling denying the Motion to Vacate, the trial court provided:

Madame Chen has failed to dispute [any of] the [68] ownership fact[] [paragraphs] set forth in Plaintiff’s Motion [to Strike], and there is no dispute over the ownership interests of E. Excel as heretofore determined by the Court. The Court is unpersuaded that Chinese customs of the parties in some manner govern the legal ownership interests of the parties. Further, the Court notes that *it is only after the entry of the Findings of Fact and Conclusions of Law that Madame Chen has asserted that she played an integral role in the organization, funding and operation of E. Excel. This tardy assertion is contrary to the evidence presented during the litigation* and set forth in the Court’s Findings and Conclusions and the Court’s subsequent decision on the subject. *The Court has heretofore determined the ownership interests of E. Excel which do not include any ownership by Madame Chen.* Based upon the evidence presented, this Court has concluded that the actual stock ownership in E. Excel is vested in the three minor children of Plaintiff, Chi Wei Zhang, E. Lei Zhang and E. E. Zhang with each owning a combined total 75% of the shares, or 25% individually, and Defendant Mrs. Stewart, holding the remaining 25% shares. Further, Madame Chen has failed to file compulsory or *affirmative* claims to assert her ownership in E. Excel, but makes such claims solely under her Motion. She has failed to point to a single benefit derived from her claimed interest, and failed to provide proof of a single dividend or distribution passed to her by E. Excel. This Court is unpersuaded with Madame Chen’s Motion claim that by the alleged \$3 million transfer she acquired ownership in E. Excel, noting that she conceded in her Answer that the \$3 million transfer was a loan. The Court concludes that Madame Chen has at best asserted only equitable ownership claims in E. Excel by her Motion to Vacate and Set Aside, and that the subject has been adjudicated.

Plaintiffs also asserts that Madame Chen’s due process claims must fail because she was alerted of all case issues from the outset from the co-conspirator, Defendant Stewart, who lives in the same house as Madame Chen. She therefore had actual notice of the Court proceeding which nullified any claim that she was entitled to legal notice. The Court is persuaded by this argument which is

supported by the record and the Court's Findings of Fact. Madame Chen has had notice from the inception of the litigation through her daughter Jau-Hwa Stewart. Further, Madame Chen has no actual legal ownership interest in E. Excel which would require separate, formal notice to her. The Court concludes that Madame Chen's due process rights have not been violated.

R. 12755-57 (emphasis supplied).

VII. SUMMARY OF ARGUMENT

Madam Chen has never been an owner of Excel USA. The trial court properly concluded that Madam Chen lacked standing to assert claims in her Motion to Vacate because she had no ownership interest in Excel USA. In support of the claim that Madam Chen was a "principal" owner of Excel USA, Appellants offer only sparse, self-serving information most of which was not even submitted to the court until considerably after the issue of Excel USA's ownership had been adjudicated. Perhaps because of the contrast to the lack of evidence to support their claim, appellants failed to marshal the extensive, compelling and overwhelming evidence which unequivocally establishes that Madam Chen was never an owner of Excel USA and so lacked standing to assert claims in her Motion to Vacate. For the same reason, Madam Chen's claim that she was entitled to separate notice of matters in litigation that affected ownership interests in Excel USA fails.

Even while Madam Chen was a party to these proceedings, and had full knowledge of the issues in the litigation—including the filing and argument of Dr. Chen's dispositive motion concerning Excel USA's ownership, she raised no assertion of ownership interest by timely motion, claim or pleading. Through her words and conduct, she has admitted

that she has no ownership interest. Her actions contradict any claim of ownership. Relief she now seeks is untimely. She is barred from obtaining the relief under the doctrines of waiver, equitable estoppel and laches.

Finally, the Motion to Vacate is predicated in large part upon an ownership interest in Excel USA. The trial court adjudicated the ownership issues on June 26, 2002, in open court after Madam Chen's attorney chose to be excused from that proceeding because the matter did not "involve" his clients. The trial court entered the Order granting Dr. Chen's Motion for Partial Summary Judgment on August 12, 2002. Appellants' Petitions for Interlocutory Appeal, which constitute an attack of that Order, were not filed within the 20 days required by Rule 5, Utah Rules of Appellate Procedure.

VIII. ARGUMENT

A. MADAM CHEN LACKS STANDING TO ASSERT CLAIMS BASED UPON HAVING AN OWNERSHIP INTEREST IN EXCEL USA.

Certain of the relief Madam Chen seeks in her Motion to Vacate and this appeal is predicated upon having an ownership in Excel USA. Hwan Lan Chen is not an owner of Excel USA. She therefore cannot show a distinct and palpable injury giving her a personal stake in the outcome of the dispute. For this reason, the Court should affirm the decision of the trial court striking the claims in her appeal that are predicated upon ownership of Excel USA.

Standing "operates as a gatekeeper to the courthouse, allowing only those cases that are fit for judicial resolution." *Aldrich, Nelson, Weight & Esplin v. D.E.S.*, 878 P.2d

1191, 1194 (Utah Ct. App. 1994); *Bankers Ass’n. v. Dept. of Fin. Inst.*, 888 P.2d 714, 717 (Utah Ct. App. 1994). As this Court stated:

Standing . . . is designed to preserve the integrity of judicial adjudication by requiring that legal issues be adequately defined and crystallized so that judicial procedures focus on specific well defined legal and factual issues. To that end the parties must have both a sufficient interest in the subject matter of the dispute and a sufficient adverseness so that the issues can be properly explored.

Nat. Parks & Conservation Ass’n. v. Bd. of St. Lands, 869 P.2d 909, 913 (Utah 1993).

Standing requirements limit the power of a court to hear cases concerning only those who have a real stake in the outcome. As the United States Supreme Court held “standing principles ‘are founded in concern about the proper – and properly limited – role of the courts in a democratic society.’” *National Credit Union Admin. v. Bank & Trust Co.*, 522 U.S. 479 (1998) (citations omitted). Standing “preserve[s] the integrity” of our legal system by ensuring that only those cases “fit for judicial resolution” come before the courts.

In Utah the test whether standing exists is if the party “show[s] some distinct and palpable injury giving rise to a personal stake in the outcome of the dispute.” *Order of Police Lodge v. Nordfelt*, 869 P.2d 948, 950 (Utah Ct. App. 1993); *Nat. Parks*, 869 P.2d at 913. “One who is not adversely affected has no standing. A mere allegation of an adverse impact is not sufficient. There must also be some causal relationship alleged between the injury to the [complainant], the [defendants’] actions and the relief requested.” *State v. Mace*, 921 P.2d 1372, 1379 (Utah 1996). Madam Chen is not an

owner of Excel USA. She has no standing to assert any alleged ownership-related injuries.

1. APPELLANTS FAILED TO MARSHAL THE EVIDENCE CONCERNING MADAM CHEN'S STANDING; THE COURT SHOULD AFFIRM THE TRIAL COURT'S FINDING OF NO STANDING.

When the issue of standing bears upon factual determinations, the Court reviews such findings with deference to the trial court's determinations. *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373-74 (Utah 1997). Madam Chen failed to marshal the evidence in connection with the issue of her standing to assert claims predicated upon having an ownership interest in Excel USA. All such claims should be summarily dismissed.

To successfully challenge a trial court's factual determination on appeal, “an appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be ‘against the clear weight of the evidence, ‘thus making them’ clearly erroneous.” *Utah Medical Products, Inc. v. Searcy*, 958 P.2d 228, 232 (Utah 1998) (citations omitted). Put another way, this Court has explained, “a party incurs an obligation to marshal all of the evidence that arguably supports” the trial court’s conclusions. *Harding v. Bell*, 57 P.3d 1093, 1097 (Utah 2002). The marshaling requirement “also requires that the party contesting the verdict assume the role of ‘devil’s advocate.’” *Id.* After she has marshaled all of the evidence in support of the trial court's ruling, “an appellant must demonstrate that even in the light most favorable to the trial court, the evidence was insufficient to support the

findings.” *Utah Medical*, 958 P.2d at 232; *see also Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989). The Court applies “this deferential standard to trial courts because of their advantaged position to evaluate the evidence and determine the facts,” *Utah Medical*, 958 P.2d at 232. “If the Appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court.” *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991). Accordingly “[i]f the challenger fails to meet this burden, its claim must fail.” *Utah Medical*, 958 P.2d at 232; *see also Hales Sand & Gravel v. Audit Div.*, 842 P.2d 887, 893 (Utah 1992) (affirming tax commission's findings because challenger failed to marshal evidence).

Appellants claim that Madam Chen is an owner of Excel USA is made in two ways. Appellants first assert she has an ownership interest because of a claimed contribution of initial capital, and the second basis is the claim that Madam Chen transferred \$3 million into Excel USA in January 2001. *See* Brief of Hwan Lan Chen, at 8, 32, 33, 34, 35, and 43; Brief of Jau-Hwa Stewart and Taig Stewart at 5 and 6. The only matters put forward to the court to support these claims are (i) the after-the-fact Affidavit of Madam Chen, dated October 24, 2002, R. 9248, 9256, which finds no documentary support in the record whatsoever and is contradicted by virtually every other piece of evidence; (ii) her Answer to Interrogatory No. 5. R. 14336: Ex. L, which is directly contradicted by her Answers to other Interrogatories in the same set, *id.*; (iii) the testimony of Dr. Chen with respect to the Chinese custom to defer in decision-making to elders, R. 14230: 24-25, which makes no reference to ownership of Excel USA,

R. 14230: 24-25; and, (iv) claims and allegations made by Madam Chen in a complaint filed on December 31, 2002, R. 14287: 89-92, (a) after the trial court's August 12, 2002 Order granting Dr. Chen's Motion for Partial Summary Judgment, R. 6449, (b) after Madam Chen's October 24, 2002 Motion to Vacate, R. 9238, and (c) after Dr. Chen pointed out in her Motion to Strike that Madam Chen's claim of ownership of Excel USA had never been the subject of an affirmative claim, R. 10275--a complaint that was never served on Dr. Chen.

Madam Chen's claim of ownership are not supported by substantial or competent evidence in the record. Madam Chen and Ms. Stewart rely upon only these self-serving assertions and have ignored their duty to marshal. They fail to reference or marshal the overwhelming evidence that contradicts these claims and supports the trial court's findings.

2. UNDER THE PROPERLY MARSHALED EVIDENCE, HWAN LAN CHEN LACKS STANDING TO ASSERT CLAIMS BASED UPON HAVING AN OWNERSHIP INTEREST IN EXCEL USA.
 - a. HWAN LAN CHEN WAS NOT AN OWNER OF EXCEL USA.

Hwan Lan Chen was never an owner of Excel USA. The trial court properly struck Hwan Lan Chen's claims that were predicated upon a claim of ownership.

Hwan Lan Chen's assertion of ownership is contradicted by her own admissions and all of the competent evidence that addressed the issue. Hwan Lan Chen's Affidavit of October 24, 2002, in which she asserted ownership of Excel USA, R. 9248, 9256, was not supported by a single document. Her claim of ownership is expressly contrary to the

sworn testimony of her deceased husband with whom she claimed to have owned Excel USA. R. 14336: Ex. A. Her claim of entitlement to profits was expressly rejected by the sworn testimony of her deceased husband with whom she claimed to have had a joint right to receive such profits, R. 14336: Ex. A, and was tacitly conceded by her Answers to Excel USA's Second Set of Interrogatories, dated May 30, 2002. R. 14336. Ex. L.

Hwan Lan Chen's claim of "principal" ownership is directly contrary to the admission contained in the Stock Subscription Agreement she signed, dated January 6, 2001. In addition, Madam Chen's belated assertion of ownership was repudiated by her silence as a putative director of Excel USA and as a litigant when ownership and control were core issues in the case. Hwan Lan Chen knew shortly after January 10, 2001, that *ownership and control* of Excel USA were issues in litigation pending before the trial court. She was involved in the litigation as a putative director and a fiduciary of Excel USA. While Hwan Lan Chen was a putative director and fiduciary, Excel USA filed pleadings that alleged that prior to December 1995 Dr. Chen was the sole shareholder of Excel USA, and that there were four shareholders of Excel USA, "each owning twenty-five percent of the outstanding stock" R. 14336: Ex. C at 3, ¶ 9, D at 3, ¶ 9, E at 2, ¶ 4, F at 4, ¶ 16.

Her claim of ownership is directly contradicted by the corporate records of Excel USA, including: the original Stock Certificate 0001 representing 6,000 shares in Dr. Chen's name, R. 14338: Ex. 19; Stock Certificates 0002, 0003, 0004, and 0005 representing 1,500 shares in each of the names of Ms. Stewart and Dr. Chen's three

children, R. 14338: Ex. 20; Actions by Written Consent of the Shareholders of Excel USA, dated September 1, 2000, R. 14338: Ex. 22, 23; three Affidavits of Lost Stock Certificates, R. 14338: Ex. 25, 26, 27; reissued Stock Certificates 0003, 0004, and 0005, R. 14338: Ex. 28; the Minutes of Special Meetings of the Board of Directors of Excel USA, dated December 15, 2000, *signed by Hwan Lan Chen as acting secretary*, R. 14338: Ex. 29; Stock Subscription Agreement, dated December 15, 2000, which identified as “currently issued and outstanding” a total of 6,000 shares of stock, R. 14338: Ex. 30, the Minutes of Special Meetings of the Board of Directors of Excel USA, dated January 6, 2001, *signed by Hwan Lan Chen as a putative director*, R. 14338: Ex. 32, 33; Stock Subscription Agreement, dated January 6, 2001, which again identified as “currently issued and outstanding” a total of 6,000 shares of stock, which Subscription Agreement was *signed by Hwan Lan Chen*, R. 14338: Ex. 34; the stock subscription agreements, in particular, are admissions of Ms. Stewart’s and Hwan Lan Chen’s attempts to wrest ownership control from Hwan Lan Chen’s three grandchildren through Stock Subscription Agreements that would have given Hwan Lan Chen along with Ms. Stewart 51.1% ownership interest in Excel USA, R. 14338: 20, 34, had the trial court not voided the latter such agreement. R. 7954; R. 14336: Ex. T.

Every witness who testified contradicted her claim of ownership. Hwan Lan Chen’s claim of ownership was flatly repudiated by the sworn testimony of Dr. Chen, R. 14293: 173; R. 14230: 54-56; R. 14232, 14233: 9-31, the sworn testimony of

Ms. Stewart, R. 14293: 24-25, 53-59, the sworn testimony of Taig Stewart, R. 14223: 22-77 and the sworn testimony of Lynn Gilbert, R. 14226: 53-58, 88, 101, 106.

Hwan Lan Chen's direct activities in the litigation do not support her claim. In her Answer to ¶ 1 of the Third-Party Complaint she claimed to be "without knowledge or information necessary to form a belief as to the truth of the allegations" that her grandchildren owned 75% of Excel USA. R. 5585. Madam Chen's Affidavit of June 4, 2002, filed in opposition to Dr. Chen's Motion for Partial Summary Judgment Regarding Stock Ownership did not raise a claim that she owed Excel USA. Instead in the Affidavit, she claimed to have had great concern over whether Dr. Chen in 1995 would convey stock to Ms. Stewart through a redistribution of Dr. Chen's shares. R. 7126; R. 14336: Ex. Q.

Hwan Lan Chen's claim of ownership is singularly inconsistent with her counsel's acknowledgment on June 26, 2002, that the Motion for Partial Summary Judgment Regarding Stock Ownership did not involve Hwan Lan Chen, and therefore he should be excused from sitting through the arguments. R. 14276: 78-79.

There was no substantial or competent evidence of any kind or nature that Hwan Lan Chen was ever an owner of Excel USA. The overwhelming evidence was and is to the contrary. Her October 24, 2002 assertions are nothing more than a change in strategy. The trial court carefully considered all of Hwan Lan Chen's claims and categorically rejected them.

b. THE CLAIM THAT MADAM CHEN PROVIDED EXCEL USA \$3,000,000 WAS NOT ESTABLISHED.

During the evidentiary hearings on Dr. Chen's application for Preliminary Injunction, claims were made that \$3,000,000 was provided to Excel USA by Madam Chen. Accordingly, when the court entered the Interim Order requiring Ms. Stewart to leave the Company, that issue was preserved as follows: "The *Parties* reserve all rights with respect to such issues." R. 633 (emphasis supplied). Madam Chen was not a party on February 21, 2001 when the trial court entered the Interim Order. She was on notice, however, that her having put money into Excel USA was at issue, having discussed the matter with her son-in-law, Taig Stewart, during the pendency of the first Preliminary Injunction hearing, R. 14226: 16-18, and she was aware of and was otherwise kept apprised of the litigation by defendant Ms. Stewart with whom she lived. *E.g.*, R. 14229: 25; R. 14245: 85-87; R. 14251: 46; 14264: 19-23; R. 12755-57. Prior to Excel USA bringing her in as a Third-Party Defendant, Madam Chen could have easily intervened under Rule 24(a), Utah Rules of Civil Procedure. *See Republic Ins. Group v. Doman*, 774 P.2d 1130, 1131 (Utah 1989) (concluding attempt to intervene was untimely); *Jenner v. Real Estate Services*, 659 P.2d 1072, 1073-74 (Utah 1983) (same).

Even when she became a party late in October 2001 and thereafter, she took no steps to make or preserve such a claim until October 2002 some 120 days after the trial court had considered argument on stock ownership and 72 days since formally entering its Order. R. 9238. In addition, Hwan Lan Chen provided no documentation in support of this claim or the assertions in her October 24, 2002 Affidavit, R. 9249-53, even though,

seemingly, documents memorializing transactions involving the claimed large sums of money should have been available. The evidence that is in the record constitutes notes to Excel USA's balance sheet as of March 31, 2001, noting that Excel USA received \$2,999,995 from Sam Tzu, not from Hwan Lan Chen. R. 14336: Ex. B, 1 and 2. In addition, Hwan Lan Chen tacitly admitted she did not invest in or loan money to Excel USA in her Answers to Excel USA's Second Set of Interrogatories, as follows:

INTERROGATORY NO. 8: Identify each and every person or entity (domestic or foreign) to whom/which you have directly or indirectly transferred, sold, loaned, or gifted cash or other assets, either tangible or intangible, in excess of \$10,000 over the course of the past five years. With respect to each such transfer, sale, loan, or gift, also identify the date(s), amount(s), and form(s) of the same.

ANSWER TO INTERROGATORY NO. 8: Objection to this interrogatory on the basis that it is overly broad, burdensome and requests personal and confidential information which is not reasonably calculated to lead to the discovery of relevant evidence.

R. 14336: Ex. L.

Even if Madam Chen had infused Excel USA with \$3 million during January 2001, her explanation was that it was a "loan." R. 12755-57. In answer to ¶ 155 of the Third-Party Complaint, Hwan Lan Chen admitted she had "loaned \$3 million to the company." R. 5585. Moreover, and to illustrate additional inconsistency between the facts and her claims, on August 25, 2002, Ms. Stewart moved the Court under Rule 60(b) for reconsideration of Dr. Chen's Motion for Partial Summary Judgment Regarding Stock Ownership. In support of the Motion, Ms. Stewart advanced the following "facts": "In January 2001, *on behalf of Ms. Stewart*, Hwan Lan Chen facilitated the transfer of approximately \$3 million to E. Excel International, Inc.," R. 14326, Excel USA's records,

however, do not show any such funds being provided from either by Hwan Lan Chen or by Ms. Stewart.

Hwan Lan Chen has advanced no substantial or competent evidence that she has an ownership interest in Excel USA. Such an assertion, which found its way into the record not by affirmative claim, but by untimely Affidavit and Motion, was properly rejected.

B. THE TRIAL COURT PROPERLY REJECTED MADAM CHEN'S DUE PROCESS CLAIM.

Madam Chen was not an owner of Excel USA. She was not entitled to separate notice of matters in the litigation that affected ownership interests in Excel USA. *See* R. 12755-57.

C. HWAN LAN CHEN'S CLAIM OF OWNERSHIP IS BARRED.

The documentary and testimonial evidence overwhelmingly establishes Hwan Lan Chen is not and has never been an owner of Excel USA. Further, her own activities both before and after the commencement of the litigation contradict her untimely claim of ownership.⁸ She is now barred under a number of doctrines from asserting a claim of

⁸Such activities include, for example, the corporate mischief in which she was involved in September 2000 resulting in purported changes in the make-up of the board of directors and officers of Excel USA; her involvement in efforts to "replace" Dr. Chen's children's stock certificates by reissuing them in Ms. Stewart's name as trustee (so the shares would be subject to control by her and Ms. Stewart and not by the children); the unfulfilled Stock Subscription Agreements, the first of which purported to give Ms. Stewart 51.1% of the stock of the company, and the second of which purported to give Madame Chen, along with Ms. Stewart, 51.1% of the stock of the company; the various pleadings Excel USA filed while Madame Chen was a putative director and fiduciary that alleged, for example, that prior to December 1995 Dr. Chen was the sole shareholder of

ownership. Allowing Madame Chen to re-open the issue of ownership would completely undermine the integrity of the judicial process on which Dr. Chen, as every litigant, is entitled to rely for timeliness, fairness, predictability, consistency and finality.

As noted, Excel USA made ownership of Excel USA an issue in the very first paragraph of its Third-Party Complaint. Madam Chen denied knowing whether her grandchildren owned 75% of Excel USA. As a party, and with full knowledge of all that was going on in the litigation, she waited. She did not raise the issue of ownership by timely motion, by compulsory counterclaim or by other pleading. The position she now has taken is contrary to her admission of non-ownership, both express and implied by her counsel, and her claim of ownership is specious in view of the record and findings.

The facts in support of this bar include: (1) Hwan Lan Chen knew shortly after January 10, 2001, that ownership and control of Excel USA were issues in litigation pending before this Court; (2) she never sought to intervene in the case; (3) while Hwan Lan Chen was a putative director and fiduciary, Excel USA filed pleadings alleging that prior to December 1995 Dr. Chen was the sole shareholder of Excel USA, and that there were four shareholders of Excel USA, “each owning twenty-five percent of the outstanding stock . . .”; (4) Madam Chen executed the Stock Subscription Agreement

Excel USA, and that there were four shareholders of Excel USA, “each owning twenty-five percent of the outstanding stock . . .”; her denial in her Answer to the Third-Party Complaint that she had any knowledge or information concerning whether Excel USA “is 75% owned by Dr. Chen’s children”; her admission in her Answer to Third-Party Complaint that the phantom \$3 million was a “loan”; and, her refusal in her Answers to Interrogatories concerning sources of income and monies she provided to any others in excess of \$10,000 to provide any information about this subject.

acknowledging that there were 6,000 shares of stock issued representing the ownership of Excel USA;⁹ (5) she was kept apprised of the litigation by her daughter and son-in-law with whom she lived; (6) even after she was brought into the case as a Third-Party Defendant, Madam Chen made no affirmative claim of ownership in the case; (7) in Answer to Third-Party Complaint, she denied having knowledge or information concerning whether Excel USA “is 75% owned by Dr. Chen’s children”; (8) no documentary evidence was provided to support her assertion that she put \$3,000,000 into Excel USA in January 2001, and even if she had done so in her Answer to the Third-Party Complaint, she stated the money was a “loan”; (9) in her Answers to Interrogatories concerning sources of income and monies she had provided to any others in excess of \$10,000, she refused to provide such information, instead stating: “. . . this interrogatory . . . is overly broad, burdensome and . . . requests personal confidential and information which is not reasonably calculated to lead to the discovery of admissible evidence”; (10) she was on notice of Dr. Chen’s Motion for Partial Summary Judgment Regarding Stock Ownership; (11) the Motion for Partial Summary Judgment was clearly a Motion

⁹Having admitted the factual representations in the Stock Subscription Agreement, she cannot now take a position contrary to those admissions. *See Smith v. Sovran Bank Central South*, 792 S.W. 2d 928, 931 (Tenn. Ct. App. 1990) (holding in the context of discussion of the doctrine of estoppel by deed, “Ordinarily, recitals of matters of fact contained in a deed are binding on both the grantor and the grantee, such as the date of the instrument, the existence of prior agreements and the nature or status of either grantor or grantee.”); *Estate of Wilson*, 64 Cal. App. 3d 786, 801 (Cal. Ct. App. 1976) (holding that under California Code of Civil Procedure, there is a “conclusive presumption of ‘the truth of the facts recited, from the recitals in a written instrument between the parties thereto, where their successors in interest by subsequent title . . .’”).

that would impact the assertion of ownership she is now making; (12) on June 4, 2002, Madam Chen signed an Affidavit in Opposition to Chen's Motion for Partial Summary Judgment Regarding Stock Ownership in which she admitted ownership of Excel USA in Dr. Chen; (13) at the hearing on this motion, her lawyer expressly acknowledge to the court on June 26, 2002, that the issue of the ownership of Excel USA did not involve his client, Madam Chen, and before the Motion for Partial Summary Judgment was argued, her counsel obtained leave of court to be excused for that reason; (14) Hwan Lan Chen did not object to the form of Order submitted pursuant to the Court's ruling granting the Motion; (15) Hwan Lan Chen did not seek interlocutory review of the August 12, 2002 Order; (16) Hwan Lan Chen did not come forward with any explanation or reason why she now takes a position that is wholly contradicted by her affirmative conduct, acquiescence and silence.¹⁰

From the date the trial court granted Dr. Chen's motion on June 26, 2002, or entered the Summary Judgment Order on August 12, 2002, through October 23, 2002, she took no steps to intervene. She filed her Motion to Vacate on October 24, 2002, which constituted an collateral attack on the trial court's August 12, 2002 Order, as well as an indirect attempt to intervene in the ownership issues.

¹⁰Her silence should also be construed as an admission that she has no ownership interest. *See, e.g.,* 30B Michael H. Graham, *Federal Practice and Procedure*, § 7021, at 190 (3d. ed. 2000) (“[i]f an oral or written statement is communicated by another person to a party in the litigation containing assertions of fact which if untrue the party would under all the circumstances naturally be expected to deny, his failure to speak is receivable against him as an adoptive admission”) (citing Rule 801(d)(2)(B), Federal Rules of Evidence).

1. HWAN LAN CHEN'S WAIVER OF ANY CLAIM OF OWNERSHIP IS SUPPORTED BY THE RECORD.

Hwan Lan Chen waived any right to assert a claim of ownership. Waiver requires an existing right, benefit or advantage, knowledge of its existence, and an intention to relinquish it. *See, e.g., U.S. Realty 86 Associates v. Security Inv., Ltd.*, 40 P. 3d 586 (Utah 2002). Had Hwan Lan Chen at one time had a claim of ownership, the record is unequivocal that it would be deemed intentionally relinquished through her express and implied conduct. Madam Chen had notice of the ownership disputes before becoming a party. Even after she was a party to the proceedings, she not only remained silent on the issue but took affirmative conduct that clearly demonstrated that she had no ownership when ownership was clearly in dispute.

Evincing her intent to waive any such right to assert an ownership interest is manifest by evidence set forth above. Hwan Lan Chen clearly and unequivocally waived any right she may have had to assert a claim of ownership.

2. MADAM CHEN IS EQUITABLY ESTOPPED FROM ASSERTING OWNERSHIP.

Hwan Lan Chen is further proscribed under the doctrine of equitable estoppel from making an assertion of "ownership" now that is entirely inconsistent with and contrary to her previous allegations, denials, conduct, admissions, and silence in circumstances when she had a duty to speak, conduct upon which the trial court and Dr. Chen reasonably and necessarily relied. Equitable estoppel is premised upon the principle of fair dealing and is designed to aid in the administration of justice in cases where without it, manifest

injustice would result. To establish a claim of equitable estoppel, a party must show three elements:

(i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 34, 989 P.2d 1077 (citations omitted).

Here, the conduct referenced in connection with the discussion of intervention above constitutes statements, admissions, acts and failures to act by Madam Chen that is inconsistent with her later assertion of ownership. Second, after Madam Chen's entry into the case on December 12, 2001, the Zhang Children took action to establish their ownership with full notice to Madam Chen. Finally, allowing Hwan Lan Chen to contradict or repudiate her prior statements, admissions, acts and failures to act would clearly result in a manifest injustice to Dr. Chen's children--rehashing and relitigating matters that were soundly put to rest.

3. MADAM CHEN'S ASSERTION OF OWNERSHIP IS BARRED BY THE DOCTRINE OF LACHES.

Hwan Lan Chen is also barred from raising an assertion of "ownership" under the doctrine of laches. This doctrine operates when one omits to take steps reasonably expected to vindicate or enforce her rights, or omits to do what the law requires to protect one's rights, under circumstances that mislead or cause prejudice to an adverse party.

This doctrine is “based upon [the] maxim that equity aids the vigilant and not those who slumber on their rights.” *CIG Exploration, Inc. v. State of Utah*, 24 P.3d 966, 970 (Utah 2001) (quoting *Black’s Law Dictionary*, 787 (6th ed. 1990)). It is defined as neglect to assert a right or claim which, taken together with the lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar. *See, e.g., Angelos v. First Interstate Bank of Utah*, 671 P.2d 772, 777 (Utah 1983) (“[l]aches is not mere delay, but delay that works a disadvantage to another. To constitute laches, two elements must be established: (1) The lack of diligence on the part of plaintiff, [and] (2) An injury to defendant owing to such lack of diligence”).

Despite her involvement in litigation centered on the rights of ownership and control of Excel USA, she stood silent. She elected perhaps for reasons of strategy to take no steps to raise or protect any putative ownership interest. Accordingly, Madam Chen has lost any right that she claims to have had to raise this issue. Her assertion of ownership is barred by the doctrine of laches because to now raise it, would result in a manifest injustice to the Zhang Children.

D. THE INTERLOCUTORY APPEAL IS UNTIMELY.

Madam Chen’s and Ms. Stewart’s Petitions for Interlocutory Appeal were filed November 5, 2002. Relief Madam Chen seeks in the October 24, 2002 Motion to Vacate is predicated upon Hwan Lan Chen’s untimely assertion of ownership. This appeal therefore challenges, on an interlocutory basis, the trial court’s Order of August 12, 2002, granting Dr. Chen’s Motion for Partial Summary Judgment. In essence, Hwan Lan Chen

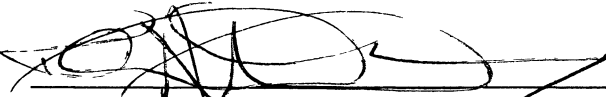
and Ms. Stewart have manipulated the Motion to Vacate as an improper means to appeal the August 12, 2001 Order. The appeal is out of time and the Court is without jurisdiction.

IX. CONCLUSION

For these reasons, the Court should dismiss the claims Madam Chen asserts that are based upon having an ownership interest in Excel USA.

DATED this 19th day of November, 2003.

SNOW, CHRISTENSEN & MARTINEAU



Michael R. Carlston
Richard A. Van Wagoner
David L. Pinkston
Attorneys for Plaintiffs/Appellees

ADDENDUM

Ruling Re: (I) Hwan Lan Chen's Motion to Vacate and Set Aside Judge Howard's Orders: (1) Appointing and Establishing the Powers and Duties of Special Master Larry C. Holman; and (2) Approving the Powers, Duties, and Actions of Special Master Holman; and (II) Plaintiff's Motion to Strike Claims of Hwan Lan Chen for Lack of Standing, and for Attorney's Fees and Costs.

(Filed in the Fourth District Court of Utah County, State of Utah, on January 24, 2003.)

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

1/24/03 MB7 Deputy

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

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

Plaintiffs,

vs.

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

Defendants.

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

Cross-Claimant,

vs.

IAU-HWA STEWART,
Cross-Defendant.

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

Third-Party Plaintiff,

vs.

TAIG STEWART, BEVERLY WARNER, ANGELA
BARCLAY, DALE STEWART, HWAN LAN CHEN,
SAM TZU, RICHARD HU, APOGEE, INC., a Utah
corporation, APOGEE ESSENCE INTERNATIONAL
PHILIPPINES, INC., a Philippine corporation,
EXCELLENT ESSENTIALS INTERNATIONAL
CORPORATION, a Philippine corporation, USA
APOGEE, LTD.,

RULING Re: (I) HWAN LAN CHEN'S
MOTION TO VACATE AND SET ASIDE
JUDGE HOWARD'S ORDERS: (1)
APPOINTING AND ESTABLISHING
THE POWERS AND DUTIES OF SPECIAL
MASTER LARRY C. HOLMAN; AND (2)
APPROVING THE POWERS, DUTIES, AND
ACTIONS OF SPECIAL MASTER HOLMAN;
AND (II) PLAINTIFF'S MOTION
TO STRIKE CLAIMS OF HWAN LAN
CHEN FOR LACK OF STANDING, AND
FOR ATTORNEY'S FEES AND COSTS

Civil No. 010400098
Consolidated with 010400201

Honorable Fred D. Howard
District Court Judge

<p>a Hong Kong corporation, SHANNON RIVER, INC., a Utah corporation, SHANNON HEATON, SHEUE WEN SMITH, BRYAN HYMAS, PAUL COOPER, KIM O'NEILL, BYRON MURRAY, and JOHN DOES 1 THROUGH X,</p>	
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Third-Party Defendants.

The above-entitled matter having come before the court on (I) Third Party Defendant Hwan Lan Chen's Motion to Vacate and Set Aside Judge Howard's Orders: (1) Appointing and Establishing the Powers and Duties of Special Master Larry C. Holman; and (2) Approving the Powers, Duties and Actions of Special Master Holman; and (II) Plaintiff's Motion to Strike Claims of Hwan Lan Chen for Lack of Standing, and for Attorney's Fees and Costs, and in Opposition to Hwan Lan Chen's Motion to Vacate and Set Aside Judge Howard's Orders: (1) Appointing and Establishing the Powers and Duties of Special Master Larry C. Holman; and (2) Approving the Powers, Duties and Actions of Special Master Holman; and the court having reviewed the Motions, and E. Excel's and Special Master Holman's Oppositions to Madame Chen's Motion and Madame Chen's Opposition to Plaintiff's Motion thereto; and the court being fully advised in the premises, and good cause appearing, it now makes the following ruling:

RULING

The matter before the Court arises from (I) Third Party Defendant Hwan Lan Chen's (hereinafter "Madame Chen") Motion to Vacate and Set Aside Judge Howard's Orders: (1) Appointing and Establishing the Powers and Duties of Special Master Larry C. Holman; and (2) Approving the Powers, Duties, and Actions of Special Master Holman (hereinafter "Madame

Chen's Motion"); and (II) Plaintiff's Motion to Strike Claims of Hwan Lan Chen for Lack of Standing, and for Attorney's Fees and Costs, and in Opposition to Hwan Lan Chen's Motion to Vacate and Set Aside (hereinafter "Plaintiff's Motion to Strike"). On October 24, 2002, Madame Chen filed her Motion. The Third Party Defendants and Defendant Mrs. Stewart then filed their Notices of Joinder to Madame Chen's Motion. E. Excel and Special Master Holman each filed their Oppositions to Madame Chen's Motion on November 7, 2002. On November 8, 2002, Plaintiff filed her Motion to Strike. Madame Chen then filed her Reply Memorandums to E. Excel's Opposition and Special Master Holman's Opposition on November 21, 2002. E. Excel later filed its Notice of Joinder to Plaintiff's Motion to Strike. On November 25, 2002, Madame Chen filed her Opposition to Plaintiff's Motion to Strike. Finally, on December 5, 2002, Plaintiff filed her Reply and thereafter notices to submit were filed for the two Motions. The Court notes that in conjunction with Madame Chen's Motion, E. Excel has filed a Motion to Strike Defendant Stewart's Joinder in Madame Chen's Motion and a Motion to Strike the Affidavits of Samuel O. Gauvin and Hwan Lan Chen which will each be examined in separate rulings.

This action was initiated in January, 2001 with a 10 day Temporary Restraining Order hearing that examined a number of issues and concluded with the appointment of Mr. Larry C. Holman as CEO/President of E. Excel and Special Master. Subsequently, the Court conducted approximately 24 days of evidentiary hearings that concluded on June 7, 2002. The Court also conducted two days of oral arguments regarding several motions, including Plaintiff's Partial Motion for Summary Judgment regarding stock ownership in E. Excel. Subsequently, on August

19, 2002, the Court entered a ruling and extensive Findings of Fact and Conclusions of Law. The Court's Ruling included the granting of summary judgment regarding the ownership of stock in E. Excel. The parties requested a hearing on Madame Chen's Motion, Plaintiff's Motion to Strike, and E. Excel's Motions to Strike and the Court heard argument regarding the motions on January 10, 2003.

I. Madame Chen's Motion to Vacate and Set Aside

Madame Chen asserts that the Orders of Judge Howard appointing Special Master Holman and approving the powers, duties, and actions of the Special Master are patently unlawful; exceed the power of the Court under Utah Rules of Civil Procedure Rule 53 governing special masters; violate the provisions and purposes of Rule 53; and are wholly contrary to and inconsistent with the subordinate judicial office of a special master authorized by Rule 53. E. Excel, however, asserts that Madame Chen's Motion is barred by the doctrines of waiver and estoppel because she failed to object to the Special Master's powers and duties throughout the course of the litigation; that she lacks standing because she possesses no ownership interest in E. Excel; and that if there exists any error in the appointment, such error is harmless and as such, there is no basis to vacate this Court's orders. The Court notes that the principal basis for Plaintiff's Motion to Strike is Madame Chen's alleged lack of standing; therefore, the Court will analyze Plaintiff's Motion to Strike and E. Excel's argument regarding standing in Section II of this Ruling. Further, E. Excel asserts that there exists no factual issue regarding the parties' stipulation and the unique appointment of a CEO/President with the immunities and protections of

a special master; that the *ex parte* communications Madame Chen asserts to be unlawful and beyond the scope of a rule 53 special master were stipulated to by the parties to provide a means of communication during the early and critical period of the litigation; that the parties are bound by their stipulations; and that if any error exists it is harmless and the orders that Madame Chen alleges to be unlawful should not be vacated.

Specifically, Madame Chen asserts that this Court's orders are unlawful because they were made without notice or hearing to her, before she was a party to the litigation, and usurped, injured, and confiscated her rights as a primary owner of E. Excel. Further, Madame Chen contends that certain powers and actions by Special Master Holman were approved by this Court and accepted into the record. She also asserts that the reports which provide the basis for the Findings of Fact and Conclusions of Law and subsequent Court rulings and orders are false. Madame Chen asserts that the following powers and actions by the Special Master are powers and actions that have tainted the record: (1) Special Master Holman was unlawfully authorized to become (a) CEO of E. Excel without need of Court approval; (b) engage in *ex parte* communications; (c) investigate and take actions with issues outside of the pleadings; and became a witness in the proceedings; (2) Special Master Holman unlawfully became a party litigant by bringing claims and preliminary injunction against her, and required that E. Excel fund litigation brought by Plaintiff; (3) in the Master's Settlement Agreement, the Special Master was authorized to and did settle, as a litigant with approval of the Court, all claims involving E. Excel outside the scope of the pleadings which adversely affected E. Excel's business and her interests as an owner

of E. Excel; (4) the Special Master was unlawfully authorized to and did attempt to destroy ownership in E. Excel and implemented the litigation strategies of Plaintiff; and (5) this Court adopted Master Reports 1 through 5. For these reasons, Madame Chen asserts that the record is tainted as a matter of law and the orders appointing and empowering the Special Master and all orders subsequent to that appointment should be vacated and set aside.

The Court begins its analysis of Madame Chen's Motion with Rule 53 of the Utah Rules of Civil Procedure. Rule 53 (c) states that, "the order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts." Further, the Utah Supreme Court has emphasized Rule 53(c) by stating, "Rule 53(c) provides that the Court may specify or limit the master's powers and may direct the master to report only upon particular issues." *Plumb v. State of Utah*, 809 P.2d 734, 741-42 (Utah 1990). E. Excel contends that this Court's appointment of the Special Master does not exceed the parameters of Rule 53(c) and that Madame Chen has grossly mischaracterized the nature of Mr. Holman's appointment. In essence, Madame Chen is arguing that Mr. Holman is a renegade judicial officer operating far afield from the mandates of his appointment. The Court is persuaded by E. Excel's arguments. The circumstances of the litigation was an extraordinarily troubled one in January and February 2001 creating the need for a unique and immediate response. Exigent circumstances necessitated the immediate appointment of a CEO/President of E. Excel without which the company would cease to operate. E. Excel was in chaos and was losing stability rapidly. Among other things the record reflects that E. Excel was missing important files,

documents, equipment, product, and cash flow needed for day to day operations. This Court later discovered and concluded from the evidence that E. Excel had been stripped by it's acting President and Officers and that certain of it's employees were involved in a conspiracy led by Defendant Mrs. Stewart and funded by Madame Chen. The intent and purpose of the conspiracy was to destroy E. Excel and then install a new competing company named Apogee with a distribution network carved from E. Excel's distribution network. Following the initial 10 day hearing, the Court and the parties agreed that an interim CEO/President of E. Excel would be appointed to forestall the erosion of E. Excel's business and attempt to revitalize it's business. Mr. Holman was appointed to this position and was given the title of interim CEO/President. The parties and Mr. Holman insisted that the same immunities and protections that a special master would receive be bestowed on him because of the potential for oppressive lawsuits against him as interim CEO. At this critical time the parties included Plaintiff Jau-Fei Chen, Defendant Jau-Hwa Stewart and E. Excel. Each stipulated that Mr. Holman would act as CEO/President of E. Excel and as special master with full executive authority to act as CEO under the direction of the Board of Directors and with the prescribed protections and immunities. The parties having stipulated to such appointment, the Court approved the stipulation. E. Excel and Mr. Holman assert that the stipulations are binding upon the parties and that generally the Court should not overturn such stipulations. This Court agrees and concludes that the stipulations reached regarding the appointment of the Special Master were lawful and binding upon the parties.

Madame Chen also asserts that the stipulations reached to allow the Special Master to

conduct *ex parte* communications is unlawful. Madame Chen contends that the Special Master admitted to conducting *ex parte* communications. E. Excel, however, asserts that such action was conducted in his function as CEO and is harmless inasmuch as the Special Master has not exercised judicial functions such as take evidence, hold hearings, compel testimony or production of documents, or make adjudicative decisions. Again, and respectfully, this Court is unpersuaded by Madame Chen's argument. The parties stipulated to such communications; and, therefore, said communications were not unlawful. The record also reflects that the Court excluded *ex parte* communications with the Court by requiring that the Special Master make all communications to the Court in writing to allow the parties opportunity to respond.

In her Reply and Opposition Memorandums Madame Chen asserts the new argument that notwithstanding any stipulation, the appointment of the Special Master under such terms is patently unlawful, and, as such, the Court was without subject matter jurisdiction to appoint Mr. Holman to the dual role of CEO/President of E. Excel and Special Master. E. Excel counters however, that this argument has been raised unsuccessfully in other courts in an attempt to avoid waiver limitations. This Court is a court of general jurisdiction possessing ~~subject~~ matter jurisdiction over a wide range of actions. As such, Madame Chen has failed to assert that this Court lacks subject matter jurisdiction over the underlying case. The Fifth Circuit rejected this same argument stating,

...appellants' contention that the reference was improper is not a case where a court has exceeded or refused to exercise its jurisdiction; it is rather a question of whether the judge

erred ruling on matters within his jurisdiction. Since the judge's reference was within his power, a challenge to that order is unlike a challenge to a court's subject matter jurisdiction.

Cruz v. Hauck, 515 F.2d 322, 327 (5th Cir. 1975).

Cruz further held that challenge to the appointment of a special master is waivable. The Fifth Circuit stated,

We see no reason why the parties to the lawsuit...may not waive their objections to a [special master] reference. A party objecting to a reference should do so prior to or at the time of the reference. If this is infeasible, the objection should be made to the judge at the earliest possible opportunity. Such procedure permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master's report would be able to obtain a 'second bite at the apple' by withholding his objection to the reference until after the report. Since appellants did not object to the reference in the district court, we hold that they waived their right to object and may not do so for the first time on appeal.

Cruz v. Hauck, 515 F.2d 322, 330-31 (5th Cir. 1975)

In an en banc opinion, the Tenth Circuit overruled a contrary opinion of one of its panels, holding that a claim that a special master reference is outside the scope of Rule 53 does not pose a subject matter jurisdiction problem. *Polin v. Dun & Bradstreet, Inc.*, 634 F.2d 1319, 1321 (10th Cir. 1980). Further, in 1992, the Tenth Circuit held that issues involving the appointment of a magistrate or special master are not jurisdictional. *Clark v. Poulton*, 963 F.2d 1361, 1366-67 (10th Cir. 1992). Utah courts have adopted the same conclusion, holding that any error made by a

district court in appointing a special master was subject to harmless error analysis. *Phumb v. State*, 809 P.2d 734, 741, 744 (Utah 1990). Noting the authorities presented by both parties and that this was a stipulated appointment under peculiar and exigent circumstances, the Court concludes that Madame Chen's challenge of the appointment of the Special Master is not a subject matter jurisdictional issue; and the Court is unpersuaded with the argument that the Court is without subject matter jurisdiction to appoint, empower, and grant immunity to the Special Master.

Next, the Court examines E. Excel's assertion that Madame Chen has waived any challenge to the appointment of the Special Master. The Court is persuaded by Plaintiff's and E. Excel's argument and authorities regarding waiver. While participating in the litigation, Madame Chen has had ample opportunity to challenge the Special Master's appointment from at least December 12, 2001 to October 2002, more than 10 months. The Court concludes that she has waived and is to be estopped from asserting any objection to the appointment. The Court notes E. Excel's 33 paragraph summary of undisputed facts regarding Madame Chen's involvement in the litigation, the difficulties that Madame Chen created when E. Excel attempted to serve Madame Chen; and the general hide and seek tactics taken until E. Excel announced it's intention to seek her default. The Court concludes that Madame Chen had ample opportunity to timely challenge the Master's appointment and failed to do so; and, therefore, her claims are barred by the doctrine of waiver.

A challenge to subject matter jurisdiction regarding the appointment of a special master

also includes a harmless error analysis. This analysis requires the Court to view the evidence as a whole and determine if there is a reasonable likelihood a different result would have been reached absent the alleged error. *Plumb v. State*, 809 P.2d 734 (Utah 1990). The litigation of this proceeding began two years ago and has included hundreds of exhibits and almost 40 days of testimony. There exists an extensive record in this case from which the Court based its Findings of Fact and Conclusions of Law. The Reports 1 through 5 of the Special Master were entered into the record and the Master Settlement Agreement was approved by this Court. However, said reports and the Master's Settlement Agreement make up only a small fraction of the record. The Court has concluded by the overwhelmingly persuasive evidence that the conspiracy incident to this action included Madame Chen. The Findings and Conclusions relative to the Preliminary Injunction and Civil Conspiracy, while they include recitals to the Special Master Reports, were based upon record recitals independent from the Master Reports and the Master's Settlement Agreement. Further, as a matter of clarification, the two sets of Findings of Fact and Conclusions of Law stand independent of each other. While the Court incorporated said Findings of Fact relative to the civil conspiracy issues into the Findings of Fact for Preliminary Injunction, the Court hereby states to the parties to clarify, that said incorporation was not essential, and that the Court reaches the same conclusions for the relief sought by E. Excel based on the separate Findings entered. This Court concludes that the outcome of the hearings would not have been any different if the errors alleged by Madame Chen, particularly regarding the Special Master, had never occurred.

Next, regardless of any standing issue that the parties raise, Madame Chen was found to be a party to the civil conspiracy. In late 2000 Madame Chen became unhappy with her daughter Jau-Fei Chen and the conspiracy was born. Madame Chen was found in the two Findings of Fact and Conclusions of Law entered in this case, to be in active concert with other individuals to take revenge upon her daughter. (Civil Conspiracy Findings of Fact and Conclusions of Law, Paragraph 37). On September 1, 2000, Madame Chen was placed on the Board of Directors of E. Excel by then acting President Jau-Hwa Stewart. Once this action occurred, Madame Chen together with her daughter Jau-Hwa Stewart initiated actions to take over E. Excel. (Injunction Findings of Fact, Paragraph 11). Following the take over of E. Excel the conspiracy began it's destruction of the company:

Having seized control of E. Excel, Ms. Stewart and Hwan Lan Chen then proceeded to attack E. Excel's historical distributors in Asia. The attack consisted of two parts. First, Ms. Stewart, acting as president of E. Excel, cut off the flow of product to the historical distributors. Second, Hwan Lan Chen and Jau-Hwa Stewart arranged for the transfer of millions of dollars to Asia to pay for Richard Hu and Sam Tzu to establish new distribution networks.

Injunction Findings of Fact, Paragraph 15.

While the destruction of E. Excel continued, the conspirators also initiated the business Apogee to compete with E. Excel. Madame Chen funded Apogee. Further, inasmuch as Madame Chen did not trust Mr. Holman, she attempted to conceal the source of funds used to start Apogee including those used to purchase property and equipment for Apogee. (Injunction Findings of

Fact, Paragraphs 138 and 143). The Findings of Fact also describe how the conspiracy was funded by Madame Chen. (Injunction Findings of Fact, Paragraph 236). Further, as set forth in the Conclusions of Law, while serving as a director of E. Excel, Madame Chen breached her fiduciary duties owed to E. Excel because of her participation in the conspiracy. (Injunction Conclusions of Law, Paragraphs 30, 36). The Findings of Fact and Conclusions of Law entered in this case demonstrate that not only was Madame Chen involved in the conspiracy, but that she funded the conspiracy. By these acts, coupled with her participation as a litigant in the lawsuit she has waived and is to be estopped from asserting any objection to the appointment of the Special Master.

II. Plaintiff's Motion To Strike For Lack of Standing

Notwithstanding the above reasons for barring Madame Chen's Motion, the Court will address the issue of standing asserted in Plaintiff's Motion to Strike and E. Excel's Opposition to Madame Chen's Motion. The Court notes that E. Excel's assertion that Madame Chen is not an owner of E. Excel is essentially the same as Plaintiff's Motion and as such, the Court will focus its analysis on Plaintiff's Motion to Strike and Madame Chen's Opposition. Plaintiff asserts that Madame Chen is without standing to assert claims regarding the appointment and conduct of the Special Master because she does not possess an ownership interest in E. Excel. Plaintiff contends that Madame Chen is not an owner of E. Excel nor has she acquired any equity interest in E. Excel resulting from the alleged transfer of \$3 million to E. Excel. Further, regarding the alleged \$3 million transfer, Plaintiff asserts that the stock subscription agreement was never fulfilled; that

there is no evidence of equity resulting from the \$3 million transfer; that Madame Chen has failed to establish any entitlement to the \$3 million transfer; and, as such, Madame Chen's Motion should be denied and Plaintiff should be awarded attorney's fees and costs. Madame Chen contends that the standing doctrine does not provide a basis for striking her subject matter jurisdiction challenge; that the standing doctrine does not provide a basis for striking her due process challenge to the orders relating to the Special Master, and that the standing doctrine provides no basis for an advance summary adjudication on the merits. In addition, while she asserts no actual stock ownership in E. Excel, by her affidavit, Madame Chen claims she has an equitable ownership in E. Excel which gives her standing.

Plaintiff, however, asserts that Madame Chen has failed to consider the 68 paragraph factual recitals of her Motion, that "Her silence can only be considered as an admission that the undisputed facts unquestionably establish that Hwan Lan Chen has no ownership interest in Excel USA." (Reply Memorandum in Support of Motion to Strike Claims of Hwan Lan Chen For Lack of Standing, 3). Plaintiff further asserts that Madame Chen's claims that there exists a difference between stock ownership and beneficial ownership are without substance. The Court is persuaded by Plaintiff's arguments. Madame Chen has failed to dispute the ownership facts set forth in Plaintiff's Motion, and there is no dispute over the ownership interests of E. Excel as heretofore determined by the Court. The Court is unpersuaded that Chinese customs of the parties in some manner govern the legal ownership interests of the parties. Further, the Court notes that it is only after the entry of the Findings of Fact and Conclusions of Law that Madame Chen has asserted that

she played an integral role in the organization, funding and operation of E. Excel. This tardy assertion is contrary to the evidence presented during the litigation and set forth in the Court's Findings and Conclusions and the Court's subsequent decision on the subject. The Court has heretofore determined the ownership interests of E. Excel which do not include any ownership interest by Madame Chen. Based upon the evidence presented, this Court has concluded that the actual stock ownership in E. Excel is vested in the three minor children of Plaintiff, Chi Wei Zhang, E. Lei Zhang and E. E. Zhang with each owning a combined total of 75% of the shares, or 25% individually, and Defendant Mrs. Stewart, holding the remaining 25% shares. Further, Madame Chen has failed to file compulsory or affirmative claims to assert her ownership in E. Excel, but makes such claims solely under her Motion. She has failed to point to a single benefit derived from her claimed interest, and failed to provide proof of a single dividend or distribution passed to her by E. Excel. This Court is unpersuaded with Madame Chen's Motion claim that by the alleged \$3 million transfer she acquired ownership in E. Excel, noting that she conceded in her Answer that the \$3 million transfer was a loan. The Court concludes that Madame Chen has at best asserted only equitable ownership claims in E. Excel by her Motion to Vacate and Set Aside, and that the subject has been adjudicated.


Plaintiff also asserts that Madame Chen's due process claims must fail because she was alerted of all case issues from the outset from the co-conspirator, Defendant Stewart, who lives in the same house as Madame Chen. She therefore had actual notice of the Court proceeding which nullified any claim that she was entitled to legal notice. The Court is persuaded by this argument

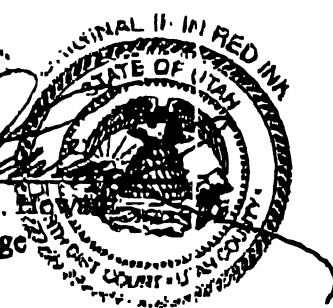
which is supported by the record and the Court's Findings of Fact. Madame Chen has had notice from the inception of the litigation through her daughter Jau-Hwa Stewart. Further, Madame Chen has no actual legal ownership interest in E. Excel which would require separate, formal notice to her. The Court concludes that Madame Chen's due process rights have not been violated.

For the forgoing reasons, and the reasons set forth in Plaintiff's Motion and E. Excel's and the Special Master's Oppositions, the Court respectfully denies Madame Chen's Motion and will award E. Excel it's reasonable attorney's fees and costs relative to the motion. The Court also grants Plaintiff's Motion to Strike the Claims of Hwan Lan Chen for Lack of Standing and will award Plaintiff her reasonable attorney's fees and costs relative to the motion. The Plaintiff and E. Excel are directed to submit appropriate affidavits and summaries relative to attorney fees and costs and respective orders consistent with this Ruling.

DATED this 24th day of January 2003.

BY THE COURT:


Honorable Fred D. Howe
District Court Judge



MAILING CERTIFICATE

I certify that true copies of the foregoing ruling were mail, postage prepaid, on the 24 day of January 2002 to the following at the addresses indicated, to wit:

Mark A. Larsen
LARSEN & GRUBER
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Deno G. Himonas
Adam B. Price
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444

Clark Sessions
CLYDE, SNOW, SESSIONS & SWENSEN PC
201 South Main, Suite 1300
Salt Lake City, Utah 84111

Patrick Hoog
E. EXCEL INTERNATIONAL, INC.
1198 North Spring Creek Pl.
Springville, Utah 84663

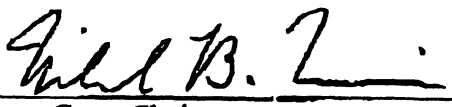
Michael R. Carlston
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Suite 1100
P.O. Box 45000
Salt Lake City, Utah 84143

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

Paul T. Moxley
Christine T. Greenwood
HOLME, ROBERTS & OWEN
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111

Jeffrey J. Hunt
Jonathan O. Hafen
Justin P. Markin
PARR WADDOLFS BROWN GEE &
LOVELESS
185 South State Street, #1300
Salt Lake City, Utah 84111

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



Deputy Court Clerk

CERTIFICATE OF SERVICE

Snow, Christensen & Martineau, attorneys for defendants herein, certifies that the attached **BRIEF OF APPELLEE JAU-FEI CHEN and APPENDIX** (Utah Supreme Court 20020927-SC) was served upon the parties listed below by placing two copies thereof in an envelope addressed to:

Mark A. Larsen
David S. Hill
Jon K. Stewart
Stacy J. McNeill
Larsen & Gruber
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

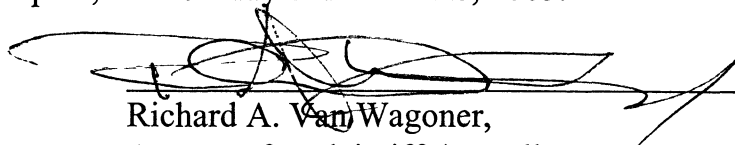
Daniel L. Berman
Stephen R. Waldron
Berman, Tomsic & Savage
50 South Main, Suite 1250
Salt Lake City, Utah 84144

H. Thomas Stevenson
Stevenson & Smith
3986 Washington Boulevard
Ogden, Utah 84403

Michael D. Zimmerman
Snell & Wilmer
15 West South Temple, Suite 1200
Salt Lake City, Utah 84111

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

and mailed, first-class, postage prepaid, this 19th day of November, 2003.



Richard A. Van Wagoner,
Attorney for Plaintiffs/Appellees