

2002

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

Utah Court of Appeals

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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.

JAU-HWA STEWART, et al.,

Defendants/Appellants.

~~UTAH SUPREME COURT~~
BRIEF

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DOCKET NO. 20020777-SC
Case No. 20020777-SC

**ADDENDUM TO
APPELLEE'S BRIEF IN RESPONSE TO BRIEF OF HWAN LAN CHEN**

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

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and
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Attorneys for Third-Party
Defendant/Appellant
Hwan Lan Chen

**FILED
UTAH APPELLATE COURTS**

APR 21 2004

IN THE UTAH SUPREME COURT

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

Plaintiffs/Appellees,

vs.

Case No. 20020777-SC

JAU-HWA STEWART, et al.,

Defendants/Appellants.

**ADDENDUM TO
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Defendant/Appellant
Hwan Lan Chen

XI. ADDENDUM

- A. Supreme Court Order of November 25, 2002
- B. Appellee Jau-Fei Chen's Motion to Dismiss for Lack of Appellate Jurisdiction and Standing
- C. Excel USA's Motion to Dismiss for Lack of Appellate Jurisdiction
- D. Hwan Lan Chen's Petition for Permission to Appeal (in the Special Master Appeal no. 20020927)
- E. Jau Hwa Stewart's Joinder in Hwan Lan Chen's Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5 (in the Special Master Appeal no. 20020927)
- F. Taig Stewart's Joinder in Hwan Lan Chen's Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5 (in the Special Master Appeal no. 20020927)
- G. Third-Party Defendants' Joinder in Hwan Lan Chen's Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5 (in the Special Master Appeal no. 20020927)
- H. Brief of Appellee E. Excel International, Inc. (in the Special Master Appeal no. 20020927)
- I. Brief of Appellants Jau Hwa Stewart and Taig Stewart (in the Special Master Appeal no. 20020927)
- J. Brief of Appellant Hwan Lan Chen (in the Special Master Appeal no. 20020927)

A

IN THE SUPREME COURT OF THE STATE OF UTAH

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FILED
UTAH SUPREME COURT

NOV 25 2002

PAT BARTHOLOMEW
CLERK OF THE COURT

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

Plaintiff/Appellee,

v.

Case No. 20020777-SC

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

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

v.

Jau-Hwa Stewart,
Cross-Defendant,

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

v.

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

Jau-Hwa Stewart,
Cross-Claimant,
v.

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

ORDER

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

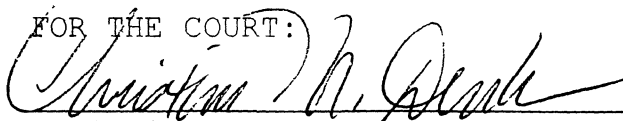
The Court denies plaintiff's motion to dismiss defendant Jau Hwa Stewart's appeal on the basis that her appeal appears at this juncture to be from a final order holding her in contempt. That order is either an order of criminal contempt or contains elements of civil and criminal contempt and will therefore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

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

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

!

Nov. 25, 2002
Date

FOR THE COURT:

Christine M. Durham
Chief Justice

CERTIFICATE OF MAILING

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

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Dated this October 29, 2002.

By 
Deputy Clerk

Case No. 20020777

B

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UTAH SUPREME COURT

OCT 23 2002

PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE UTAH SUPREME COURT

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

Plaintiff/Appellee,

vs.

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

Defendants/Appellants.

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

Case No. 20020777-SC

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

Cross-Claimant,

vs.

JAU-HWA STEWART,

Cross-Defendant.

Trial Court Nos. 010400098 and
010400201

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

JAU-HWA STEWART,

Cross-Claimant,

vs.

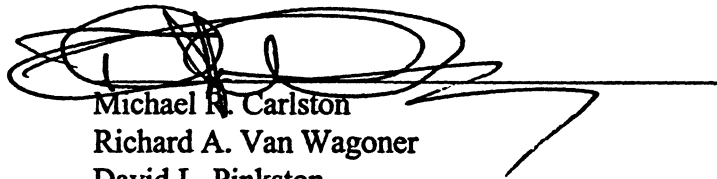
E. EXCEL INTERNATIONAL, INC., a Utah
corporation; LARRY C. HOLMAN; and GARY
TAKAGI,

Cross-Defendants.

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

DATED this 23 day of October, 2002.

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in black ink, appearing to be "Michael R. Carlston", is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke extending to the right.

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

CERTIFICATE OF SERVICE

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

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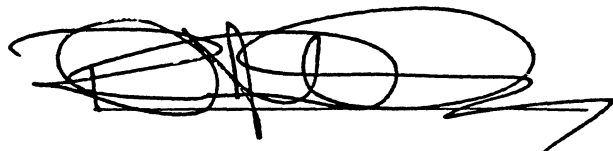
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UTAH SUPREME COURT

OCT 23 2002

PAT EARTHOLOMEW
CLERK OF THE COURT

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IN THE UTAH SUPREME COURT

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Plaintiff/Appellee,

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JAU-HWA STEWART, E. EXCEL
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Defendants/Appellants.

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

Case No. 20020777-SC

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

Cross-Claimant,

vs.

JAU-HWA STEWART,

Cross-Defendant.

Trial Court Nos. 010400098 and
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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.,
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HYMAS; PAUL COOPER; KIM O'NEILL;
BYRON MURRAY; and JOHN DOES I
THROUGH X,

Third-Party Defendants.

JAU-HWA STEWART,

Cross-Claimant,

vs.

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

Cross-Defendants.

I. INTRODUCTION

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

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

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

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

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

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

II. RELEVANT FACTS

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

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

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

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

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

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

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

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

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

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

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

Id. ¶ 74.²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit A, ¶ 116.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

A. MS. STEWART'S APPEAL IS PREMATURE

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

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

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

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

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

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

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

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

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

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

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

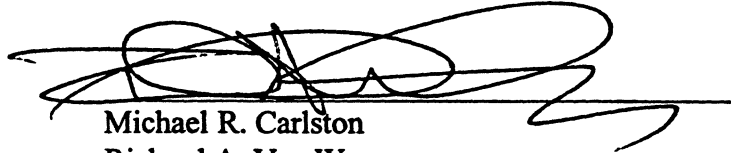
Moreover, only the contemnor has standing to appeal a finding of contempt, because only the contemnor is technically a party to the separate proceeding, and because only the contemnor is aggrieved by the contempt findings. *See, e.g., Second Injury Fund v. J & S Trucking*, 30 S.W.3d 112 (Ark. Ct. App.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

IV. CONCLUSION

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

DATED this 23rd day of October, 2002.

SNOW, CHRISTENSEN & MARTINEAU

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

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

CERTIFICATE OF SERVICE

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

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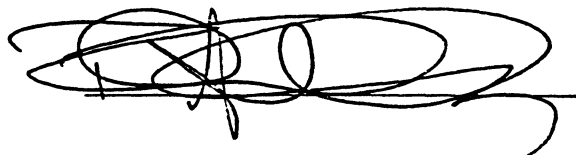
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A handwritten signature in black ink, appearing to be "J. R. O.", written over a horizontal line.

C

Moreover, even if the order were one of criminal contempt, such orders are in any event not appealable before the district court has had an opportunity to finally impose sanctions for the contempt. And such orders are only appealable by the contemnor, not by the other litigants in the underlying case. In this case, the district court has not had opportunity to fully determine the sanction to be imposed upon Jau-Hwa Stewart for her contemptuous acts. And the district court has not yet held any of the other Appellants in contempt of court.

For these reasons, the appeals filed by Jau-Hwa Stewart, Hwan Lan Chen, Taig Stewart, Beverly Warner, Angela Barclay, Dale Stewart, Sheue Wen Smith, and Apogee, Inc. (“Appellants”) are premature and should be summarily dismissed for lack of appellate jurisdiction.

The grounds for this motion are more fully set forth in a memorandum in support of this Motion to Dismiss for Lack of Appellate Jurisdiction.

DATED this 21st day of October, 2002.

JONES WALDO HOLBROOK & MCDONOUGH

By Ryan Harris

Deno G. Himonas

Adam B. Price

Ryan M. Harris

Attorneys for E. Excel International, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October 2002, I caused a true and correct copy of the foregoing **MOTION TO DISMISS FOR LACK OF APPELLATE**

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Reza Hani

Moreover, even if the order were one of criminal contempt, such orders are in any event not appealable before the district court has had an opportunity to finally impose sanctions for the contempt. And such orders are only appealable by the contemnor, not by the other litigants in the underlying case. In this case, the district court has not had opportunity to fully determine the sanction to be imposed upon Jau-Hwa Stewart for her contemptuous acts. And the district court has not yet held any of the other Appellants in contempt of court.

For these reasons, and as more fully discussed below, the appeals filed by Jau-Hwa Stewart, Hwan Lan Chen, Taig Stewart, Beverly Warner, Angela Barclay, Dale Stewart, Sheue Wen Smith, and Apogee, Inc. (“Appellants”) are premature and should be summarily dismissed for lack of appellate jurisdiction.

FACTUAL BACKGROUND

1. E. Excel International, Inc., is a manufacturer of nutritional supplements and skin care products that are sold through multi-level marketing networks. E. Excel sells its own products directly to multi-level marketers in the United States and Canada, but in Asia sells its products to a single territorial owner in each national market, who then sells the products through a multi-level marketing network. See Injunction Findings (attached hereto as Exhibit A), at ¶ 1.

2. Prior to the events that form the basis of the present litigation, E. Excel was run by Jau-Fei Chen (“Dr. Chen”), as president, and Jau-Hwa Stewart, as vice-president. Given, however, that Dr. Chen spent large amounts of time in Asia promoting E. Excel’s products, Ms. Stewart was herself responsible for all aspects of the day-to-day operations of the company. Id. at ¶ 2.

3. Beginning sometime in 2000, Jau-Hwa Stewart and her mother, Hwan Lan Chen, came to believe that Jau-Fei Chen’s husband, Rui-Kang Zhang, had been keeping a mistress.

Because of this belief, Ms. Stewart and her mother determined to take revenge upon Rui-Kang Zhang, and, when Jau-Fei Chen objected, upon Dr. Chen herself. Id. at ¶ 10.

4. As part of this scheme of revenge, Jau-Hwa Stewart and her mother determined to take over E. Excel and remove Jau-Fei Chen and Rui-Kang Zhang from their positions with the company. Towards this end, Ms. Stewart purported to vote the stock of the 75% shareholders, Jau-Fei Chen's three children, which, she alleged, had been placed with her in trust. Id. at ¶ 11. The district court later held that Ms. Stewart had no right to vote the stock of the 75% shareholders, and that her actions in taking control of the company were void from the outset. See Order Granting Plaintiff's Motion for Partial Summary Judgment With Respect to Stock Ownership (attached hereto as Exhibit B).

5. Using her purported power over the children's shares, Ms. Stewart first replaced Dr. Chen and Mr. Zhang on the board of directors with Mr. Taig Stewart and Hwan Lan Chen. The new board then exercised its powers to discharge Dr. Chen and Mr. Zhang as officers of the corporation and replace them with Ms. Stewart as president and Mr. Stewart as corporate secretary. See Injunction Findings (Exhibit A), at ¶ 12.

6. 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 company's historical distributors. Second, Hwan Lan Chen and Jau-Hwa Stewart arranged for the transfer of millions of dollars to Asia to pay for new distributors loyal to them to establish new distribution networks. Id. at ¶ 15. Ms. Stewart and Hwan Lan Chen took these actions without a legitimate business justification. Id. at ¶ 21.

7. Soon thereafter, Dr. Chen filed the underlying action in the district court. On January 10, 2001, based upon Dr. Chen's prima facie showing that Ms. Stewart intended to cause

E. Excel to violate its exclusive contracts with the historical distributors, this Court restrained Jau-Hwa Stewart from “directly or indirectly causing [E. Excel] to violate any of its exclusive contracts with [the historical distributors] or to compete with the [historical distributors] in violation of such contracts.” This Court also directed Ms. Stewart to “fill, complete, and ship all pending orders for products received from [the historical distributors].” See id. at ¶ 33 (quoting from a Temporary Restraining Order entered on January 10, 2001).

8. As a result of this order and other events, Jau-Hwa Stewart and her co-conspirators knew that there was a strong possibility that Ms. Stewart would be removed as president of the company. Faced with this likely loss of control, Jau-Hwa Stewart and Hwan Lan Chen, soon joined by Taig Stewart and others, determined both to destroy E. Excel, rather than let it revert to Jau-Fei Chen’s control, and also to replace it with Apogee, a new nutritional supplements manufacturing company controlled by Ms. Stewart and Hwan Lan Chen alone. Id. at ¶ 34.

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

10. At one point, in an effort to cover up their activities and provide cover for the conversion of property from E. Excel’s warehouse, the conspirators purchased mice at a pet store and placed the mice in the warehouse, and then claimed that it was necessary to remove the products from the warehouse because of the presence of rodents. See id. at ¶¶ 71-79.

11. Some of these activities were directly contrary to the TRO entered on January 10, 2001. During this interim period, Jau-Hwa Stewart intentionally failed to fill confirmed orders from the historical distributors despite knowing what was required, and having the ability to fill such orders. See Contempt Findings (attached hereto as Exhibit C), at 120 ¶¶ 7-8. In addition, Ms. Stewart intentionally caused and allowed shipments of E. Excel product within her control to be shipped to new distributors loyal to her, despite knowing what was required and having the ability not to ship such product. Id. at 120-21, ¶¶ 8-9.

12. Moreover, during the extended preliminary injunction hearing then occurring, more problems arose for Jau-Hwa Stewart. On February 13, 2001, a tape recording was anonymously delivered to Dr. Chen and her counsel. The tape contained a recording of a conversation, which occurred on or about January 23, 2001, between Jau-Hwa Stewart and two of the new distributors loyal to her—Sam Tzu and Richard Hu. On the tape, Ms. Stewart, Mr. Hu, and Mr. Tzu can be heard discussing the following:

- a. that they would testify falsely that Dr. Chen wanted to forge documents;
- b. that they would testify falsely concerning statements Dr. Chen had purportedly made during prior meetings;
- c. that Mr. Hu would falsely deny any involvement or ownership in the new distribution networks;
- d. that they would falsely blame Dr. Chen for things that were not her fault;
- e. that suing Dr. Chen was not enough, that they must take additional actions against her in order to consume her resources; and
- f. that if they were ever asked questions in a court proceeding that they did not want to answer, they would say “I cannot remember now” and justify giving a misleading answer with the explanation that they could choose to “remember” whenever they wanted to after that.

See id. at 57 ¶ 88.

13. That same day (February 13), Mr. Hu was scheduled to testify at the ongoing preliminary injunction hearing. His testimony adhered to the conspiratorial agreement he, Ms. Stewart, and Mr. Tzu had reached to testify falsely. Id. at 58 ¶ 90.

14. After Mr. Hu had testified falsely, counsel for Dr. Chen presented Mr. Hu with a translation of the tape recording. Thereafter, Mr. Hu admitted to having had the conversation with Ms. Stewart and Mr. Tzu. At this point, at the suggestion of Dr. Chen's counsel, the Court provided instruction to Mr. Hu concerning constitutional rights, including the right against self-incrimination. The Court then appointed an attorney from the Legal Defenders Association to provide assistance to Mr. Hu during the remainder of his testimony. Id. at 60 ¶ 91.

15. Mr. Hu declined to answer a substantial number of questions, stating that he elected to exercise his Fifth Amendment rights. Id. at 60 ¶ 92.

16. On February 21, 2001, after several days of testimony and argument, the Court signed the Interim Order removing Jau-Hwa Stewart as president of E. Excel and requiring that "Jau-Hwa Stewart shall not tortiously interfere directly or indirectly with any contract determined by the Court at any time to exist between the Company and any distributor or any Third-Party." See Injunction Findings (Exhibit A), at ¶ 121 (quoting from the Interim Order). In addition, the Interim Order commanded Ms. Stewart to "immediately return to the Company's headquarters any corporate assets in her custody or control including but not limited to all corporate records." See Contempt Findings (Exhibit C), at 123, ¶ 15.

17. After the issuance of the Interim Order, Jau-Hwa Stewart and her husband began preparations to vacate their offices in compliance with the district court's order. However, as it was actually conducted, "the removal of Mr. and Mrs. Stewart's 'personal property' became little more than a euphemism for the wholesale conversion of critical documents and other business property at the E. Excel premises." Id. at ¶ 109.

18. The Stewarts removed paper files, computer files, intellectual property, and equipment, along with the “entire contents of the surveillance room.” Id. at ¶¶ 110-15.

19. In addition, Ms. Stewart continued to ship product to the new distributors; now, however, she did so through a separate front company, Shannon River, Inc., so as to conceal her activities from Dr. Chen and the district court. See Injunction Findings (Exhibit A), at ¶¶ 123-29. Making matters worse, Ms. Stewart’s assistant Angela Barclay “removed all of the records relating to the Shannon River shipments from the premises of E. Excel and delivered them to Jau-Hwa Stewart.” Id. at ¶ 126. Thereafter, Ms. Barclay erased all remaining computer files pertaining to Shannon River. Id.

20. After the issuance of the Interim Order, Ms. Stewart’s preparations to compete with E. Excel through a separate entity—Apogee—continued apace, even though Ms. Stewart had been ordered not to interfere with any contract of E. Excel and even though Ms. Stewart remained a director (although not an officer) of E. Excel. Ms. Stewart and her mother arranged for the purchase of land for a building for the new entity, id. at ¶¶ 142-44, hired a contractor to build the building, id. at ¶¶ 145-49, wired funds to the new distributors loyal to them, id. at ¶¶ 162-63, purchased machinery and equipment for the new company, id. at ¶¶ 166-69, and registered their new entity with the Utah Division of Corporations, id. at ¶¶ 172-75.

21. Later in the year, in June 2001, Ms. Stewart openly announced her intention, formulated months earlier, to compete with E. Excel. See id. at ¶ 186. Contemporaneously with that announcement, Ms. Stewart resigned her post as a director of E. Excel. Id.

22. On June 22, 2001, in response to Ms. Stewart’s activities, Dr. Chen returned to the district court and filed a Motion for Order to Show Cause Why Jau-Hwa Stewart Should Not Be Held in Civil and Criminal Contempt of Court. Dr. Chen argued that Jau-Hwa Stewart’s activities since January and February of 2001 had been violations of the January 10, 2001 TRO

and the February 21, 2001 Interim Order. See June 22, 2001 Memorandum in Support of Motion for Contempt (attached hereto as Exhibit D).

23. As a remedy, Dr. Chen asked the district court to (1) strike Jau-Hwa Stewart's pleadings, (2) find that Dr. Chen has established the substantive allegations set forth in her complaint against Ms. Stewart, and (3) hold a hearing to award damages and attorneys' fees and costs. Id.

24. A few weeks later, on August 2, 2001, Dr. Chen filed a second motion for contempt, this time arguing that Jau-Hwa Stewart should be held in contempt of court for the additional reason that Ms. Stewart had suborned and committed perjury and obstructed justice in the preliminary injunction hearing in order to deceive the district court. See August 2, 2001 Memorandum in Support of Motion for Order Summarily Finding Ms. Stewart in Criminal Contempt of Court (attached hereto as Exhibit E).

25. During the summer of 2001, however, Ms. Stewart continued to advance her and her mother's competing enterprise. She caused promotional materials to be prepared and circulated throughout Asia that included pictures belonging to E. Excel. See Injunction Findings (Exhibit A), at ¶ 189. She also caused her enterprise to develop a line of products to be sold through her new distribution networks. Id. at ¶ 204.

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

27. In the fall of 2001, E. Excel, on its own behalf and with counsel separate from either Jau-Fei Chen's counsel or Jau-Hwa Stewart's counsel, filed a cross-claim against Jau-Hwa Stewart, and third-party complaints against several other third-party defendants, including the Appellants here. E. Excel sought, *inter alia*, a preliminary and permanent injunction against Jau-Hwa Stewart preventing her from competing with E. Excel in the marketplace. E. Excel also moved for a preliminary injunction against Jau-Hwa Stewart and those acting in active concert or participation with her. See Amended Answer, Crossclaim, and Third-Party Complaint (Exhibit F); see also Memorandum in Support of Motion for Preliminary Injunction (Exhibit G).

28. The district court combined the hearing on Dr. Chen's contempt motions with the hearing on E. Excel's motion for a preliminary injunction. The district court set the first hearing dates in late October 2001. See Ruling (Exhibit H).

29. In the meantime, E. Excel proceeded to conduct discovery of its own, both written and testimonial. E. Excel deposed Jau-Hwa Stewart in early October, and then served subpoenas on several other potential witnesses, including the contractor Ms. Stewart hired to build the building for the new enterprise. See Injunction Findings (Exhibit A), at ¶ 216.

30. Approximately two weeks after the contractor received the subpoena, Ms. Stewart sent an email to the contractor instructing him to "please delete my emails to you from now on once you read it." Id.

31. On October 31, 2001, at E. Excel's behest and after three days of hearing and argument, this Court entered a temporary restraining order prohibiting Jau-Hwa Stewart from competing with E. Excel. Despite this prohibition, immediately after the entry of the TRO, Ms. Stewart sent an email to the Asian distributors loyal to her, instructing them to "carry forth" with the Apogee enterprise until she could join them again. One week later, Ms. Stewart sent an

email to the contractor for Apogee, requesting a meeting with him and again instructing him to keep their communications “confidential.” Id. at ¶ 219.

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

33. Starting with the three hearing days in October 2001, and continuing through the winter and spring of 2002, the district court heard some 24 days of combined testimony and argument on Dr. Chen’s contempt motions and E. Excel’s motion for preliminary injunction. On August 20, 2002, at the conclusion of the hearing, the district court issued two separate sets of lengthy and comprehensive findings of fact and conclusions of law.¹ The first set (attached hereto as Exhibit C) concerned Dr. Chen’s contempt motions, wherein the district court found that Ms. Stewart had indeed disobeyed the court’s orders and had suborned and committed perjury and should be held in contempt. See Contempt Findings (Exhibit C).

34. The district court granted Dr. Chen’s prayer for relief, striking Ms. Stewart’s pleadings vis-à-vis Dr. Chen, entering judgment on Dr. Chen’s claims, and stated that it would, at a later date, set a hearing on damages and attorneys’ fees. Id. at 126-27. The damages hearing has not yet been held (or even set), and therefore the complete sanction against Ms. Stewart has not yet been imposed.

¹ Ms. Stewart has stated in her Docketing Statement that she intends to argue, if allowed to proceed with her appeal, that the district court simply signed the proposed findings prepared by E. Excel and Dr. Chen, and did not actually make the findings itself. This argument is meritless, and insulting to the district court. The district court heard more than 40 days of live testimony and argument. The district court gave “studious consideration” over two months’ time to all of the proposed findings, including Ms. Stewart’s. See Ruling (Exhibit H). Clearly, the district court put substantial time and effort into its resolution of the case, and Ms. Stewart’s suggestion to the contrary is uncalled for. The district court’s efforts are well demonstrated by its recent Order of Preliminary Injunction and its accompanying Ruling Re: Objections (attached hereto as Exhibits I and J), where the district court reviewed the proposed form of injunction, carefully considered numerous specific objections, made certain modifications to the proposed form, and entered the order.

35. The second set (attached hereto as Exhibit A) concerned E. Excel's motion for preliminary injunction, wherein the district court held that E. Excel had met its burden of proving an entitlement to the preliminary injunction against Ms. Stewart and against most of the Third-Party Defendants, including Appellants here. See Injunction Findings (Exhibit A).

36. A few weeks later, the district court issued an Order of Preliminary Injunction, granting (with several notable modifications) E. Excel's proposed form of preliminary injunction. See Order of Preliminary Injunction (attached hereto as Exhibit I). The district court overruled numerous specific objections to the form of order lodged by Jau-Hwa Stewart, Taig Stewart, and the other Third-Party Defendants (Appellants here). See Ruling Re: Defendant and Third-Party Defendants' Objections to E. Excel's Order of Preliminary Injunction (attached hereto as Exhibit J).

37. Jau-Hwa Stewart and the other Appellants are now attempting to appeal from the Contempt Findings.

38. Toward the end of the injunction/contempt hearing, E. Excel made a separate motion for sanctions against Jau-Hwa Stewart, asking the district court to use its inherent power to sanction Jau-Hwa Stewart for her egregious behavior throughout the case, including perjury, subornation of perjury, spoliation of evidence, and obstruction of justice. Specifically, E. Excel asked the district court to sanction Ms. Stewart for:

- destroying, either herself or through her agents, email communications and computer files at E. Excel in February 2001;
- instructing a material witness, during the course of this litigation, to "delete my emails to you from now on";
- destroying invoices from Apogee's equipment vendors;
- destroying email communications in her possession that E. Excel later discovered from third parties, including Mr. Stan Houghton (the contractor for Apogee), Mr. Charlie Ung (a representative from Best Formulations,

the company Apogee hired to manufacture its products), and Mr. Clement Tang (E. Excel's former Hong Kong counsel);

- failing to timely respond to document requests;
- withholding documents from production on the ground that the documents are "personal" and/or "irrelevant," when in fact the documents are central to the case before this Court;
- providing false and inaccurate answers to interrogatories, requests for admission, and other discovery requests;
- offering false (and, apparently, perjured) testimony in depositions, written discovery, and hearing testimony;
- using documents at depositions taken by her counsel that, although relevant and responsive, have not yet been produced to E. Excel;
- suborning perjury; and
- obstructing E. Excel's discovery efforts by instructing third-party witnesses and other parties to ignore pleadings and process and/or not to communicate with E. Excel.

See Memorandum in Support of Motion for Sanctions (attached hereto as Exhibit K).

39. In late August 2002, the district court granted E. Excel's motion, finding that Ms. Stewart had destroyed evidence, and had committed and suborned perjury. The district court sanctioned Jau-Hwa Stewart by striking her pleadings vis-à-vis E. Excel, and entering default in favor of E. Excel on all of E. Excel's claims against Ms. Stewart. The district court stated that it would hold a hearing at a later date to determine E. Excel's damages and attorneys' fees. See Ruling and Order Re: E. Excel's Motion for Sanctions Against Jau-Hwa Stewart (attached hereto as Exhibit L).

40. Since the district court's findings were entered, E. Excel has filed a motion asking the district court to hold some of the other third-party defendants, including the Appellants here, in civil (but not criminal) contempt of court along with Ms. Stewart. See Motion for Sanctions

and For Order to Show Cause Why Certain Third-Party Defendants Should Not Be Held in Civil Contempt (attached hereto as Exhibit M). E. Excel has not asked the Court to hold the third-party defendants in criminal contempt. Id. The motion is pending, and is set for hearing in January or February 2003.

41. E. Excel has also learned additional facts related to possible new contemptuous actions taken recently by Ms. Stewart. For instance, E. Excel has learned that Apogee—Ms. Stewart’s and Hwan Lan Chen’s company—and its affiliates have been marketing nutritional supplement products in Asia, despite the district court’s orders prohibiting Ms. Stewart or Apogee from competing with E. Excel. And E. Excel has learned of a concerted media campaign in Asia intended to disparage E. Excel, using original E. Excel company records which were stolen and never returned to the company despite the district court’s direct orders to Ms. Stewart. Because of these and other factors, E. Excel is preparing an additional motion for sanctions against Ms. Stewart.

ARGUMENT

Jau-Hwa Stewart and the other Appellants now attempt to appeal from the district court’s contempt findings. These appeals are, for various reasons, premature, and this Court is without jurisdiction to entertain them at this point. The appeals should be dismissed.

I. JAU-HWA STEWART’S APPEAL SHOULD BE DISMISSED

Jau-Hwa Stewart’s appeal should be dismissed for several independent reasons. First, the order of contempt issued against her is, despite its label, an order of civil (not criminal) contempt, and civil contempt orders are not immediately appealable. Second, even if the contempt order is ultimately treated as a criminal contempt order, which would eventually be appealable, Ms. Stewart’s appeal is premature because the district court is not finished imposing sanction upon Ms. Stewart for her contemptuous actions. Even criminal contempt orders are not

appealable until the district court has completely imposed sanctions upon the contemnor. Under the circumstances of this case, a manifest injustice would result if Ms. Stewart were allowed to appeal this contempt order at this time. For all of these reasons, Ms. Stewart's appeal is improper and should be dismissed.

A. The District Court's Order Is, Despite Its Label, an Order of Civil Contempt and Is Not Immediately Appealable

The general rule governing appealability of contempt orders is that criminal contempt orders are immediately appealable, despite the existence of ongoing proceedings before the district court, but that civil contempt orders are not appealable until the conclusion of the underlying case. The leading Utah case on the subject is Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988). In that case, this Court held that "an order finding one guilty of criminal contempt is generally considered to be a final order separate from any ongoing proceedings and appealable as a matter of right." Id. at 1167. On the other hand, "an order finding one to have committed a civil contempt is considered interlocutory and not appealable as a matter of right." Id.

In Von Hake, this Court adopted the approach taken by the U.S. Supreme Court in determining whether a particular contempt order is civil or criminal. Id. at 1168 n.5. Under the U.S. Supreme Court's approach, the substance of particular contempt proceedings determines whether they are civil or criminal, regardless of the label attached by the court conducting the proceeding. See Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 631 (1988); id. at 646 (O'Connor, J., dissenting); Shillitani v. United States, 384 U.S. 364, 369-70 (1966). The Court stated that

if it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Feiock, 485 U.S. at 631. The Court also noted that "if the relief provided is a fine, it is remedial when paid to the complainant, and punitive when it is paid to the court." Id. at 632. This aspect

of the federal approach was explicitly adopted by this Court. See Von Hake, 759 P.2d at 1168 n.5 (stating that “a contempt order is civil if the order is to pay a fine to the other party rather than to the court”).

An examination of the proceedings below leads to the inescapable conclusion that the order entered against Jau-Hwa Stewart is an order of civil contempt, and not immediately appealable. First, although the order purports to be one of civil and criminal contempt, even the caption of the order points to the opposite conclusion. The Contempt Findings (Exhibit C) have the same case number as the Injunction Findings (Exhibit A). There was never a separate criminal matter initiated; at all times the district court kept the contempt proceedings combined with the underlying case. This Court has noted this as a relevant factor. See Von Hake, 759 P.2d at 1168 n.4 (stating that “the caption should indicate whether the proceeding is a continuation of the underlying civil action or an independent criminal action”). In fact, the district court consolidated the contempt hearing with the hearing on E. Excel’s motion for a preliminary injunction in the underlying case—not only did the contempt proceedings not receive an independent criminal case number, the contempt proceedings did not even receive an independent hearing.²

More substantively, however, the remedy imposed (and which will be imposed in the near future) by the district court against Jau-Hwa Stewart clearly indicates that, whatever the label on the order, the district court held Ms. Stewart only in civil contempt. All remedies

² The rationale for treating criminal contempt orders differently from civil contempt orders with respect to appealability is that “[c]riminal contempt judgments are immediately appealable . . . because they result from a separate and independent proceeding to vindicate the authority of the court.” See Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 379 (1985); see also Carbon Fuel Co. v. United Mine Workers of America, 517 F.2d 1348, 1349 (4th Cir. 1975) (cited approvingly by this Court in Von Hake) (stating that “criminal contempt proceedings are independent of the main action”). Where, as here, the proceeding was not separate, the rationale for immediate appealability is not present. In reality, the district court proceedings were civil contempt proceedings, and Ms. Stewart cannot now appeal therefrom.

imposed by the district court for Ms. Stewart's contempt run to the benefit of Dr. Chen, not to the district court. The relief provided was not a definite term of imprisonment, or a fine ordered to be paid into the court—remedies typically associated with criminal contempt. See Feiock, 485 U.S. at 632; Von Hake, 759 P.2d at 1168 n.5. Rather, the relief provided was judgment entered in favor of Dr. Chen on her substantive claims, and (eventually) an award of damages and attorneys' fees paid by Ms. Stewart directly to Dr. Chen (and not to the court). See Contempt Findings (Exhibit B), at 126-27. This is a quintessential order of civil contempt, and must be treated as such despite the fact that the district court gave it a different label.

As noted above, it is beyond dispute that orders of civil contempt are not appealable until the conclusion of the underlying case. In this case, the district court's order is one of civil contempt, and therefore Ms. Stewart cannot appeal therefrom until the underlying case is completed.

B. Even If the District Court's Order Is Treated as an Order of Criminal Contempt, Ms. Stewart's Appeal Is Premature

Moreover, even if the district court's order can be treated as an order of criminal contempt, the order is not yet appealable in any event because the district court is not finished imposing sanction upon Jau-Hwa Stewart. Under Utah law, an order of criminal contempt may be appealed before the conclusion of the underlying case, but such an order is not appealable until the district court has completed the process of imposing sanction upon the contemnor. That process has not been completed in this case, and therefore Ms. Stewart's appeal is premature.

The rule is that even orders of criminal contempt are not appealable "if the question of sanctions is postponed." See 15B Charles Alan Wright et al., Federal Practice and Procedure § 3917, at 377-78 (2d ed. 1992). Finality, in the context of contempt orders, "requires determination of both liability and sanction, just as with ordinary civil and criminal

proceedings.” Id. at 379; see also Forschner Group, Inc. v. Arrow Trading Co., Inc., 124 F.3d 402, 410 (2d Cir. 1997); In re U.S. Abatement Corp., 39 F.3d 563, 567 (5th Cir. 1994).

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

In reality, what the district court did here is more akin to entering partial summary judgment as to liability in favor of Dr. Chen and against Ms. Stewart, with a hearing on damages to come later. The district court is not finished with Ms. Stewart, and Ms. Stewart’s argument to the contrary is disingenuous. Courts faced with this exact situation have recognized this, and have held that a district court’s “contempt” order imposing default sanctions is actually in the nature of a partial summary judgment, and have refused to allow immediate appeals, stating that

the sanction of dismissing defendant’s answer and declaring [the defendant] to be in default on the issue of liability did not constitute contempt and until damages were assessed the judgment of the court was not appealable.

See People ex rel. Hawthorne v. Hamilton, 292 N.E.2d 563, 564-65 (Ill. Ct. App. 1973) (citations omitted); see also Camp v. East Fork Ditch Co., Ltd., 2002 Ida. LEXIS 145, Docket No. 26139 (Idaho Sept. 11, 2002) (attached hereto as Exhibit N) (stating that some penalties, even though unconditional, are considered civil penalties rather than criminal penalties, including “striking pleadings” and “entering default judgments”). Litigants in Ms. Stewart’s shoes must wait until the district court has held a damages hearing and has awarded some amount of damages to the plaintiff before they can properly appeal from the district court’s contempt findings.

The Court should also be aware of the current situation in this litigation, and of the reasons why Ms. Stewart is attempting to mount an immediate appeal from the district court's order without waiting for the damages hearing. The district court found that Jau-Hwa Stewart was the ringleader of a criminal racketeering enterprise formed for the purpose of destroying E. Excel. See Injunction Findings (Exhibit A). Unfortunately, that criminal racketeering enterprise has continued in existence, and has continued to further its objectives subsequent to the district court's findings and subsequent to the filing of the notice of appeal. Recently, E. Excel discovered that Apogee—Ms. Stewart's and Hwan Lan Chen's company—and its affiliates were still marketing products in E. Excel's Asian markets, in defiance of the district court's orders, and E. Excel successfully obtained relief against one of the entities involved. See Order Holding Hamida in Contempt of Court (attached hereto as Exhibit O). In addition, Dr. Chen has taken action to attach certain of Ms. Stewart's assets, to prevent Ms. Stewart from disposing of those assets prior to the damages hearing to be held in the district court. And, as noted above, E. Excel has learned of additional actions being taken by Ms. Stewart and is currently contemplating an additional motion for sanctions and/or contempt against Ms. Stewart.

In short, then, the situation appears rather bleak for Ms. Stewart in the district court. The court has held her in contempt, imposed sanctions, has granted E. Excel and Dr. Chen relief against the criminal racketeering enterprise, and has stated that it will hold a damages hearing to award E. Excel and Dr. Chen damages in the near future. Jau-Hwa Stewart is trying to do everything she can to place the district court proceedings on hold and to prevent the district court from taking additional action against her. E. Excel believes that it is precisely to avoid the ongoing proceedings before the district court that Ms. Stewart has attempted to file this

premature appeal.³ Indeed, Ms. Stewart has noted in a letter to counsel that it is her belief that this appeal deprives the district court of any jurisdiction to take any additional action against her. See Letter dated September 30, 2002 (attached hereto as Exhibit P).

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

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

II. THE THIRD-PARTY DEFENDANTS' APPEALS: ONLY A CONTEMNOR MAY APPEAL AN ORDER OF CRIMINAL CONTEMPT

The other Appellants—Hwan Lan Chen, Taig Stewart, Beverly Warner, Angela Barclay, Dale Stewart, Sheue Wen Smith, and Apogee, Inc.—are without standing to appeal from the district court's contempt findings against Jau-Hwa Stewart, even if those findings constituted a

³ E. Excel also notes that, if Ms. Stewart followed the law and waited until after the damages hearing to appeal the district court's findings, Ms. Stewart would then be faced with a large damages judgment against her, and would (1) have to seek a stay of execution of that award pending the appeal, and (2) would have to post a bond. By filing this premature appeal, Ms. Stewart is hoping to avoid those requirements.

final and appealable order of criminal contempt.⁴ If Appellants were somehow able to convince this Court that the district court's order was one of criminal contempt, then Appellants must live with the consequences of that tactic. It is the rule—however fictional that rule may be, see 15B Charles Alan Wright et al., Federal Practice and Procedure § 3917, at 381-82 (2d ed. 1992)—that criminal contempt proceedings are considered wholly separate from the underlying case-in-chief.⁵ See supra note 2. Those “separate” proceedings involved only Dr. Chen, the party seeking contempt sanctions, and Ms. Stewart, the party against whom those sanctions were sought. The other Appellants were not technically a part of that “separate” proceeding, and therefore have no standing to appeal the contempt findings.

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

⁴ All of the arguments posited with respect to Jau-Hwa Stewart's appeal—that the appeal is improper because it is from a civil (not a criminal) contempt order, and is premature in any event—also apply to the other Appellants' appeals.

⁵ Appellants cannot have it both ways—either the contempt proceeding is separate, in which case the Third-Party Defendants have no standing to appeal, or the contempt proceeding is not separate, in which case the district court's contempt order would be a civil contempt order and would be interlocutory and not immediately appealable by anyone.

There may come a time when the other Appellants may have standing to appeal from the district court's contempt findings. As noted above, E. Excel has asked the district court to enter an order holding the other Appellants in contempt of court along with Ms. Stewart, for largely the same reasons, and the district court has set that matter for hearing in several weeks.⁶ If and when the district court grants that motion, and extends the contempt findings to the other Appellants, Appellants may have a different argument. But until that point, they are without standing to appeal the district court's determination that Jau-Hwa Stewart should be held in contempt of court.

CONCLUSION

For all the foregoing reasons, the appeals filed by Jau-Hwa Stewart and the Third-Party Defendants should be summarily dismissed for lack of appellate jurisdiction.

DATED this 23^d day of October, 2002.

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By

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⁶ Again, E. Excel notes its belief that it is in an effort to short-circuit those proceedings that the other Appellants have filed their appeals.

CERTIFICATE OF SERVICE

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

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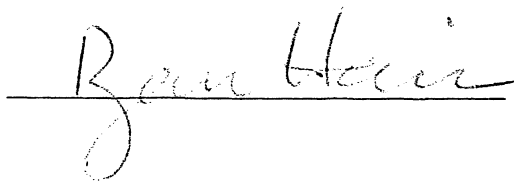
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IN THE UTAH SUPREME COURT

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

Plaintiffs,

vs.

JAU-HWA STEWART, et al.,

Defendants.

E. EXCEL INTERNATIONAL, INC.,

Cross-Claimant,

vs.

JAU-HWA STEWART,

Cross-Defendant

E. EXCEL INTERNATIONAL, INC.,

Respondent/Third-Party Plaintiff,

vs.

TAIG STEWART, et al., including HWAN
LAN CHEN,

Petitioner/Third-Party Defendant

**PETITION FOR PERMISSION TO
APPEAL PURSUANT TO UTAH
RULE OF APPELLATE
PROCEDURE 5**

Appeal No. _____

Trial Court Nos. 010400098 and
010400201
(Consolidated Cases)

"Subject to Reassignment to the
Court of Appeals"

Hwan Lan Chen, petitioner herein and third-party defendant in the trial court ("Hwan Lan Chen" or "Petitioner"), respectfully files this Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5, with regard to a Preliminary Injunction entered by the Honorable Fred D. Howard on October 16, 2002, against Petitioner and others (the "Preliminary Injunction").¹

INTRODUCTION

This Petition seeks appellate review of significant issues arising from the trial court's improper issuance of the Preliminary Injunction based upon the unlawful powers and actions of the trial court's Utah Rule of Civil Procedure 53 ("Rule 53") Special Master.

The proceedings giving rise to this Petition are utterly unprecedented: the trial court's Rule 53 Special Master -- who was appointed pendente lite and is by law a subordinate judicial officer -- was unlawfully authorized to become the dominant party litigant in the underlying action, filed as a party litigant the claims against Petitioner and others giving rise to the Preliminary Injunction, filed the Motion for the Preliminary Injunction, and obtained the Preliminary Injunction against Petitioner based upon the Rule 53 Special Master's reports, recommendations and testimony and the trial court's adoption **verbatim** of

¹ The Preliminary Injunction is attached as "Exhibit A."

almost 100 pages of findings of fact proposed by the Special Master -- not as a judge, not on a Rule 53 reference, but as a party litigant.

Fundamentally, this Petition presents the contention that a Rule 53 special master is a subordinate judicial officer who may lawfully exercise only judicial powers conferred by the court and whose lawful powers and acts cannot exceed a judge's lawful powers, and certainly cannot exceed a judge's powers pendente lite.

A Rule 53 special master cannot, consistent with Rule 53 and applicable law, be authorized to exercise the powers that the trial court's Rule 53 Special Master was authorized to exercise and exercised, particularly the power to become the dominant litigant in the pending action, make claims, and seek and obtain a preliminary injunction in the pending action. Just as the trial court below could not have asserted claims in the action pending before it, filed the motion for the Preliminary Injunction, and participated as a party litigant in obtaining the Preliminary Injunction, neither could the trial court's Rule 53 Special Master.

This Petition further presents for appellate review issues regarding whether the Preliminary Injunction against Petitioner Hwan Lan Chen resulted in a fundamental denial of due process to Petitioner, a 76 year old widow and Chinese national who does not speak or read English and who is the primary owner of the corporation that is the subject of the trial court action, E. Excel International, Inc. ("E. Excel USA"). The Preliminary Injunction against Petitioner

fundamentally denies her due process because the Preliminary Injunction was based upon 20 days of evidentiary hearings conducted before Petitioner appeared in the action and during which she had no notice of the motion for Preliminary Injunction and did not participate. What is perhaps even worse, the trial court's Rule 53 Special Master, although he regularly engaged in ex parte communications with the plaintiff and plaintiff's counsel and even used plaintiff's counsel to represent him, never even bothered in the course of his investigation to even talk to -- simply talk to -- Petitioner Hwan Lan Chen.

This Petition also presents for appellate review the issue of whether the Preliminary Injunction against Petitioner was the result of a fair and impartial adjudication by a court when: (1) the trial court's Rule 53 Special Master was the dominant party litigant, had moved for the Preliminary Injunction, and was a witness in the Preliminary Injunction proceeding; and (2) the trial court deferred to and made findings based upon its Rule 53 Special Master's reports and testimony offered in his role as a party litigant, as demonstrated both by the trial court's verbatim adoption of over 100 pages of findings submitted by his Rule 53 Special Master in support of the Preliminary Injunction, and by the extensive verbatim quotations of the Rule 53 Special Master's reports in those findings.

The appeal issues presented by this Petition involve substantial rights that materially affect the final decision, particularly when the Preliminary Injunction findings and evidence may be considered in the final decision (or, if the Rule 53

Special Master's current motion for contempt against Petitioner is granted, the Preliminary Injunction findings become the final decision). In addition, a determination of the correctness of the Preliminary Injunction will better serve the administration and interests of justice. The trial court already has adversely impacted Petitioner's substantial rights by issuing the Preliminary Injunction based upon the wrongful actions and role of its Rule 53 Special Master and the fundamental denial of Petitioner's due process rights. Moreover, the trial court's Rule 53 Special Master continues to exercise his unlawful authority against Petitioner in violation of her due process rights.

The proceedings before the trial court are permeated and infected by the unlawful powers and actions of the trial court's Rule 53 Special Master and the denial of Petitioner's due process rights. It would be contrary to the interests of justice to postpone appellate review of the patent unlawfulness of the actions and role of the trial court's Rule 53 Special Master and the resulting denial of due process to the final conclusion of the tainted proceedings before the trial court.

PETITION

I. STATEMENT OF FACTS MATERIAL TO A CONSIDERATION OF THE ISSUES PRESENTED AND THE ORDER SOUGHT TO BE REVIEWED

A. The Preliminary Injunction Was The Product Of And Based Upon The Rule 53 Special Master Being Empowered With And Exercising Patently Unlawful Powers And Was Not The Result Of A Fair And Impartial Adjudication

The Preliminary Injunction was the product of and was based upon the unlawful empowerment and exercise of patently unlawful powers by the trial court's Rule 53 Special Master. Moreover, due to the participation of the Rule 53 Special Master and the trial court's deference to its Rule 53 Special Master in issuing the Preliminary Injunction, the Preliminary Injunction proceeding was not a fair and impartial proceeding.

1. The Rule 53 Special Master Was Appointed Without Notice To Or The Participation Of Petitioner

In March 2001, at the request of plaintiff Jau-Fei Chen, the trial court appointed Larry C. Holman as its Rule 53 Special Master. The Rule 53 Special Master was appointed and authorized by the trial court pursuant to Orders entered on February 21, March 13, and May 11, 2001.

At the time these Orders were entered, the only parties to the underlying action commenced in January 2001 were two sisters, plaintiff Jau-Fei Chen and defendant Jau-Hwa Stewart, daughters of Petitioner Hwan Lan Chen. The litigation asserted claims involving E. Excel USA, a closely held corporation

based in Springville, Utah. E. Excel USA had been a highly successful multi-level marketer of dietary supplements and cosmetics. The vast majority of its sales historically were made in Asia, through foreign distributors.

Petitioner Hwan Lan Chen did not become a party to the trial court action until January 2002. Petitioner was provided no notice regarding the appointment and authorization of the Rule 53 Special Master. Petitioner never stipulated or consented to a special master, to the appointment of Larry Holman as the Rule 53 Special Master, to the powers conferred by the trial court upon its Rule 53 Special Master, or to any of the actions undertaken by the trial court's Rule 53 Special Master. Petitioner did not stipulate to the powers conferred upon the Rule 53 Special Master, and neither did any other party.²

2. The Trial Court Conferred Its Rule 53 Special Master With Unlawful Powers

The powers conferred by the trial court upon its Rule 53 Special Master and exercised by the Rule 53 Special Master were unlawful and unprecedented.

Under the February 21 and March 13, 2001 Orders, the Rule 53 Special Master was appointed as "special master, appointed by the Court, and chief executive officer" of E. Excel USA. Pursuant to the February 21 and March 13,

² Indeed, within the 10 day period of Utah Rule of Civil Procedure 52 to object to findings, Petitioner filed a motion to vacate and set aside the trial court's orders with regard to its Rule 53 Special Master and the Rule 53 Special Master's actions, including the findings entered in support of the Preliminary Injunction, pursuant to which Petitioner challenged the lawfulness of those orders and actions.

2001 Orders, the Rule 53 Special Master was authorized to exercise “**full executive authority**” of **E. Excel USA** and was “given complete executive authority in his role as chief executive officer and special master.”

Under the May 11, 2001 Order, the Rule 53 Special Master was “**granted and has full executive authority to direct and control, initiate, dismiss, settle or otherwise determine the Company’s interests in all business relationships, assets, disputes or lawsuits.**”

Moreover, under these **Orders**, the Rule 53 Special Master could not be removed by E. Excel USA’s Board of Directors or shareholders and could exercise his powers “**all without further order of this Court.**”

Under these Orders, the trial court’s Rule 53 Special Master, whose lawful role is limited to exercising **judicial functions** as a subordinate judicial officer,³ was authorized to exercise **all of the corporate powers** of E. Excel USA, **without control of the owners of E. Excel or of the trial court.** In effect, the trial court’s Rule 53 Special Master became E. Excel USA and was placed beyond the control even of its **owners** during the pendency of the trial court action. With these Orders, the trial court authorized its Rule 53 Special Master to become a party litigant in the action pending before the trial court, **to file**

³ See Utah Rules of Civil Procedure Rule 53; Plumb v. State, 809 P.2d 734, 742-43 (Utah 1990); Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 319 (3rd Cir. 1944); La Buy v. Howe’s Leather Co., 352 U.S. 249, 256 (1957).

claims in the underlying action as a party litigant against owners of E. Excel USA and other third-parties, and to seek and obtain preliminary injunctive relief.

3. The Trial Court's Rule 53 Special Master Proceeded To Unlawfully File Claims Upon Which The Preliminary Injunction Is Based, File The Preliminary Injunction Motion, And Seek And Obtain The Preliminary Injunction

Exercising his patently unlawful powers, the trial court's Rule 53 Special Master proceeded, with the approval of the trial court, to become the dominant party litigant in the trial court action, replacing plaintiff Jau-Fei Chen, and obtained the Preliminary Injunction.

The Rule 53 Special Master conducted an unlawful ex parte investigation. He had regular ex parte communications with plaintiff Jau-Fei Chen. Indeed, the Rule 53 Special Master at one point used and was represented by plaintiff Jau-Fei Chen's counsel.

Based upon his ex parte investigation, the Rule 53 Special Master filed third-party claims in the trial court action on October 29, 2001 against Petitioner and other third-parties. The Rule 53 Special Master's third-party claims not only provided the basis for the Preliminary Injunction, but also caused the expenses of prosecuting the litigation to be shifted from plaintiff Jau-Fei Chen to E. Excel USA, notwithstanding Petitioner Hwan Lan Chen's ownership in E. Excel USA.

The Rule 53 Special Master moved for the Preliminary Injunction on October 25, 2001, before Petitioner Hwan Lan Chen appeared in the case, and

obtained the Preliminary Injunction against Petitioner and others on October 16, 2002.

4. The Trial Court Deferred To Its Rule 53 Special Master In Issuing The Preliminary Injunction, Which Was Based Upon The Reports And Testimony Of The Rule 53 Special Master Offered As A Party Litigant And Not As A Judicial Officer

The trial court deferred to its unlawfully authorized Rule 53 Special Master in issuing the Preliminary Injunction on October 16, 2002, which was based upon the reports and testimony of the Rule 53 Special Master offered as a party litigant, rather than as a subordinate judicial officer.

The trial court's Rule 53 Special Master testified in the Preliminary Injunction proceeding (which was combined with a contempt proceeding upon plaintiff Jau-Fei Chen's contempt motions against defendant Jau-Hwa Stewart) as a party litigant on behalf of E. Excel USA. The Rule 53 Special Master was represented in the combined proceeding by E. Excel USA's counsel. E. Excel USA not only paid the Rule 53 Special Master's annual salary of at least \$260,000, but also paid the salaries of Rule 53 Special Master's team, which amounts to at least \$482,000 per year, and his attorneys fees.⁴

⁴ The trial court's Rule 53 Special Master was represented **both** by Jones, Waldo, Holbrook & McDonough, which also represents E. Excel USA, and by Patrick Hoog, who is "Special Counsel" to the trial court's Rule 53 Special Master and general counsel of E. Excel, who supervises the litigation.

The trial court issued the Preliminary Injunction based upon its August 20, 2002 Findings of Fact and Conclusions of Law (the “Preliminary Injunction Ruling”).⁵ The Preliminary Injunction Ruling consists of over 100 pages of findings and conclusions that the trial court adopted verbatim from proposed findings of fact and conclusions of law that the trial court’s Rule 53 Special Master had proposed as a party litigant.

The Preliminary Injunction Ruling repeatedly cites to the testimony of the trial court’s Rule 53 Special Master and repeatedly quotes verbatim and at length certain of the Rule 53 Special Master’s reports to the trial court. [Exhibit B, at Findings of Fact ¶¶ 153, 154, 156-161, 205, 236.] The reports reflect the Rule 53 Special Master’s role as a party litigant and his unlawful ex parte communications. In many instances, the Preliminary Injunction Ruling relied upon the Rule 53 Special Master’s reports and testimony as the determinative evidence. [Exhibit B, at Findings of Fact ¶¶ 153, 154, 159, 160, 161, 203, 236.]

Without notice to Petitioner, the Preliminary Injunction also was based upon findings made by the trial court and also entered on August 20, 2002, with regard to the contempt proceeding brought by plaintiff Jau-Fei Chen against defendant Jau-Hwa Stewart (the “Contempt Ruling”).⁶ Like the Preliminary Injunction Ruling, the Contempt Ruling which is incorporated in the Preliminary

⁵ The Preliminary Injunction Ruling is attached as “Exhibit B.”

⁶ The Contempt Ruling is attached as “Exhibit C.”

Injunction Ruling also repeatedly cites to the testimony of the trial court's Rule 53 Special Master and repeatedly quotes verbatim and at length certain of the Rule 53 Special Master's reports to the trial court, which reflect the Rule 53 Special Master's unlawful role as CEO of E. Excel USA who was purportedly was exercising his business judgment in the interests of E. Excel USA and acting as a party litigant.⁷ [Exhibit C, at Findings of Fact ¶¶ 187-191, 193.]

5. The Trial Court's Rule 53 Special Master Has Dominated The Litigation And Acted Unlawfully In Addition To Obtaining The Preliminary Injunction

The trial court's Rule 53 Special Master has exercised his unlawful powers to become the dominant party litigant in the underlying action. Further, although the trial court's Rule 53 Special Master has held himself out as a Rule 53 special master, was explicitly granted Rule 53 special master status, and has been recognized and accorded deference as a Rule 53 special master by the trial court, the Rule 53 Special Master has never lawfully acted as a subordinate judicial officer. In addition to seeking and obtaining the Preliminary Injunction, other unlawful actions of the Rule 53 Special Master, taken with the approval of the trial court, include:

⁷ Appeals from the Contempt Ruling are pending as Appeal No. 20020777SC. Plaintiff Jau-Fei Chen and the trial court's Rule 53 Special Master recently filed motions to dismiss the appeal for lack of appellate jurisdiction. Appellants oppose the motions to dismiss.

1. Making reports to the trial court between May and September 2001 which were not based upon any hearings or the taking of any evidence, but which were based upon ex parte communications, and which reflected the Rule 53 Special Master's unlawful role as a party litigant aligned with plaintiff Jau-Fei Chen, rather than a subordinate judicial officer who was reporting his findings to the court;

2. Settling by means of a Master Settlement Agreement in May 2001 several litigation matters involving E. Excel USA that were not before the trial court, in a manner that caused E. Excel USA to lose its most profitable Asia market to the substantially benefit of plaintiff Jau-Fei Chen. During the negotiation of the settlement, the Rule 53 Special Master was represented by counsel for plaintiff Jau-Fei Chen; and

3. Orchestrating a freeze out merger involving E. Excel USA in July through August 2002, whereby the Rule 53 Special Master implemented a litigation strategy of plaintiff Jau-Fei Chen to eliminate defendant Jau-Hwa Stewart's ownership in E. Excel USA (and thereby, deprive her of standing to assert a shareholder derivative action) and purported to affect Petitioner Hwan Lan Chen's ownership claim, without notice to Petitioner Hwan Lan Chen or benefit of a hearing, much less a trial on the merits.

The record manifestly demonstrates that, without notice to or the consent of Petitioner, the trial court's Rule 53 Special Master was conferred with and

exercised patently unlawful powers, which led the Rule 53 Special Master to become the dominant party litigant, adversely affect Petitioner's rights and interests, file claims giving rise to the Preliminary Injunction, and move for and obtain the Preliminary Injunction against Petitioner.

B. The Preliminary Injunction Was Issued Without Due Process To Petitioner Hwan Lan Chen

In addition to being improperly and unfairly based upon the unlawful participation of the Rule 53 Special Master, the Preliminary Injunction was issued without due process to Petitioner Hwan Lan Chen, to the detriment of her ownership interest in E. Excel USA.

1. Petitioner Hwan Lan Chen, Her Interest In E. Excel, And Her Appearance In the Trial Court Action

Petitioner Hwan Lan Chen is 76 years old, a widow, and the mother of Jau-Fei Chen and Jau-Hwa Stewart. She is the primary owner of E. Excel USA. Petitioner and her deceased husband, Yung Yeuan Chen, founded and helped develop E. Excel USA, and provided substantial funding for E. Excel USA. Petitioner and her husband, whose ownership Petitioner inherited upon her husband's death, provided most of the capital for E. Excel USA's present business.

Petitioner Hwan Lan Chen is a Chinese national who resides in Orem, Utah. She speaks Taiwanese and reads Chinese. She does not speak or read English.

Petitioner became a party in January 2001 when her counsel accepted service of the trial court's Rule 53 Special Master's Third-Party Complaint in the trial court action against Petitioner and others, which was filed on October 29, 2001. Petitioner first **appeared** in the trial court action on February 28, 2002, when she answered the Rule 53 Special Master's Third-Party Complaint.

2. The Rule 53 Special Master Proceeded Without Providing Notice Or The Opportunity To Be Heard To Petitioner Hwan Lan Chen

The trial court's Rule 53 Special Master moved for the Preliminary Injunction against Petitioner Hwan Lan Chen on October 25, 2001, despite that Petitioner was not yet a party to the trial court action. The Rule 53 Special Master filed his Preliminary Injunction motion **based** upon his **entirely** ex parte investigation without notice to Petitioner, without having conducted any investigation regarding Petitioner's ownership interest in E. Excel USA, without ever **providing** Petitioner an opportunity to be heard, and, indeed, **without** ever contacting Petitioner in any manner.

The Rule 53 Special Master took all of his unlawful actions, including filing his reports, without ever providing notice to, much less talking with, Petitioner, **despite the express acknowledgment in the February 21, 2001 Order by which he was appointed that Petitioner had an ownership claim as to E.**

Excel USA, which expressly was preserved.⁸

3. The Preliminary Injunction Proceeding Occurred, In Large Part, Prior To Petitioner Hwan Lan Chen's Appearance In The Trial Court Action And Without Her Participation

The Rule 53 Special Master's Preliminary Injunction motion came before the trial court for evidentiary and argument hearings on October 25 and 26, 2001, November 27 and 28, 2001, December 10, 11, 12, and 13, 2001, and February 21 and 22, 2002, **all before Petitioner Hwan Lan Chen was a party and appeared in the action and without notice to or the participation of Petitioner.**⁹

In addition, in issuing the Preliminary Injunction, the trial court took judicial notice of 10 days of evidentiary and argument hearings that had occurred in connection with plaintiff Jau-Fei Chen's motion for preliminary injunction. These prior preliminary injunction hearings had occurred between January 19, 2001 and February 21, 2001, **a year before Petitioner appeared in the trial court**

⁸ The February 21, 2001 Interim Order provided:
Hwan Lan Chen claims to have advanced 3 million dollars to the Company. There is a dispute between the Parties as to whether such monies were advanced and all issues associated with the purported advance. The Parties reserve all right with respect to this issue.

[2/21/01 Interim Order at ¶ 8.]

⁹ The Rule 53 Special Master's Preliminary Injunction motion also was heard and considered on March 13, 15, 18 and 19, 2002, April 17, 2002, May 7, 8, 10 and 31, 2002, and June 4, 5, 7, 25 and 26, 2002, at which hearings Hwan Lan Chen was represented by counsel, but was not asked to provide testimony or evidence.

action and without notice to or the participation of Petitioner.

In the end, the Preliminary Injunction was issued based upon 20 days of hearings (out of total of 34 days of hearings) as to which Petitioner Hwan Lan Chen had no notice and was not present.

In addition, the trial court based the Preliminary Injunction upon a contempt proceeding which also substantially occurred before Petitioner was a party and had appeared, and which, even after she appeared, did not involve Petitioner.

The trial court heard and considered plaintiff Jau-Fei Chen's motions for civil and criminal contempt along with the Rule 53 Special Master's Motion for Preliminary Injunction. In addition to the fact that most of the proceeding occurred before she was a party and had appeared, Petitioner never was a party to the contempt proceeding; the contempt proceeding was directed solely against defendant Jau-Hwa Stewart. Even after she appeared in the trial court action at the end of February 2002, Petitioner was provided no notice that the on-going contempt proceeding would result in findings against her or that the Preliminary Injunction would be based upon the contempt proceeding.

Despite Petitioner's lack of notice and participation in the contempt proceeding, the Preliminary Injunction Ruling adopts and incorporates by

reference the trial court's 118 pages of findings of fact in the Contempt Ruling.¹⁰ [Exhibit B, Findings of Fact at ¶ 258.] Despite Petitioner's lack of notice and participation in the contempt proceeding, the Contempt Ruling makes numerous adverse findings as to Petitioner (which, the trial court stated, were determined "beyond a reasonable doubt"). [Exhibit C, Findings of Fact at ¶¶ 24, 37, 55, 61, 68, 90, 131-133, 142, 145, 194.]

C. The Preliminary Injunction Exceeded The Scope Of Relief Sought By The Preliminary Injunction Motion And The Trial Court Improperly Excluded Relevant Evidence In The Preliminary Injunction Proceeding

The Preliminary Injunction exceeded by far the scope of relief sought by the Rule 53 Special Master with his Motion for Preliminary Injunction. The Motion sought to enjoin Petitioner Hwan Lan Chen and others only from "competing with E. Excel in any manner until such time as E. Excel has completely rebuilt its business." Going far beyond that requested relief, the Preliminary Injunction prohibits acts that would not entail competition against E. Excel USA, requires Petitioner to perform affirmative acts, and imposes a constructive trust upon Petitioner's income, all without notice to Petitioner.

¹⁰ With the Contempt Ruling, the trial court merely signed, **with no changes**, 118 pages of the proposed findings of fact that had been submitted by plaintiff Jau-Fei Chen.

During the combined Preliminary Injunction and contempt proceeding, the trial court repeatedly declined to allow evidence regarding the conduct of plaintiff Jau-Fei Chen and her husband, Rui-Kang Zhang.

D. The Preliminary Injunction Proceeding And The Rule 53 Special Master Threaten Petitioner Hwan Lan Chen's Right To A Fair And Impartial Final Adjudication On The Merits

The Preliminary Injunction proceeding and trial court's Rule 53 Special Master threatens Petitioner Hwan Lan Chen's right to a final adjudication on the merits. The Preliminary Injunction is based upon findings that are permanent in nature and the Rule 53 Special Master now seeks to have the Preliminary Injunction proceeding become the final adjudication for Petitioner.

The Preliminary Injunction is based upon findings in the Contempt Ruling which, according to the trial court, were established "beyond a reasonable doubt." Moreover, the trial court noted in its Preliminary Injunction Ruling that, although the Preliminary Injunction Ruling findings were preliminary, the findings "nevertheless represent this Court's well-considered evaluation of the voluminous record before it," thereby indicating that the Preliminary Injunction may be given weight at the final adjudication. In addition, Utah Rule of Civil Procedure 65A(a)(2) itself provides that evidence received in a preliminary injunction becomes part of the trial record and need not be repeated at trial.

In addition, on September 27, 2002, the Rule 53 Special Master moved to have Petitioner held in civil contempt and have a default judgment entered

against her on the claims the Rule 53 Special Master has asserted against her. The Rule 53 Special Master seeks to have a default judgment entered against Petitioner based upon the Preliminary Injunction and Contempt Rulings. These are the same Preliminary Injunction and Contempt Rulings that were entered without providing Petitioner a full and fair opportunity to be heard and which were based upon the reports and recommendations of the Rule 53 Special Master, who had not provided Petitioner any opportunity to be heard. The Rule 53 Special Master's contempt motion against Petitioner seeks to make the Preliminary Injunction proceeding and the contempt proceeding against Jau-Hwa Stewart -- a combined proceeding as to which Petitioner did not even participate for 20 days of hearing and, as to the contempt proceeding, Petitioner was never a party -- the final adjudication for Petitioner on claims brought by the Rule 53 Special Master. The Rule 53 Special Master's contempt motion against Petitioner remains pending in the underlying action.

Meanwhile, E. Excel USA continues to pay the Rule 53 Special Master's annual salary of at least \$260,000, as well as at least \$482,000 annually to the Rule 53 Special Master's team and his attorneys fees, all without approval by the trial court as required by Rule 53.¹¹

¹¹ See Utah Rule of Civil Procedure 53(a) ("The compensation to be allowed to a master **shall be fixed by the court.**") (emphasis added).

II. ISSUES PRESENTED

This Petition for Permission to Appeal from the Preliminary Injunction presents the following issues for appellate review, each of which provides a separate and independent ground for vacating and setting aside the Preliminary Injunction.

A. The Preliminary Injunction Must Be Vacated On The Ground That The Powers Conferred Upon And Exercised By The Rule 53 Special Master Were Fundamentally Unlawful And Contrary To The Judicial Powers Authorized By Rule 53

1. Statement of the Issue

Must the Preliminary Injunction against Petitioner and the Findings and Conclusions upon which it was based be vacated and set aside on the grounds that the claims made against Petitioner, the Motion for Preliminary Injunction, and the testimony, reports and recommendations of the Rule 53 Special Master received in evidence, were all the product of the role of a Rule 53 special master as the dominant party litigant and were thus blatantly unlawful as being in direct conflict with the judicial powers authorized by Rule 53?

2. Analysis of Determinative Authority, Standard of Review, And Preservation of the Issue Required Under Utah Rule of Appellate Procedure 5(c)(1)

A Rule 53 special master is a subordinate judicial officer who may be lawfully appointed and empowered to perform only judicial functions to assist a trial court. A Rule 53 special master is bound by the duties and obligations

applicable to Utah judges and can have no broader scope of authority than that of the appointing judge himself. Utah Rules of Civil Procedure Rule 53; Plumb, 809 P.2d at 742-743; Webster Eisenlohr, 145 F.2d at 319; La Buy, 352 U.S. at 256.¹² Where a special master has exceeded his lawful powers or acted contrary to Rule 53, the actions of the special master and the trial court's decisions that are based upon the special master's actions must be vacated and set aside, without regard to the merits of the decision or the special master's actions. Plumb, 809 P.2d at 743; Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 258 (Utah 1992); Anderson v. Industrial Comm'n of Utah, 696 P.2d 1219, 1221 (Utah 1985).

Whether a Rule 53 special master has been lawfully empowered and acted lawfully is reviewed for correctness, with no deference to the trial court. Plumb, 809 P.2d at 741-743.

The issues regarding the unlawfulness of the Rule 53 Special Master's power and actions were fully preserved in the trial court by Petitioner's timely Motion to Vacate and Set Aside Judge Howard's Orders, filed within 10 days after the entry of the Preliminary Injunction, as required under Utah Rule of Civil Procedure 52.

¹² The Court recognized in Plumb that the Federal Rule of Civil Procedure 53 dealing with special masters is "nearly identical" to Utah Rule of Civil Procedure 53 and held that Utah courts are to "look freely" to federal case law in applying Utah Rule of Civil Procedure 53. Plumb, 809 P.2d at 740 n.9.

B. The Preliminary Injunction Must Be Vacated Because Of A Fundamental Denial Of Due Process To Petitioner

1. Statement of the Issue

Must the Preliminary Injunction against Petitioner and the Findings and Conclusion upon which it is based be vacated and set aside on the grounds that the Preliminary Injunction and Findings and Conclusions were the product of a blatant denial of due process in that, for 20 of the 34 days of evidentiary hearings on the Rule 53 Special Master's Motion for Preliminary Injunction, Petitioner was not a party, had not appeared, had no notice of the Motion, and no opportunity to participate in the evidentiary hearing that was the basis of the Preliminary Injunction?

2. Analysis of Determinative Authority, Standard of Review, And Preservation of the Issue Required Under Utah Rule of Appellate Procedure 5(c)(1)(B) & (C)

Due process requires trial courts and judicial officers to provide adequate notice and a full and fair opportunity to be heard. See Plumb, 809 P.2d at 743; Nelson v. Jacobsen, 669 P.2d 1207, 1212-13 (Utah 1983); Cornish Town v. Koller, 798 P.2d 753, 756 (Utah 1990); Anderson, 696 P.2d at 1221; Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1186 (10th Cir. 1975). A ruling or determination that is made in violation of an affected person's due process rights must be vacated and set aside. Id.

Whether a trial court or judicial officer has acted in violation of a person's right to due process is reviewed for correctness, with no deference to the determinations of the trial court. State v. Hubbard, 2002 UT 45, ¶22, 48 P.3d 953; In re J.B., 2002 UT App 268, ¶7, 53 P.3d 968.

This due process issue was fully preserved in the trial court by Petitioner's timely Motion to Vacate and Set Aside Judge Howard's Orders, which was filed within 10 days of entry of the Preliminary Injunction, and the Third-Party Defendants' Objection to E. Excel's Proposed Order of Preliminary Injunction, which was timely filed before entry of the Preliminary Injunction.

C. The Preliminary Injunction Must Be Vacated Because It Was Not The Result Of A Fair And Impartial Adjudication

1. Statement of the Issue

Must the Preliminary Injunction against Petitioner and the Findings and Conclusions upon which it is based be vacated and set aside on the ground that they were not the product of a fair and impartial adjudication, based upon: (1) the role of the trial court's Rule 53 Special Master as the primary party seeking the Preliminary Injunction; (2) the clear and explicit deference of the trial court in its Findings and Conclusions to the role of the Special Master and the Special Master's reports and evidence; (3) the verbatim adoption of almost 100 pages of Findings -- the Findings of the trial court -- proposed by the Special Master; and (4) the numerous ex parte contacts between the Rule 53 Special Master and

plaintiff Jau-Fei Chen that excluded Petitioner and went so far as the Rule 53 Special Master's use of plaintiff Jau-Fei Chen's attorneys to represent the Special Master in settlements that prejudiced Petitioner?

2. Analysis of Determinative Authority, Standard of Review, And Preservation of the Issue Required Under Utah Rule of Appellate Procedure 5(c)(1)

It is fundamental that judges are required to provide a fair and impartial determination and are not permitted to engage in ex parte communications. See Plumb, 809 P.2d at 743; State v. Daniels, 2002 UT 2, ¶15, 40 P.3d 611; Judicial Code of Judicial Conduct Canon 3.B.(5), (7), (8). Consequently, a subordinate judicial officer such as a Rule 53 special master must provide a fair and impartial hearing and cannot engage in ex parte communications. Plumb, 809 P.2d at 742-43. A determination or ruling that is made based upon an unfair and partial consideration by either a judge or a Rule 53 special master must be vacated and set aside. Id.; Reichert, 830 P.2d at 258.

Whether a trial court provided a fair and impartial hearing as a result of the role of an unlawfully empowered Rule 53 special master and reliance upon improper ex parte contacts is reviewed for correctness; the decision of the trial court is subjected to "close scrutiny." See Daniels, 2002 UT 2, at ¶19.

This issue regarding the unfairness and partiality of the Preliminary Injunction proceeding was preserved in the trial court by Petitioner's Motion to Vacate and Set Aside Judge Howard's Orders, which was filed within 10 days of

the entry of the Preliminary Injunction, and the Third-Party Defendants' Objection to E. Excel's Proposed Order of Preliminary Injunction, which was filed before entry of the Preliminary Injunction.

D. The Preliminary Injunction Must Be Vacated And Set Aside Because It Is Based Upon Findings Entered Upon A Proceeding As To Which Petitioner Was Not A Party

1. Statement of the Issue

Must the Preliminary Injunction against Petitioner be vacated and set aside because it was issued based upon over 100 pages of Findings from a criminal contempt proceeding that did not involve Petitioner and of which she had no notice or opportunity to be heard?

2. Analysis of Determinative Authority, Standard of Review, And Preservation of the Issue Required Under Utah Rule of Appellate Procedure 5(c)(1)

The fundamental requirements of notice and opportunity to be heard require that a preliminary injunction be based only upon evidence presented in the preliminary injunction proceeding, with adequate notice to all adversely affected persons. Utah Rule of Civil Procedure 65A(a)(1); Penn, 528 F.2d at 1185. A preliminary injunction does not involve a final adjudication as a matter of law and, therefore, cannot be based upon a criminal contempt proceeding, which involves a final determination, especially without notice to an adversely affected party. Birch Creek Irrigation v. Prothero, 858 P.2d 990, 994 (Utah 1993) (issuing permanent injunction based upon preliminary injunction motion and

proceeding improper because both involve separate issues and permanent injunction requires final adjudication on the merits). A preliminary injunction that is based upon evidence presented in a separate, final proceeding and as to which an adversely affected person is not a party must be vacated and set aside. Id.

This issue of whether a preliminary injunction is improperly based upon a separate final proceeding as to which an adversely affected party was not a party and was without notice is a matter of law reviewed for correctness. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

This issue was preserved in the trial court with the Third-Party Defendants' Objection to E. Excel's Proposed Order of Preliminary Injunction, which was filed before the Preliminary Injunction was entered.

E. The Preliminary Injunction Must Be Vacated And Set Aside Because Its Scope Exceeds The Scope Of Relief Sought By The Rule 53 Special Master In Moving For The Preliminary Injunction

1. Statement of the Issue

Must the Preliminary Injunction against Petitioner be vacated and set aside because the Preliminary Injunction ordered relief that was far beyond the scope of relief sought with the Rule 53 Special Master's Motion for Preliminary Injunction, including imposing a constructive trust on Petitioner's income when the Motion made no mention of such a trust?

2. Analysis of Determinative Authority, Standard of Review, And Preservation of the Issue Required Under Utah Rule of Appellate Procedure 5(c)(1)

As a matter of notice and fairness, the scope of relief granted with a preliminary injunction cannot exceed the scope of relief sought with the preliminary injunction motion, if the preliminary injunction is heard in a proceeding that has not been consolidated with the final adjudication. Utah Rule of Civil Procedure 65A(a)(1); Penn, 528 F.2d at 1185.

Whether a preliminary injunction is issued without notice in that it exceeds the scope of relief sought by the preliminary injunction motion is reviewed for correctness, without any deference to the trial court. Kasco Services Corp. v. Benson, 831 P.2d 86, 89 (Utah 1992); Wells, Fargo & Co. v. Davis, 2 Utah 411, 414 (1877).¹³

This issue was preserved in the trial court with the Third-Party Defendants' Objection to E. Excel's Proposed Order of Preliminary Injunction, which was filed before the Preliminary Injunction was entered.

¹³ Kasco and Wells, Fargo both involve questions of notice under a contract. Given that the issues presented here concern more important constitutional rights, specifically, adequacy of judicial notice as required for due process, the correctness standard of review applied in Kasco and Wells Fargo to the less important contract notice situations should apply, prima facie.

F. The Preliminary Injunction Must Be Vacated And Set Aside Because Of Legal Errors And Insufficiency Of The Evidence

1. Statement of the Issue

Must the Preliminary Injunction against Petitioner be vacated and set aside on the grounds that the Findings and Conclusions upon which the Preliminary Injunction is based are legally incorrect and are not supported by sufficient evidence, including, without limitation, the Findings and Conclusions that: (1) the balancing of the equities favored issuance of the Preliminary Injunction, when the trial court categorically excluded evidence with regard to the illegal and improper conduct of plaintiff Jau-Fei Chen; (2) Petitioner was liable for breach of fiduciary duty based upon her position as a director of E. Excel USA, when the trial court previously ruled that her directorship was null and void and of no effect; (3) Petitioner was a member of a conspiracy, when Petitioner is 76 years old and does not speak English, the conclusion is not supported by sufficient evidence and, in fact, in the contemporaneous Findings and Conclusions in the contempt proceeding, the trial court did not identify Petitioner as a member of the conspiracy; and (4) Petitioner is liable under the Utah Pattern of Unlawful Activity Act, when there is insufficient evidence to support the conclusion and conclusion is legally insufficient?

2. **Analysis of Determinative Authority, Standard of Review, And Preservation of the Issue Required Under Utah Rule of Appellate Procedure 5(c)(1)**

A person cannot be liable for breach of fiduciary duty based upon a corporate directorship if the directorship never existed in the first instance or if the alleged breach occurred after the directorship concluded. Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981). There must be clear and convincing evidence for a person to be found liable for civil conspiracy. Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah Ct. App. 1987). To be liable under Utah Code § 76-10-1603(2) of the Utah Pattern of Unlawful Activity Act, there must be a finding that the defendant conducted or participated in the affairs of an enterprise through a pattern of unlawful activity, the pattern of unlawful activity must consist of at least three separate episodes of an unlawful act, and the findings and conclusions must be particular as to the defendant's involvement. Utah Code Ann. §§ 76-10-1601 et. seq.; Holbrook v. Master Protection Corp., 883 P.2d 295, 302 (Utah Ct. App. 1994). Finally, whether a preliminary injunction should be issued depends, in part, upon a balancing of the equities, which makes relevant the conduct of the parties before the trial court. 43 C.J.S. Injunctions § 32 at 834-35 (1978) (in determining whether to issue an injunction "it is the **duty** of the court to take into consideration the conduct and situation of the parties" (emphasis added)); LHIW, Inc. v. DeLorean, 753 P.2d 961, 963 (Utah 1988) ("[P]arty seeking equity must do so with clean hands").

Categorical exclusions of relevant evidence are disfavored and, where improper exclusion of evidence places the underlying fairness of the proceeding in doubt, reversal is required. U.S. v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987); State v. Blake, 478 S.E.2d 550, 559 (W. Va. 1996).

Whether the trial court's legal conclusions in the Preliminary Injunction are correct is reviewed for correctness. Pena, 869 P.2d at 936. Whether there is sufficient evidence to support Preliminary Injunction is reviewed for clear error. Id. at 935-36. The trial court's exclusion of evidence of plaintiff Jau-Fei Chen's misconduct should be reviewed for correctness because the exclusion was categorical and was tantamount to a summary adjudication.¹⁴ Id. at 936. In addition, the Preliminary Injunction is provided less deference due to the trial court's verbatim adoption of the Rule 53 Special Master's proposed findings. Automatic Control Products v. Tel-Tech, Inc., 780 P.2d 1258, 1264 (Utah 1989) (Zimmerman J., dissenting); 9A Wright & Miller, Federal Practice and Procedure § 2578, at 535 (1995).

The issues regarding the legal and factual sufficiency of the Preliminary Injunction were preserved in the trial court by the Third-Party Defendants' Objection to E. Excel's Proposed Order of Preliminary Injunction, which was filed before the Preliminary Injunction was entered.

¹⁴ In the event the Court were to decide otherwise, whether the trial court improperly excluded relevant evidence typically is reviewed for abuse of discretion. Slisze v. Stanley-Bostitch, 979 P.2d 317, 321 (Utah 1999).

III. STATEMENT OF REASONS WHY AN IMMEDIATE INTERLOCUTORY APPEAL SHOULD BE PERMITTED

The issues presented for appellate review by this Petition concern substantial rights of Petitioner Hwan Lan Chen that will materially affect the outcome of the trial court action. The issues presented by this Petition address the fundamentally unlawful manner in which the trial court has proceeded and by which the Preliminary Injunction was issued.

Specifically, the trial court has proceeded and issued the Preliminary Injunction by extensively deferring to, and relying upon, the trial court's Rule 53 Special Master, who has, contrary to the subordinate judicial officer role lawfully authorized by Rule 53, exercised absolute control of the corporation that is the subject of the litigation and become the dominant plaintiff in the trial court action. Moreover, the trial court has proceeded, both in conducting its own hearings and by relying upon the reports and recommendations of its Rule 53 Special Master, without providing Petitioner a full and fair opportunity to be heard. Only by means of an interlocutory appeal may the impropriety of the trial court's extensive reliance upon and deference to his Rule 53 its Rule 53 Special Master and the denial of Petitioner's due process rights, be addressed and remedied.

In addition, a determination of the unlawfulness of the Preliminary Injunction based upon the unlawful powers and role of the trial court's Rule 53 Special Master will better serve the administration and interests of justice because, without an immediate interlocutory review of the Preliminary Injunction,

the trial court's Rule 53 Special Master will continue to exercise his unlawful powers and the findings entered in connection with the Preliminary Injunction in reliance upon the Rule 53 Special Master may become final. The trial court has indicated the final nature of the findings that support the Preliminary Injunction in the Preliminary Injunction and Contempt Rulings and Utah Rule of Civil Procedure provides that evidence received in the Preliminary Injunction proceeding becomes part of the record that can be used at trial. Moreover, the trial court's Rule 53 Special Master already has moved for a default judgment against Petitioner based, in part, upon the Preliminary Injunction Ruling.

IV. STATEMENT OF REASON WHY THE APPEAL MAY MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION

The immediate appeal of the Preliminary Injunction will materially advance the termination of the litigation below because the issues presented by the appeal primarily address the unlawful role of the trial court's Rule 53 Special Master and because of the trial court's indication of the final nature of the findings supporting the Preliminary Injunction. Only by vacating the findings upon appellate review can Petitioner hope for a fair and impartial final adjudication. Moreover, most of the trial court's orders have been entered in reliance upon the actions, reports and recommendations of its unlawfully authorized Rule 53 Special Master. The Rule 53 Special Master continues to dominate the trial court action as a party litigant. By determining that the trial court erroneously issued the Preliminary Injunction, specifically in regard to the

trial court's reliance upon its Rule 53 Special Master, the unlawful role of the Rule 53 Special Master can be terminated. This would materially advance the termination of the trial court action.

V. STATEMENT OF WHY THE SUPREME COURT SHOULD DECIDE THE CASE

The Supreme Court should decide the case and not assign the appeal to the Court of Appeals because the appeal presents an issue of first impression and of substantial importance to the administration of justice, specifically, the propriety of the unprecedented authorization and exercise of power by the Rule 53 Special Master, and a substantial constitutional issue regarding the denial of due process.

VI. ATTACHMENTS

Pursuant to Utah Rule of Appellate Procedure 5(c)(3), attached to this Petition are: (1) the Preliminary Injunction, dated October 16, 2002, as "Exhibit A"; (2) the Preliminary Injunction Ruling, dated August 20, 2002, as "Exhibit B"; and (3) the Contempt Ruling, dated August 20, 2002, as "Exhibit C."¹⁵

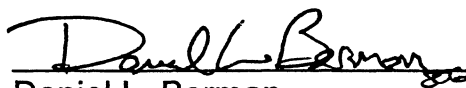
¹⁵ The formal title of the Preliminary Injunction is "Order of Preliminary Injunction." The formal title of the Preliminary Injunction Ruling is "Findings of Fact and Conclusions of Law." The formal title of the Contempt Ruling is "Plaintiff's Findings of Fact and Conclusions of Law in Connection With Plaintiff's Motion for Order to Show Cause Why Ms. Stewart Should Not Be Held in Civil and Criminal Contempt of Court and Plaintiff's Motion for Order Summarily Holding Ms. Stewart in Criminal Contempt of Court."


CONCLUSION

For all of the foregoing reasons, Hwan Lan Chen's Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5 should be granted.

DATED this 5 day of November, 2002.

BERMAN, GAUFIN, TOMSIC & SAVAGE


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I hereby certify that on November 5, 2002, a true and correct copy of **PETITION FOR PERMISSION TO APPEAL PURSUANT TO UTAH RULE OF APPELLATE PROCEDURE 5** was served as follows:

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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,	:	JAU HWA STEWART’s JOINDER IN HWAN LAN CHEN’s PETITION FOR PERMISSION TO APPEAL PURSUANT TO UTAH RULE OF APPELLATE PROCEDURE 5
	:	
vs.	:	Appellate Court No. 20020913-SC
	:	
JAU-HWA STEWART, et al.,	:	Trial Court Nos. 010400098 and 010400201
	:	(Consolidated Cases)
Defendant/Appellant.	:	
	:	Subject to Reassignment to the Court of Appeals
	:	

Jau Hwa Stewart, Defendant in the District Court Action, Civil No. 010400098, joins in Hwan Lan Chen’s Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5, upon the grounds and for the reasons set forth in that petition.

Dated: November 5, 2002.

LARSEN & GRUBER

Handwritten signatures of Mark A. Larsen and David S. Hill. The signature of Mark A. Larsen is on the left, and the signature of David S. Hill is on the right. Both signatures are written in black ink.

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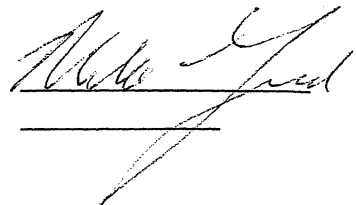
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minor children,	:	
	:	TAIG STEWART’s JOINDER IN
Plaintiffs/Appellees,	:	HWAN LAN CHEN’s PETITION FOR
	:	PERMISSION TO APPEAL
	:	PURSUANT TO UTAH RULE OF
	:	APPELLATE PROCEDURE 5
	:	
vs.	:	Appellate Court No. 20020913-SC
	:	
JAU-HWA STEWART, et al.,	:	Trial Court Nos. 010400098 and
	:	010400201
Defendant/Appellant.	:	(Consolidated Cases)
	:	
	:	Subject to Reassignment to the Court
	:	of Appeals
	:	

Taig Stewart, Third-Party Defendant in the District Court Action, Civil No. 010400098, joins in Hwan Lan Chen’s Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5, upon the grounds and for the reasons set forth in that petition.

Dated: November 5, 2002.

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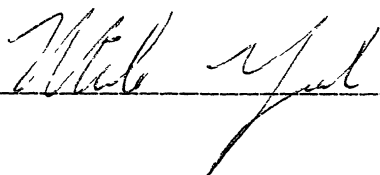
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LEI ZHANG, and E. E. ZHANG, her
minor children,

Plaintiffs,

vs.

JAU-HWA STEWART, et al.,

Defendants.

E. EXCEL INTERNATIONAL, INC.,

Cross-Claimant,

vs.

JAU-HWA STEWART,

Cross-Defendant

E. EXCEL INTERNATIONAL, INC.,

Respondent/Third-Party Plaintiff,

vs.

TAIG STEWART, et al., including
HWAN LAN CHEN,

Petitioner/Third-Party Defendant

**Third-Party Defendants' Joinder in
Hwan Lan Chen's Petition for
Permission to Appeal Pursuant to Utah
Rule of Appellate Procedure 5**

Appeal No. 20020913

Trial Court Nos. 010400098 and
010400201
(Consolidated Cases)

"Subject to Reassignment to the
Court of Appeals"

Third-Party Defendants Beverly Warner, Angela Barclay, Dale Stewart, Sheue Wen Smith, and Apogee, Inc., a Utah corporation, collectively the “Third-Party Defendants” hereby join in Hwan Lan Chen’s Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5, and based on the factual statements and legal arguments set forth therein, request permission to appeal the Court’s issuance of the Preliminary Injunction.

Respectfully Submitted this 5th day of November 2002.

CLYDE SNOW SESSIONS & SWENSON

A handwritten signature in black ink, appearing to read 'Clark W. Sessions', written over a horizontal line.

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Matthew A. Steward

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I hereby certify that I am a member of and/or employed by the law firm of Clyde Snow Sessions & Swenson, One Utah Center, 13th Floor, 201 South Main Street, Salt Lake City, Utah 84111, and that in said capacity and pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **Third-Party Defendants' Joinder in Hwan Lan Chen's Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5** was served by:

X Depositing the same in the U.S. Mail, postage prepaid and correctly addressed;

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and E. E. ZHANG, her minor children,

Plaintiffs/Appellees,

vs.

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

Defendants/Appellant.

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

Third-Party Plaintiff,

vs.

TAIG STEWART; BEVERLY WARNER;
ANGELA BARCLAY; DALE STEWART;
HWAN LAN CHEN, et al.,

Third-Party Defendants/Cross
Appellants.

Case No. 20020927-SC

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

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STATEMENT OF JURISDICTION

This appeal arises out of a petition for interlocutory review, pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Does the appellants' failure to marshal evidence in support of the trial court's findings preclude their attacking the trial judge's factual findings and any legal rulings premised upon those findings?

Standard of Review: Appellant must marshal the evidence in support of the trial court's findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be "against the clear weight of the evidence," thus making them "clearly erroneous." Young v. Young, 1999 UT 38, ¶15, 979 P.2d 338. Where a trial court's rulings on fact-dependent issues are challenged, this court grants broader than normal deference to the trial court. See State v. Pena, 869 P.2d 932, 936-38 (Utah 1994). Appellants' failure to marshal the evidence requires this Court to assume that all findings are adequately supported by the evidence. See Utah Medical Products, Inc. v. Searcy, 958 P.2d 228, 233 (Utah 1998); In re Estate of Beesley, 883 P.2d 1343, 1347-49 (Utah 1994).

2. Did the trial court abuse its discretion in appointing an Interim CEO of E. Excel International, Inc. to conduct the company's business and operations and designating him a special master as a means of providing the Interim CEO with judicial immunity?

3. Standard of Review: Trial courts historically are given considerable latitude in deciding whether and when to appoint judicial officers, such as special masters, receivers, or monitors to assist in implementing their orders. These decisions are reviewed for an abuse of discretion. See, e.g., Plumb v. State, 809 P.2d 734, 744 (Utah 1990) (reference to special master reviewed for abuse of discretion); Richardson v. Arizona Fuels Corp., 614 P.2d 636, 638 (Utah 1980) (appointment of receiver reviewed for abuse of discretion). As a consequence, the trial court's appointment of a interim CEO and the designation of that person as special master under Rule 53 of the Utah Rules of Civil Procedure for purposes of assuring maximum protection from legal harassment is reviewed under a harmless error standard. Plumb v. State, 809 P.2d 734, 744 (Utah 1990) ("The standard for determining harmless error is whether it is reasonably likely that the trial court's final order would have been different absent the master's improper activities." (citing State v. Ramsey, 782 P.2d 480, 485 (Utah 1989); State v. Knight, 734 P.2d 913, 919-23 (Utah 1987))).

4. Did the trial court abuse its discretion in entering a preliminary injunction against Hwan Lan Chen ("Madame Chen") and Jau Hwa and Taig Stewart (the "Stewarts") barring them from competing with E. Excel based upon the trial court's findings that Madame Chen and the Stewarts had conspired to strip E. Excel of corporate assets and opportunities?

Standard of Review: "In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact . . . [which] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

judge the credibility of the witnesses.” Utah R. Civ. P. 52(a). This court will “reverse the trial court’s findings of fact . . . only if they are ‘clearly erroneous’ as demonstrated by the challenger’s marshaling of the evidence.” Searcy, 958 P.2d at 233 (Utah 1998) (citations omitted). This court “will not disturb a district court’s grant of a preliminary injunction unless the district court abused its discretion or rendered a decision against the clear weight of the evidence.” Water & Energy Sys., Tech., Inc. v. Keil, 1999 UT 16, ¶ 6, 974 P.2d 821 (Utah 1999) (citing Kasco Services Corp. v. Benson, 831 P.2d 86, 90 (Utah 1992) (citing System Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983))).

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition Below.

In September of 2000, Ms. Stewart, Madame Chen, and others purported to remove Jau Fei Chen (“Dr. Chen”) and her husband as directors and officers of E. Excel International, Inc. (“E. Excel”) and took over the operations of the company. On January 10, 2001, Dr. Chen filed a verified complaint against Ms. Stewart, then acting as CEO of E. Excel, asserting, among other things, that Ms. Stewart improperly sought to force Dr. Chen out as the leader of E. Excel and to establish a competing distribution network by terminating E. Excel’s exclusive contractual relationships with its territorial owners. (R. 1-24). The complaint detailed the alleged harm to E. Excel from the destruction of the existing distribution network, including diminished profitability and significant layoffs of E. Excel employees. (Id.). Dr. Chen simultaneously sought a preliminary injunction and temporary restraining order prohibiting Ms. Stewart from causing E. Excel to violate its exclusive contracts with territorial owners. (R. 27-29). On January 10, 2001, the court

granted the temporary restraining order, finding that Dr. Chen was likely to prevail on the merits of her claim that Ms. Stewart had engaged in ultra vires acts that were damaging to E. Excel. (R. 55-58). On January 18, 2001, Dr. Chen amended the verified complaint to add E. Excel as a defendant. (R. 95-97).

On February 21, 2001, after evidentiary hearings on Dr. Chen's preliminary injunction motion, the parties agreed to a stipulated order, which, among other things, prohibited Ms. Stewart from tortiously interfering with any contract between E. Excel and its distributors, and provided for the appointment of a CEO to conserve the remaining assets of E. Excel and to operate the company pending a final determination of all legal issues in the suit. (R. 626-33). On or about March 13, 2001, the Court appointed Larry Holman to serve as Interim CEO/Special Master of E. Excel. (R. 704).

During the Summer of 2001, Dr. Chen filed two contempt motions against Ms. Stewart, alleging extensive violations of the temporary restraining order. (R. 2072-74; 14306). On October 25, 2001, evidentiary hearings on those motions began. (R. 14244). Those motions resulted in findings of civil and criminal contempt by the trial court and are part of a separate appeal currently pending before this court.

On October 29, 2001, E. Excel filed an Amended Answer, Cross-Claim against Jua-Hwa Stewart, and Third-Party Complaint naming, among others, Madame Chen and Taig Stewart as Third-Party Defendants. (R. 4171-4214). At the same time, E. Excel filed motions for a temporary restraining order (R. 4167-70) and a preliminary injunction seeking to prohibit Madame Chen and the Stewarts, among others, from unlawfully competing against E. Excel during the pendency of this action in order that E. Excel

could have an opportunity to recover for the damage done to it in the marketplace by their wrongful acts. (R. 3718-21). E. Excel's Motion for Temporary Restraining Order was granted on October 31, 2001. (R. 4215-4221.) Over the next ten months, joint hearings were held on Dr. Chen's contempt motion and E. Excel's injunction motion. On August 20, 2002, after 22 days of hearings on E. Excel's motion for preliminary injunction, the trial court entered two separate sets of findings of fact and conclusions on of law in connection with E. Excel's motion for preliminary injunction (R. 14318) and Dr. Chen's contempt motions. (R. 14317).¹ Copies of the Preliminary Injunction Findings and Contempt Findings are included in E. Excel's Addendum as Exhibits A and B respectively.

On October 16, 2002, the trial court entered an order granting E. Excel's motion for preliminary injunction. (R. 9135-45). A copy of the court's preliminary injunction order is included in E. Excel's Addendum as Exhibit C. On October 24, 2002, Madame Chen filed a Motion to Vacate and Set Aside Judge Howards' orders relating to the Interim CEO's appointment. (R. 9238). On January 24, 2003, the trial court denied the Motion to Vacate. (R. 12754-70). A copy of the court's January 24, 2003 order is included in E. Excel's Addendum as Exhibit D. This appeal followed, as well as an appeal of the contempt order on Dr. Chen's motion. This court entertained both appeals, but directed the parties to address the appeal from the E. Excel action first. Both the

¹ The evidentiary hearings on E. Excel's preliminary injunction were combined with hearings on Dr. Chen's motion for contempt. However, the trial court issued separate and independent findings of fact and conclusions of law pertaining to the preliminary

Stewarts and Madame Chen have filed briefs challenging the trial court's refusal to vacate Mr. Holman's appointment as interim CEO and special master, and the grant of a preliminary injunction to E. Excel. This brief responds to both those briefs.

II. Statement of the Facts.

The trial court made extensive findings of fact that document the almost unbelievable malicious activities of the appellants directed against E. Excel, as well as appellants' intentional flouting of the trial court's orders and processes. This brief synthesizes these facts in a relatively dispassionate manner. The court is invited to review the trial court's complete findings to view this activity in full color and in detail.

A. E. Excel and its Relationship to the Chen Family.

E. Excel International, Inc. is a manufacturer of nutritional supplements and skin care products that are sold through multi-level marketing networks. (R. 14317 (Ex. B hereto) at 6, ¶ 6 (citing R. 14293)). E. Excel is incorporated under and governed by principles of Utah corporate law. Various members of the Chen family have served in various roles, as directors, officers, or employees of E. Excel. The members of the family now include appellee Dr. Jau-Fei Chen ("Dr. Chen"), her estranged sister, appellant Jwa-Hwa Stewart ("Ms. Stewart"), her estranged mother, appellant Hwan Law Chen ("Madame Chen"), her brother Tei Fu Chen, and two other siblings. (Id.).

Dr. Chen, the founder of E. Excel, is a highly accomplished person. She was accepted as a student at Brigham Young University at the age of 16. She earned her

Bachelors degree in microbiology at the age of 19, a Masters degree in the same subject at the age of 21, and a Ph.D. in microbiology at the age of 26. (Id. at 6, ¶ 2 (citing R. 14293)). Together with her husband, Rui Kang Zhang, Dr. Chen incorporated E. Excel on July 20, 1987. (Id. at 6, ¶ 5 (citing R. 14293; R. 14230)). Dr. Chen quickly established herself as a charismatic leader of this multi-level marketing company. She was the public spokesperson for E. Excel within its distribution channels, and was often featured in photographs and articles regarding the company. (Id. at 8, ¶ 10 (citing R. 14293; R. 14262)).

Dr. Chen gained familiarity with multi-level marketing networks, in part, through her family's work in the industry. Her brother, Tei-Fu Chen, operated his own successful multi-level marketing business named Sunrider. (Id. at 6-7, ¶ 6 (citing R. 14293)). Dr. Chen's sister, Ms. Stewart, also gained extensive experience working at Sunrider. (Id.).

By the early 1990s, Ms. Stewart had officially left Sunrider to become vice-president of E. Excel, where she assumed substantial responsibilities, including directing E. Excel's finances and cash flow, arranging for credit, and overseeing the manufacturing of product and the payment of invoices. (Id. at 7, ¶ 7 (citing R. 14230)). In addition, Ms. Stewart communicated directly with E. Excel's territorial owners – foreign distribution companies in Malaysia, Taiwan, Hong Kong, and the Philippines, where much of its sales originated. (Id.; see also R. 14293).

E. Excel quickly became quite successful. From its beginning, manufacturing and selling approximately 20 product lines, it grew to market well over 100 product lines. (Id. at 8, ¶ 10 (citing R. 14293; R. 14262)). E. Excel sold its products to territorial

owners located in Korea, Taiwan, Philippines, Hong Kong, Malaysia, Singapore, France, and the United States, which in turn marketed the products to end users through local distribution networks.

B. Ms. Stewart and Madame Chen Attempt to Destroy E. Excel Because of a Family Dispute with Dr. Chen.

The Chen family has a long history of serious internal feuds. One familial dispute resulted in Ms. Stewart reporting her brother, Tei-Fu Chen, to the Internal Revenue Service and to U.S. Customs agents for various activities associated with Sunrider. As a result of Ms. Stewart's information, Tei-Fu Chen was prosecuted, sent to prison, and assessed several million dollars in fines and unpaid taxes. Ms. Stewart received a \$2 million bounty for informing on her brother. (R. 14317 (Ex. B hereto) at 25-26, ¶ 37 (citing R. 14230, R. 14235, R. 14255)).

Another family dispute, directly related to this case, arose when Ms. Stewart and Madame Chen learned that Dr. Chen's husband allegedly was keeping a mistress. Ms. Stewart and Madame Chen demanded that Dr. Chen divorce her husband immediately. When Dr. Chen refused, Ms. Stewart and Madame Chen, along with another Chen sister, took extreme measures. For example, the women would awaken Dr. Chen in the middle of the night, physically shake her, and accuse her of disloyalty to the family. Madame Chen and Ms. Stewart also told Dr. Chen that she was "of the devil" and told her that she should kill herself to end the family's dishonor. (*Id.*). Ms. Stewart also threatened to report Dr. Chen to authorities for unspecified wrongs so that she would be put in jail as had occurred to her brother, Tei-Fu. Madame Chen demanded that Dr. Chen grant her

custody of her three minor children, and then refused to allow the children to see their father. (Id.). Ms. Stewart also began monitoring telephone conversations between Dr. Chen and Mr. Zhang, to determine whether she was complying with the family's wishes. (Id.). Finally, in an apparent effort to strike at Dr. Chen's financial base, Madame Chen and Ms. Stewart demanded that Dr. Chen terminate her relationship with E. Excel and that she cut off all ties with the territorial owners, who were essential to the marketing network. (Id.).

Despite all these tactics, Dr. Chen eventually decided to reconcile with her husband. (Id. at 26, ¶ 38 (citing R. 14230)). To punish Dr. Chen for refusing to divorce Mr. Zhang and to resign from E. Excel, Ms. Stewart and Madame Chen developed an elaborate scheme to oust Dr. Chen and Mr. Zhang from the company, or, in the alternative, to destroy the company in order to prevent Dr. Chen and her husband from sharing in the company's wealth. (Id. at 26, ¶ 39). Dr. Chen's three minor children controlled 75% of E. Excel's shares. By an action taken in October 2001 (but dated September 1, 2000), and while Dr. Chen and her husband were out of the country, Ms. Stewart, purporting to act as trustee for Dr. Chen's children, voted these shares to remove Dr. Chen and her husband as directors of E. Excel. (Id. at 27, ¶ 40 (citing R. 14338)). Ms. Stewart then voted to install her husband, Taig Stewart, and her mother, Madame Chen, as new directors. At the same time, this newly constituted board of E. Excel voted to remove Dr. Chen as president and Mr. Zhang as secretary. The board then appointed Ms. Stewart as president and her husband, Taig Stewart, as secretary of E. Excel. (Id. at 27, ¶ 40 and at 27, ¶ 41 (citing R. 14338; R. 14255)).

In furtherance of their scheme to destroy E. Excel and deprive Dr. Chen and her husband of its financial rewards, Ms. Stewart and Madame Chen also began to take action against the territorial owners who were loyal to Dr. Chen. As a condition of receiving additional E. Excel product, Ms. Stewart demanded that the territorial owners sign new contracts with E. Excel that required the owners to renounce any business relationship with Dr. Chen. (Id. at 26-27, ¶ 39 (citing R. 14339; R. 14345)). The territorial owners who refused to comply were replaced by new distributors loyal to Ms. Stewart.

Perhaps mindful that her coup might be short-lived, Ms. Stewart began to take actions directly against E. Excel – actions which would damage it financially and in the marketplace. For example, on September 1, 2000, without any authorization from E. Excel’s board of directors, Ms. Stewart transferred \$425,000 from E. Excel’s money market account into her personal checking account. (Id. at 30, ¶ 47 (citing R. 14255; R. 14343)). Later, on September 28, 2000, Ms. Stewart made another unauthorized transfer of more of E. Excel’s funds to her personal checking account, this time in the amount of \$1.5 million. (Id.). Ms. Stewart also established two bank accounts at the Central Bank in Provo, Utah, one in her aunt’s name, Ching-Chun Lu Huang, and one in her uncle’s name, Ching Lu. (Id. at 36, ¶ 58). Ms. Stewart then arranged for over \$8 million to be transferred to these accounts. (Id.). Finally, Ms. Stewart set up a bank account in the name of her long-time friend, Su-Chiu Kuo Shen, with funds from Madame Chen, wire-transferred from Asian accounts. Ms. Stewart and Madame Chen used this account to fund Apogee, Inc., a competing nutritional supplements manufacturing company

incorporated and controlled by Ms. Stewart and Madame Chen. These funds were also used to pay former employees of E. Excel in cash to perform various tasks for Apogee. (Id. at 45-46, ¶ 68).

Similar patterns of financial manipulation of E. Excel's funds were found by a court in Hong Kong to have been engaged in by Ms. Stewart and Madame Chen. During this same period, Ms. Stewart brought an action in Hong Kong against the Board of Directors of E. Excel and E. Excel Limited and its shareholders. In its order denying Ms. Stewart's prayed for relief, the Hong Kong court found that Madame Chen personally received over \$32 million of E. Excel product sale proceeds, and that a Utah County Central Bank account controlled by Ms. Stewart by a power of attorney received over \$7.6 million. The Hong Kong judge found as follows:

As to the alleged wrongful diversions from [E. Excel Limited's] account [Jau Hwa Stewart] not only was privy to the diversion of \$7.6 million from [E. Excel Limited] to accounts of her aunt and uncle (for which she was the contact person), but further that she was instrumental in the utilization of at least part of these monies to pay certain of her US attorney fees, and also to provide seed capital for the establishment of companies to compete with existing Territorial Owners in Hong Kong and Taiwan

In addition, the diversion of a sum of US \$32,681,011, which was taken from the [E. Excel Limited's] accounts to buy cashier orders in the name of [Hwan Lan Chen] with regard to which [Jau Hwa Stewart] holds power of attorney

(See Hong Kong court's August 30, 2001 Order at ¶¶ 68-71, included in E. Excel's Addendum as Exhibit E.) (emphasis added).

Ms. Stewart and Madam Chen also struck at E. Excel's distribution network in ways that appear to have been calculated to destroy both the network and the company's goodwill. Ms. Stewart decided to unilaterally terminate contracts with Excel's Malaysian and Taiwanese distributors, and to sever all business relations with those territorial owners. (R. 14317 (Ex. B hereto) at 26, ¶ 39 (citing R. 14339; R. 14345; R. 14223; R. 14223; R. 14226)). Ms. Stewart, acting as President of E. Excel, cut off the flow of product to E. Excel's historical distributors. Ms. Stewart also arranged to fill some of the distributors' orders with expired or poor quality products. (Id. at 47, ¶ 70 (citing R. 14226)). In addition, Ms. Stewart and Madame Chen arranged for a transfer of millions of dollars back to Asia in order to establish new distribution networks loyal to them. (R. 14318 (Ex. A hereto) at 9, ¶ 15).

On January 10, 2001, Dr. Chen filed this action in the district court, alleging corporate waste, breach of fiduciary duty, and improper removal of a director. (R. 1-24). She then moved for a temporary restraining order to protect her and her children's interests in E. Excel. On January 10, 2001, Judge Howard of the Fourth District Court granted a temporary restraining order prohibiting Ms. Stewart from "directly or indirectly causing [E. Excel] to violate any of its exclusive contract[s] with [the historical distributors] or to compete with the [historical distributors] in violation of such contracts." The district court also directed Ms. Stewart to "fill, complete, and ship all pending orders for products received from [the historical distributors.]" (R. 14318 (Ex. A hereto) at 16-17, ¶ 33 (citing R. 14341)).

Ms. Stewart and her co-conspirators knew that there was a strong possibility that Ms. Stewart would be removed as president of the company. Faced with this likely loss of control, Ms. Stewart and Madame Chen, soon joined by Taig Stewart and others, determined both to destroy E. Excel, rather than let it revert to Jau-Fei Chen's control, and also to replace it in the market with Apogee, a new nutritional supplements manufacturing company controlled by Ms. Stewart and Madame Chen alone. (Id. at 17, ¶ 34 (citing R. 14262)).

Over the next few weeks, following entry of the temporary restraining order, the district court held several days of evidentiary hearings in order to determine whether the temporary restraining order should be converted into a preliminary injunction. During the time the court was hearing the evidence, and while the temporary restraining order was in place, Ms. Stewart and the third party defendants who assisted in the scheme, disabled the surveillance system that monitored activities at E. Excel's warehouses and offices. Ms. Stewart and her conspirators then stole or destroyed millions of dollars worth of E. Excel's inventory and equipment, as well as E. Excel's business records and computer files. (Id. at 23, ¶ 53; and at 26-27, ¶¶ 63-67)). In one of the more bizarre episodes in a bizarre case, the conspirators first removed huge amounts of product from E. Excel's warehouse and converted it to their own purposes. They then purchased mice at a pet store and released them into E. Excel's warehouse for the purpose of giving them a basis to claim that it was necessary to remove the products from the warehouse because of the presence of rodents. (Id. at 23, ¶ 53; and at 28-29; ¶¶ 71-74).

Some of the conspirators' activities, including the looting of E. Excel's warehouse and offices, were in direct violation of the temporary restraining order entered on January 10, 2001. Another example is Ms. Stewart's intentional failure to fill confirmed orders from the historical distributors. (R. 14317 (Ex. B hereto) at 35-36, ¶ 57). In addition, Ms. Stewart intentionally allowed and even caused shipments of E. Excel product within her control to be shipped to new distributors loyal to her. (Id.).

Matters came to a head when, on February 13, 2001, a tape was anonymously delivered to Dr. Chen and her attorneys which contained definitive evidence of Ms. Stewart's ongoing wrongdoing, and of her flouting of the trial court's temporary restraining order. The tape contained a recording of a telephone conversation between Ms. Stewart and two of her loyal distributors located in Asia, Sam Tzu and Richard Hu. During the conversation, Ms. Stewart, Mr. Tzu and Mr. Hu agreed that they all would testify falsely during the evidentiary hearing by denying knowledge of certain critical matters, and then blaming Dr. Chen for certain events harmful to E. Excel for which Ms. Stewart or others were actually responsible. (Id. at 57-60, ¶¶ 88-92). In fact, one of these associates did give false testimony in court in accordance with this joint agreement before the tape recording was delivered to the court and Ms. Stewart was confronted with it. (Id.). As a result of this incident, the trial court referred the tape recording and a transcript of the witness testimony to the County Attorney. (R. 14229). The hearing transcript relating to these events is included in E. Excel's Addendum as Exhibit F.

C. The Entry of the February 21, 2001 Interim Order and Mr. Holman's Appointment as Interim CEO of E. Excel.

Following these evidentiary hearings, and in anticipation of the court's ruling against Ms. Stewart and the other defendants, all parties stipulated to an interim order. Among other things, the stipulated order prohibited Ms. Stewart from tortiously interfering with any contract between E. Excel and its distributors or third parties. The order also required Ms. Stewart to return to E. Excel's corporate headquarters any corporate assets in her custody or control, including corporate records.² (R. 626-632). A copy of the Interim Order is included in E. Excel's Addendum as Exhibit G. Finally, the Interim Order provided for removal of Ms. Stewart as President of E. Excel, removal of Madame Chen and Taig Stewart from the board, reinstatement of Dr. Chen and Rui Kan Zhang to the board, and appointment by the court of a CEO to conserve the remaining assets of E. Excel and to operate the company pending a final determination of all legal issues in the suit. This stipulated order was presented to the court and became the court's February 21, 2001 Interim Order. (*Id.*). Actions taken by the court pursuant to the Interim Order are the subject of this appeal.

² The trial court later determined that, despite its February 21, 2001 Interim Order, Ms. Stewart and her husband continued to remove files, computer files, equipment, and the "entire contents of E. Excel's surveillance room" from E. Excel's offices. Ms. Stewart also continued to direct shipment of product to new E. Excel distributors using a new entity, Shannon River, Inc. (R. 14317 at 74-79; ¶¶ 112-114). To conceal these activities, Ms. Stewart's assistant Angela Barclay "removed all of the records relating to the Shannon River shipments from the premises of E. Excel and delivered them to Jau-Hwa Stewart," and erased all computer files pertaining to Shannon River (R. 14318 at 44, ¶ 126).

Paragraph 1 of the Interim Order directed the parties to exchange lists of proposed candidates for the position of Interim CEO/President of E. Excel. (R. 632 (Ex. G hereto)). However, the parties were unable to agree on a candidate, so the issue was submitted to the court. Significantly, from the standpoint of this appeal, the Interim Order does not contemplate that the interim CEO will be designated as a special master, nor does it suggest that any judicial powers will be conferred upon the CEO. Rather, the Interim Order is specific as to the interim CEO's duties with respect to the operations of the company. (R. 626-632). It provides that the "CEO / President shall have full executive authority to act on behalf of the Company, and conduct its business, subject to the continuing oversight of the board of directors and the Court." (R. 629). The Interim Order also obligates the CEO / President "to provide monthly written reports ... [and] financial statements, including a balance sheet, a statement of operations, cash receipts and disbursements journals, a detailed sales journal, copies of all bank statements, bank reconciliations, a detailed report showing what invoices have not been paid, and any other reports or information reasonably requested by the parties." (Id.).

The parties could not agree upon a candidate for the CEO position. The district court then held a telephonic hearing on March 5, 2001 to discuss the appointment of the Interim CEO / President. (R. 14274). A transcript of the March 5, 2001 Hearing is included in E. Excel's Addendum as Exhibit H. During the hearing, Dr. Chen's counsel noted that the proceedings had been hotly contested, and that, given the circumstances, anyone appointed to the Interim CEO position in the middle of hostile litigation would be very wary of becoming embroiled in the litigation personally. For that reason, Dr.

Chen's counsel argued that as an incentive to serve, the Interim CEO should be granted some form of judicial immunity or other protection from liability. Suggestions included the immunities available to "a receiver" or "a master."³

MR. CARLSTON [counsel for Dr. Chen]: Each of our candidates is very concerned, however, that they receive the maximum protection from the Court in the form of being—even though they're designated as an interim CEO—have the protections they would have if they were appointed a receiver or otherwise received limited judicial immunity. But they're both fine candidates. The people that –

THE JUDGE: I didn't understand your last statement. They're concerned about what protection?

MR. CARLSTON: Well they're, they're concerned that as contentious as this is that, that even though they're referred to as an interim CEO that they also be accorded the protection of being a, a master or a, or something like that so that, so that they're acting under the direction of the Court so they don't, so that these decisions can, can be taken to the Court as contemplated by the order and they be protected through that process.

(Id. at 5-6) (bracketed material and emphasis added). In response to this concern, the district court, when it appointed Mr. Holman as Interim CEO, also designated him as a "Special Master." (R. 704). A copy of the March 13, 2001 order naming Mr. Holman Interim CEO and special master is included in E. Excel's Addendum as Exhibit I.

The colloquy among court and counsel during the March 5 telephonic hearing, like the text of the stipulated order, makes it clear that all parties understood that the interim CEO was not appointed as some form of neutral magistrate, but instead was appointed as manager of E. Excel, to act in its best interests, and pursue any claims the company may have. All understood and agreed that the Interim CEO/President would have the

³ It soon became evident that this protection was necessary; Jau-Hwa Stewart sued Mr. Holman and E. Excel CFO Gary Takagi in December 2001.

authority to cause the company to assert claims and to conduct litigation on behalf of the company. In fact, Ms. Stewart's counsel relied on this fact as a basis for arguing to the Court on March 5 for the appointment of her candidate, a team from Arthur Anderson:

MR. JORDAN [former counsel for Ms. Stewart]: Well, you're asking me, what I hear you saying is is the CEO going to participate in the litigation.

THE JUDGE: And maybe the CEO is going to be burdened by the litigation. Maybe that's the way I –

MR. JORDAN: Well, we asked that question of everyone too. And we, of course, indicated that there's a provision in the, in the order of the Court already that allows the parties to proceed with the litigation on behalf of their respective clients unless the CEO decides he wants to participate in those claims actively.

The advantage of having someone like a Mr. Shields or Mr., or the Arthur Anderson group is is that they have the capability to investigate and participate in those claims. ... When I asked the question of Mr. Homan and Mr. Boyer about that they indicated they, they could do it as well. But obviously, if they're going to be participating in litigation that's going to deprive them of their time, directly of their time. Whereas if you were involving just members of the other two fellows' groups it doesn't take away from the other team members' ability to run the company while the litigation is going on.

(R. 14274 (Ex. H hereto) at 17-18) (bracketed material and emphasis added).

The district court confirmed this understanding of the anticipated duties when, in its March 13, 2001 order appointing Mr. Holman Interim CEO/Special Master, it gave him all authority provided for in the stipulated order just discussed. The March 13 order states: "Mr. Holman is given complete executive authority in his role as chief executive officer and special master . . . subject to this Court's Interim Order." (R. 703 (Ex. I hereto) at ¶ 3). Illustrative of the fact that the district court's addition of "special master" designation was intended to accomplish only the grant of immunity requested by the

lawyers as an incentive to the applicants for the interim CEO position is the fact that the district court never granted Mr. Holman authority to conduct functions appropriate to a neutral judge surrogate, such as hearing evidence, settling discovery issues, or taking testimony.

Consistent with one functioning as a fiduciary and CEO acting in the interest in E. Excel, and inconsistent with one functioning as a quasi-judicial official, all parties understood and agreed that in order to run the company the Interim CEO would engage in ex parte communications with both Jau-Fei Chen and Ms. Stewart, as well as with other E. Excel employees and territorial owners. (R. 14236 at 72). To that end, the parties specifically acknowledged the establishment of a procedure for Mr. Holman's necessary ex parte communications with parties and witnesses. (Id. at 69-74).

Pursuant to the Interim Order, and the rather atypical character of the "special master" designation, Mr. Holman has not acted in any quasi-judicial capacity as a neutral judge surrogate. Rather, he has behaved as a court appointed CEO whose duty is to preserve and protect the assets and the ongoing business opportunities of the company under the court's jurisdiction—E. Excel.

D. The District Court Issues a Preliminary Injunction Against Ms. Stewart and Madame Chen.

In the fall of 2001, E. Excel filed a cross-claim against Ms. Stewart and third-party complaints against several other third-party defendants, including Mr. Stewart and Madame Chen, seeking a preliminary and permanent injunction to prevent them from competing with E. Excel in the marketplace in order to permit E. Excel to recover from

the damage done by the defendants in the marketplace. (R. 4214). Beginning on November 27, 2001 and continuing through the winter and spring of 2002, the district court heard approximately 22 days of testimony and argument on E. Excel's motion for preliminary injunction. On August 20, 2002, the district court entered lengthy and comprehensive findings of fact and conclusions of law. (R. 14318 (Ex. A hereto)). It held that E. Excel had met its burden of proving an entitlement to the preliminary injunction against the Stewarts, Madame Chen, and against most of the Third-Party Defendants. (Id.).

A few weeks later, the district court issued an Order of Preliminary Injunction, granting, with several notable modifications, E. Excel's proposed form of preliminary injunction. (R. 9135-45 (Ex. C hereto)). In entering the order, the district court overruled numerous specific objections to the form of the order lodged by the Stewarts, Madame Chen and the other Third-Party Defendants. (R. 8550-73). A copy of the trial court's Ruling on Appellant's Objections is included in E. Excel's Addendum as Exhibit J.

E. Trial Court's Denial of Motion to Vacate.

On October 24, 2002, Madame Chen, after retaining her current counsel, filed a Motion to Vacate and Set Aside Judge Howard's orders relating to the Interim CEO's appointment. In her motion, Madame Chen for the first time argued that Mr. Holman's appointment as a "special master" exceeded the parameters of Rule 53 of the Utah Rules of Civil Procedure, which limited a special master's role to that of a subordinate judicial surrogate. Based on her newly developed theory, Madame Chen argued that all court orders subsequent to Mr. Holman's appointment should be set aside because they were

contaminated by reliance on the reports to the court of Mr. Holman and on his activities. (R. 12766-12767 (Ex. D hereto)).

Judge Howard denied the Motion to Vacate on January 24, 2003. (R. 12754-70 (Ex. D hereto)). He ruled that Mr. Holman's appointment and the powers to act as interim CEO which were bestowed on him and exercised by him under the order of reference were consistent with Rule 53(c) of the Utah Rules of Civil Procedure because that rule allows the Court to "specify or limit" a special master's powers. In particular, the trial court found that the unique circumstances which confronted E. Excel in early 2001 required "a unique and immediate response." (R. 12765). Specifically, the court concluded that "E. Excel was in chaos," that it "was losing stability rapidly," and that "[e]xigent circumstances necessitated the immediate appointment of a CEO / President of E. Excel without which the company would cease to operate." (Id.).

The court also revisited its decision to afford Mr. Holman judicial immunity by designating him a "special master." (R. 12764). The trial court noted that the "parties agreed that an interim CEO/President of E. Excel would be appointed to forestall the erosion of E. Excel's business and attempt to revitalize the business." (Id.). The trial court further noted that Mr. Holman was initially appointed as an interim CEO / President, but that he was given "the same immunities and protections of a special master ... because of the potential for oppressive lawsuits against him." (Id.). The Court also noted that all parties to the litigation at the time of his appointment had stipulated both to Mr. Holman's appointment as an interim CEO and the appropriateness of the accompanying judicial immunity. (Id.).

Finally, the trial court ruled that Madame Chen had waived her challenge to Mr. Holman's actions. The court found she had participated in the litigation for over 10 months, from December 12, 2001 on, with full knowledge of the provisions of the Interim Order and of the terms upon which Mr. Holman operated under the court's supervision, without raising an objection or asking the court to revisit Mr. Holman's authority. (R. 12761-12762). Rather, Madame Chen waited until after the lengthy preliminary injunction hearing was completed—and the district court had issued its findings which were adverse to her—before lodging any objection.

Based on the foregoing, the court concluded that Mr. Holman's appointment was proper.

SUMMARY OF THE ARGUMENT

The Stewarts and Madame Chen make two basic challenges to the trial court's actions in this interlocutory appeal. First, and most important, they challenge the orders of reference pursuant to which the trial court appointed Mr. Holman to act as an interim CEO / President of E. Excel and gave him the title of "special master". Second, they challenge both the entry and the scope of the trial court's preliminary injunction. Both of these challenges fail.

A fundamental flaw runs through appellants' challenge to these two rulings. Although appellants claim that this appeal presents only legal questions, in fact, the legal questions are heavily fact dependent. For the appellants to prevail, this court must revisit the facts and redetermine them. But appellants have not laid the necessary groundwork. They have not even attempted to marshal the evidence in support of the findings, and

then show the evidence is legally insufficient, as required by this court's long-standing authority. For good reason. The trial court heard 22 days of testimony and argument, and entered 110 pages of factual findings before entering the preliminary injunction. Then, when appellants belatedly challenged the appointment of Mr. Holman following the entry of the preliminary injunction, the court heard argument and issued another ruling that contained additional factual findings. All these findings are overwhelmingly adverse to appellants, which explains their aversion to discussing them. Because these findings are not properly challenged and must be accepted for purposes of this appeal, and because they are thoroughly integral to the rulings under attack and are more than sufficient to support them, the trial court's rulings can be affirmed on this basis alone.

The primary focus of Madame Chen and the Stewart's appeal is their challenge to the appointment of Mr. Holman as the interim CEO / President. Their challenge is based on the fact that he was given the title of "special master" under Utah Rule of Civil Procedure 53. Because Mr. Holman has not acted as a neutral judicial officer, appellants claim that everything that has happened since his appointment must be undone. Appellants are wrong, and the trial court's rulings should be upheld, for three independent reasons:

- First, there is no dispute that the trial court had ample legal authority to appoint an interim CEO / President to manage E. Excel's business affairs during the pendency of the litigation; such an appointment was clearly necessary in the context of this case; and Mr. Holman acted at all times consistent with the

detailed terms of the trial court's orders, which orders, not the title "special master," define his authority.

- Second, appellants did not timely challenge Mr. Holman's appointment. Ms. Stewart stipulated to the appointment of an interim CEO / President, and to the orders defining his responsibilities, and Madame Chen actively participated in the case for almost a year before raising this issue. Because the appellants chose to wait until after they had lost the preliminary injunction motion to raise this issue, this court should not entertain it now.
- Third, even if the trial court erred in using the title "special master," that error was technical only and completely harmless because (i) Mr. Holman's actions were entirely consistent with the actions of a receiver appointed pursuant to Rule 66 of the Utah Rules of Civil Procedure, and (ii) the trial court specifically found that even without the special master's reports to the court, there was ample evidence to support the preliminary injunction.

As something of an afterthought, the appellants attempt to challenge the preliminary injunction entered against them. Madame Chen argues that the trial court erred in finding that E. Excel had shown the requisite likelihood of prevailing on the merits, and both appellants argue that the injunction is overbroad because it is prospective. In challenging the preliminary injunction, appellants face an extremely heavy burden – they must show that the trial court abused its discretion or rendered a decision that was against the clear weight of the evidence. They have not begun to carry this burden. Madame Chen challenges the extensive findings that she acted wrongfully,

but does not even attempt to marshal the evidence, which overwhelmingly supports the injunction. And both appellants challenge the injunction's prospective operation, without attempting to refute the trial court's findings that appellants' actions are particularly egregious and harmful to E. Excel, and that it needs protection against further depredations pending the final termination of this litigation. Finally, Madame Chen claims, for the first time on appeal, that her due process rights were violated by the trial court's entry of the preliminary injunction against her because she was present and represented by counsel at only 18 of the 22 days of preliminary injunction hearings. She makes this argument even though she actively evaded service of process, her counsel was present for all 22 days of hearing, she had ample opportunity to present whatever evidence she deemed appropriate in her defense, and she never complained of any prejudice until after the trial court ruled against her.

For each of these reasons, the trial court's orders should be affirmed, and this matter remanded to the trial court for further proceedings.

ARGUMENT

I. The Trial Court's Findings of Fact Have Not Been Properly Challenged.

The Stewarts and Madame Chen try to paint their appeal as raising only questions of law. See Stewarts' Br. at 1-3; Madame Chen's Br. at 2-6. However, given the devastatingly negative findings that the trial court entered respecting the conduct of the Stewarts and Madame Chen, and the implication that those findings have for the legal issues, the briefs of both the Stewarts and Madame Chen attempt to recast the facts in a light more favorable to them. In so doing, they implicitly acknowledge the centrality of

the facts to the issues on appeal. When the highly selective statements of facts in appellants' two briefs are read against the extensive findings of the trial court, findings which appellants seldom cite, (see Stewarts' Br. at 5-27; Madame Chen's Br. at 6-46), it becomes apparent that not only are both the Stewarts and Madame Chen explicitly challenging the trial court's rulings of law, but of necessity implicitly challenging the trial court's factual findings upon which those rulings are based. Yet neither brief even attempts to carry the heavy burden Utah imposes upon one who seeks to overturn a trial court's factual findings.

A. The Stewarts and Madame Chen Have Failed to Marshal the Evidence.

As repeatedly recognized by this court, one attacking a trial court's findings "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (internal quotation and citation omitted). The Utah Court of Appeals, following the Supreme Court's lead, has said that "[i]n order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." Neely v. Bennett, 2002 UT App 189, ¶ 11, 51 P.3d 724 (finding that appellant failed to meet marshalling duty despite presenting 68 pages and 284 numbered paragraphs of facts) (emphasis added); Harding v. Bell, 2002 UT 108, ¶ 19, 57 P.3d 1093 (holding that appellant must marshal "every scrap" of evidence); Timm v. Dewsnap, 2003 UT 47, ¶ 24 (holding appellant must

marshal “all relevant evidence . . . that tends to support the findings”) (citation and quotation omitted).

The marshalling process requires that the challenger “assume the role of devil’s advocate.” Harding, 2002 UT 108 at ¶ 19 (internal quotations and citation omitted). “The party challenging the jury’s verdict must therefore temporarily remove its own prejudices and fully embrace the adversary’s position.” Id. (internal quotation and citation omitted). This “rigorous” and “strict requirement both grows from and nurtures two interrelated court objectives: efficiency and fairness.” Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1053 (Utah Ct. App. 1994). A proper marshaling of the evidence promotes efficiency by avoiding “retrying the facts” and by assisting the court in “decision-making and opinion-writing.” Id. It also promotes fairness by requiring that the appellants bear the expense and time of marshalling the evidence rather than putting the appellee in the “precarious position” of performing the appellants’ work, “at considerable time and expense.” Id. at 1053-54. “[T]he deference [appellate courts] afford to trial courts’ factual findings is based on and fosters the principle that appellants rather than appellees bear the greater burden on appeal.” Id.

Instead of marshalling the evidence supporting the factual findings and then demonstrating the insufficiency of this evidence, the Stewarts and Madame Chen have presented either a selection of facts that support arguments they have made below (for example, while arguing against the scope of the injunction, the Stewarts and Madame Chen do not point to all the racketeering activity the trial court found they committed against E. Excel), or they have asserted that there is “no evidence” to support the trial

court's findings.⁴ The marshalling duty, however, is not met by “merely present[ing] carefully selected facts” or by simply “rearguing” the evidence that was presented below. Oneida, 872 P.2d at 1053. And, even if an appellant asserts that there is “no evidence” for certain factual findings, the “heavy burden of marshaling all of the evidence in support of the finding of fact does not shift to the appellee in order to refute the appellant’s assertion of the absence of evidence.” Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶ 22, 54 P.3d 1177. Instead, “the appellee, when confronted with such a ‘no evidence’ sufficiency challenge, need only point to a scintilla of credible evidence from the record that supports the finding of fact in order to overcome the appellant’s ‘no evidence’ assertion and to demonstrate that the appellant has failed to meet its marshaling burden.” Id. (emphasis added).

As we will demonstrate throughout the argument section of this brief, the Stewarts and Madame Chen have utterly failed to meet their marshaling burden under this standard.

B. Because the Trial Court’s Findings of Fact Are Not Properly Challenged and Because They Dispose of the Stewarts’ and Madame Chen’s Legal Arguments, This Court Should Affirm the Trial Court’s Decisions.

Each of the legal issues appellants raise are highly fact-dependent. For example, the trial court’s finding that the Stewarts and Madame Chen have waived their right to challenge the order of reference appointing Mr. Holman as a special master is dependent upon what the appellants knew and what they did during the period preceding the filing

⁴ See, e.g., Madame Chen’s Br. at 41- 46 (the phrase “no evidence” is used at least ten

of their challenge. Similarly fact sensitive are the correctness of the trial court's determination of the need for, and the conditions under which, Mr. Holman was appointed interim CEO of E. Excel and a special master; the correctness of the trial court's conclusion that if the special master designation was error, it was harmless; the correctness of the trial court's conclusion that E. Excel can make out a prima facie case of wrongful conduct against Madame Chen sufficient to support the preliminary injunction against her; the correctness of the trial court's conclusion that Madame Chen was not prejudiced by not being technically represented at 4 days of E. Excel's preliminary injunction hearings; and the appropriateness of the scope of the preliminary injunction. Yet all of these rulings are challenged by appellants without properly challenging the fact findings that underlie them. See Madame Chen's Br. at 53-83; Stewarts' Br. at 28-49.

Where a trial court's rulings on such fact-dependent issues are challenged, this court grants broader than normal deference to the trial court. See State v. Pena, 869 P.2d 932, 936-38 (Utah 1994); see also Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 939-42 (Utah 1993) (recognizing that waiver is a highly fact intensive question on which trial courts exercise discretion in applying the law to facts). Consistent with that approach, this court has recognized that even if an appellant purports only to challenge a legal ruling, if a determination of the correctness of a court's application of a legal standard is extremely fact sensitive, the appellant also has a duty to marshal the evidence. See, e.g. In re Estate of Beesley, 883 P.2d 1343, 1347-49 (Utah 1994) (because

times and in response to almost all of the trial court's findings).

the appellant did not marshal the evidence, the findings were presumed valid and the findings proved fatal to appellant's legal argument). As the court explained in Utah v. Teuscher, 883 P.2d 922, 929 (Utah 1994), because the court "accord[s] a measure of discretion to the trial court's determination unless such determination exceeds established legal boundaries," it requires "as a preliminary matter" that the appellant "marshal all evidence in favor of the in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact."

As discussed in greater detail in the following sections, the Stewarts and Madame Chen's failure to properly marshal and then challenge the sufficiency of the evidence adduced respecting the factual predicates of each of the trial court's legal rulings under appeal ultimately dooms both the Stewarts and Madame Chen's arguments on all points under appeal.⁵

II. The Trial Court's Decision To Appoint An Interim CEO And To Afford The CEO Judicial Immunity As A Special Master Was Lawful.

In their opening briefs, the Stewarts and Madame Chen argue that Mr. Holman's appointment as interim CEO / President of E. Excel was improper under Rule 53 of the Utah Rules of Civil Procedure. See Madame Chen's Br. at 53-71; Stewart's Br. at 28-38. The Stewarts and Madame Chen contend that because Mr. Holman was given the title

⁵ Even if this court were to consider these fact issues, they are reviewed for whether any errors in the admission or exclusion of evidence were so substantial and prejudicial that the Stewarts and Madame Chen were deprived in some manner of a full and fair consideration of the disputed issues. Ashton v. Ashton, 733 P.2d 147 (Utah 1987),

“special master,” rather than, for example, “receiver,” he necessarily was converted from a CEO—a person having the duty to preserve company assets and operations, to protect them from others, and to operate the company with a view to making it profitable—to a quasi-judge whose powers and activities are strictly limited to that of a neutral magistrate. See Madame Chen’s Br. at 54-57; Stewart’s Br. at 28-29. They argue that all his post-appointment activities on behalf of E. Excel, and the court proceedings in which he participated, were fatally flawed because he did not act with impartiality towards all parties, and asserted claims on behalf of E. Excel against the appellants. See Madame Chen’s Br. at 53-57; Stewart’s Br. at 32. To remedy this hypothesized problem, the Stewarts and Madame Chen ask this court to treat Mr. Holman’s activities on behalf of E. Excel as without legal effect and to disregard two years of litigation and forty days of evidentiary hearings by vacating Mr. Holman’s appointment and any subsequent court orders. See Madame Chen’s Br. at 58-63; Stewart’s Br. at 45-47. The Stewarts and Madame Chen’s argument is as sophistic as it is belated.

Interestingly, the Stewarts and Madame Chen are silent about the implications that setting aside Mr. Holman’s actions and the trial court’s orders would have on E. Excel’s territorial owners, creditors, and customers, all of whom have relied on Mr. Holman’s board-approved actions in contracting and dealing with E. Excel. It takes little imagination to see that the consequences would be devastating for E. Excel.

The response to their claim is three-fold. First, Judge Howard acted properly in appointing Mr. Holman to act as interim CEO for E. Excel. Contrary to the Stewarts and Madame Chen's assertions, the terms of Mr. Holman's appointment never encompassed a grant of quasi-judicial powers. He was given the title of "special master" only to provide him with some form of judicial immunity to protect him in this highly acrimonious family war of attrition. The determinant of his authority or his role is not the title "special master," but the highly specific terms of the court's orders of February 21, 2001 and March 13, 2001. These orders nowhere suggest Mr. Holman's role was that of a neutral magistrate.

A second reason for rejecting appellant's challenge to Mr. Holman's appointment as Interim CEO/Special Master is that the Stewarts and Madame Chen did not timely challenge that appointment. Mrs. Stewart originally consented to Mr. Holman's appointment as interim CEO and the grant of judicial immunity to him by way of his being titled "special master." Both the Stewarts and Madame Chen were fully aware of all relevant facts concerning Mr. Holman's appointment and his activities throughout ten months of litigation and forty days of evidentiary hearings, yet never challenged Mr. Holman's appointment until after the court ruled against them and Madame Chen retained new counsel. The Stewarts and Madame Chen's objection to the reference is untimely and, therefore, waived.

Finally, even assuming that the trial court erred in titling Mr. Holman a "special master" under Utah Rule of Civil Procedure 53, the court's order appointing Mr. Holman should still be upheld and his actions sustained because any error was technical only and

was harmless. One reason is that in running E. Excel and in seeking to vindicate E. Excel's legal rights, Mr. Holman's actions were all within the scope of what a court-appointed CEO would ordinarily do, and would have been entirely unexceptional if he had been titled a court-appointed "receiver." See Utah R. Civ P. 66(a). A second reason appellants cannot show harmful error is that the trial court specifically found that, even without the special master's testimony, there was ample evidence to support its entry of a preliminary injunction against the Stewarts and Madame Chen. Under these circumstances, any error the court may have committed by titling Mr. Holman a "special master" was harmless.

A. The Trial Court had Authority to Appoint an Interim CEO to Manage E. Excel's Business Affairs and Operations.

Judge Howard's decision to exercise his inherent equitable powers to appoint an interim CEO to manage E. Excel's affairs was both lawful and necessary under the circumstances of this litigation. The need for an Interim CEO in early 2001, when the order under attack was entered, cannot seriously be questioned. At that time, members of the Chen family were fighting for control of E. Excel, and Ms. Stewart and Madame Chen were systematically wrecking the company and stripping it of its assets. In its January 24, 2002 order, the trial court rejected appellants' belated challenge to Mr. Holman's appointment, a decision which is under review here. In so doing, the trial court described the company's situation at the time of Mr. Holman's appointment as follows:

The circumstances of the litigation was an extraordinarily troubled one in January and February 2001 creating the need for a unique and immediate response. Exigent circumstances necessitated the immediate appointment of a CEO / President of E. Excel without which the company would cease

to operate. E. Excel was in chaos and was losing stability rapidly. Among other things the record reflects that E. Excel was missing important files, documents, equipment, product, and cash flow needed for day to day operations. This Court later discovered and concluded from the evidence that E. Excel had been stripped by it's [sic] acting President and Officers and that certain of it's [sic] employees were involved in a conspiracy led by Defendant Mrs. Stewart and funded by Madame Chen. The intent and purpose of the conspiracy was to destroy E. Excel and then install a new competing company named Apogee with a distribution network carved from E. Excel's distribution network.

(R. 12764-65 (Ex. D hereto)).

The court's January 24, 2003 order then describes the response of the court and the parties, after the court held its initial hearings at which the malfeasance of Ms. Stewart, Madame Chen, and others was revealed:

Following the initial 10 day hearing, the Court and the parties agreed that an interim CEO / President of E. Excel would be appointed to forestall the erosion of E. Excel's business and attempt to revitalize it's [sic] business. Mr. Holman was appointed to this position and was given the title of interim CEO / President. The parties and Mr. Homan insisted that the same immunities and protections that a special master would receive be bestowed on him because of the potential for oppressive lawsuits against him as interim CEO. At this critical time the parties included Plaintiff Jau-Fei Chen, Defendant Jau-Hwa Stewart and E. Excel. Each stipulated that Mr. Holman would act as CEO / President of E. Excel and as special master with full executive authority to act as CEO under the direction of the Board of Directors and with the prescribed protections and immunities. The parties having stipulated to such appointment, the Court approved the stipulation.

(Id.).

Significantly, in their brief to this court, the Stewarts and Madame Chen never seriously challenge Judge Howard's findings on this point. They do not dispute that a court-appointed officer was necessary to protect E. Excel's interests. They do not assert that the trial court lacked the inherent equitable power to appoint an Interim

CEO/President for E. Excel to preserve its assets and operations. They do not contend that the authority the court bestowed on Mr. Holman, pursuant to the stipulation of all parties to the terms of the February 21, 2001 order, exceeded the scope of the court's equitable power.⁶ Instead, the Stewarts and Madame Chen contest Mr. Holman's appointment and challenge everything he and the court have done thereafter on the ground of one technicality: that the court entitled Mr. Holman a "special master" in an effort to give him immunity, rather than a "receiver." They argue that as a Rule 53 special master, Mr. Holman had to act as a quasi-judicial neutral magistrate only, and that any number of the things he did as interim CEO / President were inconsistent with those limitations. See Madame Chen's Br. at 54-57; Stewart's Br. at 39-42. In the words of the trial court before which this same argument was made, appellants contend that "Mr. Homan is a renegade judicial officer operating far afield from the mandates of his appointment" and far beyond what the court had authority to authorize under Rule 53. (R. 12765 (Ex. D hereto)).

1. The trial court had ample equitable powers to appoint an Interim CEO.

The first problem with the Stewarts' and Madame Chen's argument is that the trial courts' power to appoint Mr. Holman did not derive solely from Rule 53. The rules of civil procedure that established modes for the exercise of substantive power by courts, such as Rule 53 on special master, and Rule 66 on receivers, were not created out of whole cloth. Rather, they are efforts to describe circumstances and procedures which

⁶ Indeed, they could not. See Utah R. Civ. P. 66(a).

govern the exercise by courts of inherent judicial power. It is well established under the common law that a trial court has the equitable authority to appoint a receiver or other judicial officer to preserve the corporation's assets and manage its operations. See, e.g., Wilentz v. Home Serv. Society, 21 A.2d 795, 795 (N.J. Ct. Chan. 1941); State Ex Rel. Ind. Dist. Telegraph Co. v. Second Judicial Dist. Ct., 39 P. 316, 321 (Mont. 1895). This authority is particularly well recognized where, as here, allegations are made that a shareholder has converted corporate assets for their own use, or otherwise destroyed the value of the corporation. See, e.g., Anglo-American Royalties Corp. v. Brentnall, 29 P.2d 120, 121 (Olka. 1934); Allen v. Hawley, 6 Fla. 142, 164 (Fla. 1855); Southern Maryland Agricultural Assoc. v. Magruder, 81 A.2d 592, 595 (Md. Ct. App. 1951).⁷

Utah follows the uniform weight of authorities recognizing that a court may “appoint a receiver at the request of the stockholders of the corporation suing either individually or on behalf of the corporation.” Richardson v. Arizona Fuels Corp., 614 P.2d 636, 638 (Utah 1980) (citing 3 Clark on Receivers § 738(d) (3rd ed. 1959); 16 Fletcher, Cyclopedia of the Law of Private Corporations, § 7688 (rev. perm. ed. 1979); 65 Am. Jur.2d Receivers § 11 (1972); 19 C.J.S. Corporations § 833c (1940)). In that

⁷ The modern courts continue to observe this inherent equitable power. See, e.g., SEC v. Keller Corp., 323 F.2d 397, (7th Cir. 1963) (recognizing federal courts possess equitable authority to appoint trustee-receiver for protection of corporation and stockholders); Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997) (noting that a trial court may appoint a receiver in the absence of a statute pursuant to its inherent equitable authority); Suphers v. Scardino, 1985 U.S. Dist. Lexis 13161 * 56 (E.D. Penn. 1985) (recognizing that the appointment of a receiver is warranted when gross mismanagement of a corporation or misappropriation of corporate assets is at issue); Petitpren v. Taylor School Dist., 304 N.W.2d 553, 557 (Mich. Ct. App. 1981) (receiver may be appointed under appropriate facts and circumstances pursuant to the court's equitable jurisdiction).

regard, Utah law also observes the well-established common law rule that allows a court to appoint a receiver “in cases where misappropriation of corporate assets by corporate insiders is asserted.” Id. (citing Stevens v. South Ogden Land, Bldg. & Improvement Co., 14 Utah 232 (1896); Bookout v. Atlas Fin. Corp., 395 F. Supp. 1338 (D. Ga. 1974)).

The vitality of these principles is acknowledged in modern law through the adoption of Rule 66 of the Utah Rules of Civil Procedure, which sets guidelines for the exercise of this inherent power. That rule allows the trial court to appoint a receiver over a “corporation in imminent danger of insolvency” or in other cases where a receiver could be appointed by a court of equity. See Utah R. Civ. P. 66(a). Recognizing that a receiver is appointed to protect the property and assets at issue, Rule 66 further empowers a receiver to “bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, to collect debts, to compound for and compromise the same, to make transfer and generally to do such acts respecting the property as the court may authorize.” Utah R. Civ. P. 66(e). Thus, without relying on Rule 53 pertaining to special masters, the trial court had undisputed authority to appoint an officer to act on behalf of E. Excel and to preserve its assets.

While the trial court would have been within its authority under Rule 66 to appoint Mr. Holman as a receiver for E. Excel in order to protect the company’s assets and interests, the title “special master” was bestowed to acknowledge Mr. Holman’s immunity from suit in his personal capacity. Like Rule 66, Rule 53 of the Utah Rules of Civil Procedure also recognizes the trial court’s inherent ability to appoint a officer to assist the court in carrying out its orders. See Plumb v. State, 809 P.2d 734, 741 (Utah

1990) (“We see little virtue in an interpretation of rule 53(b) that unnecessarily narrows a trial judge’s options in dealing efficiently with the issues presented for decision.”). To that end, Rule 53 allows a court to refer any or all issues pending in an “to a master upon the written consent of the parties...” and to “specify or limit” the master’s powers through the order of reference. See Utah R. Civ. P. 53(a) and 53(c). Rule 53 also allows a court to appoint a variety of judicial officers as masters, including referees, auditors, and examiners. Utah R. Civ. P. 53(a).

The facts surrounding the formulation of the interim order by counsel for all parties and the court in February 2001, (see supra, at pp. 12-18), demonstrate that the appointment of an interim CEO for E. Excel was contemplated as being done pursuant to this inherent equitable power. There is no indication that anyone contemplated the appointment of a neutral judicial officer to run E. Excel. See supra at pp. 15-18. Instead, the duties specified in the stipulated interim order are entirely consistent with this court’s equitable power to appoint an officer to preserve and protect E. Excel’s assets, to conduct the company’s operations, and to restore it to profitability. The special master designation was only to provide Mr. Holman some protection from collateral harm he might suffer in this highly acrimonious family war of attrition. The title bestowed on him was not the determinant of his authority or role. Rather, the determinant is the highly specific terms of the court’s interim order.

2. Mr. Holman's activities were consistent with his authority as a Court-Appointed CEO.

The Stewarts' and Madame Chen's challenges to specific activities of Mr. Holman acting as interim CEO of E. Excel are all specific applications of their general legal claim that anyone given the title of a Rule 53 special master is limited to performing actions consistent with the role of a neutral judicial officer. Each of these particularized contentions is subject to the same fundamental flaw: Mr. Holman's appointment was not so limited.

The Stewarts and Madame Chen contend that Mr. Holman overreached his authority under Rule 53 when he directed that E. Excel pursue its claims against the Stewarts and Madame Chen, among others. They contend that such actions are unsuitable for a special master. See Madame Chen's Br. at 58-63; Stewart's Br. at 40-42. The response is that not only are such activities appropriate to an interim CEO, but all parties understood at the time of Mr. Holman's appointment that the court-appointed interim CEO would be authorized to pursue litigation as an officer of the corporation, and subject to the board's control. As described in detail above, during the March 5, 2001 telephonic hearing, which preceded Mr. Holman's selection as interim CEO, the parties discussed the role of the court-appointed CEO in the pending litigation. See supra at pp. 15-18. The parties and the trial court understood and agreed that the Interim CEO/President, acting with board approval, would have the right and authority to cause the company to bring claims on behalf of the company. Indeed, it was precisely because the court and parties foresaw that anyone appointed would be involved in the time-

consuming activity of investigating and pursuing claims on behalf of E. Excel that Mr. Jordan, Ms. Stewart's former counsel, argued in favor of appointing a team of accountants to run E. Excel, as opposed to one individual. See supra at p. 18; (R. 14274 (Ex. H hereto) at 17-18).

Another contention of the Stewarts and Madame Chen that is a particularized application of this general claim that Mr. Holman is limited to acting as a neutral judicial officer is the assertion that his actions have manifested a bias in favor of Jau-Fei Chen, and as such, he has engaged in conduct that undermines appellants in the litigation. The Stewarts and Madame Chen wholly ignore the trial court's finding that the Stewarts and Madame Chen – not Jau-Fei Chen – acted against the interest of E. Excel. Among other things, the trial court noted that Ms. Stewart and Madame Chen founded Apogee, Inc., an entity which Madame Chen funded, to compete with E. Excel. (R. 12759 (Ex. D hereto) (citing R. 14318 at ¶¶ 138, 143)). Madame Chen and Mrs. Stewart attempted to conceal these activities from Mr. Holman. (Id.; R. 14245 at 94-95). The trial court also recognized that its findings were largely in favor of E. Excel and Dr. Chen, but it observed that it found “the evidence in this matter overwhelmingly persuasive to the positions of Dr. Chen and E. Excel.”

The Stewarts and Madame Chen mount an attack on Mr. Holman and the trial court that depends entirely on the premises that designating Mr. Holman a special master trumped all the provisions of the stipulated interim order and entirely vitiated the authority that equity would permit a court to bestow on an interim CEO. Once that

premise is rejected, all their particular claims of misconduct and trial court error must fail.

3. **A Rule 53 Special Master is not necessarily precluded from exercising the power of an Interim CEO if the Order appointing him specifically so provides.**

The Stewarts and Madame Chen assert that the text of Utah Rule of Civil Procedure 53, and the cases construing that rule and its federal analogue, require that the rule be construed narrowly and that anyone appointed under that rule cannot be other than a neutral judicial officer. They contend that to appoint someone to act as an interim CEO for a company with power to act in the company's interests, even if that requires bringing suit against others, is necessarily beyond the power the rule gives to a court.

Significantly, the Stewarts' and Madame Chen's position is based on their reading of LaBuy v. Howes Leather Co., 352 U.S. 249 (1956), which construed the Judicial Rule 53 narrowly and displayed a traditional hostility of federal courts to the delegation of judicial power to non-judges. The Utah Supreme Court has previously recognized that Rule 53 of the Federal Rules of Civil Procedure is nearly identical to Rule 53 of the Utah Rules of Civil Procedure. Plumb, 809 P.2d at 740, n. 9. Thus, federal case law is considered a "useful guide" in interpreting Rule 53, provided that it does not "unnecessarily narrow[] a trial judge's options in dealing efficiently with the issues present for decision. Id. at 740, n. 9; 741. But this court specifically rejected LaBuy's approach to Utah's analogous Rule 53 in Plumb v. State, 809 P.2d 734 (Utah 1990). As noted in Plumb, the LaBuy decision was authored over forty years ago, long before the widespread use of magistrates within the federal system softened the federal courts'

hostility to delegating judicial authority. In addition, this court has recognized that LaBuy is too limited in scope as it “unnecessarily narrows a trial judge’s options in dealing efficiently with the issues presented for decision.” Id. at 741.

A number of more recent federal and state cases demonstrate a tendency to allow trial courts to appoint a variety of officers to assist in implementing their orders under Rule 53, even when they do not seem to fall squarely within the literal terms of Rule 53. The key to these decisions seems to be the fact that the scope of the officer’s authority is determined by the court order appointing the officer, not the arbitrary title assigned to the officer. The ultimate question is whether the court has the power to make the appointment and has spelled out the master’s duties so as to minimize the potential for abuse.

The Eighth Circuit Court of Appeals articulated this principle in Jenkins v. Missouri, 890 F.2d 65 (8th Cir. 1989), a case involving a court-appointed monitoring committee. In Jenkins, the state of Missouri challenged the trial court’s decision to appoint a monitoring committee to oversee its desegregation orders. Specifically, the state argued that the district court did not comply with Rule 53 of the Federal Rules of Civil Procedure in appointing the committee. In affirming the trial court’s appointment, the Eighth Circuit rejected the narrow approach to what can be done under Rule 53:

Rule 53 does not terminate or modify the district court’s inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy. The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established. Such court-appointed agents have been identified by a confusing plethora of titles: ‘receiver, Master, Special Master, master hearing officer, monitor, human

rights committee, ombudsman,' and others. The function is clear, whatever the title.

Id. at 67 (quoting Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982) (emphasis added)).

The Ninth Circuit has reached a similar conclusion in Federal Trade Commission v. World Wide Factors, Ltd., 882 F.2d 344 (9th Cir. 1989), a case involving a court-appointed receiver / special master. In World Wide Factors, the district court entered a preliminary injunction finding that the defendants had violated certain FTC regulations. The court sua sponte appointed a special master to account for and preserve the corporations' assets so that they would be available for distribution following trial. See id. at 348. The defendant challenged the appointment, arguing that the special master had been transformed into a "receiver" for purposes of the litigation. See id. In reviewing the district court's decision, the Ninth Circuit recognized that the special master's responsibilities technically met the definition of a receiver. Nevertheless, the court concluded that the trial court had not erred by designating the court-appointed officer a special master. Id. at 348.

The same principles apply to the case at hand. Here, the trial court appointed an interim CEO, pursuant to a stipulation of the parties and in the exercise of its historical equitable powers, in order to preserve E. Excel's assets and operations. Although the same objective of protecting E. Excel's assets likely could have been achieved by appointing a receiver or some other officer, under Utah Rule of Civil Procedure 66 or otherwise, the title "special master" was bestowed in the hope it would protect Mr.

Holman from being dragged into the family's internal and ongoing struggles. Mr. Holman has behaved entirely consistently with the definition of his authority in the stipulated order, and has acted with board approval and under the court's supervision. The Stewarts and Madame Chen do not suggest any judicial act taken by Mr. Holman in his capacity as CEO / special master. The fact that the trial court denominated Mr. Holman a special master under Rule 53, pursuant to the agreement of the parties and to protect him from suit does not change the scope of duties or responsibilities under the Interim Order. There is nothing inherent in Rule 53 that forbids a judge from defining with particularity duties a special master is to perform. Consistent with the liberal approach signaled by Plumb v. State, and the decisions in the Jenkins and World Wide Factors cases, the trial court's appointment of Mr. Holman as a special master under Rule 53 should not be found to have been in error.

B. Madame Chen and the Stewarts Waived Their Right to Challenge Mr. Holman's Appointment When They Failed to Timely Object.

As shown above, the challenge to Mr. Holman's actions based on his being titled a "special master" fails on its merits. But this court need not reach the merits of that challenge because Madame Chen and the Stewarts have waived their right to challenge the order appointing the interim CEO/special master by not asserting their challenge in a timely manner.

A party challenging an order of reference to a special master must timely raise their objection or forfeit their claim. See, e.g., Score v. Wilson, 611 P.2d 367, 368 (Utah 1980) (defendant failed to object to master's report and was barred from raising same);

Cruz v. Hauck, 515 F.2d 322, 327 (5th Cir. 1975) (party waived objection to by failing to object to reference at earliest possible opportunity).⁸ The policy behind this rule was articulated by the Fifth Circuit in Cruz:

A party objecting to a reference should do so prior to or at the time of the reference. If this is infeasible, the objection should be made to the judge at the earliest possible opportunity. Such procedure permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master's report would be able to obtain "a second bite at the apple" by withholding his objection to the reference until after the report.

Cruz, 515 F.2d at 331.

In this case, the same policy against parties having a second bite at the apple is applicable. Madame Chen participated in litigation for 10 months, between December 12, 2001 and October 2002. During that period she raised no challenge to Mr. Holman's appointment as CEO of E. Excel or as a special master. And Ms. Stewart not only participated in the litigation for over two years without challenging the terms of Mr. Holman's appointment, but had stipulated to them originally. Both Madame Chen and Ms. Stewart waited until after Mr. Holman filed several extensive and unfavorable reports, had filed claims against them on behalf of E. Excel, and had successfully sought

⁸ This principle is well-established by the federal appellate courts interpreting Rule 53. See, e.g., Regents v. Knight, 321 F.3d 1111, 1127-28 (Fed. Cir. 2003) (finding parties waived objection to special master's appointment when the parties had waited over one year before raising objection, and only objected after special master issued two unfavorable reports); Adrian Intl. Corp. v. Lewis & Co., 913 F.2d 1406, 1410 (9th Cir. 1990) ("[A]n objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter or the party's objection is waived.") Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1566 (Fed. Cir. 1988) ("A party cannot wait to see whether he likes a master's findings before

a preliminary injunction against them, and after Madame Chen hired new counsel, to challenge his appointment as CEO/special master.

As this court has recognized, “waiver is a highly fact-dependent question.” Pena, 869 P.2d at 938. When Madame Chen’s new lawyer raised the issue for the first time in October of 2002, and the Stewarts then joined in the objection, the trial court addressed the issue at length and found, inter alia that Madame Chen had been involved in the litigation, had engaged in “hide and seek tactics” in an effort to evade service of process, and had been given “ample opportunity to timely challenge the Master’s appointment....” (R. 12761 (Ex. D hereto)). In light of these unchallenged findings and the supporting evidence, the trial court correctly concluded that Madame Chen and the Stewarts’ objections to the special master’s appointment were untimely, and therefore waived.

C. Any Error by the Court in Designating Mr. Holman as a Special Master was Harmless.

As noted above, there is precedent for the proposition that designating as a Rule 53 special master a person charged with performing the duties traditionally those of a receiver at equity is not an abuse of discretion on the part of a trial court. See FTC v. WW Factors, 882 F.2d at 348. However, even if this court were to conclude that Mr. Holman should not have been titled a “special master,” that fact would not warrant reversal of the trial court’s order appointing him E. Excel’s interim CEO, or any consequent order of the trial court, because any such error would have been harmless.

challenging the use of a master. Failure to object in a timely fashion constitutes a waiver.”).

An entirely separate ground for affirming the trial court is the rule that this court will not reverse a trial court if the ruling in question can be sustained on alternative grounds. See Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993) (appellate court affirm trial court’s ruling “on any ground available to the trial court, even if it is one not relied on below.”). The trial court here equally could have designated Mr. Holman a “receiver” under Rule 66, or under its common law equitable power, and given him exactly the same duties. See Utah R. Civ. P. 66(d) (recognizing power of receiver to preserve assets and assert claims on behalf of corporation). As a receiver, nothing Mr. Holman has done would be exceptional. Under this approach, the appointment of Mr. Holman was not error, much less harmful error. Under either approach, a reversal would not be warranted.

Returning to the harmless error analysis, this court has said it will reverse a trial court’s decision based on the fact that it acted improperly in the appointment of a special master only if this court first determines that “it is reasonably likely that the trial court’s final order would have been different” if the court had not committed the Rule 53 error. Plumb v. State, 809 P.2d 734, 744 (Utah 1990). In Plumb, the trial court acted on a report prepared by a special master that was beyond the scope of his authority and in connection with which parties had had little opportunity to participate. Id.; see also State v. Ramsey, 782 P.2d 480, 485 (Utah 1989). In this case, appellants cannot show that Mr. Holman did anything inconsistent with the order appointing him. Also, nothing that Mr. Holman did as a special master, as opposed to as a CEO, altered the outcome of the

preliminary injunction proceeding. And appellants openly contested with E. Excel at every stage.

The Stewarts and Madame Chen attempt to draw an analogy between the activities of the special master in Plumb and the activities of Mr. Holman in an attempt to show that the trial court's rulings are somehow tainted by reliance on Mr. Holman as a court officer. This argument is without merit, as the trial court's January 24, 2003 ruling demonstrates. When Madame Chen moved to vacate on this ground, Judge Howard viewed as whole the evidence that had been presented to determine if there would have been a different result absent the alleged error in designating Mr. Holman as a special master. (R. 12760 (Ex. D hereto)). The court noted that "[t]here exists an extensive record in this case from which the Court based its Findings of Fact and Conclusions of Law." (Id.). The court concluded that the "Findings and Conclusions relative to the Preliminary Injunction and Civil Conspiracy, while they include recitals to the Special Master Reports, were based upon record recitals independent from the Master Reports and the Master's Settlement Agreement." (Id.). The trial court also noted that while the Special Master's Reports were admitted into evidence, the reports represented only a small fraction of the record which was relied upon in entering its findings.⁹ The court then specifically concluded "that the outcome of the hearings would not have been any different if the errors alleged by Madame Chen, particularly regarding the Special Master,

⁹ For example, other evidence which supports the trial court's factual findings regarding the malfeasance of Ms. Stewart and Madame Chen, among others—evidence which was not marshaled by appellants—includes the testimony of Jwa-Hwa Stewart, the testimony

had never occurred.” (Id.). This court, viewing the evidence as a whole, should be led to the same conclusion.

The Stewarts and Madame Chen assert, again in an attempt to make the case appear analogous to the facts of Plumb, that the trial court relied entirely on Mr. Holman and adopted E. Excel’s proposed findings in their entirety. See Madame Chen’s Br. at 25; Stewarts’ Br. at 18.

This is not true. Rather, Judge Howard made several notable revisions to the proposed findings. For example, he excised block quotations from Judge Schofield in two separate places, removed Dr. Kim O’Neill and Dr. Byron Murray from the list of individuals and entities associated with the criminal racketeering enterprise, and removed “Dr. Kim O’Neill’s statement at his deposition regarding his trip to California on behalf of Apogee” from the list of the false or inconsistent material statements made by members of the criminal racketeering enterprise. These changes, which were substantive in nature, indicate that the trial court carefully reviewed the proposed findings and that those entered were the court’s own.¹⁰

of Beverly Warner, and the tape recording introduced on February 13, 2001, all of which were relied upon in the trial court’s findings of facts.

¹⁰ In its separate and independently-authored ruling, issued after two months of deliberations, the district court noted that it had received and carefully reviewed the proposed findings and conclusions submitted by all parties in their entirety. The district court referred to all of the proposed findings as “legal service of the highest quality” and stated that it had given “studious consideration” of all the proposed findings and conclusions. In addition, the court noted that it had also undertaken a considerable review of the cited record and authorities.

III. The Trial Court Did Not Abuse Its Discretion In The Entry Or Scope Of The Preliminary Injunction Against The Appellants.

Seemingly as an afterthought, appellants challenge the trial court's entry of the preliminary injunction on the following three grounds: (i) Madame Chen challenges the findings of fact alleging there is no evidence of a "prima facie" case against her (See Madame Chen's Br. at 77-83); (ii) Madame Chen and the Stewarts both challenge the scope of the preliminary injunction (See Madame Chen's Br. at 74-77; Stewarts' Br. at 47-49); and (iii) Madame Chen claims that the preliminary injunction was entered in violation of her due process rights. See Madame Chen's Br. at 72-74. Each of these arguments should be rejected.

A. The Preliminary Injunction Against Madame Chen is Supported by the Court's Factual Findings.

Madame Chen claims that E. Excel "did not come close" to make a prima facie showing of the elements of its underlying claims that support the injunction. See Madame Chen's Br. at 77. She argues that "[t]he evidence against Hwan Lan Chen shows only that she was a mother, a matriarch of a Chinese family that defers to its elders, a director for a limited time, and a potential competitor." Id. Madame Chen explicitly challenges the following legal conclusions and findings made by the trial court: (i) that Madame Chen breached her duty of care to E. Excel; (ii) that Madame Chen breached her duty of loyalty to E. Excel; (iii) that Madame Chen usurped E. Excel corporate opportunities for her own benefit; (iv) that Madame Chen engaged in unfair competition; (v) that Madame Chen engaged in racketeering activities directed to destroying E. Excel; and (vi) that Madame Chen engaged in a conspiracy to unlawfully

disable E. Excel. See Madame Chen's Br. at 77-83 (challenging the court's finding at R. 9142-44 (Ex. C hereto)).

These conclusions of the trial court are obviously highly fact-dependent. See, e.g., C&Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 54 n. 7 (Utah Ct. App. 1995) ("we point out that the law of breach of fiduciary duty by corporate directors is highly fact-dependent") (internal citation and quotation omitted). As noted earlier in this brief, when challenging fact-dependent legal conclusions an appellant faces a very high hurdle. See supra at pp. 25-30. The appellant must marshal all evidence in support of the underlying factual findings and then demonstrate that the findings are so lacking in support that they are clearly erroneous. See Young v. Young, 1999 UT 38 at ¶ 15. And when one challenges a preliminary injunction, the Utah Rules of Civil Procedure underscore the burden on the challenger. Rule of Civil Procedure 52(a) states that a trial court's findings of fact made in support of a preliminary injunction "shall not be set aside unless clearly erroneous, and due regard of a preliminary injunction shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a). The appellate court gives the trial court an added measure of deference when reviewing the application of the law to those facts. Searcy, 958 P.2d at 233, n. 7. Madame Chen has not begun to overcome these hurdles.

1. **Madame Chen has failed to marshal the evidence, much less show that it is insufficient to support the trial court's factual findings.**

In Utah Medical Products, Inc. v. Searcy, this court addressed the issue of marshaling in the course of reviewing a challenge to the denial of a preliminary

injunction by the trial court. See 958 P.2d at 232-33. It held that appellant failed to meet its marshaling burden when it “[i] merely stated those facts favorable to its position or [ii] stated that there was no evidence whatsoever to support the trial court’s findings.” Id. at 232 (bracketed material added). This is precisely what Madame Chen has done.

Madame Chen acknowledges in the facts sections of her brief that she has a marshaling burden, but she fails to comply with that burden in the fact section when she points only to select evidence. See Madame Chen’s Br. at 41-46. To comply with the marshaling requirement, appellants must marshal all the favorable evidence at the point at which they challenge the factual finding. See Roderick v. Ricks, 2002 UT 84, ¶ 47 n. 11, 54 P.3d 1119 (citing Tanner v. Carter, 2001 UT 18, ¶¶ 18-19, 20 P.3d 332; Fitzgerald v. Critchfield, 744 P.2d 301, 304 (Utah Ct. App. 1987) (concluding appellant’s listing of favorable facts in facts section did not meet marshaling requirement)). Madame Chen’s attempt to comply with her marshaling burden only in the fact section of her brief fails for this reason. And, in the argument section of her brief, Madame Chen simply asserts there was “no evidence” of any wrongdoing by her. See Madame Chen’s Br. at 77-83.¹¹

¹¹ Among other things, Madame Chen states as follows: “there is no evidence, or even a finding, that Hwan Lan Chen either funded, acquired or controlled an ‘enterprise’ through a ‘pattern of unlawful activity.’” Madame Chen Br. at 77. “There is no evidence that Hwan Lan Chen committed any of the alleged predicate acts under UPUAA.” Id. at 78. “[T]here is no evidence that Hwan Lan Chen conspired to violate UPUAA or ‘unlawfully disable[d] E. Excel.’” Id. “There is no direct evidence of any agreement by Hwan Lan Chen to violate UPUAA or unlawfully act against E. Excel.” Id. “There is no evidence that Hwan Lan Chen acted to cripple E. Excel, stole any of its assets, solicited any of its employees while she was an E.Excel director, or had any involvement with Jau-Hwa Stewart’s cutting off the Territorial Owners from obtaining E. Excel Products.” Id. at 80. “[T]here is no evidence that any of Hwan Lan Chen’s actions that allegedly were in breach of her fiduciary duties were continuing, as required to support the Preliminary

This assertion of “no evidence” directly contradicts the trial court’s factual findings, as is demonstrated below, and is legally insufficient, as Searcy found.

In support of the preliminary injunction against Madame Chen, the trial court made extensive specific findings of wrongdoing which she has not addressed other than with flat denials. Among those findings are the following which we give with supporting record references:

- “Ms. Stewart and [Madame Chen] determined to take revenge upon [Dr. Chen’s husband], and, when [Dr.] Chen objected, upon [Dr.] Chen herself.” (R. 14318 (Ex. A hereto) at 7, ¶ 10 (citing R. 14228 at 73; R. 14222 at 49, 63; R. 14277 at 112-13)).
- “Having seized control of E. Excel, Ms. Stewart and Hwan Lan Chen then proceeded to attack E. Excel’s historical distributors in Asia. . . . Hwan Lan Chen and Jau-Hwa Stewart arranged for the transfer of millions of dollars to pay for Richard Hu and Sam Tzu to establish new distribution networks.” (Id. at 9, ¶ 15).
- “The second part of Jau-Hwa Stewart and Hwan Lan Chen’s strategy, as it developed through November and December 2000, was to establish new distribution channels for E. Excel’s product by splitting portions of E. Excel’s distribution channels . . . away from the historical distributors.” (Id. at 14, ¶ 24).
- “Ms. Stewart and her mother, Hwan Lan Chen, then sent \$2.3 million to Sam Tzu for the purpose of setting up a new distribution company.” (Id. at 14, ¶ 27 (citing R. 14247 at 119-20)).
- “Also at that same time period, Ms. Stewart and her mother provided no less than \$400,000 to Richard Hu to set up a new distribution company in the Philippines.” (Id. at 14, ¶ 28 (citing R. 14247 at 120-21)).
- “In December 2000, however, Ms. Stewart and her mother purported to initiate a transaction that would have rendered the children minority shareholders and made Ms. Stewart and Hwan Lan Chen collectively the majority shareholders of E.

Injunction.” Id. at 82. “There is no evidence that Hwan Lan Chen committed or had any knowledge of any theft of E. Excel assets or their use to compete with E. Excel.” Id. “There is no evidence that Hwan Lan Chen was in any manner connected with, directed, or was otherwise responsible for the Asian distributors’ sale of E. Excel products under the name of Apogee.” Id.

Excel.” (Id. at 16, ¶ 32 (citing R. 14223 at 62-64; R. 14293 at 37; R. 14228 at 61-62)).

- “Faced with this likely loss of control, Jau-Hwa Stewart and Hwan Lan Chen, soon joined by Taig Stewart and others, determined both to destroy E. Excel, rather than let it revert to Jau-Fei Chen’s control, and also to replace it with a new nutritional supplements manufacturing company controlled by Ms. Stewart and Hwan Lan Chen alone. Without such an agreement between Ms. Stewart, Hwan Lan Chen, and the others, there is no way to understand the coordinated efforts that followed.” (Id. at 17, ¶ 34).
- “Having commenced the disablement of E. Excel, Ms. Stewart and Hwan Lan Chen also determined to start their own competing enterprise (Apogee).” (Id. at 24, ¶ 58).
- “During that same period of time, Ms. Stewart, her mother, her sister, Sheue Wen Smith, and Dale Stewart, were making preparations to abscond with product and raw materials belonging to E. Excel and to use those items to support the new Apogee enterprise they were planning.” (Id. at 27, ¶ 65).
- “On February 20, . . . one day before Hwan Lan Chen was removed as a director, Sheue Wen Smith signed the lease for the ATL warehouse In her initial Answer in this matter, Ms. Smith directly implicated her mother in her decision to rent the facility, ‘affirmatively alleg[ing] that she was asked to lease the warehouse by her mother, Hwa[n] Lan Chen, and that she was not given an explanation as to the purpose of the warehouse.’” (Id. at 31-32, ¶ 81 (citing R. 5607)).
- “From the outset, Jau-Hwa Stewart and her mother, Hwan Lan Chen, worked hand-in-hand to establish the Apogee enterprise. As Ms. Stewart explained, ‘My mother helped me - my mother helped me to pay for anything of a bigger amount, but in setting up the - my mother - my mother helped to pay for anything of a larger, you know, more larger expenses.’ As Ms. Stewart also explained, she could not have taken any steps to set up Apogee without her mother’s active participation and assistance: ‘I really can’t do anything with my own idea. My mother’s the one with the money. I have no money.... In the first place you have to have some cash order to really make things happen.’ In some accounts, Ms. Stewart goes even further, stating that everything that happened prior to June 2001 (when Ms. Stewart resigned her directorship with E. Excel) was ‘all my mother’s idea.’ Whatever the exact allocation of responsibilities between them, the Court has no difficulty finding that Ms. Stewart and her mother, Hwan Lan Chen, have been working closely together from September 2000 onward.” (Id. at 47-48, ¶ 137 (citing R. 14248 at 40; R. 14295 at 45; R. 14250 at 75)).

- “In preparation for the Apogee enterprise, Hwan Lan Chen arranged for a wire of \$3.5 million into a Central Bank account, No. 42407353 As explained by Ms. Stewart, Hwan Lan Chen used the nominee bank account in order to conceal the existence of the monies in that account from Mr. Holman.” (*Id.* at 48, ¶ 138 (citing R. 14344; R. 14264 at 22)).
- “Ms. Stewart admitted, also, that all of the funds in the account were arranged for by Hwan Lan Chen, and that Ms. Stewart may herself have assisted in the wire transfers.” (*Id.* at 48, ¶ 139 (citing R. 14264 at 7, 22)).
- “On March 12, 2001, Hwan Lan Chen paid \$1.2 million in cash for the land purchased for use by Apogee, drawn entirely on the common fund ‘424 account.’” (*Id.* at 50, ¶ 144 (citing R. 14264 at 12; R. 14343)).
- “Stan Houghton held three to four meetings in the ‘first week to ten days of March’ with Jau-Hwa Stewart, Hwan Lan Chen, and Sheue Wen Smith, leading to the creation of a drawing for an 80,000 square foot facility to be built on behalf of Apogee at a cost of \$3.2 million.” (*Id.* at 50, ¶ 146 (citing R. 14249 at 13-14)).
- “Hwan Lan Chen paid the cost of the construction for the Apogee facility.” (*Id.* at 51, ¶ 148 (citing R. 14249 at 17-19)).
- “According to Ms. Stewart, the money for the new distribution arms, a ‘few million dollars,’ came from Hwan Lan Chen and was used to ‘to help [Jau-Hwa Stewart] to prepare to compete with E. Excel.’” (*Id.* at 56, ¶ 163 (citing R. 14250 at 80)).
- “Ms. Stewart’s own expert, Dr. Bamossy, testified that it was inappropriate for Jau-Hwa Stewart and Hwan Lan Chen to use Richard Hu or Sam Tzu as a distributor for Apogee or to use the distribution systems that they had set up on behalf of E. Excel.” (*Id.* at 56, ¶ 163 (citing June 7, 2002 Transcript at 193-94, which is missing from the record)).
- “As Dale Stewart now admitted on the stand he, like Beverly Warner, had been receiving envelopes containing cash (\$1500 twice per month), ever since he left E. Excel. In his case, Mr. Stewart claimed that the money came from Hwan Lan Chen as a gift, rather than from Jau-Hwa Stewart as a salary. . . . Dale Stewart acknowledged finally that he understood that the cash, whatever its source, was given to him because of his assistance on the ‘Apogee enterprise.’” (*Id.* at 67-68, ¶¶ 163-64 (citing R. 14295 at 119-21, 123)).
- “Exhibits 577K-L are E. Excel products that reflect that they were manufactured by E. Excel International, Inc., in Springville Utah. Under the shrink wrap for each of these products is a sticker indicating that it was imported by Mr. Hu’s new

distributor, Excellent Essentials International. The demonstrated presence of this product in the hands of Apogee Philippines persuades the Court that the Apogee distributors are nothing other than the former “new distributors” for E. Excel set up by Ms. Stewart and Hwan Lan Chen, now operating under a different name.” (Id. at 78, ¶ 233).

These factual findings provide ample support for the trial court’s conclusion that E. Excel has made out a prima facie case of multiple claims of wrongdoing against it by Madame Chen and that it was entitled to a preliminary injunction against Madame Chen. Madame Chen has not begun to meet her marshaling duty, much less demonstrate that the evidence is insufficient to support these findings. Her challenge to the injunction should be rejected on this ground alone.

2. The trial court’s findings against Madame Chen are supported by substantial evidence.

To be entitled to a preliminary injunction, a party must show the following:

(1) The applicant will suffer irreparable harm unless the order or injunction issues; (2) the threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; (3) The order or injunction, if issued, would not be adverse to the public interest; and (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

Searcy, 958 P.2d at 231 (citing Utah R. Civ. P. 65A(e)). Here, the trial court concluded, based on its factual findings, that E. Excel had satisfied these requirements. (R. 9136-9145 (Ex. C hereto)). On appeal, Madame Chen does not challenge the trial court’s finding that E. Excel has shown it will be irreparably harmed in the absence of an injunction, that the balance of the hardship weighs in favor of issuing an injunction in

favor of E. Excel, or that the injunction will not be adverse to the public interest. (R. 9142-43). Rather, she only appears to attack the trial court's grant of an injunction on one ground—that E. Excel has not shown a “substantial likelihood of prevailing on the merits.” See Madame Chen's Br. at 77-83.

E. Excel's response to this challenge is twofold. First, Madame Chen misconceives E. Excel's burden. While the trial court's factual findings are adequate to support a conclusion that a prima facie case of the various causes of action has been established against Madame Chen, E. Excel need not meet that standard. Because this appeal is from the grant of a preliminary injunction, rather than from a final judgment on the merits, Utah law requires only that E. Excel “make a prima facie showing that the elements of its underlying claim can be proved,” Keil, 1999 UT 16, at ¶ 8 (emphasis added), or in the words of Utah Rule of Civil Procedure 65A(e)(4), quoted above, that “the case presents serious issues on the merits which should be the subject of further litigation.” Utah R. Civ. P. 65A(e)(4).¹² No matter how narrowly construed, the trial court's factual findings satisfy this test. Second, the trial court's factual findings on their face are more than sufficient to support the conclusion that E. Excel has a “substantial likelihood of prevailing on the merits” on its claims of breach of the duty of care, breach of the duty of loyalty, usurpation of corporate opportunities, unfair competition,

¹² Utah has expressly adopted the Tenth Circuit's relaxed standard in considering requests for injunctive relief under which the movant only needs to “raise[s] questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation.” Otero Saving and Loan Ass'n v. Federal Reserve Bank of Kansas City, 665 F.2d 275, 279 (10th Cir. 1981); see also Utah R. Civ. P. 65A comment at ¶ (e).

racketeering, and civil conspiracy. Madame Chen's bald assertion of "no evidence" or "no findings" on necessary elements of E. Excel's substantive claims cannot avail her here.

This court has long followed the rule that it surveys evidence and the reasonable inferences that may be drawn therefrom in the light favorable to the trial court's findings. See, e.g., Ovard v. Cannon, 600 P.2d 1246, 1247 n.1 (Utah 1979) (citing Charlton v. Hackett, 360 P.2d 176, 176 (Utah 1961)). The trial court's findings, just a few of which are detailed above (see supra at pp. 53-56), made after some 22 days of evidentiary hearings and two days of argument, together with the reasonable inferences drawn from those findings, demonstrate that there is overwhelming evidence that E. Excel has made a "prima facie showing that the elements of its underlying claims can be proved." Keil, 1999 UT 16, at ¶ 8 (emphasis added) (citing Utah State Road Comm'n v. Friberg, 687 P.2d 821, 833 (Utah 1984) (comparing the state's prima facie showing of the authority to condemn to the prima facie showing for a preliminary injunction and indicating that it can be met by a showing of "some evidence"). This trial court's finding that there is a prima facie showing will not be disturbed unless it is against the clear weight of the evidence. Id. at ¶ 6. The trial court here was presented with overwhelming evidence that supported the factual finding of a prima facie case against Madame Chen, including the testimony of Ms. Stewart. For example, the trial court made the following finding:

As Ms. Stewart also explained, she could not have taken any steps to set up Apogee without her mother's active participation and assistance: 'I really can't do anything with my own idea. My mother's the one with the money. I have no money.... In the first place you have to have some cash

order to really make things happen.’ In some accounts, Ms. Stewart goes even further, stating that everything that happened prior to June 2001 (when Ms. Stewart resigned her directorship with E. Excel) was ‘all my mother’s idea.’ Whatever the exact allocation of responsibilities between them, the Court has no difficulty finding that Ms. Stewart and her mother, Hwan Lan Chen, have been working closely together from September 2000 onward.

(R. 14318 (Ex. A hereto) at 47-48, ¶ 137 (citing R. 14248 at 40; R. 14295 at 45; R. 14250 at 75)).

Madame Chen’s efforts to deflect any wrongdoing are simply not supported by the record, and the trial court had more than sufficient evidence, particularly in the context of a preliminary injunction hearing, to conclude that E. Excel has made out a prima facie case against her for causes of action of racketeering, conspiracy, breach of fiduciary duty, usurpation of corporate opportunities, and unfair competition. Madame Chen’s challenge to the trial court’s findings should be rejected.

B The Scope of The Injunction is Proper Based on the Appellants’ Actions.

This court “will not disturb a district court’s grant of a preliminary injunction unless the district court abused its discretion or rendered a decision against the clear weight of the evidence.” Keil, 1999 UT 16 at ¶ 6 (citing Kasco Services Corp. v. Benson, 831 P.2d 86, 90 (Utah 1992) (citing System Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983))). This court considers “whether the trial court exercised its discretion using sound equitable principles based on all of the facts and circumstances.” Dairy Prod. Servs. v. City of Wellsville, 13 P.3d 581, 587 (Utah 2000) (citation omitted) (emphasis added). The trial court’s detailed findings, which have not been marshaled by Madame

Chen or the Stewarts, show that it did not abuse its discretion either in granting the preliminary injunction or in fixing its scope.

On October 16, 2002, in a detailed order, the trial court entered a preliminary injunction against the appellants. Among other things, until there could be a final hearing on the merits, enjoined them from “competing, or preparing to compete with E. Excel or otherwise engaging or preparing to engage in the worldwide manufacture or marketing of herbal and dietary consumer products, and personal care, cosmetic, or hygiene products.” (R. 9125-45 (Ex. C hereto)). The district court’s preliminary injunction was based on findings and conclusions that the Stewarts and Madame Chen had: (i) breached their duty of care to E. Excel by, among other things, wrongfully causing E. Excel to terminate its highly successful relationships with its historical distributors; (ii) breached their duty of loyalty by, among other things, seeking the disablement of E. Excel by disabling its operations and establishing a competing enterprise; (iii) usurped E. Excel corporate opportunities for their own benefit; (iv) engaged in unfair competition by unlawfully misappropriating and converting E. Excel’s property and using it to compete with E. Excel; (v) engaged in racketeering activities directed to destroy E. Excel, including stealing and selling E. Excel’s product through a competing business; and (vi) engaged in a conspiracy to unlawfully disable E. Excel. (R. 9142-44 (Ex. C hereto)). Based on these findings, the court enjoined the Stewarts and Madame Chen from competing in E. Excel’s field pending a final hearing on the merits.

Appellants do not challenge the trial court’s findings that E. Excel was the victim of a particularly aggressive racketeering enterprise that was aimed at destroying E.

Excel.¹³ Instead, appellants quibble with the scope of the preliminary injunction.

Specifically, they claim that the injunction is overbroad because it operates prospectively.

See Madame Chen's Br. at 74-77; Stewarts' Br. at 47-49. They imply that the court's extensive findings of wrongful conduct do not include findings that the wrongful conduct is on-going, and that such a finding is essential.¹⁴ See id. In substance, the appellants argue that even if they were bad in the past, that provides no basis for restraining them in the future. Their arguments lack any merit.

Plaintiffs ignore the trial court's power under the Utah Pattern of Unlawful Activity Act, Utah Code Ann. § 76-10-1601 *et seq.* ("UPUAA"), to issue preliminary injunctions to protect the rights of innocent persons against the threat of ongoing racketeering activity. UPUAA provides that "[b]efore liability is determined in any action brought under this section, the district court may issue restraining orders and injunctions." Utah Code Ann. § 76-10-1605(10)(b)(i). Appellate courts construing the analogous Federal racketeering statute have consistently held that trial courts have broad authority to issue injunctive relief not only to restrain past, but to prevent future,

¹³ The Stewarts do not challenge the factual findings, (See Stewarts' Brief, *passim*) and Madame Chen recognizes that E. Excel has been the victim of a racketeering enterprise, but simply claims she is not to blame. See Madame Chen's Br. at 77-83 (for example, Madame Chen does not dispute that E. Excel's assets were stolen and used to compete with E. Excel, she simply claims that there is no evidence that she committed the theft). Neither party even attempts to marshal the trial court's findings regarding the acts that were committed at crippling and destroying E. Excel.

¹⁴ Once again, appellants attempt to challenge the trial court's findings without marshalling the evidence. See Madame Chen's Br. at p. 75 (the trial court made "no finding of any continuing irreparable harm"); Stewarts' Br. at p. 49 ("Because there is no underlying support or purpose for the Preliminary Injunction, it must be reversed."). As

racketeering violations. See, e.g., United States of America v. Local 30, 871 F.2d 404, 407-09 (3rd Cir. 1989).¹⁵ In the present case, the trial court took a similar approach to the Stewarts' and Madame Chen's conduct. When presented with the appellants' objections to the scope of the instant preliminary injunction, the trial court ruled:

This is a case where the Court has determined that the [appellants] have engaged in a 18-month long criminal racketeering enterprise and whose members have repeatedly and willfully spoliated evidence, committed perjury, and defied numerous court orders. The Court concludes that the E. Excel Proposed Order is properly tailored to prevent further criminal activities by the [appellants].

(R. 9129-30).

Appellants have failed to show that the court abused its discretion in entering an injunction which only remains in effect until a final decision on the merits and is narrowly tailored to prevent future racketeering activities.¹⁶ Given the appellants' past

discussed herein, the trial court specifically found that the injunction was necessary to prevent "further criminal racketeering activities." (R. 9128-9134).

¹⁵ The UPUAA was modeled after the federal RICO statute. See State v. Bell, 770 P.2d 100, 101 n.1 (Utah 1988). Because Utah law on this issue is sparse, and because the provisions of the Utah act are nearly identical to those in the federal act, federal district courts "look to the law of other states and to federal case law for guidance." See Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty, 668 P.2d 535, 540 (Utah 1983) (stating that "[i]dentity in language [in Utah and federal statutes] presumes identity of construction"); see also State v. Hutchings, 950 P.2d 425 (Utah Ct. App. 1997) (adopting federal courts' interpretation of RICO as Utah law).

¹⁶ Appellants' complaint about the length of the injunction has only been exacerbated by their own conduct of trying to avoid an adjudication of the merits of this suit, including action such as pursuing this interlocutory appeal.

conduct, and the trial court's detailed factual findings, this court should not disturb the preliminary injunction in place.¹⁷

C. The Court's Entry of the Preliminary Injunction did not Violate Madame Chen's Due Process Rights.

Madame Chen claims that she was denied due process because she was not a party to the case during a portion of the period during which E. Excel's preliminary injunction evidentiary hearing was being held. She asserts that the bulk of the hearing occurred "without notice to her." Madame Chen's Br. at 73-74. This argument should be rejected for two reasons. First, it was not properly preserved. Second, even if it was preserved, its factual premise is contradicted by the facts in the record.

1. This due process argument was not properly preserved below.

For the first time in this litigation, Madame Chen contends before this court that she was deprived of due process because the preliminary injunction against her was based

¹⁷ Appellants also claim that they do not currently have a duty not to compete, and, therefore, cannot now be barred from competition even if they violated their fiduciary duties while the duty existed. See Madame Chen's Br. at 74-75; Stewarts' Br. at 48. As found by the trial court, however, where the activities in question had their inception while fiduciary relationship existed, it does not matter if the director or officer resigns before the activities are consummated. (R. 14318 at 97-98 (citing Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981); Dowell v. Bitner, 652 N.E.2d 1372 (Ill. Ct. App. 1995)). Despite appellants' protestations, the trial court found that they breached their fiduciary duties and engaged in racketeering activities while they were still officers or directors. Those findings are not effectively challenged because the appellants once again have not marshaled the evidence.

on “18 days of evidentiary hearings held before she was joined as a party.”¹⁸ Madame Chen’s Br. at 72-74.¹⁹

This court adheres to the rule that it will not consider issues raised for the first time on appeal, including constitutional issues. Julian v. State, 966 P.2d 249, 258 (Utah 1998); see also Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996). To properly preserve an issue for appeal, a party must raise it in a manner in which the “trial court [is] offered an opportunity to rule on [the] issue.” Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998). “A trial court has the opportunity to rule if the following three requirements are met: (1) ‘the issue must be raised in a timely fashion;’ (2) ‘the issue must be specifically raised;’ and (3) a party must introduce ‘supporting evidence or relevant legal authority.’” Id. (citation omitted).²⁰ Madame Chen satisfied none of these conditions. Madame Chen never argued to the trial court that she had been denied her due process rights because evidence had been taken before she entered her appearance, even in her objection to the proposed form of order for the preliminary injunction. (R. 8550-73 (Ex. J hereto)). This court should decline to consider the claim now.²¹

¹⁸ In fact, Madame Chen was not formally present at only 4 of the days of hearings on E. Excel’s motion for preliminary injunction, not 18. See infra. at pp. 68-69.

¹⁹ Pursuant to Rule 24(a)(5)(A), Madame Chen is required to provide a “citation to the record showing that the issue was preserved in the trial court.” Madame Chen has failed to meet this requirement regarding this due process claim.

²⁰ The only exceptions to the preservation requirement are plain error and manifest injustice, neither of which are applicable here. See State v. Lopez, 886 P.2d 1105, 1113 (Utah 1994).

²¹ Madame Chen did not raise this argument on the record or in her objection to the proposed order of preliminary injunction. (R. 8550-8573 (Ex. J hereto)). Indeed, it would have been difficult for Madame Chen to do so, because she was present for 18 of the 22 days of evidence, her counsel was present during the entire hearings, and her

Madame Chen's avoidance of service, and actual notice of and participation in the preliminary injunction hearing, bars her claim.

Even if this court were to ignore Madame Chen's failure to preserve the issue below, her claim should still be rejected. Madame Chen claims that the preliminary injunction must be "set aside because it granted in fundamental denial" of her due process rights under article 1, section 7 of the Utah Constitution and Amendment XIV of the United States Constitution. Madame Chen's Br. at 72-74. The Utah and federal due process provisions provide that no person shall be deprived of "life, liberty or property, without due process of law."²² In interpreting this protection, this court has recognized that "due process is not a technical conception with a fixed content unrelated to time, place, and circumstances." Dairy Prod. Servs. v. City of Wellsville, 13 P.3d 581, 593 (Utah 2000) (citing V-1 Oil Co. v. Department of Env'tl. Quality, 939 P.2d 1192, 1196 (Utah 1997) (quoting Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961))). "Instead, due process is flexible and, being based on the concept of fairness, should afford the procedural protections that the given situation demands." Id. (internal quotation and citations omitted).

Madame Chen's current counsel argued in the petition for review, which this court granted, that she "first appeared in the trial court action on February 28, 2002," and that,

counsel was given a full opportunity to present evidence, call new witnesses, and re-call the former witnesses for cross-examination. See infra at pp. 66-70.

²² The Utah Supreme Court has repeatedly held that Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution. See, e.g., Untermyer v. State Tax Comm'n, 129 P.2d 881, 885 (Utah 1942).

as a result, the preliminary injunction proceeding occurred, “in large part, prior to Hwan Lan Chen’s appearance” and “without her participation.” (R. 10206-07). Madame Chen has since abandoned that argument. She now asserts that she first made an appearance in this matter on December 17, 2001, and that the findings made against her were based on evidence presented before she “was made a party and without notice to her.” Madame Chen’s Br. at 28. But even this retrenchment is in error. In fact, her counsel stated on December 12, 2001, on the fourth day of the E. Excel preliminary injunction proceeding, that he would be appearing for her. And the record shows, and the trial court specifically found, that Madame Chen had actual notice of the preliminary injunction proceedings from the beginning, that she participated in the vast majority of the preliminary injunction hearing, that she would have participated in the entire proceedings if she had not avoided service, and that her counsel never asked the trial court for an opportunity to cure any prejudice that she now claims she supposedly suffered by reason of not participating in all of the evidentiary hearings. There is no merit to her due process claims.

On October 29, 2001, E. Excel filed its Amended Answer, Cross-Claim, and Third-Party Complaint, naming Madame Chen as a Third-Party Defendant. (R. 4171-4214). Four days earlier, E. Excel had filed a Motion for Preliminary Injunction, specifically seeking injunctive relief against “Jau-Hwa Stewart [and] Third-Party Defendants Taig Stewart, Hwan Lan Chen, Sam Tzu, Richard Hu, and Apogee, Inc.” (R. 3718-21). A few days later, E. Excel began its efforts to serve the new Third-Party Defendants with the Third-Party Complaint. On November 8, 2001, E. Excel successfully served process upon Apogee, Inc., a shell corporation owned and/or

controlled by Madame Chen. (R. 4490-93). That same day, E. Excel began a series of unsuccessful efforts to personally serve Madame Chen with the Third-Party Complaint.²³

On or about November 29, 2001, E. Excel asked the Court to allow alternative service upon Madame Chen. (R. 4750-55). That motion was granted by the court, but before service occurred, on December 12, 2001, E. Excel's counsel stated in open court that a Default Certificate would soon be filed against Apogee, Inc., which had theretofore refused to appear. (R. 14248 at 117-18). Not two hours later, Mr. Matt Steward of Clyde, Snow, Sessions & Swenson, the law firm that had been representing some of the Third-Party Defendants, stood up in open court and stated that his law firm was "filing a notice of appearance on behalf of two third-party defendants, Hwan Lan Chen, also known as Madam Chen, and the corporation Apogee Incorporated." (R. 14248 at 182-83) (emphasis added). The Court asked Mr. Steward, to be clear whether he was representing both Apogee as well as Madame Chen, and Mr. Steward responded in the affirmative.²⁴ (*Id.*). Thus, according to the record, Madame Chen was represented by

²³ On November 8, 2001 at 5:45 p.m., E. Excel's process server went to the Orem mansion where Madame Chen resides (along with Jau-Hwa Stewart and Taig Stewart). (R. 4750-55). There is a security system at the mansion, including a camera and video surveillance system. The neighbors told the process server that there were persons at home in the mansion, but, despite the process server's continuing efforts for 20 minutes, no one would answer the door. (*Id.*). On November 10, November 13, and November 14, the process server returned, and received the same treatment each time—no one would answer the door at the Orem residence. (*Id.*).

²⁴ The next day, December 13, 2001, the Court again specifically asked Mr. Steward if he would "be representing Apogee and Madam Chen." (R. 14249 at 172). Mr. Steward again responded in the affirmative. (*Id.*). Four days later, on December 17, 2001, Clark Sessions and Matt Steward of Clyde Snow Sessions & Swenson filed a written document entitled Notice of Entry of Appearance of Counsel, in which they stated that they "enter

counsel in the preliminary injunction/contempt hearing no later than the afternoon of December 12, 2001.

Plainly, Madame Chen was not prejudiced by not being formally represented until December 12. The hearing on the preliminary injunction began on November 27, 2001. (R 14250). Contrary to Madame Chen's assertions, there were 22 days, not 34,²⁵ of combined hearings and argument on Dr. Chen's contempt motions and E. Excel's preliminary injunction motion. (R. 8109-8113). Madame Chen was present and represented at all hearings after and including December 12, 2001 (18 of the 22), and could have been present or represented at all 22 had she not dodged the process server. Moreover, Madame Chen's counsel, although not formally present for her until December 12, was present at all 22 hearing dates representing other third-party defendants, and thus did not have to get up to speed after being officially retained by

an appearance as counsel of record for the Third-Party Defendants Hwan Lan Chen and Apogee, Inc." (R. 4998-5000 (emphasis added)).

²⁵ Two of the hearing dates occurred in late October 2001, before the consolidation of the hearings on the contempt motions and the preliminary injunction motion, and were solely devoted to Dr. Chen's contempt motions which are not the subject of this appeal. (R. 14244, 14245, 14243 at 63-64, 14250). The other hearings occurred in January and February 2001, long before Dr. Chen filed her contempt motions, and before E. Excel filed its preliminary injunction motion. Any argument that Madame Chen makes that the district court committed error by relying upon the evidence presented during those earlier hearing dates is meritless. First, a district court may rely on affidavits and other forms of written unexamined evidence in granting a preliminary injunction. See, e.g., Drywall Tapers & Pointers Local 1974 v. Local 530, 954 F.2d 69, 76-77 (2nd Cir. 1992) (affidavits and records generated in prior hearings were sufficient to establish factual record). Second, at no time did Madame Chen come forward, even after her entry in the case, and object to the district court's reliance on the evidence presented at these early hearing dates. Finally, and most significantly, nowhere does Madame Chen explain how she was possibly prejudiced by such reliance, given that she was an active participant in

Madame Chen on December 12. He actively participated in the entire hearing, knowing all the while that relief was specifically being sought against Madame Chen. In addition, counsel for Jau-Hwa Stewart and Taig Stewart, Madame Chen's daughter and son-in-law with whom Madame Chen shares a home, had been present for the entire proceeding. Thus, despite Madame Chen's representations to the contrary, she was a participant in the vast majority of the preliminary injunction hearing. In addition, the court specifically found that Madame Chen had "actual knowledge" of the court's proceedings from the co-conspirators, including Ms. Stewart with whom she lived, from the very beginning of the proceedings.²⁶ (R. 12756 (Ex. D hereto)). Her non-participation was plainly her own choice. As Judge Howard explained:

[W]hat's troublesome and disturbing to me is this stonewalling in light of the rather involved injunctive TRO proceeding that is before the Court. I have reason to believe that the parties with the ability to retain counsel and to secure legal assistance had information available to them such that

the preliminary injunction hearing, and had every opportunity to present evidence, call new witnesses, and re-call the former witnesses for cross-examination.

²⁶ Madame Chen has been involved in the matters central to this case from the very outset, and has been acutely aware of this litigation from the beginning. Courts do not look favorably upon litigants that are aware of litigation that impacts their interests, but sit back and wait until the court has taken action, and then attempt to intervene to undo action taken by the court. See, e.g., Republic Ins. Group v. Doman, 774 P.2d 1130, 1131 (Utah 1989). The record discloses the following information: (1) Madame Chen was a member of the board of directors of E. Excel from September 2000 through February 21, 2001 and this litigation began during Madame Chen's tenure on the board (R. 14318 at 8, ¶ 12); (2) on February 1, 2001, Madame Chen and Taig Stewart had a conversation about the ongoing preliminary injunction hearing, and, specifically, that the \$3,000,000 upon which Madame Chen bases at least part of her newfound ownership claim was at issue in the litigation (R. 14226 at 16-18); and (3) Madame Chen (along with Jau-Hwa Stewart) was the one "in charge" of Third-Party Defendant Apogee (the front company for the criminal racketeering enterprise) as she was the one who had funded the project, (R. 14250 at 37-38), and was the driving force behind Apogee. (R. 14250 at 79-80).

they could have acted more expeditiously.

(R. 14258 at 35).

Finally, it is noteworthy that Madame Chen does explain how she suffered any actual prejudice by reason of not being formally represented by counsel for 4 of the 22 hearing dates. See Madame Chen's Br. at 74-77.

This court should reject Madame Chen's due process claim both because it was not properly preserved and because it lacks any merit.

CONCLUSION

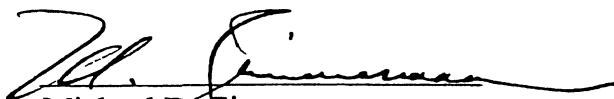
The trial court in this case was confronted with a highly unusual situation. The court had before it a company, E. Excel, that had become the battleground of a highly contentious family war. That war was being fought by individuals with astounding personal wealth, an endless appetite for confrontation, and very little regard for the American rule of law. The trial court correctly recognized that E. Excel was not mere pawn, but a separate legal entity, with employees and distributors who depended on it for their livelihood. The trial court saw that this unusual situation required immediate action if E. Excel was to survive the pending litigation. The trial court's decisions to appoint an independent CEO / President, and to enter TRO's and preliminary injunctions, were solidly within its discretion. These decisions were not made casually – they were made only after what must be among the longest preliminary injunction proceedings in the history of this state.

The appellants' attacks on those rulings should be rejected because, as explained above, they are entirely without merit. But this court also should recognize the

seriousness of the issue before it. Although the appellants are silent about the necessary implications of a ruling that would set aside the appointment of Mr. Holman, and void his actions and the trial court rulings based upon them, such a decision likely would be devastating to E. Excel. E. Excel's territorial owners, its suppliers, its creditors, and its customers have all relied upon the lawful and binding nature of Mr. Holman's board-approved actions in contracting for and acting on behalf of E. Excel as its CEO. Only because of the trial court's protective actions toward E. Excel has it been able to survive the appellants' determined efforts to destroy it. Unwinding those protections on the technical and flimsy grounds advanced by the appellants could well permit them to accomplish by indirection that which the trial court stopped them from doing directly. The trial court's orders should be affirmed, and this matter remanded to the trial court for further proceedings.

DATED this 26th day of November, 2003.

Snell & Wilmer L.L.P.

A handwritten signature in black ink, appearing to read "M. D. Zimmerman", with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

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JURISDICTION

This appeal arises from petitions for interlocutory review under Rule 5 of the Utah Rules of Appellate Procedure. On January 13, 2003, this Court granted Jau Hwa Stewart's petition for interlocutory appeal of the preliminary injunction entered against her in the trial court on October 16, 2002, based on Findings of Fact and Conclusions of Law entered on August 20, 2002. On April 2, 2003, this Court also granted Jau Hwa Stewart's petition for interlocutory appeal of the decision of the trial court entered on January 24, 2003 and denying Third-Party Defendant Hwan Lan Chen's¹ Motion to Vacate and Set Aside the trial court's Orders relating to the Rule 53 appointment of Special Master Holman. This Courts' April 2, 2003 Order also consolidated both interlocutory appeals under case number 20020927-SC.²

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF REVIEW

This appeal seeks review of the trial court's Orders of January 24, 2002, in which the trial court denied Hwan Lan Chen's Motion to Vacate and Set Aside, in which Mrs. Stewart had joined (R.12754-12770); and the Preliminary Injunction entered by the trial court on October 16, 2002 (R. 8110-13), based on its Findings of Fact, Conclusions of Law and Order (R. 14317) filed on August 20, 2002.

¹ Jau Hwa and Taig Stewart each individually joined in Hwan Lan Chen's Petition. Taig Stewart's Joinder in Hwan Lan Chen's Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5 dated November 5, 2002, and Jau Hwa Stewart's Joinder in Hwan Lan Chen's Petition for Permission to Appeal Pursuant to Utah Rule of Appellate Procedure 5 dated November 5, 2002, both filed in the Utah Supreme Court. Appellant Hwan Lan Chen and Taig Stewart were joined in this action at the same time, both as Third-Party Defendants. Taig Stewart, therefore, incorporates by reference the Brief of Appellant Hwan Lan Chen.

² A separate appeal of the trial court's August 20, 2002 contempt ruling is also before the Court under case number 2002077-SC. This case was not consolidated and no briefing schedule has been established.

Issue No. 1: Did the trial court err in appointing Special Master Holman as a Rule 53 Special Master and simultaneously as interim CEO of E. Excel, Inc. (“E. Excel”) and subsequently allowing Special Master Holman to become a party-litigant?

Issue Preserved for Appeal: Hwan Lan Chen’s Motion to Vacate and Set Aside preserved this issue. This Motion was filed timely within ten days of the entry of the Preliminary Injunction (R. 9230-38), and Mrs. Stewart joined in it. (R. 10119-10125). Issues regarding the impartiality of the Special Master also were presented and preserved in Stewart’s Motion to Disqualify Larry C. Holman as Special Master and Interim CEO of E. Excel (R. 5176-78).

Standard of Review: The trial court’s interpretation and empowerment of Special Master Holman under Rule 53 of Utah Rules of Civil Procedure is a question of law that is reviewed for correctness. *See Plumb v. State*, 809 P.2d 734, 741-43 (Utah 1990).

Issue No. 2: Did the trial court err in entering its “Special Master Orders” purportedly empowering Special Master Holman with the non-judicial authority to participate in the action as a party-litigant and Special Master Holman’s resulting exercise of those non-judicial powers, requiring all such “Special Master Orders” to be vacated and set aside?

Issue Preserved for Appeal: This issue was reserved for appeal in exactly the same manner as Issue No. 1, which is incorporated by reference.

Standard of Review: The issue regarding the trial court’s entry of Orders related to the Special Master’s empowerment is a question of law that is reviewed for correctness. *Plumb v. State*, 809 P.2d at 741-43.

Issue No. 3: Did Mrs. Stewart stipulate to the appointment of a Rule 53 Special Master or to allow Special Master Holman to participate as an active party litigant, and if such stipulation occurred, is it binding if the trial court lacked discretion to confer non-judicial powers

upon a Rule 53 special master?

Issue Preserved for Appeal: This issue was reserved for appeal in exactly the same manner as Issue No. 1, which is incorporated by reference.

Standard of Review: The issue regarding Mrs. Stewart's stipulation to the Special Master's empowerment are a question of law that is reviewed for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Issue No. 4: Did the trial court err in deferring any resolution of Stewart's Motion to Disqualify Larry C. Holman as Special Master and Interim CEO of E. Excel (R. 5176-78)?

Issue Preserved for Appeal: This issue was reserved for appeal in exactly the same manner as Issue No. 1, which is incorporated by reference.

Standard of Review: The issue regarding the deferral of Stewart's Motion to Disqualify is a question of law that is reviewed for correctness. *State v. Pena*, 869 P.2d at 936.

Issue No. 5: Did the trial court abuse its discretion in entering a Preliminary Injunction barring Mrs. Stewart from all competition with E. Excel and from any participation worldwide in the entire health food supplement industry for an undetermined period of time where Mrs. Stewart has no ongoing duty not to compete with E. Excel?

Issue Preserved for Appeal: These issues regarding the scope of the Preliminary Injunction were preserved in Jau Hwa Stewart's Trial Brief Summarizing the Facts and the Law Applicable to Jau Fei Chen's Motions for Contempt and E. Excel's Motion for Preliminary Injunction (R. 7169-7436, specifically 7188), Mrs. Stewart's June 25, 2002 closing argument on E. Excel's Motion for Preliminary Injunction (R. 14291: 105 & 175) and Stewart's Objections to E. Excel's Order of Preliminary Injunction (R. 8660; 14291).

Standard of Review: This court reviews issues of the permissible scope of preliminary

injunctions under an abuse of discretion standard. *Water & Energy Sys, Tech., Inc. v. Keil*, 1999 UT 16, ¶6, 974 P.2d 821 (Utah 1999).

DETERMINATIVE RULE

Utah Rule of Civil Procedure 53, entitled “Masters,” is attached as Addendum No. 1.

STATEMENT OF THE CASE

E. Excel is a multi-million dollar closely-held corporation, owned by members of the Chen family. A disagreement arose between Jau Hwa Stewart (“Mrs. Stewart”) and her sister, Jau Fei Chen (“Mrs. Chen”), which resulted in the restructuring of the Board of Directors of E. Excel. Mrs. Chen, removed as a director during the restructuring, brought suit against Ms. Stewart for breach of fiduciary duty, invalid removal of director and officer, unauthorized and ineffective voting of shares, and breach of the standard of conduct. Early in the litigation, the trial court entered an Interim Order, reversing the restructuring, removing Mrs. Stewart as president, and requiring the appointment of an interim CEO to be agreed upon by the parties or, if they could not agree, to be Court appointed.

The relationship between the parties prevented an agreement as to an appropriate interim CEO. At the suggestion of Mrs. Chen, however, Larry Holman was nominated to proceed as Special Master and Interim CEO. The trial court accepted the nomination and appointed Mr. Holman as Special Master and Interim CEO of E. Excel. It became apparent that Mr. Holman was partisan, allied with two of the parties to the proceeding, E. Excel and Jau Fei Chen, and devotedly opposed to Jau Hwa Stewart. Mr. Holman’s alignment with Jau Fei Chen’s interests never faltered. He was so obvious in his prejudiced alliance throughout the proceedings that his own attorney was the first to suggest that Mr. Holman was “partisan.”

STATEMENT OF FACTS

I. E. Excel International and What Led to the Present Litigation

The Chen family is a traditional Chinese family and adheres to the longstanding Chinese custom wherein the role of family relationships and the seniority of family members are very significant and afforded great deference and authority. (R. 14230:13). Mrs. Stewart is the older sister of Mrs. Chen. (R. 14230:13). Hwan Lan Chen is the widowed matriarch of the Chen family. Her husband, Yung Yeuan Chen, died in 1995.

After receiving a degree in micro-biology (R. 14250:101), Mrs. Stewart worked at Sunrider USA (R. 14250:102), an international manufacturer and multi-level marketer of herbal health products. Mrs. Stewart's older brother, Tei Fu Chen, owns and operates Sunrider. At the behest of her mother, Hwan Lan Chen, Mrs. Stewart left Sunrider in 1990 to work for E. Excel, then a fledgling, closely-held corporation the Chen family formed in 1987. (R. 14250:101). At the time, Mrs. Chen and her husband, Rui Kang Zhang, managed E. Excel. (R. 14230:128). Hwan Lan Chen and Yung Yeuan Chen asked Mrs. Stewart to assist with the management of E. Excel because the company was struggling to establish itself as a multilevel marketer of herbal products, and the Chens hoped Mrs. Stewart's experience with Sunrider would benefit the new company. (R. 15250:101, 14293:30).

E. Excel was formed as a family business, headquartered in Springville, Utah, with the goal of benefitting and supporting the Chen family. (R. 14257:21). Hwan Lan Chen and Yung Yeuan Chen financed E. Excel with millions of dollars of initial capital. (R. 14257:21-23; 14230:78). Mrs. Stewart became vice-president of E. Excel, with Mrs. Chen serving as president and Mr. Zhang as chief financial officer. (R. 14230:82-83). This management structure remained in place until September 2000. (R. 14245:6).

E. Excel's markets quickly expanded, and the company grew into a successful multilevel marketing entity with substantial markets in Taiwan and Malaysia. (R. 14342:Ex.280:¶11). Approximately 90-95% of E. Excel's revenue historically has been generated in markets in Malaysia, Singapore, Taiwan, Hong Kong and the Philippines. (R. 14342:Ex.280:¶11). E. Excel manufactures over 100 product lines and markets its products internationally through the use of "Territorial Owners," which purchase product directly from company. (R. 14342:Ex.280). The Territorial Owners then sell the product to local distributors who, in turn, sell the product directly to consumers. (R. 14342:Ex.280). Each Territorial Owner had the exclusive right to distribute E. Excel products within one or more foreign territories assigned to the Owner. (R. 14342:Ex.280). Historically, E. Excel held no ownership interest in its Territorial Owner entities. Instead, Barry Le (Taiwan) and Hendrik Tjandra (Malaysia) primarily owned and operated those entities. (R. 1425:39)

In the summer of 2000, Mr. Zhang's long-term affair with a woman in California was exposed, as well as the diversion of E. Excel funds to support her. (R. 14230:7; 14245:123-24). Mrs. Stewart and Hwan Lan Chen insisted that Mrs. Chen divorce her husband and that he sever his relationship with the company. (R. 14230:7; 14235:64-65). When Mrs. Chen refused, Mrs. Stewart and her mother insisted that both she and Mr. Zhang end their affiliation with E. Excel. (R. 14230:8-10). Despite Mrs. Chen's resistance, Mr. Zhang eventually resigned his position with E. Excel in June 2000 and moved to Singapore. Mrs. Chen joined him shortly thereafter, and with the exception of a brief return to the United States in October and November of 2000, the couple has remained in Singapore ever since. (R. 14223:79).

Believing that she controlled 100% of the outstanding shares of E. Excel, Mrs. Stewart

subsequently acted to remove Mrs. Chen as directors of the corporation.³ The new board then removed Mrs. Chen as officers and assumed control of the company. (R. 14338:Ex.23). Mrs. Stewart became president of E. Excel and installed Hwan Lan Chen as vice-president and her husband, Taig Stewart, as secretary. (R. 14338:Ex.22).

As president, Mrs. Stewart attempted to reinvent E. Excel's relationship with its Territorial Owners and to establish new distribution networks in which E. Excel would have an ownership interest. (R. 14245:33). She also was deeply concerned that Mr. Le and Mr. Tjandra, who were very loyal to Mrs. Chen, would use their distribution networks to distribute new product Mrs. Chen and Mr. Zhang manufactured. (R. 14245:33-37).

Accordingly, Mrs. Stewart arranged a meeting with the historic Territorial Owners at the Provo Marriott Hotel on October 19, 2000. (R. 14245:128). Mr. Tjandra and Mr. Le attended the meeting along with Mrs. Chen, Richard Hu and Sam Tzu, both of whom had served as managers for Mr. Le and Mr. Tjandra. (R. 14245:128). At the meeting, Mrs. Stewart attempted to persuade the Territorial Owners to abandon Mrs. Chen and secure their support for E. Excel and its products. (R. 14295:66-67).

Mr. Tjandra and Mr. Le maintained their devotion to Mrs. Chen and refused to accept Mrs. Stewart as president of E. Excel. (R. 14222:44). Mr. Tzu and Mr. Hu, however, agreed to establish new distribution channels in Hong Kong and the Philippines in which E. Excel would

³ Mr. Zhang previously had resigned as a member of the Board of Directors. Mrs. Stewart held 25% of the outstanding shares of E. Excel stock (R. 14228:Ex.20) and reasonably believed that the remaining shares were held in trust for Mrs. Chen's children, with Mrs. Stewart acting as trustee. (R. 14338:Ex.21a-c). The trial court subsequently determined that the trust was invalid because an exhibit describing the trust *was* never attached to the trust agreement. The trial court, therefore, determined that Mrs. Stewart's actions related to the voting of the children's shares were *void ab initio*. (R. 7956-59).

have an ownership interest. (R. 14245:139-141).⁴ In November and December 2000, Mrs. Stewart caused substantial funds to be distributed to Mr. Hu and Mr. Tzu to finance the construction of the new distribution channels. (R. 14245:25-26). Hwan Lan Chen provided the funds for the establishment of the new channels and additionally infused \$3 million in operating capital to keep the company afloat during the transitional period. (R. 14245:79-81).

Much of the cash flow problem confronting E. Excel after Mrs. Chen and Mr. Zhang departed was a result of the company's course of dealing with the Territorial Owners. Historically, the products shipped to the Territorial Owners were accompanied by two invoices: one lower-priced invoice payable to E. Excel; and one higher-priced invoice payable to a Hong Kong entity known as E. Excel, Ltd. (Affidavit of Gil Argyle Miller, R. 1255-1866). Mrs. Chen and Mr. Zhang controlled the funds remitted to E. Excel, Ltd. Mr. Zhang's two sisters nominally owned and operated E. Excel, Ltd. (R. 14230:19). Mrs. Chen was then responsible for remitting operating capital to E. Excel on a regular basis. (Affidavit of Gil Argyle Miller, R. 1255-1866). Mrs. Chen maintained control of the flow of funds to E. Excel, Ltd., and stopped sending funds to E. Excel necessary for its operation. (R. 14226:24-25; 14223:34)

Shortly after she became president, Mrs. Stewart learned that the lack of any contractual relationship between E. Excel and the historic Territorial Owners made this course of conduct largely possible. In an effort to protect the company and to ensure full-payment for product shipped, Mrs. Stewart refused to ship product to the historic Territorial Owners until they produced their written contracts with E. Excel. (R. 14245:139-141). The Territorial Owners

⁴ Prior to September of 2000, E. Excel never owned a distribution channel. (R. 14245:38). It was always Mrs. Stewart's intention that E. Excel own a controlling share of the new distributors in Hong Kong and the Philippines. (R. 142245:44-45).

refused to produce contracts and ultimately sued E. Excel.⁵

II. Present Litigation

On January 10, 2001, Mrs. Chen filed a lawsuit in the Fourth Judicial District Court as guardian of her three children against Mrs. Stewart, Civil No. 010400098. (R. 1-24). At the time, Mrs. Chen's three children owned 4,500 shares of E. Excel stock, and Mrs. Stewart owned 1,500 shares of E. Excel stock. (R. 30). Mrs. Chen sued to regain control of the corporation, and argued that Mrs. Stewart had breached her fiduciary duties as a director and was wasting corporate assets. (R. 24). Recognizing that her claims were derivative in nature, Mrs. Chen later amended her Complaint to add E. Excel as a putative party defendant. (R. 95-97).

E. Excel, under Mrs. Stewart's direction, filed an action in Hong Kong, No. 558/2001, against Mrs. Chen, Mr. Zhang and E. Excel, Ltd., claiming that Mrs. Chen and Mr. Zhang had used E. Excel, Ltd., and the double-invoicing scheme to divert at least \$75 million from E. Excel. (R. 14342:Ex.280).⁶

At the outset of her case, Mrs. Chen filed a Motion for Temporary Restraining Order and Preliminary Injunction to compel the shipment of product to the distributors (Territorial Owners). (R. 29). The trial court granted Mrs. Chen's Motion for Temporary Restraining Order (R. 55-58, 89-92) and subsequent Preliminary Injunction hearings were held January 19, 2001 through February 21, 2001. The hearings were comprised of approximately ten days of

⁵ The action was filed in the Fourth Judicial trial court in January 2001 as consolidated Civil Nos. 1040200 and 01400189. The Territorial Owners claimed that E. Excel had breached the distribution agreements and sought to compel the company to fulfill outstanding orders for product. The original contracts never were produced.

⁶ Mrs. Stewart also filed a similar action individually against Mrs. Chen, Mr. Zhang, Mr. Le and Mr. Tjandra in the Fourth Judicial District Court, captioned as Civil No. 01400201. That case was eventually consolidated with Civil No. 010400098 and the two cases form the basis of this appeal, although no formal Consolidation Order was entered.

testimony. (R. 112-13, 231-32, 265-66, 558-59, 582, 624-25).

A. Appointment of the Special Master

During the preliminary injunction hearings, the parties stipulated to the entry of an Interim Order on February 21, 2001 (“Interim Order”). The Interim Order required Mrs. Stewart to resign as president (R. 631), reinstated the prior board of directors (R. 630-31), and compelled Mrs. Stewart to return any E. Excel property in her possession. (R. 626). The Interim Order also called for the appointment of an Interim CEO to manage E. Excel during the pendency of the litigation. (R. 632). The Interim Order made absolutely no mention of the appointment of a special master. The Interim Order only provided that Mrs. Chen and Mrs. Stewart jointly would select an “interim CEO/President” to manage the corporation, or if the parties could not agree, the Court would select the Interim CEO/President. (R. 631-32).

The Interim Order did not allow the Interim CEO to initiate and prosecute litigation on behalf of E. Excel. Rather, Paragraph 9 of the Order envisioned E. Excel’s role as that of a independent neutral third party, stating:

The Company shall not be required to pursue or pay for the pursuit of claims against the Parties or other persons that are of a shareholder derivative nature, and the Parties may pursue such derivative claims in their own names. Neither the Company’s board of directors nor the Interim CEO/President shall cause to be dismissed, settled, or otherwise compromise, any lawsuit pending purportedly on behalf or against the Company, without prior approval of the Court. The Parties reserve the right to apply to the Court for relief requiring the Company to take or forbear specific actions with respect to any litigation to which the Company is a putative party.

(R. 628). Based upon the language of paragraph 9, actual pursuit of the litigation would remain among the members of the Chen family, with the Interim CEO focusing on the day-to-day operations of E. Excel..

Because the parties could not agree on an individual to serve as interim CEO, the trial

court held a hearing on March 5, 2001. (R. 684). The trial court selected Mr. Holman upon the suggestion of Mrs. Chen's counsel, made for the first time during the course of the hearing, and during the course of the hearing, determined that Mr. Holman also "would serve as a master status and make reports to the court." (R. 14274:21). The trial court's special master ruling was not the product of a stipulation, but rather was entered without notice, briefing or a finding of exceptional circumstances warranting the appointment of a special master.

As a result of the March 5, 2001 hearing, on March 13, 2001, the trial court entered an Order appointing Larry Holman ("Special Master Holman") as Interim CEO of E. Excel. (R. 702-04). Although it was not part of the stipulated Interim Order, the trial court also appointed Mr. Holman as Special Master under the provisions of U.R.C.P. 53. (R. 2033). As the trial court specifically stated in the March 13, 2001 Order:

[T]he Court selects Mr. Larry C. Holman to serve as the interim chief executive officer of E. Excel and as special master for and on behalf of the Court . . . Mr. Holman is to serve as a special master, appointed by the court, and chief executive officer of E. Excel with all rights, protections and immunities available to a special master under the law . . . Mr. Holman is given complete executive authority in his role as chief executive officer and special master, in accordance with and subject to this Court's Interim Order, dated February 21, 2001.

(R. 703)(emphasis added). The March 13, 2001 Order provided that Mr. Holman would serve as a subordinate judicial officer, while also maintaining complete executive authority over E. Excel International which was a "passive" party-litigant at the time.

B. Expansion of Special Master Holman's Power

Special Master Holman was keenly aware of his role as a subordinate judicial officer with the constraints and obligations of a judge. This specifically was evidenced during a hearing on March 26, 2001, when Special Counsel to the Special Master, Patrick Hoog ("Mr. Hoog"), raised

the issue of the Special Master Holman's intent to engage in *ex parte* communications with the parties. In his address to the trial court, Mr. Hoog stated the following:

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

(R. 14236:71)(emphasis added). Special Master Holman's admission that he was having *ex parte* communications with the parties and was seeking to continue having those *ex parte* communications, marked the first and last time Special Master Holman addressed with the trial court that his actions both as interim CEO and special master under Rule 53 were in violation of the Code of Judicial Conduct.

At the March 26, 2001 hearing, Mrs. Chen and Mrs. Stewart stipulated to Special Master Holman's ex-parte communications, but Mrs. Stewart reserved the right to discontinue those communications. (R. 14236:74-75). Counsel for Mrs. Chen also recognized that "Mr. Holman is a special master and we acknowledge his authority and capacity with the Court," and asked that Special Master Holman exercise judgment in his *ex-parte* communications regarding the lawsuit. (R. 14236:73). The trial court accepted the limited stipulation regarding *ex-parte* communications and ruled that Special Master Holman's communications to the Court had to be in the form of written reports. (R. 733; 14236:75).

On May 11, 2001, over Mrs. Stewart's objections, Special Master Holman's non-judicial power was expanded further when the trial court empowered him to act as a party-litigant and

make deals on behalf of E. Excel, without the need for trial court approval. (R. 762). This act came resulted from Special Master Holman's power as interim CEO under the Interim Order and from the growing dispute among the parties regarding Special Master Holman's ability to direct litigation on behalf of E. Excel. At Special Master Holman's request, therefore, the trial court modified the Interim Order as follows:

The Special Master and CEO, Larry C. Holman, is granted and has full executive authority to direct and control, initiate, dismiss, settle or otherwise determine [E. Excel's] interests in all business relationships, assets, disputes and lawsuits, subject to approval of the Board of Directors of the Company, as necessary under the by-laws of the Company, all without further Order of this Court.

(R. 762)(emphasis added). The only exception to the additional power granted to Special Master Holman was a limitation on his power to settle the ongoing Hong Kong litigation, which still required approval of the trial court. (R. 762).

C. The Conflict Created by Appointing Special Master Holman under Rule 53 to Also Serve as Interim CEO of E. Excel

1. Master Settlement Agreement

Shortly thereafter, Judge Howard approved Special Master Holman's power to act as corporate deal maker and party-litigant by approving his negotiation and execution of his comprehensive "Master Settlement Agreement." (R. 14344:Ex.534). By virtue of the Master Settlement Agreement, Special Master Holman accomplished the following:

- ☐ Special Master Holman **released** Mrs. Chen, Mr. Zhang and the Territorial Owners of all claims brought by E. Excel, including the claim that those parties had stolen approximately \$75 million from the corporation using an elaborate double invoicing scheme. (R. 14344:Ex.534,¶4.1). This clemency was not extended to Mrs. Stewart.
- ☐ Special Master Holman **settled** all pending litigation in which E. Excel was a party, including the Hong Kong action, but excluding the action in the Fourth Judicial District. (R. 14344:Ex.534:¶4.1(a)).

- Special Master Holman completely restructured E. Excel and essentially turned over 90% of its international business to Mrs. Chen, Mr. Zhang and the historic Territorial Owners. (R. 14344:Ex534:¶3.1, S.8; 14222:99-102, 141, 164; 14235:42-44-48). This provision of the Master Settlement Agreement divested E. Excel of approximately 90% of its overseas sales in exchange for a paltry 1.5% royalty on all products sold to the Territorial Owners, with a minimum annual royalty of \$500,000, and a \$2.5 million annual purchase commitment by the Territorial Owners to purchase E. Excel products actually manufactured by E. Excel. (R. 14344:Ex.534, S.8). This left E. Excel in a position to recoup approximately 5-10% of the company's historical international sales. (R. 14265:174-76)

Among the outstanding issues settled by Mr. Holman was a forgiveness of any debt owed to E. Excel by E. Excel, Ltd., as well as approval of E. Excel's relationship with certain contract manufacturers that produce E. Excel products for sale domestically and overseas. (R. 14344: Ex. 534: S.3A) The forgiveness of the debt E. Excel, Ltd., owed to E. Excel was approved without any investigation into the amount of the debt owed or the nature of the obligation. As Gary Takagi, Chief Operating Officer of E. Excel, stated in his deposition:

Q. How much money did E. Excel, Ltd., owe E. Excel, at the time of the execution of the Master Settlement Agreement?

...

A. I don't know.

Q. Okay. So as you sit here today, you have no idea as to how much money E. Excel, Ltd. owed E. Excel when the Master Agreement was executed? Isn't that a fair statement?

A. Yes.

(R. 5184:31)(emphasis added). The approval of E. Excel's relationship with certain contract manufacturers also was done without the benefit of any investigation regarding ownership of the plants, their location or methods they employ to manufacture E. Excel products. (R. 5179-80; 5183: 95-96). No officer in Mr. Holman's regime had any idea how the contract

manufacturers obtained E. Excel's secret formulas before the Master Settlement Agreement was signed. (R. 5183:94-96).

In stark contrast to his lack of investigation into E. Excel's relationship with the contract manufacturers and the amount of debt E. Excel, Ltd., owed to E. Excel, Mr. Holman focused his attention and the corporation's assets toward an exhaustive investigation of Mrs. Stewart's conduct with regard to E. Excel as evidenced by Special Master's Reports 1-5. (R. 14297, 14298, 14300, 14302, 14310). Instead of attempting to retrieve the estimated \$75 million E. Excel, Ltd., owed to E. Excel International, Mr. Holman chose to chronicle every scrap of paper and each piece of office furniture Mrs. Stewart purportedly removed from E. Excel. Instead of analyzing the ownership structures of the contract manufacturers that produce and sell E. Excel products to determine whether they should be allowed to compete with E. Excel, Mr. Holman again focused his efforts and the company's resources toward preventing only Mrs. Stewart from competing with E. Excel.

Mr. Holman also submitted materially misleading financial reports to this Court, as well as to lending institutions associated with E. Excel. Mr. Holman also signed E. Excel's 2000 Federal Income Tax Return, which also was materially misleading. As chronicled in Stewart's Memorandum in Support of Her Motion for Temporary Restraining Order and Preliminary Injunction supported by the attached deposition transcripts (R. 5200-04; 5229-40), Mr. Holman submitted financial reports and filed tax returns based on inventory numbers that understated E. Excel's then current inventory by approximately \$20 million.⁷

⁷ These inventory numbers have been historically provided to E. Excel's former accountant, Lynn Gilbert, by Mrs. Chen and Mr. Zhang. There is no indication that Mr. Holman has investigated Mrs. Chen and Mr. Zhang's conduct in this regard or that he intends to take action against them on behalf of the corporation.

The Master Settlement Agreement was the subject of two hearings. On May 30, 2001, the trial court heard Mrs. Stewart's Motion for Temporary Restraining Order to prevent the Board of Directors of E. Excel from considering the Master Settlement Agreement. (R. 777-798; 14239). The trial court denied Mrs. Stewart's Motion. The second hearing, held on June 1, 2001, involved Special Master Holman's Rule 53 Motion to have the trial court approve the Master Settlement Agreement. (R. 1887-88).

During the course of both hearings, Judge Howard reaffirmed that Special Master Holman indeed was appointed as a subordinate judicial officer authorized to act directly as a party litigant. For example, on May 30, 2001, the trial court stated, **"I have employed a Special Master to get this company up and rolling."** (R. 14240:15). Later in that same hearing the trial court stated, "Do I have to try all of the business decisions of E. Excel to see if my special master is making appropriate ones?" (R. 14240:40). Similarly, on May 30, 2001, Special Master Holman also emphasized his role as the trial court's "representative," in asking the Court to defer to his business judgment and approve the Master Settlement Agreement:

[Special Counsel Hoog:] So you acquired a Special Master and said, 'Special Master, you have two roles. You're my representative of the court, a judicial officer. You're to go and investigate and report to me, and you're to operate the company.' He's exercised his business judgment. He's investigated, and he's come back and reported (R. 14240:28)

. . . .
[Special Master Holman] is a judicial officer (R. 14240:30)

. . . .
The final point, Your Honor, is that you've put in place a Special Master and asked for his business judgment.

(R. 14240:34).

Deferring to Special Master Holman's business judgment, the trial court entered an Order on June 1, 2001, approving the Master Settlement Agreement and authorizing the Special Master

to “enter into and conclude the Master Settlement Agreement forthwith.” (R. 2032). Noting Special Master Holman’s reference of authority under Rule 53, the June 1, 2001 Order reads as follows:

That under Utah Rules of Civil Procedure Rules 53(e)(2) and 6(d), based on the Report No. 3 of the Special Master . . . that exigent circumstances exist and cause is shown to fix the time of notice of the Report No. 3 and the Special Master’s Motion for Order thereon at five calendar days . . .

....

[T]his Court accepts the conclusion of the business judgment made by the Special Master, acting as president and CEO of E. Excel, Inc. Consequently, the Special Master’s [sic] is hereby authorized to enter into and conclude the Master Settlement Agreement forthwith, and perform such acts as necessary to comply with the terms thereof, including but not limited to effecting the immediate dismissal with prejudice of the Hong Kong [action] on behalf of the Company.

(R. 2032-34). Subsequently, in the last days of extensive Preliminary Injunction hearings, Special Master Holman and his counsel acknowledged that the Master Settlement Agreement had a “devastating impact” on E. Excel as the transfer of manufacturing rights to Mrs. Chen and the Territorial Owner’s “substantially jeopardized” E. Excel. (R. 14270:27; 14324:3).

Subsequently, Mrs. Chen brought a Motion to Dismiss Plaintiff’s Second Amended Complaint. The trial court dismissed Mrs. Stewart’s Second Amended Complaint containing her \$18 million+ claim against Mrs. Chen and Mr. Zhang, among others, ruling that Special Master Holman was a “court appointed representative” and that he was “independent **because** of his appointment by the Court and the Court’s supervision over E. Excel’s business affairs.” This derivative action was dismissed because the trial court considered Mr. Holman to be an independent party who was in a position to determine E. Excel’s best interest. (R. 14850).

2. Special Master Reports

During this same time period, Special Master Mr. Holman also submitted a total of five

“Special Master Reports” to the trial court between April 11, 2001 and September 18, 2001. (R. 14297; 14298; 14300; 14302; 14310). Special Master Holman acknowledged the reports were submitted under Rule 53 in his capacity as a Rule 53 special master.⁸ Periodic hearings were held to entertain Mrs. Stewart’s objections to the various Special Master Reports, but ultimately, the trial court adopted each of the five Reports verbatim upon Special Master Holman’s Motions under Rule 53. (R. 2033; 2043; 2294; 14297; 14298; 14309; 14310; 14317:47-48, 109-117; 14318:89). In a surprisingly frank admission, counsel for Special Master Holman and E. Excel revealed to the trial court that the Special Master Reports were “clearly partisan” in nature. (R. 14287:117, 125).

This startling admission came approximately four months after the trial court relied substantively on the content of the Reports in entering its Findings of Fact, Conclusions of Law and Order on August 20, 2002, holding Mrs. Stewart in Criminal and Civil Contempt. (R. 14318). A year earlier, on July 12, 2001, the Special Master submitted his Report No. 4, detailing his activities for the period June 2, 2001 through July 6, 2001. (R. 14302:1, 9-12). As noted in the trial court’s Findings, virtually all of the evidence relied upon to conclude that Mrs. Stewart was continuing to violate the terms of the Interim Order was simply lifted from the pages of Special Master Report No. 4, which was not subject to cross-examination, is hearsay and was proffered by a party litigant cloaked as a subordinate judicial officer. (R.14302).⁹

⁸ Both Special Master Holman and the trial court recognized that he was appointed as special master under Rule 53. (R. 1885, 2033).

⁹ Special Master Holman also frequently used his status as subordinate judicial officer to obtain information on behalf of E. Excel and in compiling his Reports. A supplement to Report No. 5 indicates that in a meeting with E. Excel’s lenders, “the Special Master identified his role under Rule 53 and questioned counsel for Zions Bank in such capacity.” (R. 14310:2).

As Special Master Holman evolved into a dominant party-litigant, he notified the trial court in May 2001 that he had retained the law firm of Jones, Waldo, Holbrook & McDonough (Jones Waldo) “to assist him.” (R. 14298:2; 2033). Previously, only Mr. Hoog, who served as Special Counsel to the Special Master, represented and “assisted” the Special Master. Of the first 125 documents filed by Jones Waldo, ninety-seven identify Jones Waldo as counsel for both the Special Master and E. Excel. Jones Waldo entered an appearance for Special Master Holman on April 26, 2001 (R. 750-51) and represented both Special Master Holman and E. Excel throughout the very last of those hearings on June 26, 2002. (R. 14269:2).

4. Special Master as a Dominant Party Litigant

Special Counsel Hoog’s role in the litigation essentially has been limited to “directly supervising” Jones Waldo. (R. 8674). Concurrent with Hwan Lan Chen’s Motion to Vacate, Jones Waldo conspicuously stopped listing their representation of Special Master Holman in the caption of the documents they filed with the trial court. Despite this obvious attempt to create distance between Mr. Holman the party-litigant and Mr. Holman the subordinate judicial officer, Jones Waldo has not filed a notice of withdrawal of counsel pursuant to Rule 4-506 of the Utah Code of Judicial Administration.

In late October 2001, Special Master Holman’s evolution as a party-litigant reached fruition when he caused E. Excel to file a Cross-Claim and Third-Party Complaint against Mrs. Stewart and a host of Third-Party Defendants, including Mrs. Stewart’s mother, husband (Taig Stewart), sister and sister-in-law. (R. 4171-4214). In conjunction with his Cross-Claim and Third-Party Complaint, Special Master Holman filed a Motion for Temporary Restraining Order and Preliminary Injunction seeking to enjoin Mrs. Stewart and the Third-Party Defendants from competing with E. Excel. (R. 4167-70). Jones Waldo, as attorneys for both E. Excel and Special

Master Holman, filed both the Complaint and Motion. (R. 4170, 4214).

Paragraph 3 of the Cross-Claim and Third-Party Complaint shows the level of Special Master Holman's involvement as a party-litigant:

After commencing an investigation of [E. Excel's] finances and operations, Special Master Holman has determined that E. Excel should initiate litigation against the cross-defendant Jau Hwa Stewart, and the third party defendants, in order to preserve the assets of E. Excel, to protect E. Excel from tortious and on-going harm, and to render E. Excel a viable business going forward.

(R. 4205). As evidenced by this paragraph, the unthinkable occurred: a subordinate judicial officer, appointed under Rule 53 and described by his own counsel as a "judge and the judge's representative," sued Mrs. Stewart and most of her family.¹⁰

Acting as a party-litigant, Special Master Holman proceeded to obtain a Preliminary Injunction against Mrs. Stewart and the Third-Party Defendants, enjoining them from competing in any fashion with E. Excel. Hearings on Special Master Holman's Motion for Preliminary Injunction were combined with Mrs. Chen's Motions brought to hold Mrs. Stewart in Criminal and Civil Contempt of Court. (R. 14243:64). Despite his status as a subordinate judicial officer, Special Master Holman testified as a witness in the combined proceedings in support of the Motion for Preliminary Injunction. Although he testified as a party-litigant, Special Master Holman still argued, in response to a Notice of Deposition filed by Mrs. Stewart (R. 2701), that "[i]t would be entirely inappropriate to allow [Mrs.] Stewart . . . to question Special Master Holman regarding his mental processes in making his recommendations." (R. 2721). Jones Waldo represented Special Master Holman at his deposition, and his counsel

¹⁰ Since at least September of 2002, Special Master Holman has been identifying himself to the world on E. Excel's website as the trial court's "independent Special Master" who allegedly was appointed "as a result of the wrongful conduct of Mrs. Jau Hwa Stewart." (R. 11380).

instructed him not to answer the question on the grounds that the question “invades the province of his role as the special master.” (R. 14281:40-41).

Similarly, on May 31, 2002 during the combined hearings, counsel for Special Master Holman objected to questions aimed at comparing his actions as Interim CEO with Mrs. Stewart’s actions during her reign as president of the corporation. Counsel for Special Master Holman argued that the questions were irrelevant and stated the following:

If Mr. Holman is asked, I believe he would testify that the basis for his powers came from the Court’s order empowering him as the special master. That’s what is unique about him and why you can’t compare what he did with respect to what Ms. Stewart did.

(R. 14267:17). The trial court sustained the objection, therefore recognizing Special Master Holman’s status as a Rule 53 Special Master and affording him an elevated status as a party-litigant. (R. 14267:17).

If Mrs. Stewart and Special Master Holman engaged in the same activity for the same reasons, such as securing E. Excel’s distribution network, her actions were despicable and his were irrelevant. (*Cf.* R. 14267:17 *with* R. 5467-68). As a subordinate judicial officer, Special Master Holman’s actions were not subject to the same scrutiny visited upon Mrs. Stewart, and she was even deprived of the opportunity to explain her actions in relation to his conduct in the same position under the same circumstances. In the same hearing, Special Master Holman also recognized that he had “additional powers as special master that would not typically be vested in the CEO of the company.” (R. 14289:16). The trial court heavily relied upon Special Master Holman and his counsel in granting the Preliminary Injunction. (R. 9136-9145).¹¹ The

¹¹ The trial court also granted Special Master Holman’s Motion for Sanctions in which he claimed that Mrs. Stewart had engaged in “litigation misconduct” that undermined his ability to prosecute his claims against her and the Third-Party Defendants. (R. 5828). In granting

Court's Findings of Fact, Conclusions of Law and Order represent a virtual wholesale adoption of the findings and conclusions filed by Special Master Holman and his litigation team. Ten findings of fact are based solely upon the testimony of Special Master Holman, which typically was cited as determinative evidence. The Findings of Fact, Conclusions of Law and Ruling expressly incorporated all of the Findings and Conclusions entered in the related contempt proceedings. Eight of the Findings of Fact in the Contempt Ruling are based upon the Special Master's Reports and the June 1, 2001 Order approving the Master Settlement Agreement.

In September 2002, Special Master Holman moved to have the August 20, 2002 Contempt Ruling against Mrs. Stewart extended to apply to all of the Third-Party Defendants. (R. 8943, 9016). Special Master Holman's Motion sought to hold all of the Third-Party Defendants in contempt and to have their pleadings stricken based upon a theory of co-conspirator liability. Similarly, Special Master Holman filed another Motion for Order to Show Cause Why Hwan Lan Chen and Jau Hwa Stewart Should Not be Held in Contempt, claiming that Mrs. Stewart and her mother had violated the newly-entered Preliminary Injunction. (R. 14329-14330). The Motion was largely based upon a secret sworn statement (a deposition without notice to any other party) that is rife with hearsay and absurd testimony.¹² (R. 14330:J).

Special Master Holman's Motion for Sanctions, the trial court struck Mrs. Stewart's pleadings (presumably for the second time) and granted Special Master Holman and E. Excel attorneys' fees and costs in excess of \$900,000. (R. 8167).

¹² The partisan Special Master arranged and conducted the secret sworn statement for Mrs. Chen without notice to Mrs. Stewart or Hwan Lan Chen and with no attempt to establish or explore the foundation of the witness's incredible story. The witness testified that in September 2002, he flew from Taiwan to San Francisco (a 12-hour flight), was driven from San Francisco to Salt Lake City (a 12-hour drive) by a woman who he only knew as "Grace" (rather than fly directly to Salt Lake City), stayed in a Salt Lake City hotel he could not describe or recall, met with Hwan Lan Chen and an unknown Asian woman at Hwan Lan Chen's house in Orem (despite staying in Salt Lake City after allegedly having been driven from San Francisco), and was

Special Master Holman, a subordinate judicial officer, made no effort to cross-examine the witness or establish the veracity of his testimony.

From April 2002 through August 2002, Special Master Holman worked closely with Mrs. Chen to orchestrate a freeze-out merger to eliminate Mrs. Stewart's 25% share of E. Excel. (R. 14320:Ex.1; 14324). At the conclusion of the merger, despite the fact that E. Excel had revenue in excess of \$20 million in 2000, Special Master Holman offered Mrs. Stewart a mere \$75,000 for her 25% share.¹³ (R. 14320:Ex.1 Agreement 2(b)(ii)). Special Master Holman's valuation of the company placed its value at \$300,000: the equivalent of his salary for one year. Special Master Holman personally presented the merger proposal to the Board of Directors, which was comprised only of Mrs. Chen and Mr. Zhang at the time, issued the statutory notice to shareholders and signed the merger agreement for E. Excel and the acquiring company. (R. 7954, 7957, 14270, 14320).

The merger dissolved the corporation the trial court appointed the Special Master to direct. Special Master Holman, however, still acts as CEO of the new E. Excel and shows no signs of ever stepping down regardless of his one-time "interim" moniker. Prior to the freeze-

given \$25,000 and subsequently \$2 million in "Utah dollars" by an anonymous woman he believed was acting for Hwan Lan Chen to arrange a media campaign in Taiwan at the request of Mrs. Stewart and Hwan Lan Chen.

After briefing was completed on the Motion for Contempt regarding the media campaign, E. Excel never pursued obtaining a hearing on the Motion or otherwise pursued the Motion in any fashion. Most notably, E. Excel has not approached the trial court since the entry of the stay to request that the Motion be heard. As such, E. Excel has not even attempted to exhaust its remedies at the trial court level before seeking relief from this Court. (R. 14330:J).

¹³ Mrs. Stewart exercised her statutory dissenter's rights and Special Master Holman initiated an action to value the shares. Regardless, Mrs. Chen attached whatever interest Mrs. Stewart will eventually obtain pursuant to the Court's Contempt Ruling.

out merger, the only obstacle preventing Special Master Holman from forcing Mrs. Stewart out of the corporation was a prohibition against shareholder's meetings in the February 21, 2001 Interim Order. To remove this obstacle, Mrs. Chen moved to amend the Interim Order and on June 26, 2002, again recognized that Special Master Holman served a dual role as judicial officer and party-litigant:

[Mrs. Chen's Counsel:] The [February 21, 2001] interim order provided for a process to take place to investigate and to locate someone to be in charge of the corporation pending the resolution the dispute. **As a result of that, of course, Mr. Holman was appointed to serve as the chief executive officer as well as appointed as special master for the Court and has functioned in those dual capacities since, I believe, approximately March 13 of 2001.**

(R. 14276:124)(emphasis added). The trial court amended the Interim Order to allow for shareholder meetings, and within a few months, Mrs. Stewart's ownership interest evaporated in the vapor of the squeeze-out merger. (R. 7950-54).

C. Conflict Created by Appointing Special Master Holman as Brisbane, Ltd.'s Receiver

On November 1, 2001, Mr. Holman also was appointed as the receiver of Brisbane, Ltd. ("Brisbane") and vested with the authority to compromise the outstanding claims and interests between Brisbane and E. Excel which are at issue in separate litigation. (R.14265:190). Brisbane and E. Excel share common ownership, but with different percentages of ownership. The two entities also share a history of legal and financial transactions regarding Brisbane's ownership of E. Excel's business premises and various other investment ventures. (R. 14265:199; 14297:8).

Brisbane, Ltd., is a limited partnership, with Mrs. Stewart as general partner. (R.14265:199). It was intended to and did hold the real estate for the E. Excel business, consisting of an office building and two large warehouses valued at \$5 million. (R.14265:198).

E. Excel filed a lawsuit against Brisbane and Jau Hwa Stewart, as its general partner. (R.14265:198). As a result of the Brisbane settlement, E. Excel released Brisbane in exchange for all of the real estate Brisbane held and the payment of \$50,000 to Brisbane. (R.14265:190). The rent expenses for E. Excel dropped from \$1.7 million in 2000, to \$162,000 in 2001. (R. 14265:190-91). Holman believes that E. Excel is better off owning the buildings rather than renting them. (R. 14265:193).

Despite their shared ownership, the existence of litigation between the two entities is evidence of E. Excel's and Brisbane's adverse interests. Among the conflicts between Brisbane and E. Excel is a dispute over E. Excel's unpaid rent to Brisbane (R.14265:190-91), a dispute over funds transferred by E. Excel to Soldier Summit Recreation and Development Company, L.L.C., in exchange for a promissory note issued to Brisbane, and a dispute regarding the obligation to satisfy C&A Construction Company's mechanic's lien on E. Excel's business premises. (R.14265:8-9, 14; 14298:4). Therefore, by serving as Special Master and Receiver of Brisbane, Mr. Holman created a conflict that prohibits him from acting impartially with regard to the two entities.

D. The Unresolved Motion to Disqualify Larry Holman as Special Master and Interim CEO of E. Excel

On January 23, 2002, Jau Hwa Stewart filed Stewart's Motion to Disqualify Larry Holman as Special Master and Interim CEO of E. Excel. (R. 5176-78) At a hearing held on April 17, 2002, Judge Howard stated:

THE COURT: As to the motion to disqualify Mr. Holman, the Court is going to defer that. I'm persuaded – even though the pleadings may not state succinct factual dispute, I've heard enough in this case to know where the quarrel is. And I think that these allegations and claims are large and serious and are subject to an evidentiary hearing. Therefore, I'll defer the matter for evidentiary hearing. But our plate is full right now, and I can't

accommodate that just yet.

In that sense, Mr. Larsen, it's deferred. I know that's troubling, but I don't have much more that I can say other than I would expect to hear evidence on these matters because I think they're serious and large and they're disputed, and there may be explanations or examination that's necessary.

We'll accommodate scheduling for such a matter after you give the Court better indication of what your discovery is, if you're going to conduct discovery on these questions, when you've completed it and when you're prepared to schedule it.

Anything further today? I think that's all we have.

(R. 14258;63-64). Stewart's Motion to Disqualify Larry Holman as Special Master and Interim CEO of E. Excel remained unresolved when the trial court entered its Findings of Fact and Conclusions of Law.

SUMMARY OF ARGUMENT

By appointing Special Master Holman as Interim CEO, the trial court created an inherent conflict. Doing so put Special Master Holman under control of both the trial court and E. Excel's Board of Directors. By allowing a judicial officer to become aligned with E. Excel and Mrs. Chen, the adversarial process completely broke down. Under E. Excel's control, Special Master Holman sought, and the trial court allowed, him to become an active party litigant and to bring claims against Mrs. Stewart and her family. After becoming a party to the action, Special Master Holman dominated the litigation. When Mrs. Stewart moved to disqualify Mr. Holman, the trial court deferred any action on that Motion.

The impact of the improper authority the trial court granted to Special Master Holman is clear and pervasive. After becoming a party litigant, Special Master Holman began steam-rolling through the litigation, and the trial court granted every single significant motion its subordinate judicial officer brought and also adopted his proposed Findings of Fact and

Conclusions of Law virtually verbatim. After the trial court turned Special Master Holman loose on the litigation, Mrs. Stewart found herself in default, with her pleadings stricken twice and her complaint dismissed, in both civil and criminal contempt of court and subject to a worldwide, temporally unlimited, preliminary injunction. A subordinate judicial officer, whose proper role is one of neutrality, orchestrated all of this.

Because the appointment of Special Master Holman to be E. Excel's Interim CEO destroyed the adversarial process, the appointment must be vacated, and the trial court's orders resulting from Special Master Holman's improper actions must be set aside.

Mrs. Stewart did not, and in any event could not, stipulate to the grant of non-judicial powers to Special Master Holman, or to his joining the litigation as an active party litigant. Mrs. Stewart did consent to allow *ex parte* communications, but never stipulated to having claims brought against her virtually by the trial court itself.

After resigning as a corporate officer and director, Mrs. Stewart shed any obligation she had not to compete with E. Excel. Competition from a former corporate officer is not irreparable harm that justifies a preliminary injunction. Even if a preliminary injunction is warranted, it is far more broad than is necessary to protect Excel International's interests. Instead, it is unlimited in scope temporally, geographically and purports to bar Mrs. Stewart from participating in an entire segment of industry. A preliminary injunction should be narrowly tailored to prevent irreparable harm.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONFERRING NON-JUDICIAL POWERS UPON SPECIAL MASTER HOLMAN THAT INHERENTLY CONFLICTED WITH HIS ROLE AS A SPECIAL MASTER AND ULTIMATELY CULMINATED IN A JUDICIAL OFFICER BECOMING A PARTY LITIGANT

A. By Conferring Non-Judicial Powers upon Special Master Holman, The Trial Court Violated Rule 53

By empowering Special Master Holman with non-judicial powers, the trial court exceeded the limits of power that a court may properly confer upon a special master under U.R.C.P. 53.¹⁴ In doing so, the trial court created an inherent conflict, concluding with Special Master Holman acting simultaneously as both a neutral judicial officer *and* an admitted “partisan” litigant.

The rules governing the appointment, empowerment and obligations of a Rule 53 special master are longstanding and uncontradicted. Specifically, the Rules of Judicial Conduct bind a special master as a subordinate judicial officer who may be given only limited powers no greater than the powers of a trial court.¹⁵ The United States Court of Appeals for the Third Circuit described the limited nature of a special master’s power as follows:

[t]he master operates as an arm of the court. Surely he has no wider scope of activity than the court itself. If the court is limited in its judicial duties to deciding the issues presented

¹⁴ In *Plumb v. State*, 809 P.2d 743 (Utah 1990), this Court recognized that Fed. R. Civ. P. 53 is “nearly identical” to U.R.C.P. 53 and held that Utah courts may “look freely” to federal case law in applying U.R.C.P. 53. *Plumb*, 809 P.2d at 740 n.9.

¹⁵ *Plumb v. State*, 809 P.2d 734, 742-43 (Utah 1990) (“[A] special master has ‘the duties and obligations of a judicial officer.’” (quoting *In re Gilbert*, 276 U.S. 6, 9 (1928) (emphasis added))); *see also Deland v. C.M.R. & Co.*, 824 A.2d 185, 186-87 (N.J. Super. Ct. App. Div. 2003) (“[S]pecial master is subject to substantially the same conflict of interest rules as a judge.”).

in the litigation before it, the master's function can go no further than to aid the court's discharge of its duties.

Webster Eisenlohr v. Kaladner, 145 F.2d 316, 319 (3rd Cir. 1944) (emphasis added).

The use of a special master originates from common law rules of equity which authorized the use of masters in courts of chancery.¹⁶ Historically, courts have used masters for the purpose of aiding the “chancellor” in “ministerial functions such as: recording testimony, disposing of property . . ., presiding over evidentiary hearings, tabulating damages, and auditing accounts.” *Id.* Utah courts have used special masters since the nineteenth century in territorial courts. *See Nephi Irr. Co. v. Jenkins*, 8 Utah 369, 31 P. 986, 987 (1893) (“If the court is in doubt concerning the facts, it may direct a feigned issue, or an action at law, or a reference to a master, to aid it in determining the same.” (citation omitted)). Since then, however, there has been no case allowing the appointment of a special master as a party litigant.

“The use of [a special] master . . . is ‘to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,’ and not to displace the court.” *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1956) (quoting *Ex Parte Peterson*, 253 U.S. 300, 312 (1920)). Further, as a subordinate judicial officer, a special master only may exercise his powers under the direction, supervision and approval of the appointing judge.¹⁷

Consistent with this subordinate role, a special master is bound by the same duties and

¹⁶ *See De Clements v. De Clements*, 662 So.2d 1276, 1279 (Fla. Ct. App. 1995) (analyzing Rule 53 of the Federal Rules of Civil Procedure as relating to Florida’s special master rule).

¹⁷ *See* Utah R. Civ. P. 53(a), (b); *Plumb*, 809 P.2d at 742-743; *see also* Utah R. Prof. Cond. 1.12, cmt (“The term ‘adjudicative officer’ includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers . . .”). The appointment and activities of a special master “are only for the purpose of assisting the court to get at the facts and arrive at a correct result in a complicated piece of litigation pending before the court.” *Webster Eisenlohr*, 145 F.2d at 319; *see also Nephi Irr. Co.*, 31 P. at 987.

obligations applicable to the presiding judge.¹⁸ Thus, by accepting the trial courts' appointment, Special Master Holman became bound to the same duties and obligations as the trial court under the Code of Judicial Conduct.

In clear violation of the rules limiting the power that a trial court may grant to a special master, however, the trial court also permitted Special Master Holman to exercise non-judicial powers in the course of ongoing litigation. Specifically, the Order entered March 13, 2001, appointed Mr. Holman as Special Master and CEO of E. Excel. (R. 702-04). To further his role as judicial officer and Interim CEO, the trial court also entered an Order on May 11, 2001, allowing Special Master Holman to exercise his "complete executive authority" regarding the business of E. Excel without the necessity of the trial court's control or review. (R. 762). By virtue of the March 13, 2001 and May 11, 2001 Orders (Combined Orders), Special Master Holman's activities in exercising "executive authority" as interim CEO over E. Excel was controlled by the Board of Directors of E. Excel which, by mid-June 2001, was comprised solely of party litigants Mrs. Chen and Mr. Zhang.

A corporation is a product of, and may only act through, those persons who exercise its authority.¹⁹ As a result of the Combined Orders, Special Master Holman unlawfully was vested with non-judicial powers to determine and represent the interests of E. Excel and conduct its business. Only Mrs. Chen and Mr. Zhang, as directors of E. Excel, with whom he clearly was

¹⁸ *Plumb*, 809 P.2d at 742-43 ("[A] special master has the 'duties and obligations of a judicial officer.'" (quoting *In re Gilbert*, 276 U.S. at 9)); *see also* 9 Moore's Federal Practice § 53.11[5][a] (3rd ed.) ("The Code of Judicial Conduct for the United States Judges is applicable to special masters.").

¹⁹ *See Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶36, 63 P.3d 686 (recognizing that "corporations ordinarily act only through their agents").

aligned, controlled Special Master Holman's non-judicial powers. Parties in opposition to Mrs. Chen, Mr. Zhang and E. Excel, therefore, were at odds with the Special Master Holman, representing both the court as a judicial officer and E. Excel, as Interim CEO.

The fundamental conflict the granting of non-judicial roles to Special Master Holman created is apparent. Under the direct control of Mrs. Chen and Mr. Zhang, this conflict completely undermined the adversarial process and destroyed any possibility that Special Master Holman would or could perform his role in a nonpartisan fashion.²⁰ The trial court erred in creating such a clear conflict of interest.²¹ As Interim CEO of E. Excel, and exercising the full executive authority of that office, Special Master Holman was conferred with powers directly contrary to the lawful judicial powers and neutral role of a judicial officer. *Id.* He also simultaneously donned a third conflicting role: Brisbane's Receiver.

Finally, despite Special Counsel Hoog's express acknowledgment that Special Master Holman was bound to follow the Code of Judicial Conduct (R. 14236:71), Special Master Holman violated numerous Canons of the Code of Judicial Conduct. Special Master Holman's role under U.R.C.P. 53 as CEO of E. Excel created an untenable conflict; namely, being both an independent and impartial part of the judiciary while at the same time advocating for E. Excel as its Interim CEO under direct and exclusive control of its Board of Directors. The appearance of impropriety inherent in these actions alone represents a gross violation of the Utah Code of

²⁰ See *Webster Eisenlohr*, 145 F.2d at 319 (determining that a special masters "activities are only for the purpose of assisting the court to get at the facts and arrive at a correct result").

²¹ See *U.S. v. O'Connor*, 291 F.2d 520, 526 (D. Cal. 1961) (determining that to appoint the same person as receiver and as special master creates a conflict because "[a]lthough in theory the receiver may have no interest in whether any claims are established, in fact he certainly does; such an interest, as well as his duties to the claimants and the taxpayer, disqualify him from performing the judicial duties [as a special master]").

Judicial Conduct, Canons 2.B (“A judge shall avoid impropriety and the appearance of impropriety in all activities.”) and 3.B(1),(5), (7) and (8) (“A judge shall perform the duties of the office impartially and diligently.”). Moreover, the improper conflict the trial court created did not stop with Special Master Holman merely taking on into these competing roles; it became the dominant force driving the outcome of the litigation.

B. The Trial Court Erred by Empowering and Permitting Special Master Holman to Act as CEO of E. Excel and as a Party Litigant.

Beyond the Rule 53 violations inherent in Special Master Holman’s appointment, the trial court also permitted Special Master Holman to participate as an active party litigant. The trial court’s Order entered May 11, 2001 (May 11, 2001 Order) authorized the Special Master to “direct and control, initiate, dismiss, settle, or otherwise determine [E. Excel’s] interests in all business relationships, assets, dispute or lawsuits” without further control of the trial court. (R. 762). The May 11, 2001 Order effectively modified the Interim Order of February 21, 2001 (Interim Order), to allow Special Master Holman to exercise full executive authority as CEO of E. Excel, and most improperly, to become an active litigant.

Allowing Special Master Holman to act as a party-litigant is unprecedented, directly violates the powers Rule 53 authorizes and cannot comport with the neutral judicial role required of a proper special master. The role of the judiciary is “to hear and determine controversies between adverse parties and questions in litigation.” *Timpanogos Planning & Water Mgmt. Agency v. Central Utah Water Conservancy Dist.*, 690 P.2d 532, 569 (Utah 1984) (quoting *Citizens Club v. Welling*, 83 Utah 81, 27 P.2d 23, 26 (1933)). Because of Special Master Holman’s duties as a judicial officer, it was clearly inappropriate for the trial court to also appoint him “to

fulfill an adversary role.”²²

Just as no judge can retain counsel to act on his behalf in an action pending before him, a special master cannot retain and be represented by counsel, much less rely upon the services of counsel representing a party to the action.²³ Shortly after his appointment as Special Master and Interim CEO, Mr. Holman retained the services of Special Counsel Patrick Hoog and later the law firm of Jones Waldo.

As the litigation progressed from May 11, 2001, through the completion of the Preliminary Injunction proceedings, Special Master Holman and E. Excel eclipsed Mrs. Chen as the dominant party-litigant. Special Master Holman’s determination that E. Excel should file a Cross-Claim and Third-Party Complaint against Mrs. Stewart and a host of Third-Party Defendants, including Mrs. Stewart’s mother, husband, sister and sister-in-law, particularly illustrates this point. (R. 4171-4214). In late October 2001, Jones Waldo as “Attorneys for the Special Master Larry C. Holman and Defendant E. Excel,” filed a Cross-Claim/Third-Party Complaint seeking approximately \$200 million in damages. (R. 4167-70). Paragraph 3 of the Cross-Claim and Third-Party Complaint shows the extent of Special Master Holman’s participation as a party-litigant:

²² See *Plumb v. State*, 809 P.2d 734, 743-44 (Utah 1990) (finding in complicated class action that it is more appropriate to insist a party hire special counsel rather than insist a special master fulfil both roles); see also *Deland v. C.M.R. & Co.*, 824 A.2d 185, 186-87 (N.J. Super. Ct. App. Div. 2003) (concluding that strict conflict of interest rules must apply to special master because the “master’s recommendations may be highly influential”).

²³ See, e.g., *Lowder v. All Star Mills, Inc.*, 309 S.E.2d 193, 199-200 (N.C. 1983) (determining that counsel for plaintiff could not also serve as counsel for a receiver). It cannot go without mention that the trial court entered a Judgment against Mrs. Stewart awarding attorneys’ fees for Jones Waldo’s as well as Special Counsel Hoog’s work. This Judgment exceeded \$900,000. (R. 8167).

After commencing an investigation of [E. Excel's] finances and operations, Special Master Holman has determined that E. Excel should initiate litigation against the cross-defendant Jau Hwa Stewart, and the third party defendants, in order to preserve the assets of E. Excel, to protect E. Excel from tortious and on-going harm, and to render E. Excel a viable business going forward.

(R. 4205)(emphasis added). Because the role of a Special Master is one of a “judicial officer,” see *Plumb*, 809 P. 2d at 724, paragraph 3 of the Cross-Claim essentially reads as follows:

After commencing and investigation of [E. Excel's] finances and operations, [the trial court] has determined that E. Excel should initiate litigation against the cross-defendant Jau Hwa Stewart, and the third party defendants, in order to preserve the assets of E. Excel, to protect E. Excel from tortious and on-going harm, and to render E. Excel a viable business going forward.

Obviously, such determination of the trial court directly would be improper and contrary to any understanding of an independent and neutral judiciary. Allowing Special Master Holman, as a subordinate judicial officer, to do the same is no less objectionable.

As a party-litigant, Special Master Holman obtained both a Preliminary Injunction against Mrs. Stewart and the Third-Party Defendants, as well as an order of default against Mrs. Stewart as a sanction for “litigation abuses.” (R. 8110-13). This is further evidence of the impropriety of Special Master Holman’s conflicting appointments. By virtue of his default order, Special Master Holman moved for, and obtained, an award of attorneys’ fees in excess of \$900,000. (R. 8167). Special Master Holman premised his award of attorneys’ fees on the theory that E. Excel had “prevailed” on its cause of action against Mrs. Stewart and the Third-Party Defendants brought under Utah’s Pattern Of Unlawful Activity Act. See Utah Code Ann. § 76-10-1601 through 1609.

Because the trial court’s representative as an adverse party-litigant brought the Motion for Preliminary Injunction and Motion for Sanctions Against Mrs. Stewart, it is impossible to

believe that the trial court could impartially assess the veracity of the allegations, claims, and testimony of Special Master Holman. The trial court placed itself in the intractable position of assessing the credibility of private parties against that of the trial court's subordinate judicial officer who was appointed by the very same judge acting as fact-finder. The Motions Special Master Holman brought, exercising full executive authority of E. Excel, bore the imprimatur of the trial court and were not considered in the same adversarial setting as those a private litigant brought. Further, Special Master Holman's obvious alignment with Mrs. Chen and Mr. Zhang served to canonize the veracity of both their claims and testimony. All evidence of Mrs. Chen's and Mr. Zhang's successful scheme to divert at least \$75 million from E. Excel (R. 14342:Ex.280), never saw the light of day.

Judges, and by extension special masters, do not have the power to decide the claims, interests and rights of parties or persons-in-interest absent a pleaded case and controversy before the court in which they preside.²⁴ More specifically, special masters have no lawful power to determine conflicting claims and interests by negotiating and entering settlement agreements, much less pursue claims and interests that are outside the scope of the pleadings before the court in which they are appointed.²⁵ *Id.* The Master Settlement Agreement is an example of such a

²⁴ See *Timpanogos Planning & Water Mgmt. Agency v. Central Utah Water Conservancy Dist.*, 690 P.2d 532, 569 (Utah 1984) (stating role of judiciary is “to hear and determine controversies between adverse parties and questions in litigation” (citations omitted)).

²⁵ Other courts have limited the special master to purely advisory roles. *Cf. La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (“The use of masters is ‘to aid’ judges in the performance of specific judicial duties”); *Webster Eisenlohr*, 145 F.2d at 319 (“[The] Special Master’s appointment and activities are only for the purpose of assisting the court to get at the facts and arrive at a correct result in a complicated piece of litigation pending before this court.”); *DeClements v. DeClements*, 662 So.2d 1276, 1280 (Fla. Dist. Ct. App. 1995) (stating value of masters is in the “aiding, and making more efficient, the judicial process”); *Deland v. C.M.R. & Co.*, 824 A.2d 185, 189 (N.J. Super. Ct. App. Div. 2003) (limiting the special masters powers to

prohibited transaction.

As a graphic illustration of the breakdown of the adversarial process resulting from Special Master Holman's conflicting appointments, the trial court fully granted every sanction and plea for injunctive relief sought by the Special Master regardless of how broad or overreaching. At the end of the Preliminary Injunction proceedings, the trial court adopted over 100 pages of Special Master Holman/E. Excel's proposed Findings of Fact and Conclusions of Law. (R. 14317). The trial court adopted these Findings and Conclusions with virtually no edits or limitations. In contrast, the Findings and Conclusions do not include even one of the Findings or Conclusions Mrs. Stewart submitted. The ultimate Preliminary Injunction Order the trial court entered purports to enjoin Mrs. Stewart, and others, from all competition with E. Excel, and the entire herbal remedy industry worldwide, for an undetermined period of time. (R. 8110-13).

Special Master Holman's impact, however, was not limited to controlling the outcome of litigation. By virtue of the Master Settlement Agreement, Special Master Holman released Mrs. Chen, Mr. Zhang and the Territorial Owners of all claims brought by E. Excel, settled all pending litigation in which E. Excel was a party, including the Hong Kong, and completely restructured E. Excel, essentially turning over 90% of its international business to Mrs. Chen, Mr. Zhang and the historic Territorial Owners.

In the last days of extensive Preliminary Injunction hearings, Special Master Holman begrudgingly acknowledged that the Master Settlement Agreement had a "devastating impact" in E. Excel as the transfer of manufacturing rights to Mrs. Chen and the Territorial Owner's

"rendering opinions, proposing findings, issuing recommendations, and assisting the court in other similar ways as it may direct").

“substantially jeopardized” E. Excel. (R. 14270:271 14324:3). Despite the admitted impact to E. Excel, the trial court adopted the Master Settlement Agreement Special Master Holman proposed and afforded him the deferential “business judgment” standard in negotiating and presenting the Agreement to the Court. (R. 14240:34). By way of the Agreement, Special Master Holman unlawfully determined the rights and claims of E. Excel Shareholders without the benefit of trial and without regard to whether the individuals effected were party to the trial court action in which he was appointed.

From June 1, 2001 through October 4, 2001, the trial court adopted five Special Master Reports submitted by Special Master Holman. (R. 14297; 14298; 14300; 14302; 14310). Counsel for the Special Master later characterized the Special Master Reports as “clearly partisan.” (R. 14287:117:125). A special master generally is required to report to the court his findings and recommendations based upon properly hearings and the compilation of evidence taken from the parties. Utah R. Civ. P. 53(e)(1); *Plumb*, 809 P.2d at 741-42. Special masters are not authorized to submit “partisan” reports and the Code of Judicial Conduct requires them to act in an unbiased manner. The “partisan” nature of the Special Master Reports is apparent:

Special Master Report No. 1 (Appointment to April 10, 2001): Concludes with Special Master Holman asking for numerous Orders to allow him to act with complete discretion without Court supervision.

Special Master Report No. 2 (April 10 through May 10, 2001): The tone begins to deteriorate, and Special Master Holman requests control over E. Excel’s litigation:

It is asked that the Court enter its Order clarifying the Special Master’s understanding that he has full executive authority, **subject to oversight by the board of directors**, which enables the Special Master to direct and control all Company litigation. (R. 14298 P.2)(emphasis added).

Special Master Report No. 3 (May 10, 2001 through May 25, 2001): Shows the evolution of Special Master Holman's role from the Interim Order (R. 14300 P.2) to the May 11, 2001 Order:

[Special Master Holman] is granted and has full executive authority to direct and control, initiate, dismiss, settle or otherwise determine the Company's interests in all ... disputes or lawsuits, subject to the approval of the Board of Directors, ... **all without further order of this court.**

Id. Although the report opens by describing the status of E. Excel's operations, *e.g.*, construction projects, cash flow and the Zions line of Credit, it then spends eight pages discussing the litigation, the Shannon River shipment and the lack of documents returned to E. Excel that Special Master Holman believed to be in Mrs. Stewart's possession. The report also makes an extensive argument for adopting the Master Settlement Agreement.

Special Master Report No. 4 (June 2, 2001 through July 6, 2001): Dedicates only a paragraph each to discuss international operations, North American sales, plant operations and inventory and only one and a half pages to the financial status of the company relating to the Zion's Bank line of credit. The rest of the report vilifies Mrs. Stewart, including a detailed list of documents occupying seven pages Mr. Holman claims Mrs. Stewart removed from E. Excel.

Special Master Report No.5 (July 7, 2001 through August 7, 2001): From the first sentence of the Introduction, "The theme of Report No. 5 is that the hoped for cooperation of Mrs. Stewart has not been to any degree forthcoming," Report No. 5 takes up 24 pages of argument and discussion of the misdeeds of Mrs. Stewart (R. 14309 P.1) Special Master Holman also reveals his alignment: "The special master is the one charged with protecting the interests of the [E. Excel]" (R. 14309 P.2)

There is no indication that Mr. Holman investigated Mr. Zhang's and Mrs. Chen's

misconduct regarding materially misstated inventory numbers, their competition with E. Excel via the establishment of “contract manufacturers,” or their long history of diverting funds from E. Excel for the benefit of E. Excel, Ltd. Instead, Mr. Holman directed his efforts solely toward an exhaustive investigation of the brief period in which Mrs. Stewart served as President of E. Excel, taking action only against Mrs. Stewart and host of Third-Party Defendants. Mr. Holman’s myopic approach to his role as Special Master is clearly the product of bias and should not be condoned by this Court.

As a final unlawful and partisan act, Special Master Holman orchestrated a squeeze-out merger of Mrs. Stewart’s 25% interest in E. Excel. (R. 14320:Ex.1; 14324). The squeeze-out merger was completed within months of the completion of the Preliminary Injunction hearings. Reports commissioned by Special Master Holman placed the value of Mrs. Stewart’s share in the corporation at \$75,000 and the overall value of the company at \$300,000—the equivalent of Special Master Holman’s salary for one year. In exchange for a mere \$75,000, which Mrs. Chen has attached with a Writ of Garnishment, Mrs. Stewart was forced out of a corporation that she had been instrumental in creating since its inception in the early 90’s.

POINT II

MR. HOLMAN DID NOT ACT IMPARTIALLY WITH REGARD TO THE ALL OF THE PARTIES INVOLVED IN THIS MATTER

A. Mr. Holman Served as Both Special Master of E. Excel and as Receiver of Brisbane

Given that Mr. Holman served as both Special Master of E. Excel and as Receiver of Brisbane, his ability to act impartially is extremely questionable. Despite sharing common ownership, Brisbane and E. Excel have many interests that are adverse. These adverse interests

have given rise to separate litigation between the two entities and include disputes over unpaid rent and the obligation to satisfy a mechanic's lien against the property where E. Excel conducts business. Mr. Holman compromised the disputes between E. Excel and Brisbane, while serving as Special Master and Interim CEO of E. Excel and as Receiver of Brisbane. Mr. Holman demonstrated the inherent conflicts presented by this dual-appointment by proposing a settlement between the two entities that fails to take into consideration the interests of Brisbane's partners. Mr. Holman also expressed no interest in pursuing any further claims by E. Excel against Brisbane outside of those presented in his proposed settlement. This conflict of interest clearly draws Mr. Holman's impartiality into question and should have resulted in his disqualification as both Special Master and CEO of E. Excel and as Receiver of Brisbane.

B. Mr. Holman Drove the Crusade Against Jau Hwa Stewart

Beyond the inherent conflict of interest presented by Mr. Holman's involvement with both Brisbane and E. Excel, Mr. Holman's conduct demonstrated that he did not act impartially with regard to all of the parties involved in this matter. Upon his appointment as Special Master and Interim CEO of E. Excel, Mr. Holman embarked on a single-minded mission to vilify Mrs. Stewart, using her as a scapegoat for all of the problems facing the corporation. All of the Special Master's Reports filed by Mr. Holman are focused solely on Mrs. Stewart's alleged misconduct with regard to E. Excel and do not include any investigation of the misconduct of Mr. Zhang, Mrs. Chen or any of the agents working on their behalf.

C. Mr. Holman Violated the Terms of the Interim Order by Failing to Act in the Best Interests of E. Excel and its Shareholders

The Interim Order grants Mr. Holman the authority to act on behalf of E. Excel, conduct business on its behalf and issue financial reports and reports pertaining to E. Excel's operations.

Implicit in this grant of authority is the requirement that Mr. Holman act in the best interests of E. Excel and its shareholders. This implicit requirement is consistent with the fiduciary relationship that exists between the board of directors and the management of a corporation on one hand and stockholders on the other. *See Hansen v. Granite Holding Co.*, 218 P.2d 274 (Utah 1950). Officers and directors of a corporation accept the fiduciary responsibility to serve the interests of its shareholders which they must discharge with fidelity and which they should not desert for their own gain. *See Cox v. Berry*, 431 P.2d 575 (Utah 1967).

Mr. Holman failed to act in the best interests of E. Excel and its shareholders, violating the terms of the Interim Order and his fiduciary duties. Through the Master Settlement Agreement, Mr. Holman forgave any debt owed to E. Excel by E. Excel, Ltd., without any knowledge of the amount of the debt owed or the nature of E. Excel, Ltd.,’s obligation to E. Excel. Mr. Holman also ratified the relationship between E. Excel and certain “contract manufacturers” without investigating the ownership structures of the manufacturers, the procedures they use to manufacture E. Excel products or, in some instances, even the location of their manufacturing facilities. Mr. Holman’s failure to conduct any investigation prior to settling with E. Excel, Ltd., and the contract manufacturers directly violates his fiduciary responsibilities to E. Excel and its shareholders as well as the responsibilities inherent in the Interim Order.

Finally, as Special Master and Interim CEO of E. Excel, Mr. Holman submitted materially misstated financial reports to this Court and to lending institutions associated with E. Excel. Mr. Holman also signed E. Excel’s federal income tax return for the year 2000, which also materially misstated E. Excel’s inventory. Mr. Holman is aware of the fact that E. Excel’s inventory is understated by approximately \$20 million, imposing on him the duty to correct and

disclose the problem in the interest of the corporation and its shareholders. Despite this duty, Mr. Holman signed E. Excel's 2000 federal tax return and submitted financial reports to Zion's Bank without disclosing the extent of the corporation's misstatement.

D. The Trial Court Deferred Ruling on Stewart's Motion to Disqualify Partisan Special Master Holman

On July 23, 2002, the trial court's deferred ruling on Stewart's Motion to Disqualify Larry Holman as Special Master and Interim CEO of E. Excel. Even when deferring ruling, the trial court recognition that "these allegations and claims are large and serious and are subject to an evidentiary hearing." (R. 14258;63-64). **Special Master Holman's "large and serious" conflicts of interest should have been resolved prior to relying extensively upon his Special Master Reports and testimony in forming the basis for rulings against Mrs. Stewart.**

E. The Trial Court Deferred Ruling on Stewart's Motion to Disqualify Partisan Special Master Holman, and Then a Month Later, Based on His Independent Judgment, Dismissed Mrs. Stewart's \$18 million+ Claims in Her Second Amended Complaint

On July 23, 2002, the trial court's deferred ruling on Stewart's Motion to Disqualify Larry Holman as Special Master and Interim CEO of E. Excel, despite the "large and serious" issue the Motion raised. A little over a month later, the trial court granted Mrs. Chen a Motion to Dismiss Plaintiff's Second Amended Complaint. (R. 14850) The trial court's dismissed Mrs. Stewart's Second Amended Complaint containing her \$18 million+ claim against Mrs. Chen and Mr. Zhang, among others, ruling that Special Master Holman was a "court appointed representative" and that he was

independent because of his appointment by the Court and the Court's supervision over E. Excel's business affairs. **The Court also concludes that Mr. Holman as an independent decision maker determined what was in**

the best interest of E. Excel. This Court's approval and adoption of the Master's Settlement Agreement that dismissed the Hong Kong lawsuit brought by Plaintiff signified the Court's approval of that decision being in the best interest of the company. Mr. Holman determined that lengthy and costly litigation was not in the best interest of E. Excel. As such, Mr. Holman determined to settle the litigation and dismiss Plaintiff's derivative actions relating to the Company's alleged transfer of funds to E. Excel Limited. Therefore, the Court determines that the Special Master's decision was in the best interest of the Company. . . .

Id. at 4 (emphasis added). This derivative action was dismissed solely because the trial court considered Mr. Holman to be an independent party who was in a position to determine E. Excel's best interest, *i.e.*, not to pursue the litigation. The Court found that this decision was within the Partisan Special Master's "business judgment." *Id.* at 5. Finding Mr. Holman to be independently exercising his business judgment, and using that as a basis to dismiss the derivative action against Mrs. Chen, was tantamount to having Mrs. Chen rule on her own Motion.

POINT III

MRS. STEWART DID NOT STIPULATE TO SPECIAL MASTER HOLMAN'S APPOINTMENT TO INTERIM CEO OR TO ALLOW SPECIAL MASTER HOLMAN TO PARTICIPATE AS AN ACTIVE PARTY LITIGANT

Mrs. Stewart did not, and could not, stipulate to Special Master Holman's appointment as interim CEO. The trial court's March 13, 2001 and May 11, 2001 Orders, appointing Special Master Holman and empowering him to act as a party-litigant were not the product of a stipulation. (R. 702-04, 762). The trial court's ruling appointing Mr. Holman as Special Master was entered upon the suggestion of Mrs. Chen's counsel and was entered without the benefit of notice, briefing or a finding of exigent circumstances warranting the appointment of a special master.

At the hearing on March 26, 2001, Mrs. Chen and Mrs. Stewart stipulated to Special Master Holman's *ex parte* communications, but Mrs. Stewart reserved the right to discontinue those communications. (R. 14236:74-75). Mrs. Stewart's limited stipulation to *ex parte* communications represents the only stipulation with regard to the appointment of Special Master Holman. Mrs. Stewart did not stipulate to Special Master Holman's appointment as Interim CEO and did not stipulate to the trial court's empowerment of Special Master Holman to participate as a party-litigant.

Even if Mrs. Stewart had stipulated to the Special Master Holman's appointment as Interim CEO and ultimately as a party litigant, it is powerless to confer non-judicial powers upon Special Master Holman under Rule 53. As such, the parties could not consent either to the unlawful empowerment of Special Master Holman or to his subsequent exercise of those unlawful, non-judicial powers.²⁶ Just as parties may not consent to the appointment of a receiver where the appointment is not authorized by law, parties may not consent to an unlawful reference of power to a special master under Rule 53. *See Wilver*, 387 F.2d 66, 69 (10th Cir. 1967).

In *Wilver*, the Tenth Circuit stated:

We are unaware of any decisions which approve the appointment of a Master to supervise the answers to interrogatories. Here the Master was given the power to restate the questions and to recommend the answers. **The fact that the parties agreed to such anomalous procedure does not make it permissible**

²⁶ *See Wilver v. Fisher*, 387 F.2d 66, 69 (10th Cir. 1967) (stating even where parties agreed to broaden powers of master does not make it permissible). Parties cannot consent to the exercise of jurisdiction where none exists. *See A.J. Mackay Co. v. Okland Const. Co.*, 817 P.2d 323, 325 (Utah 1991) (stating, "acquiescence of the parties is insufficient to confer jurisdiction on the court, and a lack of jurisdiction can be raised by the court or either party at any time").

.... The order of the reference here borders on an abdication of the judicial function and is not justified by the record.

Id. at 69 (emphasis added); see also *Cademartori v. Marine Midland Trust Co.*, 18 F.R.D. 277, 278-79 (S.D. N.Y. 1955) (determining parties cannot stipulate to the court being committed to the decision of the master). In this case, Special Master Holman's actions go much further; as a party litigant, Special Master Holman completely abdicated his judicial functions and became an adversarial party. Thus, even if the parties stipulated to the trial court's appointment of Special Master Holman as Interim CEO and to his exercise of non-judicial powers, the stipulation would have no effect.

POINT IV

THE TRIAL COURT'S "SPECIAL MASTER ORDERS," GRANTING SPECIAL MASTER HOLMAN WITH EXTRA- JUDICIAL AUTHORITY TO PARTICIPATE IN THE ACTION AS A PARTY-LITIGANT AND ORDERS RESULTING FROM SPECIAL MASTER HOLMAN'S EXERCISE OF EXTRA-JUDICIAL POWERS MUST BE VACATED AND SET ASIDE

Because the court did not have the power to grant Special Master Holman with *ultra vires*, non-judicial powers, which he then exercised, the Orders are void and they must be vacated.²⁷ The Special Master Orders also must be vacated because they encouraged Special Master Holman to act in violation of the Utah Code of Judicial Conduct because he was unable to act

²⁷ See *Andrus v. Blazgard*, 23 Utah 233, 63 P. 888, 894 (1901) ("It is elementary that a judgment or order of a court made without authority is void, and confers no rights on, and affords no protection to, persons acting in pursuance thereof."); see also *Cruz v. Hauck*, 515 F.2d 327, 327 (5th Cir. 1975) (noting, "[a]n order without power is void"). See generally *Plumb v. State*, 809 P.2d 734, 742 (Utah 1990) (stating a special master has the "duties and obligations of a judicial officer" (emphasis added) (citations omitted)); *Webster Eisenlohr v. Kaladner*, 145 F.2d 316, 319 (3rd Cir. 1944) (noting that a special masters special duties can be no wider "than the scope of activity of the court itself).

as the role of a subordinate judicial officer without the appearance of impropriety or impartiality.²⁸

Using these principles, the following orders should be vacated: First, the March 13 and May 11, 2001 Orders appointing Special Master Holman and empowering him with *ultra vires*, non-judicial powers. (R. 703, 762). These Orders form the cornerstone for Special Master Holman's improper participation as a party litigant. The role of Special Master must be expunged, and the case returned to its status prior to his appointment on March 13, 2001. Second, the Preliminary Injunction Order is a direct result of Special Master Holman's exercise of unlawful, non-judicial powers. (R. 8110-13). Third, the June 1, 2001 Order approving the Master Settlement Agreement resulted from Special Master Holman's exercise of his unlawful, non-judicial powers as a subordinate judicial officer. (R. 2032). Fourth, the April 12, 2002 Orders modifying the Interim Order and allowing the freeze-out merger to occur without any trial court. (R. 7950-54). Fifth, the August 26, 2002, Order sanctioning Mrs. Stewart and entering default against her is the direct result of Special Master Holman's actions as a subordinate judicial officer. (R. 8167). Each of these Orders is void because they are the direct result of Special Master Holman's improper participation in the litigation by a judicial officer and, therefore, must be vacated.

Additionally, the June 1, 2001 and October 4, 2001 Rulings regarding the entry of the Special Master Reports must be vacated and set aside because the reports are clearly partisan in

²⁸ See Utah R. Jud. Conduct Cannon 1-3; see also *Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 258 (Utah 1992) (decision was automatically set aside due to a violation of the Code of Judicial Conduct); *Anderson v. Industrial Comm'n*, 696 P.2d 1219, 1221 (Utah 1985). Violations of the code of judicial conduct must be set aside regardless of the merit of the decision or the influence of the misconduct. *Id.* (vacating order was proper remedy even without showing of prejudice).

violation of Rule 53. (R. 2032). Special Master Holman's counsel admitted that the Reports are partisan (R. 14287:117, 125) and that they formed the basis of the trial court's Findings of Fact, Conclusions of Law and Order which were adopted by the trial court nearly verbatim. (R. 14317). The trial court relied almost exclusively upon Special Master Holman's testimony and on his partisan Special Master Reports in forming the Preliminary Injunction Order. This Court, therefore, should vacate the Findings, Conclusions and Order as it was a violation of Mrs. Stewart's due process rights. (R. 14317, R. 8110-13).

Because the trial court possessed neither the authority nor the discretion to confer non-judicial powers upon Special Master Holman, this Court should vacate the Special Master Orders, including the Preliminary Injunction and Sanctioning Order against Mrs. Stewart (Orders). Further, this Court should remand this case to the trial court with the instructions that the case be returned to its status prior to the appointment of Special Master Holman.

POINT V

THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING A PRELIMINARY INJUNCTION BARRING MRS. STEWART FROM COMPETING WITH E. EXCEL AND FROM PARTICIPATING IN THE ENTIRE HEALTH FOOD SUPPLEMENT INDUSTRY FOR AN UNLIMITED PERIOD OF TIME WORLDWIDE

Because the Preliminary Injunction bars Mrs. Stewart from participating in the entire herbal, dietary supplement, cosmetic and personal-care product industry worldwide for an indeterminate period of time, the Preliminary Injunction is invalid. The scope of the trial court's prohibition on Mrs. Stewart's right to compete is unprecedented and grossly exceeds the harm alleged by E. Excel. Generally, a defendant may be preliminary enjoined from competition with a plaintiff if the defendant has a continuing duty not to compete under a valid non-competition

agreement or underlying fiduciary duty.²⁹

Absent a duty not to compete, a defendant's efforts to do so is not irreparable harm and cannot satisfy this prerequisite for obtaining a preliminary injunction.³⁰ It is undisputed that Mrs. Stewart did not enter into a noncompetition agreement with E. Excel. Further, any duty not to compete flowing from Mrs. Stewart's role as a corporate fiduciary ended at the time Mrs. Stewart resigned as an officer and director of E. Excel in June 2001.³¹ In late December 2002, Special Master Holman and Mrs. Chen eliminated Mrs. Stewart's minority share of E. Excel stock. (R. 7950-54). As such, Mrs. Stewart currently has no relationship with E. Excel as a fiduciary, employee or shareholder.

Absent a duty not to compete, the purpose of the trial court's Preliminary Injunction is simply to punish Mrs. Stewart rather than protect E. Excel. A preliminary injunction may not be granted to sanction or punish wrongful conduct, regardless of how egregious that conduct may be.³² Without irreparable harm, the trial court's Preliminary Injunction cannot bar Mrs. Stewart from competing with an entire industry on a global scale.

If there was proper basis for a preliminary injunction in this case, there is no proper basis for barring Mrs. Stewart from an entire industry worldwide forever. The trial court's Preliminary

²⁹ See *Microbiological Research Corp. v. Muna*, 625 P.2d 690, 697 (Utah 1981); *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1113 (8th Cir. 1969); *United Aircraft Co. v. Boreen*, 413 F.2d 694, 699 (3rd Cir. 1969); *Resolution Trust Corp. v. Sealetty*, 810 F. Supp. 1505, 1513 (D. Kan. 1992).

³⁰ See Utah R. Civ. P. 65A(e); *Robbins v. Finley*, 645 P.2d 623, 627 (Utah 1982); *Nestle Food Co. v. Miller*, 836 F. Supp. 69, 75 n.19 (D. R.I. 1983).

³¹ *Microbiological Research Corp.*, 625 P.2d at 695 ("When a corporate officer ceases to act as such . . . the fiduciary relationship ceases.").

³² See, e.g., *Standard Brands, Inc. v. U.S. Partition & Packaging Corp.*, 199 F. Supp. 161, 175 (E.D. Wis. 1961).

Injunction violates principles of free enterprise and individual liberties.³³

Finally, it is essential that an injunction be narrowly tailored to accomplish a simple goal: to preserve the status quo pending the outcome of the case.³⁴ E. Excel did not, and could not, establish irreparable harm sufficient to warrant an injunction that completely bars a competitor from an entire industry worldwide indefinitely.

Special Master Holman's unfair competition and racketeering claims under Utah's Pattern of Unlawful Activity Act ("UPUAA") fail to serve as a predicate for barring Mrs. Stewart from all competition with E. Excel, much less the entire dietary supplement industry. These claims only serve as a predicate for an injunction limited in scope to prevent any continuing unfair competition or UPUAA violations, *i.e.*, the underlying irreparable harm.³⁵ Because there is no underlying support or purpose for the Preliminary Injunction, it must be reversed.

CONCLUSION

By appointing a Special Master Holman to act as Interim CEO and ultimately allowing him to become a party litigant and adverse receiver, the trial court greatly exceeded its power of reference under Rule 53. After improperly granting these powers, the trial courts' Special

³³ See *Crane v. Dable*, 576 P.2d 870, 872-73 (Utah 1978) ("Under our system of free enterprise and individual liberties, there is no serfdom."); Restatement (Third) of Unfair Competition, cmt. 2 (1995) ("The freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system.").

³⁴ *Bowman v. Dixon Theatre Renovation, Inc.*, 581 N.E.2d 804, 808 (Ill. Ct. App. 1991); *Hughes Network Systems, Inc. v. Interdigital Communication, Corp.*, 17 F.3d 691, 694 (4th Cir. 1994); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 198 (3rd Cir. 1990); *Citizen Band Potawatomi Indian Tribe of Oklahoma v. the Oklahoma Tax Comm'n*, 969 F.2d 943, 948 (10th Cir. 1992) ("[T]he trial court order follows the well-settled principle that an injunction must be narrowly tailored to remedy the harm shown[.]") (R. 14291: 105 & 175; 7188).

³⁵ See, e.g., *Envirotech Corp. v. Callahan*, 872 P.2d 487, 496 n.8 (Utah Ct. App. 1994) (finding defendant not barred by a fiduciary duty from competing but barred from using confidential information); *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1112-13 (8th Cir. 1969).

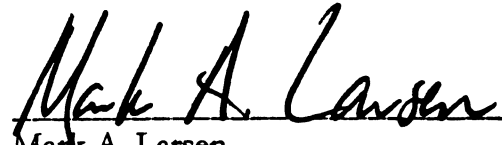
Master, not surprisingly, dominated the litigation and destroyed any semblance of an adversarial process. Because Special Master Holman's dominance taints all of the subsequent orders and proceedings below, all of these orders and the improper appointment should be vacated.

The preliminary injunction entered against Mrs. Stewart lacks an adequate basis. Once Mrs. Stewart ceased to be an officer and director, she no longer owed E. Excel and Mrs. Chen any fiduciary obligations. Because of this, Mrs. Stewart should be free to compete with E. Excel.

Even if the preliminary injunction has adequate foundation, its scope is overly broad both temporally, geographically and in the scope of business from which Mrs. Stewart is now excluded. A preliminary injunction must be narrowly tailored and limited in scope. The injunction entered against Mrs. Stewart, however, far exceeds what is necessary to protect any legitimate interest of E. Excel, and instead is punitive in nature. The preliminary injunction should be vacated, and this Court should remand to the trial court the question of whether a more narrowly tailored injunction is appropriate at all given Mrs. Stewart lack of contractual or fiduciary obligations to E. Excel.

Dated: September 17, 2003.

LARSEN & GRUBER

A handwritten signature in black ink, appearing to read "Mark A. Larsen", is written over a horizontal line.

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ADDENDUM

Utah Rule of Civil Procedure 53

**WEST'S UTAH RULES OF COURT
UTAH RULES OF CIVIL PROCEDURE
PART VI. TRIALS**

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Current with amendments received through 7-1-2003.

RULE 53. MASTERS

(a) Appointment and Compensation. Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

(c) Powers. 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 or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Utah Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished,

or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) **Objections to Appointment of Master.** A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

J

IN THE UTAH SUPREME COURT

JAU-FEI CHEN, individually and as the natural guardian of CHI WEI ZHANG, E. LEI ZHANG, and E. ZHANG, her minor children,)	
)	
Plaintiffs/Appellees,)	Supreme Court No. 20020927 SC
vs.)	
)	
JAU-HWA STEWART, E. EXCEL INTERNATIONAL, INC., a Utah corporation, and Does I through X,)	
)	
Defendants/Appellant.)	
)	
<hr/>		
E. EXCEL INTERNATIONAL, INC., a Utah corporation,)	
)	
Third-Party Plaintiff.)	
vs.)	
)	
TAIG STEWART; BEVERLY WARNER; ANGELA BARCLAY; DALE STEWART; HWAN LAN CHEN, et al.)	
)	
Third Party Defendants/Cross Appellants)	

BRIEF OF APPELLANT HWAN LAN CHEN

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

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

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

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

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

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

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APPELLATE JURISDICTION

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

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

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

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

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

ISSUES PRESENTED

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

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

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

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

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

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

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

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

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

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

B. The Preliminary Injunction

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

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

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

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

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

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

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

CONTROLLING RULE

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

[R. 14230 at 14.]

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

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

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

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

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

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

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

¹(...continued)

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

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

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

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

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

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

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

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

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

[R. 4205 at ¶ 3.]

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

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

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

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

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

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

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

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

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

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

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

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

II. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[*Id.*; R. 1885; 2033 at ¶ 1; 2721.]

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

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

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

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

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

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

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

[*Id.* at 06 (¶ 2(a)(ii)).]

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

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

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

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

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

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

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

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

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

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

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

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

- Jones Waldo sought a partial protective order with respect to the Special Master's deposition on the ground that, as a judicial officer, his mental processes were protected from discovery. [R. 2721.]
- Judge Howard, referring to the Master Settlement Agreement as the "Master's Settlement Agreement," dismissed derivative claims against the plaintiff, her husband, and their allies on the basis that the Special Master, in entering into his "Master's Settlement Agreement," had acted as an "independent decision maker" under Utah Code § 16-10a-740 – a role no CEO can occupy – and had determined that the claims were not in E. Excel's best interest. [R. 14846-47 (*see* Addendum, Tab R).]
- The Special Master was admittedly "**PARTISAN**" and submitted "**CLEARLY PARTISAN**" Reports under Rule 53, which were used against Hwan Lan Chen. The Special Master submitted five Reports to Judge Howard pertaining to the litigation, which Judge Howard adopted or "received" verbatim to make them part of the record and which were subsequently cited in findings that supported the grant of the Preliminary Injunction. [R. 2033 at ¶ 2; 2043; 2294; 2953; 14297; 14298; 14300; 14302; 14309-10; 14317 at 47-48 (¶¶ 71-72), 109-117 (¶¶ 187-90, 192-93); 14318 at 89 (¶ 258).] The Reports were submitted by the Special Master in "his capacity as Special Master" under Rule 53 and made recommendations under Rule 53(e)(2), including the Special Master's request for the May 11, 2001 Order and for approval of the Master Settlement Agreement. [R. 1885; 2033 at ¶ 1; 2721; 14298 at 2; 14300 at 25.] Even though the Reports were submitted by a special

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹(...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 319 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶(...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Howard's ruling violated the simple rule that there can be no adjudication of a claim absent the claim being asserted in a pleading in the case. *See Combe*, 680 P.2d at 736 (“[A] judgment must be responsive to the issues framed by the pleadings, and a trial court has no authority to render a decision on issues not presented for determination.”); *In re H.J.*, 1999 UT App. 238, ¶ 38, 986 P.2d 115, 124 (stating that one element of claim preclusion is assertion of claim by a pleading). No claim of any type has ever been asserted by way of pleading in the action below that is directed at Hwan Lan Chen's claim to ownership of E. Excel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

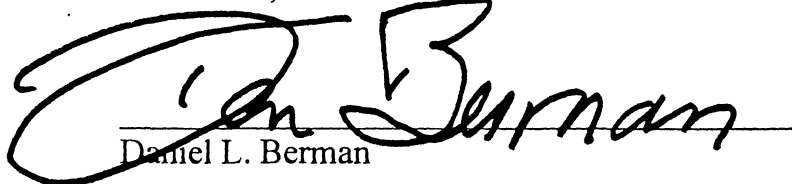
In sum, the Special Master/E. Excel wholly failed to establish a prima facie case on any of the key predicate findings against Hwan Lan Chen – that she was a crook, conspirator, or corporate wrongdoer – on which the Preliminary Injunction was based. The Preliminary Injunction must be reversed on this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

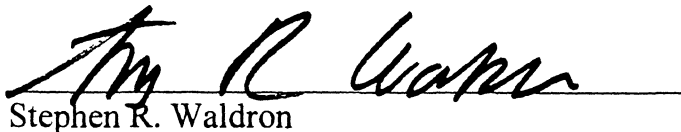
CONCLUSION

For the foregoing reasons, appellant Hwan Lan Chen respectfully submits that Judge Howard’s Orders relating to the Special Master’s appointment, empowerment, and actions must be vacated and set aside, the Preliminary Injunction findings and Order must be vacated and set aside, and the case remanded with instructions that it be returned to its status before the Special Master’s unlawful appointment, empowerment, and actions.

DATED: September 16, 2003.

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