

2002

Jau-Fei Chen, Chi Wei Zhang, E. Lei Zhang and
E.E. Zhang v. Jau-Hwa Stewart, E Excel
International, Inc.; E. Excel International, Inc. v. Taig
Stewart, Beverly Warner, Angela Barclay, Dale
Stewart and Hwan Lan Chen: Brief of Appellant

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, E. EXCEL
INTERNATIONAL, INC., a Utah corporation, and
Does I through X,

Defendants/Appellant.

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

Third-Party Plaintiff.

vs.

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

Third Party Defendants/Cross
Appellants

Supreme Court No. 20020777

UTAH SUPREME COURT
BRIEF

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APPENDIX TO
BRIEF OF APPELLANT HWAN LAN CHEN

APPEAL FROM A CONTEMPT RULING AND ORDER ENTERED IN THE
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE
HONORABLE FRED D. HOWARD PRESIDING

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FILED
UTAH APPELLATE COURTS
MAR - 1 2004

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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,)	Supreme Court No. 20020777
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)	

**APPENDIX TO
BRIEF OF APPELLANT HWAN LAN CHEN**

APPEAL FROM A CONTEMPT RULING AND ORDER ENTERED IN THE
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE
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FILED
Fourth Judicial District Court
of Utah County, State of Utah

8/20/02 MB Deputy

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

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

Plaintiff,

vs.

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

Defendants.

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

Cross-Claimant,

vs.

JAU-HWA STEWART,

Cross-Defendant.

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

Third-Party Plaintiff,

vs.

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

[FILED UNDER SEAL]

Civil No. 010400098
Consolidated with 010400201

Judge Fred D. Howard - Division 9

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
HYMAN; 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.

On June 22, 2001, Plaintiff Dr. Jau Fei Chen ("Dr. Chen") filed a Motion for Order to Show Cause Why Ms. Jau Hwa Stewart ("Ms. Stewart") Should Not Be Held In Civil And Criminal Contempt Of Court For Her Violation Of Court Orders in the first-filed action. On August 2, 2001, Dr. Chen Filed a Motion For Order Summarily Holding Ms. Stewart In Criminal Contempt Of Court in the first-filed action. The Motion filed in June of 2001, references two Orders of this Court, the Temporary Restraining Order dated January 10, 2001 that the Court extended without objection on January 24, 2001 ("TRO") (Exhibit 201), and the Interim Order dated February 21, 2001 ("Interim Order") (Exhibit 202). The latter Motion deals with evidence established in part by a telephone conversation among Ms. Stewart and Messrs. Richard Hu ("Mr. Hu") and Sam Tzu ("Mr. Tzu") (Exhibits 104, 276, 277, 504), which demonstrates that Ms. Stewart 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. Plaintiff 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. Plaintiff sought leave to address this Motion at the Order to Show Cause hearing on the ground that principles of due process required as much because some of the contumacious conduct occurred outside the Court's presence. Tr. 10/25/01, at 23-24. The Court granted leave and such evidence was presented.

The OSC Motions 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. In the same proceedings, the Court heard Excel USA's Motion for Preliminary Injunction which sought, among others, to preclude Ms. Stewart, her company Apogee, Inc., and others, from competing with E. Excel International, Inc. ("Excel USA"), and Ms. Stewart's Motion for Preliminary Injunction against Excel USA concerning certain issues relating to labeling its products. Because the evidence in relation to the forgoing motions was heard altogether, the Court considered all of the evidence as it is deemed to relate to each of the separate motions. To the extent evidence in support of the Preliminary Injunction motions is relevant and persuasive to Dr. Chen's Motions, the Court considers, and where appropriate, makes findings in connection with such evidence, by reference. As part of the OSC hearing, and in the interests of judicial economy, the Court took judicial notice of the Preliminary Injunction proceedings that had occurred in the first-filed action from January 19, 2001 through February 21, 2001, wherein Dr. Chen was represented by Michael R. Carlston, Richard A. Van Wagoner and David L. Pinkston of the law firm of Snow, Christensen & Martineau, and Ms. Stewart was represented by Willis

Orton, Eric Olson and the law firm Kirton & McConkie, and David Jordan of the law firm Steel Rives.

In the OSC proceedings and proceedings on the Motion for Order Summarily Holding Ms. Stewart in Contempt of Court, Dr. Chen was represented by Michael R. Carlston, Richard A. Van Wagoner and David L. Pinkston of Snow, Christensen & Martineau. In these Motions as well as the Preliminary Injunction Motions, Ms. Stewart was represented by Mark A. Larsen and Jerome H. Mooney of the law firm of Larsen and Mooney. Excel USA was represented by Deno Himonas and Adam Price of the law firm Jones, Waldo, Holbrook and McDonough. The Court, having considered extensive evidence including the live and deposition testimony of numerous witnesses, numerous Exhibits, the stipulations of counsel, and the arguments of counsel, and now being fully apprised in the premises and good cause appearing therefor, hereby finds the following Facts:

I. FINDINGS OF FACT

BACKGROUND: DR. CHEN, EXCEL USA, EXCEL LTD., CONTRACTS WITH TERRITORIAL OWNERS AND COURSES OF PERFORMANCE

1. Dr. Chen was born in Taiwan in 1962. She is a member of a Chinese family that adheres to traditional deferring to decision making authority of the elder member of the family. She is the youngest of five children. Sheue Wen Smith ("Ms. Smith") is her oldest sibling; Tei Fu Chen, her only brother, is second oldest. Next is Jau-Fang Chen who is married to Jimmy Lu, and then Ms. Stewart. Part of the Chinese tradition observed by her family was to respect the wishes

of and take instruction from elders. Another Chinese tradition was to share profits in business between and among family members, including in-laws. Tr. 2/8/01, at 170; Tr. 2/9/01, at 12-14.

2. Dr. Chen and most of her family moved to the United States when she was 16 years old. She was accepted as a student at Brigham Young University at 16, obtained her Bachelors degree in microbiology with a minor in chemistry at 19, obtained her Masters degree in microbiology at 21 and obtained her Ph.D. in microbiology with an emphasis in immunology at 26. Tr. 2/8/01, at 170.

3. Dr. Chen married Mr. Rui Kang Zhang ("Mr. Zhang") when she was 25 years old. Tr. 2/8/01, at 172.

4. Dr. Chen and Mr. Zhang are the natural parents of E.E. Zhang, a daughter, E. Lei Zhang, a daughter, and Chi Wei Zhang, a son. The three children are minors. Tr. 2.8/01, at 169.

5. Excel USA was incorporated on July 20, 1987. Dr. Chen, her husband Mr. Zhang and her parents were the original directors and incorporators. Dr. Chen was president and the sole shareholder. Six thousand shares of stock were issued to Dr. Chen represented by Stock Certificate 0001. Tr. 2/8/01, at 171-73; Tr. 2/9/01, at 54; Exhibits 17, 18, 19, 37.

6. Excel USA manufactures health-related products and sells them through a multi-level network marketing system. Dr. Chen became familiar with multi-level marketing networks, in part, from Tei-Fu Chen, who operated Sunrider, a company that manufactured products and sold them through multi-level marketing networks, and Ms. Stewart who, at the time of Excel USA's

inception, was working at Sunrider. At Sunrider, Ms. Stewart served as the personal assistant to Tei-Fu Chen. Tr. 2/8/01, at 174-75, 181.

7. Ms. Stewart left Sunrider and became an employee and the vice-president of Excel USA in the early 1990s. Relatively soon thereafter, Ms. Stewart assumed responsibility for day-to-day operations and control of executive decisions at Excel USA. Tr. 2/8/01, at 182-83. This occurred in part because of the knowledge and expertise she acquired while working for Sunrider and in part because she was the elder sister to Ms. Chen. Ms. Stewart's responsibilities included, but were not limited to, controlling and managing all daily operations of Excel USA, tracking Excel USA's finances and cash flow, authorizing purchases of materials within the United States, arranging for credit, and assuring that bills were paid, orders were filled and properly invoiced, product was manufactured, bank statements were reconciled, and wires transfers were confirmed. Tr. 2/9/01, at 35-36, 63-67, 82. She also participated directly in communicating with the foreign distribution companies known as "Territorial Owners" concerning the information that would be included in the product labels for their respective countries. Tr. 2/9/01, at 125. Ms. Stewart was intimately familiar with and aware of Excel USA's exclusive contracts and courses of dealing with the Territorial Owners in, among others, Malaysia, Taiwan, Hong Kong and The Philippines. Tr. 2/8/01, at 158; Tr. 2/9/01, at 125.

8. At a point during the early 1990s, the make up of Excel USA's officers and board of directors changed. Dr. Chen was and remained the president of Excel USA and chairperson of

the board, her husband Mr. Zhang remained a director and was secretary of Excel USA, and her sister Ms. Stewart became the vice-president of Excel USA and a director. Dr. Chen's parents were removed from the board of directors. Tr. 2/8/01, at 30, 63; Tr. 10/26/01, at 5-6.

9. Dr. Chen's goal for Excel USA was to successfully promote the development of products that would enhance people's health through what was called "nutritional immunology." Tr. 2/8/01, at 171.

10. Excel USA grew to become a successful business. It began by manufacturing and selling approximately 20 product lines, and eventually manufactured and marketed well over 100 product lines. Excel USA sold its products to exclusive Territorial Owners that were located in countries such as Korea, Taiwan, Phillippines, Hong Kong, Malaysia, Singapore, U.S.A. and France. Excel USA also marketed its products in Canada through a wholly owned affiliate, Dunnkirk, Inc. Tr. 2/8/01, at 173-75, 184-85; Tr. 3/15/02, at 46-47.

11. Excel USA's growth and success were due in large part to Dr. Chen as Excel USA's charismatic founder and leader. Dr. Chen's involvement as the Excel USA spokesperson and symbolic representative of its products was critical to the company's success as a result of the overall public relations and marketing plan. Dr. Chen is closely identified with Excel USA and its products throughout the distribution channels in the countries in which Excel USA sells its products. Photographs and articles featuring her as the founder of Excel USA, and as having developed the Excel USA products consistent with "nutritional immunology," were and are

prominently displayed in the Territorial Owners' publications and promotional materials and those of Excel USA. Consumers and distributors of Excel USA products became loyal to Excel USA and utilize Excel USA's products in large measure because of Dr. Chen's identity with the products, and their trust in the products because of their confidence in Dr. Chen. The Territorial Owners also considered Dr. Chen to be the leader of Excel USA marketing and product sales. As Excel USA's founder and charismatic leader, Dr. Chen traveled frequently and extensively, promoting "nutritional immunology" through use of Excel USA products, by speaking at conventions sponsored by Territorial Owners and giving seminars and training sessions in the countries where Excel USA products were sold. These characteristics are exemplified in the testimony of one Territorial Owner:

Q. Okay. From your point of view, [as] the distributor in Taiwan, what importance does Dr. Chen's relationship to this product have?

A. I think I always talk to people that Dr. Chen is the treasure of the company. She is the spirit of the company. So people in Taiwan, we need her to support us, to hear her speech. . . .

Q. What role does trust play in your billings?

A. . . . The network marketing has become like trust. We trust each other, then make an organization to get together to become--trust each other. Then we have the belief in the product, belief in the company, then become loyal. So trust is the basis of the business. That is the foundation of the business.

Tr. 1/24/01, at 18-19, 67-68, 152-53; Tr. 2/2/01, at 37-40; Tr. 2/8/01, at 185; Tr. 2/9/01, at 62-63, 86-90; Exhibits 76 and 547.

12. Dr. Chen's role is also illustrated by an Excel USA publication entitled *A Profile of Excellence*, dated June 1, 2000:

Excellence is the result of knowledge, vision, and perseverance. Each of these qualities personifies Dr. Jau-Fei Chen--a gifted scientist, businesswoman, wife, mother, and role model for people all over the world. Through innovation, creativity, and hard work, Dr. Chen successfully balances these varying facets of her life. By overcoming challenges, she accomplishes her dreams and continues to impact the overall health of humankind.

Dr. Chen has devoted her life to studying the vital relationship between nutrition and the human immune system--a science Dr. Chen has termed *Nutritional Immunology*. Because of her deep commitment to the improvement of health, Dr. Chen remains one of the world's most noted immunologists. In 1987, Dr. Chen founded E. Excel International, Inc. in hopes of teaching others how to prevent--rather than treat--sickness and disease through a properly nourished immune system. As people learn about E. Excel's Nutritional Immunology, they also have the desire to share this important message with others.

Although Dr. Chen serves as president of E. Excel International, she still finds time to conduct her own research and keep abreast of the latest studies so she can continue to formulate products with maximum nutritional benefits. Dr. Chen has shared her passion for science and nutrition with the world through both research and education. As a result, her message of better health will be passed on to future generations.

This special publication profiles the honorable mission and diverse accomplishments of a truly visionary and dedicated woman--Dr. Jau-Fei Chen--a woman who exemplifies excellence.

Exhibit 76.

13. Excel USA commenced doing business with E. Excel International (Taiwan), Inc. ("Excel Taiwan"), in 1990, and began shipping product to Excel Taiwan even before the parties entered an exclusive distribution contract. On August 19, 1990, Excel USA and Excel Taiwan entered into an exclusive distribution contract for Taiwan. During a ceremony marking the event,

the parties signed duplicate originals, and each party kept an original. Tr. 2/8/01, at 158-59, 175-78; Tr. 2/2/01, at 32-34, 99-101, 105, 109; Exhibits 38 and 39. Under such agreement, Excel USA agreed it would supply Excel Taiwan, and no other Taiwanese persons or entities, with Excel USA products, and Excel Taiwan agreed it would purchase Excel USA products from Excel USA and would market exclusively Excel USA products. From its inception Excel Taiwan established and maintained a multi-level marketing network that sold exclusively Excel USA products. Tr. 2/2/01, at 36-37. Excel Taiwan was a Territorial Owner. Mr. Huan Hsin Le ("Mr. Le" or "Barry Le") became the president and executive director of Excel Taiwan. Tr. 2/2/01, at 32-33.

14. Dr. Chen placed a duplicate original of the Excel USA contract with Excel Taiwan in a filing cabinet at Excel USA's offices. Tr. 2/8/01, at 178. Ms. Stewart, who joined Excel USA from Sunrider after the execution of the Excel USA contract with Excel Taiwan, was aware and was delighted that Excel USA had been able to secure an exclusive contract with Excel Taiwan. Tr. 2/8/01, at 180.

15. The manner in which this contract was performed was Excel Taiwan would submit orders for products to Excel USA by faxing or e-mailing such orders to Ms. Stewart, Excel USA would confirm the orders, Excel USA would ship the products, Excel Taiwan would receive the products approximately 45 days after the confirmation, and Excel Taiwan would wire money into Excel USA's account to pay for the products within a week of having received the products. The

performance of this contract took place without exception or interruption for over ten years with Excel USA. After Excel Ltd. came into existence, Excel Taiwan was also invoiced by and paid Excel Ltd. for its services. Excel USA shipped product to Excel Taiwan uninterrupted from the inception of the relationship between Excel USA and Excel Taiwan until September 2000. Tr. 2/2/01, at 44-45, 107, 109; Tr. 2/8/01, at 178.

16. For 1999, 2000 and January through September 2001, Excel Taiwan's retail sales of Excel USA products were approximately US \$40 million respectively. Tr. 2/2/01, at 40-42, 125.

17. Excel USA began doing business with Extra Excel (Malaysia) Sdn. Bhd. ("Excel Malaysia"), another Territorial Owner, in or about November 1992. Excel Malaysia distributed Excel USA products in both Malaysia and Singapore. Hendrick Tjandra became the general manager and a director of Excel Malaysia. He was personally involved in preparing orders for Excel USA products in the years 1992 through 2000. Tr. 1/24/01, at 13-15, 110. On December 17, 1995, Excel USA formalized the then well-established course of dealing by entering into an exclusive distribution contract with Excel Malaysia for the countries of Malaysia and Singapore. The parties signed duplicate originals and each party kept an original. Tr. 1/24/01, at 17-18. Excel USA agreed it would supply Excel Malaysia, and no other Malaysian or Singaporean persons or entities, with Excel USA products, and Excel Malaysia agreed it would purchase Excel USA products from Excel USA, and would market exclusively Excel USA products. Dr. Chen signed the contract on behalf of Excel USA, and Mr. Tjandra signed it on behalf of Excel

Malaysia. Tr. 1/24/01, at 16-18, 147. From its inception Excel Malaysia established and maintained a multi-level marketing network that sold exclusively Excel USA products in Malaysia and Singapore. As of September 2000, Excel Malaysia had a staff of approximately 90 people, and approximately 50,000 active distributors. Tr. 1/24/01, at 13-18, 110, 147, 152; Exhibit 1; Tr. 2/8/01, at 158-59; Tr. 2/9/01, at 56-59. Ms. Stewart was aware of the existence of the parties' relationship. Tr. 2/8/01, at 158-89.

18. The manner in which this contract was performed was Excel Malaysia made four product orders per month from Excel USA--one each of health products for Malaysia and Singapore, and one each of skin/cosmetic products for Malaysia and Singapore. Tr. 1/24/01, at 23-24. Excel Malaysia had a policy of maintaining three months of inventory on hand and two months of pending orders, for a total of five months of inventory, in order to sustain its distribution of products through the multi-level marketing system. Tr. 1/24/01, at 27. With Excel USA's permission, Excel Malaysia maintained a consistent five-month grace period for payment that was directly tied to maintenance of the inventory. Excel Malaysia has always paid its accounts as required and agreed. Tr. 1/24/01, at 146-51. Prior to September 2000, Excel USA had never failed to fill an order that Excel Malaysia had placed. Tr. 1/24/01, at 24

19. In 1997, Excel Malaysia's annual sales were approximately US \$70 million, in 1998 Excel Malaysia's sales were approximately US \$45 million, in 1999 Excel Malaysia's sales were

approximately US \$45 million, and in 2000 Excel Malaysia's sales were approximately US \$47 million through October 31, 2000. Tr. 1/24/01, at 19-22.

20. From time to time as new products were developed and licensed, Excel USA was required to obtain the authorization of various countries to permit the new product to be imported. In connection with such products, Excel USA would sometimes execute a one-page document. These documents intended ~~for~~^{for} product registration purposes only were not intended to supersede the terms of the exclusive distribution agreement nor could they since such documents were signed only by Excel USA and not also by the Territorial Owners. *See e.g.*, Exhibits 71 and 72.

21. On October 4, 1999, in an Exclusive Rights Contract, Ms. Stewart, vice president of Excel USA, granted Extra Excel International (Philippines) ("Excel Philippines") "the exclusive right to distribute the products of [Excel USA] in the Philippines. The US Corporation agrees to sell the E. Excel products to the Philippines Corporation. . . ." By entering this agreement, Excel USA, and in particular Ms. Stewart as signatory on behalf of Excel USA, acknowledged and confirmed the existence of the exclusive contract and long-term course of dealing with Excel Philippines. Exhibit 71. This is further demonstrated by the fact that Ms. Stewart would later recruit Mr. Hu, the manager of Excel Philippines, with the expectation that he would use his knowledge of the Excel Philippines' distribution chain and Excel Philippines' good will to assist her in establishing a rogue distribution company.

22 On October 20, 1999, in an Exclusive Rights Contract, Dr Chen, president of Excel USA, granted Extra Excel International Ltd (Hong Kong) ("Excel Hong Kong") "the exclusive right to distribute the products of [Excel USA] in Hong Kong The US Corporation agrees to sell the E Excel products to the Hong Kong Corporation. . " By entering this agreement, Excel USA acknowledged and confirmed the exclusive contract and long-term course of dealing with Excel Hong Kong Exhibit 72. In light of her position and responsibilities at Excel USA, Ms Stewart was intimately familiar with and aware of this exclusive contract and course of dealing with Excel Hong Kong This is further demonstrated by the fact that Ms Stewart would later recruit Mr Tzu, the manager of Excel Philippines, with the expectation that he would use his knowledge of the Excel Hong Kong's distribution chain and Excel Hong Kong's good will to assist her in establishing a rogue distribution company This is further demonstrated by the fact that on January 18, 2001, Ms Stewart would purport to terminate the exclusive contract with Excel Hong Kong

23. The Chen and the Zhang families agreed to adhere to a Chinese custom This custom was to share profits from business enterprises among the families having involvement in the enterprise Members of the Zhang family had aided in the early and ongoing development of Excel USA In addition to the Chinese custom, members of the Chen family thought it wise from a business perspective to involve the Zhang family in order to provide Excel USA secure relationships for raw materials as well as to avert potential competition from Mr Zhang's family

E. Excel Limited ("Excel Ltd.") was incorporated in Hong Kong on May 5, 1994. This occurred at Ms. Stewart's instruction and under her direction. In acquiescing in the establishment of Excel Ltd., Dr. Chen relied upon Ms. Stewart's experience acquired during her employment with Sunrider. Ms. Stewart specifically represented to Dr. Chen that the establishment and operation of Excel Ltd. would not result in any of the tax or associated problems that their brother Tei-Fu Chen had encountered. Dr. Chen's reliance upon Ms. Stewart's assurances was reasonable particularly since Ms. Stewart had reported her brother Tei-Fu to U.S. authorities and had been paid a \$2 million "reward." Mr. Zhang's two sisters, Zhang Sheng-Mei and Zhang Mei-Feng, became Excel Ltd.'s shareholders. Mr. Zhang's sister, Zhang Sheng-Mei, had assisted in procuring raw material for Excel USA from Excel USA's inception; she had also helped formulate certain of Excel USA products. Excel Ltd. became responsible for procuring raw materials in China for Excel USA products, maintaining confidentiality of sources of raw materials, and arranging and paying for shipping those materials to Excel USA. Excel Ltd. became responsible for funding Excel USA's and the Territorial Owners' promotional activities, lessening their burden and enabling Excel USA and the Territorial Owners to expand their markets. Excel Ltd. incurred all the risks associated with opening new markets by subsidizing distributors in new territories until they became profitable. Excel Ltd. funded the development of Asian market software. Excel Ltd. funded what was known as the "International Team," a group of members from different countries who traveled in order to provide customer and computer support. Excel Ltd.

consulted with Excel USA concerning product formulations, including procuring the services of herbologists. From time to time, at Ms. Stewart's instruction Excel Ltd. would also loan money to Excel USA for the purpose of expanding its warehouse and manufacturing capacity. The Territorial Owners paid Excel Ltd. directly for its services. Tr. 1/24/01, at 54; Tr. 2/2/01, at 97, 124-25, 131-33; Tr. 2/9/01, at 14-29, 39, 109-111, 126-35, 139-41, 146; Exhibit 1, p. 3; Exhibit 85.

24. In the Chinese tradition, it was determined that to the extent Excel Ltd. was successful, profits were to be divided one-half to the Zhang's family and one-half to the Chen family. Further consistent with tradition, such profits were to be placed under the control of the elder family members, which in the case of the Zhang family was Zhang Sheng-Mei and Zhang Mei-Feng, and in the case of the Chen family, Ms. Stewart and Ms. Chen's mother Hwan Lan Chen. At Ms. Stewart's express direction, a significant share of the profits controlled by Hwan Lan Chen were deposited into the Hong Kong office account of Credit Suisse Bank in her name, with Ms. Stewart as power of attorney on the account. Dr. Chen, from time to time, was instructed to make such deposits either by Ms. Stewart or by their mother Hwan Lan Chen. Tr. 2/9/01, at 24-29, 39, 110-11.

25. At the direction of Ms. Stewart and with the knowledge of Dr. Chen, after Excel Ltd. commenced operation, Excel USA would invoice Excel Taiwan for products and Excel USA would invoice Excel Taiwan for equal amount on behalf of Excel Ltd. for the services it

provided. Excel Taiwan would pay the invoices to the respective companies, pursuant to instructions from Ms. Stewart. Tr. 2/2/01, at 42, 97, 124-25. With respect to Excel Malaysia and other Territorial Owners, Excel Ltd. would purchase the product from Excel USA and then sell the product to the Territorial Owners. Excel USA would issue two invoices, one from Excel USA to Excel Ltd., for the products, and one from Excel Ltd. to the Territorial Owners for the products and an approximately equal amount for Excel Ltd's services, again under the direction of Ms. Stewart. Ms. Stewart had signature stamps for various persons which she kept under her control at all times. Ms. Stewart used Mr. Zhang's signature stamp upon the invoices from Excel USA to Excel Ltd and used Zhang Mei-Feng's signature stamps upon Excel Ltd.'s invoices to the Territorial Owners. Tr. 2/8/01, at 64-69. Ms. Stewart gave instructions to Excel Taiwan and Excel Malaysia on how and where to make payments for Excel USA product and the consultation services provided by Excel Ltd. Tr. 2/2/01, at 131-33. Ms. Stewart specifically instructed Mr. Tjandra to pay the Excel Ltd. invoice directly to Excel Ltd., and provided him the bank information for payment to Excel Ltd. Both Messrs. Tjandra and Le respectively notified Ms. Stewart each time Excel Malaysia and Excel Taiwan paid an invoice to Excel Ltd. Tr. 2/9/01, at 40-51. The uncontroverted evidence is that Excel Ltd. paid Excel USA's invoices without exception throughout the course of dealing between Excel Ltd. and Excel USA. Tr. 1/24/01, at 54, 123 Tr. 2/9/01, at 36-37, 139-40; Exhibits 12, 13, 75.

EXCEL USA EMPLOYEES AND OTHERS UTILIZED BY MS. STEWART

26. Ms. Stewart hired Ms. Angela Ku Barclay ("Ms. Barclay") in 1994 as an employee of Excel USA. She began as an order clerk. After two or three months with the approval of Ms. Stewart, Ms Barclay was assigned responsibility over foreign shipments. Her new title was "Executive Secretary," and as such she was in charge of Excel USA's export department. Her responsibilities included receiving from Ms. Stewart the foreign orders that were sent to a fax machine located in Ms. Stewart's office, processing that information to the warehouse, determining from the warehouse when foreign shipments would be ready for pickup by the freight forwarding company, contacting the freight forwarding company, and instructing it to pick up the shipment on a date certain provided by the warehouse. Her responsibilities also included preparing the invoices for Excel USA to Excel Ltd. and for Excel Ltd. to the Territorial Owners, under Ms Stewart's direction Tr. 10/25/01, at 51-54, Tr. 10/26/01, at 59-62. After such invoices were prepared, Ms. Stewart would review the invoices and then utilize one of the stamps she kept in her possession to stamp them. Ms. Stewart would stamp the invoice from Excel USA to Excel Ltd. with Mr. Zhang's signature. She would stamp the invoice from Excel Ltd. to the territorial owners with Zhang Mei Feng's signature. Tr. 2/9/01, at 29-32 After orders came in from the distributors, it would normally take one to four weeks to prepare the product for shipment. Tr. 10/25/01, at 100, 103. Ms. Barclay's duties as Executive Secretary remained the same until she left Excel USA in 1999. Tr. 2/9/01, at 29-32.

27. Beverly Warner ("Ms. Warner") went to work for Excel USA on March 20, 1995. At Ms. Stewart's invitation, she became the office manager shortly thereafter. Ms. Stewart was her supervisor from her date of hire until at least February 21, 2001. She reported to Ms. Stewart until at least February 21, 2001. At no time during her six or so years with Excel USA did Ms. Warner ever have a business-type communication with Hwan Lan Chen, Dr. Chen's and Ms. Stewart's mother. Tr. 12/11/01, at 62-63.

28. Ms. Stewart and Ms. Warner have a close personal and professional relationship. Ms. Warner was a subordinate of Ms. Stewart. Ms. Warner did Ms. Stewart's bidding. Tr. 3/13/02, at 80. When Ms. Stewart was not at the office as acting president of Excel USA, Ms. Warner was in charge. She was the office manager. Ms. Warner did not come up with substantive ideas on her own. Any ideas of substance came from Ms. Stewart and were implemented by her through Ms. Warner and others. Tr. 3/13/02, at 78-86; Tr. 12/12/01, at 18-22. Ms. Warner was the authorized and designated person to approach with questions when Ms. Stewart was unavailable. If a question came up that exceeded Ms. Warner's official job duties, she would contact Ms. Stewart to find out what to do. Between the period 1997 until entry of the Interim Order on February 21, 2001, discussed below, Ms. Warner never authorized any action that exceeded her official job duties without first contacting Ms. Stewart and receiving authorization. Tr. 3/13/02, at 78-80; Tr. 12/12/01, at 18-22.

29. On July 31, 2000, Dale Stewart became assistant plant manager at Excel USA. His duties were to oversee production and make certain the production equipment was maintained and properly running. During the period of his employment his direct supervisor was Paul Cooper, but he would report to Ms. Stewart when Mr. Cooper was unavailable. He never met Dr. Chen. Tr. 12/10/01, at 93.

30. During August 1997, Dr. Kim L. O'Neill ("Dr. O'Neill"), a professor in the Department of Microbiology at Brigham Young University, began his affiliation with Excel USA as a scientific consultant. He was paid \$928 twice-monthly. In addition, Excel Laboratories, Inc., through a contract with Brigham Young University, agreed to provide funding to BYU for TK1 research, in exchange for the "exclusive option to obtain an exclusive license for the use of BYU's monoclonal antibodies and Thymidine Kinase Isoenzyme Assay technology which includes all uses of the monoclonal antibody with radioactive assays, and the thymidine kinase monoclonal antibody assays . . . to be developed under this agreement within the following countries:

The People's Republic of China ("China")
Republic of China ("Taiwan")
Malaysia
Indonesia
Korea
Japan
Philippines
Singapore"

Excel Laboratories, Inc., paid \$200,000 for the option. Dr. O'Neill's laboratory received approximately \$104,000 of those funds. Over the next several years, until his resignation on

February 26, 2001, Dr. O'Neill consulted with Excel USA in connection with a number of scientific issues, conducted research on certain ingredients that went into Excel USA's products, contributed to articles for Excel USA's publication, *Excellent Word*, and gave lectures and made presentations on behalf of Excel USA to various distributors who traveled to Provo, Utah. Tr. 3/18/02, at 120-30; Exhibits 546 and 547.

31. Over the course of several years, Dr. O'Neill allowed Excel USA to take still photographs and video footage of his laboratory at BYU for Excel USA's promotional purposes. Dr. O'Neill also posed for Excel USA promotional photographs. Excel USA promoted Dr. O'Neill as an Excel USA scientific consultant, prominently featuring numerous photographs of him and descriptions of his contributions in Excel USA publications. Tr. 3/18/02, at 130-31; Exhibit 547.

32. During November 2000, Dr. Byron Murray, a professor at BYU, began scientific consulting with Excel USA as Associate Research Director with Dr. O'Neill. He received approximately \$1,800 per month for his services. Tr. 3/18/02, at 93-95.

EXCEL USA PROCEDURES; RELATED COMPANIES

33. In 1998 or 1999, Excel USA implemented a policy that required all employees of the company to sign a contract that contained non-competition and confidentiality clauses. Every employee of Excel USA, with the exceptions of Dr. Chen, Mr. Zhang, Ms. Stewart and Taig Stewart, signed the contracts as a condition of ongoing employment. After the policy was

implemented, every new hire was required to and did sign such a contract Tr 12/11/01, at 63-64, 151-52, 5/10/02, at 95-98, Exhibit 405

34 Early in 2000, Ms Stewart instructed Ms Warner to arrange for a surveillance camera system to be installed throughout Excel USA's facilities Ms Warner's husband was instrumental in that installation The 42 security cameras are located throughout the Excel USA facility, with the exception of the bathrooms, private offices, and kitchen areas The monitoring equipment was placed in a room in the northwest corner of the office area Ms Warner was responsible for operation of the camera surveillance system As of February 2001, the only people with keys to the room where the monitoring equipment was located were Taig Stewart and Beverly Warner Tr 12/11/01, at 160-62, 183, Tr 2/21/02, at 110-113, 244-45

35 On November 6, 1998, Dunnkirk, Inc , was incorporated as an Excel USA affiliate to do Excel USA work in Canada It was owned by Excel USA, and operated as Excel USA's Canadian distributor Its corporate headquarters were located at the same address as Excel USA's address, 1198 North Spring Creek Place, Springville, Utah 84663 Ms Stewart asked Taig Stewart, her husband, to serve as its president, sole director and sole shareholder, and he agreed At Ms Stewart's instruction, Taig Stewart signed a corporate resolution authorizing Dunnkirk to obtain an extra-provincial license in Canada Although he agreed Ms Stewart could use his identity in connection with Dunnkirk, Inc , Taig Stewart had nothing to do with its operation, other than to sign documents that his wife or others at his wife's instruction would

place in front of him for signature. He did not study the documents that were placed in front of him. Exhibit 511, Tr 3/13/02 at 49-62

36 Ms Stewart established Shannon River, Inc, on June 27, 2000. Ms Stewart recruited Shannon Heaton, her husband's sister, to execute the necessary corporate documents and to serve as its sole owner, director and officer. Shannon River, Inc's purpose, according to Ms Stewart, was to serve as an import company that would replace Malcolm, Inc, the company Excel USA had historically used to import certain raw materials for use as ingredients in Excel USA's products. Malcolm, Inc, was owned and operated by members of Dr Chen's husband's family. Shannon River's corporate office was listed at 190 West 800 North, Suite 100, Provo, Utah 84604 (Mr Gilbert's offices), but Ms Stewart used her home address, 1966 South Laguna Vista Drive, Orem, Utah, as the location of Shannon River, Inc, because she maintained that she wanted to keep the identities of Excel USA and Shannon River, Inc, separate and so it would appear as though Excel USA and Shannon River, Inc, were unrelated. Tr 10/26/01, at 51, 11/27/01, at 50-55 144-145. Shannon River, Inc's bank account was at Central Bank, and Ms Stewart received Shannon River, Inc's bank statements at her home address. She obtained a signature stamp of Shannon Heaton's signature in order to be able to authorize the movement of funds in connection with Shannon River, Inc, and Ms Stewart was responsible for the movement of hundreds of thousands of dollars to and from Shannon River, Inc, utilizing the Shannon

Heaton signature stamp. Tr. 11/27/01, at 144-151, 156; Tr. 11/28/01, at 8, 12-14; Exhibits 401, 407, 409, 411, 501.

MS. STEWART'S EFFORTS TO EXCLUDE DR. CHEN AND TO DISRUPT THE BUSINESS OF EXCEL USA.

37. Dr. Chen enjoyed a good relationship with her mother and Ms. Stewart, until the spring of 2000, when the relationship began to change as a result of some private family matters between Dr. Chen and Mr. Zhang. Ms. Stewart and her mother Hwan Lan Chen demanded that Dr. Chen divorce Mr. Zhang. Ms. Stewart, another sister, and their mother acting in concert took extreme measures to attempt to force Dr. Chen to divorce Mr. Zhang. Among the measures employed, they would awaken Dr. Chen during her sleep, physically shake her, and accuse her of disloyalty to the Chen family. Dr. Chen's mother, Hwan Lan Chen, insisted that Dr. Chen grant custody of her children to someone else. Both Hwan Lan Chen and Ms. Stewart told Dr. Chen she should kill herself, and that she was of the devil. As time went on, Ms. Stewart monitored telephone conversations between Dr. Chen and Mr. Zhang, without Dr. Chen's or Mr. Zhang's permission. Therefore, Ms. Stewart and her mother demanded that Dr. Chen terminate her relationship with Excel USA and cut all ties with Territorial Owners. They demanded that Dr. Chen allow no contact between her three children and Mr. Zhang. They threatened Dr. Chen that if she did not do as demanded, they would cause Dr. Chen to be put in jail. Ms. Stewart had earlier reported her brother, Tei-Fu Chen, to the Internal Revenue Service and to U.S. Customs agents. Tei-Fu Chen was subsequently incarcerated, and Ms. Stewart received compensation

from the I.R.S. in the amount of \$2 million. Ms. Stewart threatened Dr. Chen by saying, "if I can put Tei-Fu in jail, I can put you in jail." Tr. 2/9/01, at 6-13, 73-75; Tr. 2/13/01 (a.m.), at 17-18; Tr. 3/13/02, at 86-88.

38. Dr. Chen eventually determined to reconcile with her husband rather than follow the demands of her mother and sisters. Tr 2/9/01, at 12.

39. In part at least to punish Dr. Chen for not meeting the demands made to terminate her marriage and cease being involved in Excel USA, beginning in September 2000, Ms. Stewart embarked upon a scheme to eliminate Dr. Chen as the charismatic leader of Excel USA, and to unilaterally terminate the contractual relationships and courses of dealing with Territorial Owners who were loyal to Dr. Chen. Ms. Stewart's scheme arose out of a family dispute over Dr. Chen's ongoing relationship with Mr. Zhang and as a way to find favor with her mother. Purportedly, as a condition to receive Excel USA products, Ms. Stewart sought to require the Territorial Owners to sign "new" contracts. Exhibit 53. Ms. Stewart's conditions for ongoing and future business relationships with Excel USA included a requirement that the Territorial Owners renounce any business relationship with Dr. Chen, never again identify Dr. Chen with Excel USA or its products, and never again use Dr. Chen to promote sales, Excel USA products or nutritional immunology. Exhibits 45, 53. For those who would not accede to Ms. Stewart's conditions, Ms. Stewart determined to replace them with new distributors. Ms. Stewart's purported new conditions for an ongoing business relationship with Excel USA were a ruse: as revealed by

correspondence prepared by her attorney Anthony I. Bentley, Jr., of Kirton & McConkie, dated November 28, 2000, Ms. Stewart never intended to give Excel Malaysia and Excel Taiwan an opportunity to comply with her new conditions and enter these “new” (Exhibit 53) distributorship agreements. Exhibit 571. Rather, Ms. Stewart’s intent was altogether to unilaterally and permanently terminate the contracts, and sever those business relationships and long-term courses of dealing Tr. 2/1/01, at 82-83; Tr. 2/2/01, at 61-63, 69-70, 111, 131, ; Tr. 10/26/10, at 20-34, 37-41; Exhibits 5, 10, 45, 53.

40. On September 1, 2000, while Dr. Chen and her husband were out of the country, Ms. Stewart claiming to exercise control over the shares of her nieces and nephew (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. She also purported to appoint her husband and her mother as new directors. Exhibit 22. Ms. Stewart took such action even though the shares of the children were in their respective names and not in her name in any representative capacity.

41. On September 1, 2000, the new slate of directors, through “Action by Written Consent,” purported to remove Dr. Chen as president and her husband Taig Stewart as secretary, and replace them with Ms. Stewart as president and Ms. Stewart’s husband as secretary. Exhibit 23; Tr. 3/13/02, at 6.

42. Ms. Stewart's assumed non-delegable responsibilities and duties as president included:

The President shall have active executive management of the operations of the Corporation, subject, however, to the control of the Board of Directors, and limited in scope to the purpose of the Corporation as defined in the Articles of Incorporation. [Sh]e shall preside at all meetings of shareholders and Directors, discharge all the duties that devolve upon a presiding officer, and perform such other duties as the Bylaws provide or the Board of Directors may prescribe. The President shall have full authority to execute powers of attorney appointing other corporations, partnerships or individuals the agent of the corporation.

Exhibit 37.

43. The Articles of Incorporation, referenced in the above-quoted language as circumscribing the scope of the executive power, provide as the "Corporate Purposes":

1. To export from and import to the United States, and its territories and possessions, and any and all foreign countries, as principal or agent, merchandise of every kind and nature, and to purchase, sell, and deal in and with merchandise of every kind or nature for exportation from and importation into, the United States, to and from all countries foreign thereto, and for exportation from, and importation into, any foreign country, to and from any other country foreign thereto, and to purchase and sell domestic merchandise in domestic [sic] markets and foreign merchandise in foreign markets, and to do a general foreign and domestic exporting and importing business and undertake and engage in all matters related or ancillary thereto.
2. To do all things and engage in all lawful transactions which a corporation under the laws of the State of Utah might do or engage in, including acting as a partner in a general or limited partnership, even though not expressly stated therein.
3. To undertake, contract for, or carry on any business incidental to or in aid of, or convenient or advantageous in pursuance of, any of the objects of purposes of the Corporation.

4. The objects and purposes specified in the foregoing clauses shall, except where otherwise expressed, be in nowise limited or restricted by reference to, or inference from, the terms of any other clause herein contained, but the objects and purposes specified in each of the foregoing clauses of this Article shall be regarded as independent objects and purposes.

Exhibit 18.

44. From September 1, 2000, until she was removed pursuant to the stipulated Order of February 21, 2001, Ms. Stewart was in charge of all operations of Excel USA. All actions of the company were at Ms. Stewart's direction with her in charge, including responsibility for all financial aspects of the company, invoicing, collecting payment for shipped product, handling and processing orders, and shipping product. Acting as president from September 1, 2000, until she was removed on February 21, 2001, the "buck stopped with" Ms. Stewart. Tr. 2/8/01, at 63-64, 124; Tr. 10/25/01, at 104; Tr. 10/26/01, at 5-9; Tr. 3/13/02, at 10-12.

45. Taig Stewart, the art director for Excel USA and a subordinate of Ms. Stewart, was, in name only, a director of Excel USA and its secretary, but assumed none of the responsibilities associated with those positions, except as specifically instructed by his wife, Ms. Stewart. He was sometimes handed documents by Ms. Stewart, Ms. Warner or Ms. Spencer to sign, but he understood and knew that they were being directed for his signature by Ms. Stewart. He simply continued to do his job as art director. He acknowledged that he had no idea as to what were his responsibilities as a director or secretary, and he took no steps to attempt to investigate or learn

what his duties were Tr 2/1/01, at 13-21, , Tr 10/26/01, at 73-74, Tr 3/13/02, at 7, 10-12, 73-84; Exhibit 206

46 Even though Ms. Stewart purported to terminate Dr Chen's husband on September 1, 2000, she continued to use his signature stamp for a period of time for financial transactions Tr 2/8/01, at 64-69, Exhibit 228, ¶ 70

47 On September 1, 2000, without authorization from Excel USA's board of directors and without official board action, Ms Stewart caused a \$425,000 transfer from Excel USA's money market account to her and Taig Stewart's personal checking account Tr 3/13/02, at 71, 137-38, Exhibit 415 On September 28, 2000, without authorization from Excel USA's board of directors and without official board action, Ms Stewart caused a \$1,500,000 transfer from Excel USA's money market account to the personal checking account of Ms Stewart and her husband Taig Stewart Tr 3/13/02, at 65-67, 136-38, Exhibit 414 There is no evidence in the record to legitimize these conflicted interest transactions.

48 Shortly after Ms Stewart wrested control of Excel USA on September 1, 2000, Ms. Barclay recommenced her employment with Excel USA. Upon Ms. Barclay's return, her title was "Executive Assistant " She was once again placed in charge of the export department, with duties identical to those she had had as Executive Secretary from 1994 to 1999 Tr 10/25/10, at 54-56 The fax machine to which foreign orders were sent continued to be located in Ms. Stewart's office Ms Stewart would give Ms Barclay the foreign orders she had received by fax, and Ms

Barclay would make the arrangements with the warehouse and the freight forwarder for the orders to be filled. After the orders came in, it typically took one to four weeks to prepare the product for shipment. Tr 10/25/01, at 56-57; 100, 103, Tr 10/26/01, at 59-62, Tr 11/27/01, at 41-43

49 During the Fall of 2000, unbeknownst to Messrs Tjandra and Le and pursuant to her scheme, Ms Stewart instructed Ms Barclay and others not to ship product to the Territorial Owners in Malaysia and Taiwan. Tr 10/25/01, at 87-89. In accordance with such instructions, during the time Ms Barclay was employed at Excel USA from approximately September 2000 to approximately March 2001, she complied with Ms Stewart's instructions and caused no confirmed orders to be filled and no product shipments to be sent to the Territorial Owners in Taiwan or Malaysia. In furtherance of Ms Stewart's instructions, during the Fall of 2000, at Ms Stewart's specific direction, Ms Barclay caused a shipment that had arrived in port in Malaysia to be returned to Excel USA. Due to the delay between the time an order is placed, the order is confirmed, the order is filled, the order is shipped, and the order is received in Taiwan or Malaysia, Messrs Tjandra and Le had no knowledge that Ms Stewart was refusing to ship them product until late in the Fall 2000. Tr 10/25/01, at 121-23, Tr 10/26/01, at 20-34, 37-41, Tr 11/27/01, at 41-44, Tr 12/10/01, at 154-56

50 Excel USA maintained control of its product shipments until they were accepted at port by the party to which the product was shipped. This was exemplified, for example, by a

shipment to Excel Malaysia that Excel USA, under Ms Stewart's direction, had recalled during the Fall of 2000 as part of Ms Stewart's overall scheme to unilaterally terminate the long-term relationship with that Territorial Owner Tr 10/25/01, at 122-23, Tr 10/26/01, at 13, 57

51. During September 2000, in accordance with its historical performance, Excel Malaysia submitted four orders for Excel USA product via fax, and Ms Stewart confirmed receipt of those orders. The September orders were in the amount of US \$1.45 million. Excel USA did not fill the confirmed orders Tr 1/24/01, at 24-25, 56-57, 61-64, Exhibit 3. During October 2000, in accordance with its historical performance, Excel Malaysia submitted four orders for Excel USA product via fax, and Ms Stewart confirmed receipt of those orders. The October orders were in the amount of US \$1.55 million. Excel USA did not fill the orders Tr 1/24/01, at 24-25, 57-58, 64, Exhibit 4. During November 2000, in accordance with its historical performance, Excel Malaysia submitted four orders for Excel USA product via fax. Excel Malaysia received no confirmation from Excel USA or Ms Stewart. The amount of the November orders was US \$1.8 million. Excel USA did not fill these orders Tr 1/24/01, at 26, 64

52. As of January 1, 2001, Excel Malaysia had 12 outstanding orders for Excel USA product that Ms Stewart and Excel USA had failed to fill Tr 1/24/01, at 24, Exhibits 3 and 4. By January 15, 2001, Excel Malaysia's five-months of inventory of Excel USA products was

essentially depleted, and it had received orders and payments for product from down-line distributors that Excel Malaysia could not fill. Tr 1/24/01, at 32-36, Exhibit 2

53 On October 13, 2000, Excel Taiwan, in accordance with its historical performance, submitted five product orders to Ms Stewart of Excel USA via fax. The cover page provided. "Concerning this payment, as soon as we receive Packing List we wire out. Please kindly acknowledge recei[pt] and arrange this shipment as usual. Thank you." The total amount of the five orders was US \$441,440.86. Excel USA confirmed receipt of the orders. Excel USA did not fill these orders. Tr 2/2/01, at 54-55, 58-60, Exhibit 41. On November 16, 2000, Excel Taiwan, in accordance with its historical performance, submitted five product orders to Ms Stewart of Excel USA via fax. The total amount of the five orders was US \$460,895.61. Excel USA confirmed receipt of the orders. Excel USA did not fill these orders. Mr. Le knew of no business reason why Excel USA did not fill the orders. Tr 2/2/01, at 54-55, 58-61, Exhibit 42. On January 2, 2001, Excel Taiwan, in accordance with its historical performance, submitted four product orders to Ms Stewart. The total amount of the five orders was US \$79,940.20. Excel USA confirmed receipt of the orders, and represented that the shipment would consist of 18 pallets of product. Excel USA did not fill these orders. Tr 2/2/01, at 54-55, 58-61; Exhibit 44, 48.

54 There was no shortage of product to fill the confirmed orders Excel USA had received from Excel Malaysia and Excel Taiwan. The products Ms Stewart would soon cause to

be shipped to Messrs. Hu and Tzu were the same products and types of products that Messrs. Le and Tjandra had historically ordered. Tr. 2/8/01, at 158; Tr. 10/26/01, at 21-22.

55. Messrs. Tjandra, Le, Hu and Tzu traveled to Provo, Utah in order to attend meetings with Ms. Stewart at the Marriott Hotel. The meetings took place on October 18-19, 2001. Hwan Lan Chen attended some of the meetings. During the meetings, Ms. Stewart initially represented that Dr. Chen had decided to leave Excel USA in order to concentrate on other matters. Tr. 1/24/01, at 40-41. Messrs. Tjandra and Le did not believe Ms. Stewart's representation, and asked to meet with Dr. Chen as soon as possible. Thereafter, Ms. Stewart and Hwan Lan Chen made a number of derogatory remarks about Dr. Chen and her husband, and stated that Dr. Chen would have to divorce Mr. Zhang, and would have to resign as president of Excel USA. Ms. Stewart said that if she could build up or "create" Dr. Chen, she could also destroy her, that Dr. Chen's success was the result of Ms. Stewart's efforts and that Excel USA and the distributors could do better without Dr. Chen. Tr. 1/24/01, at 42-43; Tr. 2/2/01, at 80-81. Ms. Stewart asserted that Dr. Chen had become "too proud," was extravagant in her travel arrangements, and needed to be taught a lesson. Ms. Stewart said she could "create another Jau Fei." Ms. Stewart insisted that the Territorial Owners sever business and proprietary ties with Dr. Chen, and not permit her to attend any Excel-related activities in Asia. Ms. Stewart also said that if Dr. Chen were permitted to remain in Excel USA, that would be a source of income for Mr. Zhang. Tr. 1/24/01, at 45-46, 49-53; Tr. 2/2/01, at 78-82, 111, 120.

56. Messrs. Le and Tjandra believed Dr. Chen's continuing involvement as Excel USA's charismatic founder and leader, and as the person whom consumers identified with the nutritional immunology concept represented by Excel USA products, was essential to the success of their companies. Whereas Excel Malaysia and Excel Taiwan had contracts in place and lengthy, consistent and uninterrupted courses of dealing and performance with Excel USA, they declined to terminate the contracts or execute new ones. Messrs. Tjandra and Le expressed their view that this was a family matter and should not become a business matter. They disagreed with Ms. Stewart's assessment of their ability to succeed without Dr. Chen's central involvement as the charismatic founder of and spokesperson for Excel USA. Mr. Tjandra explained that most of the distributors in Malaysia had joined because of the confidence they had in Dr. Chen, and that no individual or team of doctors or scientists could replace her. Distributors and consumers trusted Excel USA's products because of Dr. Chen's leadership and supervision. Messrs Tjandra and Le explained how hard Dr. Chen worked to promote Excel USA's concept and products in the respective countries, and that conventions, seminars and training sessions involving Dr. Chen were scheduled through the end of the year. Tr. 1/24/01, at 43-45, 47-52, 66-67; Tr. 2/2/01, at 82-83.

57. A consequence of Ms. Stewart's decision to not ship Excel USA product to Territorial Owners was that down-line distributors in the multi-level marketing chain, in order to survive financially, would of necessity defect to the new distribution companies Ms. Stewart

would establish because that was the only place Excel USA product would be available to them. Ms. Stewart expected that Messrs. Hu and Tzu, in establishing the new multi-level distribution companies under Ms. Stewart's direction, would use their extensive knowledge of the multi-level distribution chains they had gained as managers of Territorial Owners in the Philippines and Hong Kong, respectively. Tr. 10/26/01, at 20-34, 37-41; Tr. 11/28/01, at 35; Exhibit 228, at 6, 22.

58. Ms. Stewart attempted to effect the result she sought working through others as much as possible. Ms. Stewart's common practice was to work through others or nominees in order to prevent an act's discovery or attribute the act to some person or entity unrelated to her. Ms. Stewart's practice was to utilize the identities of others to carry out many of her transactions and much of her activity. An important example of this practice is found in the manner she sought to conceal her direct role in providing funds to establish the new distribution network through Messrs. Hu and Tzu. Ms. Stewart was instrumental in establishing two bank accounts, one in her Taiwanese aunt's name (Ching-Chun Lu Huang) and one in her Taiwanese uncle's name (Jui Ching Lu) at Central Bank in Provo, Utah, she then arranged for substantial sums of monies to be placed into those accounts (\$8 million or more was placed in the accounts). She then caused substantial amounts to be wired to Messrs. Hu and Tzu in establishing the new distribution companies. For this purpose, Ms. Stewart caused at least the following wire transactions to occur:

a On November 30, 2000, Ms. Stewart caused \$100,000 to be wired out of her uncle's account to Mr. Tzu. Exhibit 274 (Exhibit B, thereto);

b On December 12, 2000, she caused \$1,200,000 to be wired out of her uncle's account to Mr. Tzu. Exhibit 274 (Ex. B. thereto);

c On December 19, 2000, she caused \$400,000 to be wired out of her aunt's account to Mr. Hu. Exhibit 274 (Ex. C, thereto);

d. On December 19, 2000, she caused \$1,000,000 to be wired out of her aunt's account to Mr. Tzu. Exhibit 274 (Ex. C, thereto).

Ms. Stewart was listed on the wire instructions as the "contact person." Tr. 2/9/01, at 51-53; Tr. 11/27/01, at 21-25, 30-33; Tr. 11/28/01, at 38-39; Exhibit 274A.

59 In this regard, Ms. Stewart falsely testified about material matters on February 8, 2001, during the first Preliminary Injunction proceeding, as follows:

Q Have you either through Excel International or otherwise supplied money or caused money to be supplied to Richard Hu or through Richard Hu for the purpose of establishing a sales network in the Philippines?

A I don't believe that I have.

Q. I don't believe that--you said, "I don't believe I have"?

A. I don't recall--

Q. Do you know if--

A. --that I have.

- Q. You don't recall that?
- A. No.
- Q. Do you know if Richard Hu has received money through association with your family for the purpose of setting up a sales distribution network in the Philippines?
- A. I don't know. . . .
- Q. Okay. Now could you tell me where your aunt has wired money from this account?
- A. Where my aunt has--
- Q. Yes. You mentioned that these wires came to you. You're responsible to see that Michelle does what is requested. Where has your aunt wired money?
- A. I don't keep record of that.
- Q. You can't remember anything about where money has been wired from your aunt's account?
- A. They might have wired some back to their son--um--I don't usually turn around and send the fax, so I really do not--I really do not pay attention to their wires. . . .
- Q. . . . Have you knowledge of any money being wired from Central Bank from your aunt's account for the benefit of Richard Hu or through Richard Hu?
- A. We might have. I am not sure.
- Q. And if you might have, when might that have been?
- A. I do not know. I don't recall.
- Q. Would it have been since September first of last year?
- A. Yes. It would have been after.

Q. And could you tell me what you know about the purpose for wiring money from your aunt's account to Richard Hu?

A. I do not know. . . .

Q. Have you told me about all of the wires, transfers of money from your aunt's account that you can remember knowing about?

A. At this time, yes.

Q. Let's talk about your uncle's account. Have you had any involvement with funds being transferred from your uncle's account?

A. In the same matter as my aunt's account.

Q. And could you tell me where money has been wired from your uncle's account?

A. I don't recall.

Q. And do you recall whether any money was wired to Richard Hu from your uncle's account?

A. I don't remember. . . .

Q. Do you know for what purpose the money in the [aunt's and uncle's] accounts has been used since it has been placed in the account or the accounts?

A. I do not know. I do not know exactly.

Tr. 2/8/01, at 108-20, 145.

60. Contrary to the foregoing testimony on February 8, 2001, on August 1, 2001, Ms.

Stewart signed her 4th Affirmation that was filed in the Hong Kong action, HCA 2493/2001

(Exhibit 228). Ms. Stewart stated:

34. (7) It was [December 23, 2000] that I realized that the Corporation effectively had no control over or interest in any of the Distributors of its products. As such, I decided that the Corporation should have its own distribution channels so as to ensure that its network of distributors would be loyal to the interests of the Corporation I therefore established on behalf of the Corporation new Hong Kong and Philippines distributors ("New Distributors"). As mentioned . . . above, the Corporation is the 80% shareholder of the New Distributor in Hong Kong.

61. On October 26, 2001, Ms. Stewart gave further evidence of the falsity of her testimony on February 8, 2001:

- Q. Okay. Now, I want to talk a little bit about those two companies that you instructed them to set up. It's true isn't it that you or your mother provided Mr. Hu a substantial amount of money to set up the new company in the Philippines?
- a. We helped them to set up the company, the distributing channel for E Excel products, yes.
- Q. And, overall, you or your mother have supplied that company over a million dollars?
- a. I can't remember the exact amount, but--
- Q. It's a lot of money?
- a. Yes.
- Q. . . . It's a substantial amount of money?
- a. Yes.
- Q. It's a big investment in those companies?
- a. Yes.

Q. The same with the company that Mr Tzu was setting up in Hong Kong; you or your mother provided Mr Tzu a substantial amount of money to set up that company?

Q Yes

Q. Maybe not as much as you supplied Mr Hu, correct?

A. I don't remember I think if I remember correctly, I think we supply Mr Tzu more than Mr Hu I don't believe we supply more than a million dollars to Mr Hu

Q And you may have supplied more than a million dollars to Mr Tzu?

A My mother has helped both of them, but I do not remember the exact amount

Tr 10/26/01, at 79-80, 120, 122

62 Ms Stewart recruited Messrs Hu and Tzu through whom to develop new Excel USA product distribution companies in the Philippines, Hong Kong, and elsewhere Messrs Hu and Tzu had been managers of the historical Owners in the Philippines and Hong Kong respectively, which is how Ms Stewart knew them and was able to recruit them Messrs Hu and Tzu had no ownership interest in either Territorial Owner In September 2000, Ms Stewart first discussed with Mr Hu his establishing a new distribution company in the Philippines Tr 11/28/01, at 41-43 Shortly thereafter, Ms Stewart discussed with Mr Tzu his establishing a new distribution company in Hong Kong Tr 11/28/01, 35, 38-39 Ms Stewart caused substantial sums of money to be advanced through her aunt's and uncle's Central Bank accounts, and later caused product to be shipped at no cost for the purpose of establishing new companies and to

undermine the sales and of the good will Territorial Owners. Exhibit 274; Tr. 10/26/10, at 17, 20-34, 37-41, 58-59, 79-81; Tr. 11/28/01, 35-42.

63. Ms. Stewart admitted working with Mr. Hu to establish a distributorship network in the Philippines and with Mr. Tzu to establish a distributorship network in Hong Kong, even though she acknowledges there were *existing* distribution networks in the Philippines and Hong Kong. She explained her reasoning:

Q. Okay. Now we've heard some testimony today about Richard Hu. Who is Mr. Richard Hu?

A. Richard Hu was the formally [sic] E. Excel (Philippines) manager that I have worked with for quite some time.

Q. Do you have some relation, business relationship with him today?

A. Yes.

Q. What is that?

A. I was hoping that he would help me to distribute E. Excel (USA) products in Philippines.

Q. Why would you go through him?

A. Because he's loyal to E. Excel (USA). He promised that he would not sell other products than E. Excel (USA)'s products. . . .

Q. All right. Now who is Sam Tzu?

A. Sam Tzu was the former E. Excel (Hong Kong) manager.

Q. Do you have any business relationship with him?

A. Yes.

Q. What is that?

A. I ask him to set up an entity in Hong Kong for me to distribute E. Excel (USA) products in Hong Kong. . . .

Q. Have you entered into any agreement with him as of this time?

A. Yes, I have.

Q. And why have you decided to use Sam Tzu for distribution in Hong Kong?

A. Sam Tzu has the same kind of loyalty, and he promised me that he would never sell any other products except E. Excel (USA) products, which is the products that he has been selling before.

Q. On behalf of the company, do you--is there a concern that you have about distributors selling products other than E. Excel (USA) products?

A. Definitely. Because I--I don't--I want our products to be sold to someone that could only sell--that is willing to only sell E. Excel products because I want to make E. Excel Products to be unique. I do not want to have E. Excel products to be mixing with some other. In other words, I will not want a person to sell E. Excel (USA) products and also sell some other Nu Skin products, I mean for example. So, it's important to me, E. Excel (USA), that we find distributors or general managers that are very loyal to the company and would not breach those kind of agreement.

Tr. 2/8/01, at 106, 118, 146-48.

64. Complete confirmation of Ms. Stewart's decision to undermine the historical Territorial Owners and to utilize previous Excel USA employees or associates to create an independent distribution network is provided by the following. In a letter prepared by Ms.

Stewart's and Excel USA's attorney, Anthony I Bentley, Jr., of the law firm Kirton & McConkie, dated November 28, 2000, Mr. Bentley represented the following:

2. Mr. Tzu Shih-Shih and Mr. Jason Tzu: These two individuals, employees but not owners of the Hong Kong distributor, have been the source of much of our information about the subversive activities of the dissident officers. E. Excell's [sic] management believes they are loyal to the Company and plans to involve them in some capacity with the Company's new distributor in Hong Kong after the new company is formed. The client has no objection to your dealing with them because *the existing distributor will not be given the opportunity to enter into the new distributorship agreement you are reviewing. The company that is now the distributor will not be used in the future because it is controlled by the dissident officers.*

Exhibit 571 (emphasis supplied).

65. Mr. Bentley also revealed arrangements that Ms. Stewart, through counsel, was making to publicize in a number of newspapers the removal of Dr. Chen and Mr. Zhang as officers and directors of Excel USA, and Ms. Stewart's purported emergence as president of Excel USA. The announcement was published in newspapers in Hong Kong, Shanghai, Shanyang, Beijing, and several papers in The Philippines. Exhibits 571 and 574.

66. In a fax transmission that went out on December 20, 2000, Ms. Stewart announced to distributors:

In order to preserve the Company's success and excellent public image, I would like to take this opportunity to inform you that Jau Fei Chen and Rui Kang Zhang have been removed as directors and officers of E. Excel, and their employment with the Corporation has been terminated. Some specific reasons for their termination are as follows:

1) In June of this year, a lawsuit was filed against Mr. Zhang in Los Angeles (Los Angeles Superior Court, East District, Case No. KC033345). Although Mr. Zhang has been married to Jau Fei Chen for 13 years, this lawsuit alleges that Mr. Zhang promised to

marry another woman (Ms. Yao, the plaintiff in the case), and provide her a home, automobile and financial support for the rest of her life. No matter the result of this lawsuit, these allegations of Mr. Zhang's improper behavior may result in tremendous damage to E. Excel's public image and therefore a reduction in the economic benefits enjoyed by the Company's distributors

2) There exist differences in business philosophy and management between Mr. Zhang and Jau Fei Chen on the one hand, and E. Excel on the other. These differences were threatening to interfere with E. Excel's goal of providing the highest quality products and best business opportunity to its distributors.

The departure of Jau Fei Chen and Mr. Zhang will not affect Company operations in any way. We will continue to expand our manufacturing facilities and market new products, and our investment in new state of the art equipment will ensure the continued production of the highest quality skincare, cosmetic and herbal products that you have come to depend upon. Please rest assured that the benefits and well being of our distributors will always be our most important priority.

Exhibit 575 (emphasis supplied).

67. Ms. Stewart's use of nominees was part of all of her business dealings. This is illustrated by the use of Mr. Hu, Paris Uy, to front the new distribution company in the Philippines and serve as its nominal owner on behalf of its beneficial owner, Mr. Hu. Mr. Hu would "loan" money he had received from Ms. Stewart via her aunt's and uncle's accounts to a "friend" for an "unknown" purpose, so if anyone ever questioned the loan, it would not lead back to Ms. Stewart. Utilizing a front person, "was the intention, yes." Tr. 10/26/01, at 50; Exhibits 104, 276, 277.

68. Ms. Stewart's practice is also illustrated by the association with her long-time friend, Ms. Su-Chiu Kuo Shen ("Ms. Shen"), in setting up a checking account at Central Bank in

Springville, Utah, on November 22, 2000. Exhibit 528. When the account was first set up, no address was provided, and Central Bank held the account information. Ms. Shen is a Taiwanese national, lives in Taiwan, speaks little English, and owns no residence in Utah. At Ms. Stewart's request, Ms. Shen provided Ms. Stewart with a signature stamp for use in connection with the checking account. Ms. Stewart's mother, with Ms. Stewart's assistance, arranged millions of dollars to be run through this account, which funds were later used to establish Apogee, Inc. a competing enterpriser. Tr. 5/8/02, at 5-10; Exhibit 528. Beginning with the April 2001 bank statement, the address identified with the account in the name of Ms. Shen became 86 S. Holdaway Rd., Vineyard, Utah 84058. The person who lived at that address, Tu Fang Zu, was an old family friend of Ms. Stewart from Taiwan. Ms. Stewart did not know whether Tu Fang Zu and Ms. Shen knew each other. Ms. Stewart would have Tu Fang Zu forward the bank statements for the account in Ms. Shen's name to Ms. Stewart. Tr. 5/8/02, at 76-79; Exhibit 528 (bates AP 902).

69. On December 22, 2000, Excel Taiwan, in accordance with its historical practice and course of dealing with Excel USA, submitted five product orders to Ms. Stewart of Excel USA via fax. Exhibits 43, 48. The total amount of the five orders was US \$48,898.62. Even though Excel Taiwan had declined to execute a "new" contract with Excel USA and Ms. Stewart made the unequivocal decision to terminate Excel USA's business relationship with Excel Taiwan, Excel USA *filled* these orders. The orders included 1,704 bottles of Millennium, a liquid cactus-

based drink. No reason was given for Excel USA's decision to ship products pursuant to these orders when it had refused to ship products pursuant to the October 13 and November 16, 2000 orders. Tr. 2/2/01, at 54-55, 58-61.

70. On January 9, 2001, the product Excel Taiwan had ordered on December 22, 2000, arrived in Taiwan. Mr. Le had acquired information that caused him to be concerned that Excel USA, under Ms. Stewart's guidance, was changing the manufacturing and expiration dates on products, so he was concerned with the quality of the products. Before Mr. Le would authorize the products to be sold, he wanted to be certain the products were of reasonable quality so no one would be harmed. Mr. Le also knew that if any of the products were contaminated or of poor quality, distributors would refuse to purchase product and the entire network would suffer. Mr. Le also was concerned that if the product was contaminated and harmed someone, his company would be subjected to liability, so he caused his company to hire a laboratory to conduct testing on the products. Based upon the testing, Mr. Le returned the product to Excel USA. Tr. 2/2/01, at 70-78, 116-17. Under the circumstances, Mr. Le acted reasonably in returning the products.

71. Ms. Stewart's failure and refusal to ship Excel USA product to the historical Territorial Owners breached Excel USA's exclusive distribution contracts and lengthy course of performance with Excel Taiwan, Excel Malaysia, Excel Hong Kong and Excel Philippines. See Exhibits 1, 38. As a result of Ms. Stewart causing Excel USA to breach its exclusive contracts and course of performance with Excels Malaysia, Taiwan, Hong Kong and Philippines, these

latter entities had no available source from which to obtain Excel USA products in order to maintain their distributorships and provide the tens of thousands of Excel USA product consumers with product. The only way they could have a means to protect their existing distribution network and mitigate their substantial damages caused by Ms. Stewart's refusal to comply with the terms of the contracts would be to develop their own manufacturing facilities of Excel USA products or engage third parties to contract manufacture Excel USA products for them. See, e.g., Special Master Report No. 3; Exhibit 534.

72. Ms. Stewart asserts that the Territorial Owners in Malaysia and Taiwan intended to compete with Excel USA and that refusing to ship products to these distributors was necessary to protect Excel USA. Ms. Stewart has provided no credible evidence that the Territorial Owners intended to manufacture or buy product from other sources either at the time Ms. Stewart determined not to ship product, or at the later time when the Territorial Owners learned of the decision. At a later point after (i) Ms. Stewart actively led them to reasonably question the quality of products Ms. Stewart was willing to deliver; (ii) almost all product in inventory was depleted and (iii) distributors were leaving or threatening to move to other distribution systems because of the lack of product, the Territorial Owners did seek to arrange alternative sources of product. The Territorial Owners did not conceal such as evidenced by their voluntary disclosure of such fact to Mr. Holman. Further, the efforts of the Territorial Owners in this regard was a foreseeable and reasonable response to the actions of Ms. Stewart and Excel USA, and

constituted reasonable efforts to mitigate their substantial damages. After Ms. Stewart cut off product supply to the historical Territorial Owners in Malaysia and Taiwan and Excel Malaysia's and Excel Taiwan's later efforts to obtain Excel USA products through alternative channels in order to survive and maintain the historical distribution systems became one of Ms. Stewart's pretexts for establishing new distribution companies through Messrs. Hu and Tzu that would directly compete with the Territorial Owners utilizing product from Excel USA. See, e.g., Special Master Report No. 3; Exhibit 534.

73. As a further pretext to attempt to justify her efforts to cut ties with the historical Territorial Owners in Malaysia and Taiwan, Ms. Stewart claimed that during the Fall and Winter of 2000, she had carefully devised a plan that would purportedly result in Excel USA becoming the majority owner of the new distribution companies she caused to come into existence in the Philippines and Hong Kong through Messrs. Hu and Tzu, as more fully explained above. Tr. 10/26/01, at 25-26. She never discussed such ownership with Messrs. Hu or Tzu, there is no documentation whatsoever to memorialize or enforce such ownership interests in Excel USA, and Ms. Stewart never made any effort whatsoever to secure such property rights in Excel USA. Tr. 10/26/01, at 42-47; Exhibit 228, at 21-22; Exhibit 406; Tr. 11/28/01, at 101-02. The Court makes no finding with respect to whether Excel USA has such ownership interests.

TEMPORARY RESTRAINING ORDER

74. On January 10, 2001, Dr. Chen filed the Verified Complaint herein. Also on that date, she filed a Motion for Temporary Restraining Order ("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.*

(Emphasis supplied.) Exhibit 201.

75. Ms. Stewart was properly served with the TRO the following day, January 11, 2001, pursuant to the Utah Rules of Civil Procedure. The Affidavit of Service was filed with the Court on January 16, 2001.

76. On January 16, 2001, the Court held a telephone conference with counsel for the parties herein. Counsel for Ms. Stewart, Eric Olson of Kirton & McConkie, spoke on Ms. Stewart's behalf. Mr. Olson persuaded the Court to strike subpart (3) from the TRO so Ms. Stewart would have authority as an officer of the Company to comply with other parts of the TRO, and specifically, *immediately* to fill pending orders. Tr. 1/16/01, at 18. Mr. Olson's rationale was as follows:

If she is being stripped for [sic] powers as president and then she is to fill orders and complete and ship products, she is essentially--the only power she has is company

president. Having been stripped of her power as president in paragraph 3 and then turn around and be told to take actions, essentially, and the only power she has as company president is we believe internally inconsistent and again *exposes her to contempt sanctions*, because it is not clear how she can do--she needs to act as president, at the same time take actions which she only has power to do as president.

Id. at 7 (emphasis supplied).

77. On January 24, 2001, the Court expressly and without objection extended the TRO.

Tr. 1/24/01, at 171.

78. During the pendency of the TRO (January 10, 2001 to February 21, 2001), Ms. Stewart was represented by and consulted with counsel from at least two separate law firms, Kirton & McConkie, and Stoel Rives. One of the law firms, Kirton & McConkie, simultaneously represented both Ms. Stewart and Excel USA. Despite consulting with counsel, Ms. Stewart maintains that she showed no one at Excel USA the TRO and told no one at Excel USA of the TRO. Exhibit 201. Tr. 10/26/01, 102-03. At no time during the pendency of the TRO, or at any other time did Ms. Stewart take any action to inform Excel USA or employees (except possibly her husband Taig Stewart) of the entry of the TRO and the obligations that she had thereunder. Specifically, Ms. Stewart did not (1) provide or show Ms. Barclay or Ms. Warner a copy of Exhibit 201, (2) tell Ms. Barclay or Ms. Warner there was a TRO in place that must be followed, (3) inform Ms. Barclay or Ms. Warner that Excel USA had certain duties imposed by the Court with respect to filling orders; (4) rescind her instructions to not ship to the historical Territorial Owners in Taiwan and Malaysia, (5) instruct Ms. Barclay or Ms. Warner or any other employee

or agent of Excel USA to cause products that were en route to Mr. Hu and Mr. Tzu to be returned to the company or otherwise diverted in order to comply with the TRO, (6) instruct Ms. Barclay, Ms. Warner or anyone else to fill confirmed orders from the Territorial Owners in Taiwan and Malaysia. Ms. Barclay acknowledged that despite the lawsuit, she continued to do her work in accordance with Ms. Stewart's instructions, which included the instruction not to ship product to Territorial Owners in Malaysia and Taiwan. Tr. 10/25/01, at 57-59, 106-07; Tr. 10/26/01, at 7-15, 63-67, 76-78, 102-03; Tr. 12/11/01, at 172-74, 181-82.

79. In early January 2001, at about the time the legal proceedings were commenced, Ms. Stewart informed Ms. Warner "there were some contracts between E. Excel and the foreign office managers." Tr. 12/12/01, at 70. Ms. Stewart instructed Ms. Warner to search the offices for these distribution contracts between Excel USA and the Territorial Owners. Tr. 12/12/01, at 26. Ms. Stewart told Ms. Warner her attorney needed such contracts. Ms. Stewart instructed Ms. Warner that if she located contracts, she was to notify her. Ms. Warner searched Excel USA's offices throughout the night and was able to locate a number of contracts. Tr. 12/12/01, at 26-27. Ms. Warner maintains that no one assisted her in searching for the contracts and that she was the only one at Excel USA's premises at the time. As she would locate a contract, Ms. Warner would contact Ms. Stewart to let her know. Ms. Warner located a number of contracts between Excel USA and Territorial Owners. The contracts were kept in filing cabinets in the general office area. Ms. Warner believed she found most if not all of them. She is certain she found

contracts with Barry Le (Excel Taiwan), Excel Philippines, Europe and Korea. Tr. 12/12/01, at 27-28. Every contract with a Territorial Owner from another country bore signatures. Ms. Warner either locked the contracts in her desk and gave them to Ms. Stewart the next day, or delivered them personally to Ms. Stewart right after she located them. Ms. Warner did not again see the contracts, or what she believed to be copies of some or all of the same contracts, until early Summer 2001, when she was doing some filing at the home where Ms. Stewart was living. Tr. 12/12/01, at 26-31, 39-40, 69-70.

80. Ms. Stewart's testimony during the first Preliminary Injunction hearing wrongfully created the impression that Ms. Stewart had no knowledge of the existence of the contracts or, if they existed, where they were located. In this regard, Ms. Stewart said she had conducted a search in order to locate any contracts with Excel Malaysia and Excel Taiwan and that she "could not find any record of any kind of contract":

Q. Before I get into that, let me make it clear. What did you do to search the office?

A. I looked through all the filing cabinet that has any possibility that might have any kind of legal documents.

Q. Did you look through any filing cabinets that were maintained by Jau-Fei when she was president? . . .

A. Yes, I did. . . .

Q. Did you look anywhere beside the filing cabinets.

A. Yes, I did.

Q. Where did you look?

A. Jau-Fei's office, in Rui-Kang's Office.

Q. And after looking through Jau-Fei's office and Rui-Kang's office, did you find any such contracts?

A. No.

Tr. 2/8/01, at 133-35.

81. Although not disclosed to the Court during the evidentiary hearings on the first Preliminary Injunction motion and at the very time Ms. Stewart and her attorneys were vigorously objecting to efforts to require the shipment of product to the Territorial Owners, Ms. Stewart caused significant amounts of product to be shipped to others in Asia. Ms. Barclay, at Ms. Stewart's instruction, caused orders to be filled and product shipments to be sent to Messrs. Hu and Tzu in the Philippines and Hong Kong respectively, even though at the time of the orders and shipments Messrs. Hu and Tzu did not represent Territorial Owners. Tr. 10/25/01, at 66-77. Ms. Barclay knew Messrs. Hu and Tzu from her prior employment with Excel USA, and that the orders referenced in Exhibits 205, 207, 214, 216 and 217 came from one or the other of them. At Ms. Stewart's instruction, she did not question their orders of product. Tr. 10/25/01, at 66-77, 105-06; Tr. 11/27/01, at 41-44.

82. The first known shipment to Mr. Tzu was invoiced December 29, 2001, to Extra Excel International (HK) Limited. The shipment was in Los Angeles and boarded on ship on January 15, 2002, during the pendency of the TRO. This shipment remained in the control of

Excel USA. The weight of the product was 11,100 pounds, or 5,035 kilograms. The invoiced amount was HK \$914,916.75. Tr. 10/26/01, at 9-15; Exhibit 205.

83. The first known shipment to Richard Hu was invoiced January 5, 2001 to Excellent Essentials International Corp. The shipment, which arrived in Los Angeles and was boarded on ship on January 19, 2001, during the pendency of the TRO, remained in the control of Excel USA. The weight of the product was 72,716 pounds, or 32,984 kilograms. The invoiced amount was US \$830,752.50. Even though the product was originally shipped to the Philippines, Mr. Tzu instructed Ms. Barclay not to disclose the customer's address on any of the paperwork, only the name of the consignee, and the city and country of destination. She followed that instruction and instructed the freight-forwarder to do the same Tr. 10/25/10, at 82-83; Exhibit 207.

84. Ms. Stewart made no effort on behalf of Excel USA to make arrangements with Messrs. Hu and Tzu for payment for the product that is the subject of Exhibits 205, 207, 214, 216 or 217 or to notify the company that it was owed money directly or through Shannon River, Inc. Tr. 10/26/10, at 16-20, 28-32, 103-04.

85. On January 18, 2001, during the pendency of the TRO, at Ms. Stewart's direction, Taig Stewart, Ms. Stewart's husband, signed a letter in an effort to terminate Excel USA's exclusive distributorship agreement with its Territorial Owner, Extra Excel International (HK) Limited. Exhibit 206. Ms. Warner notarized his signature. He did so because his wife directed him to do so. At the time he signed Exhibit 206, he knew that this Court had entered a TRO

requiring Ms. Stewart to do and to refrain from doing certain things. Tr. 10/26/01, at 73-74; Tr. 3/13/02, at 73-78, 132-33; Exhibit 206. On May 30, 2001, in connection with her Motion for TRO, Ms. Stewart submitted an Affidavit stating, among other things, "I never terminated any distributors." That representation was directly contrary to Exhibit 206 and Taig Stewart's testimony concerning termination on January 18, 2001 of the Hong Kong distributorship at Ms. Stewart's instruction. Tr. 10/26/01, at 73-74; Tr. 3/13/02, at 73-78, 132-33.

86. Mr. Tjandra testified during the Preliminary Injunction hearing on January 24, 2001. As of that date, Excel Malaysia had purchased Excel USA product exclusively from Excel USA, and from no other entities. Tr. 1/24/01, at 147, 152. Mr. Le testified during the Preliminary Injunction hearing on February 2, 2001. As of that date, Excel Taiwan had purchased Excel USA product exclusively from Excel USA and from no other entities. Tr. 2/2/01, at 36-37.

87. At the time of her testimony during the first Preliminary Injunction hearing, Dr. Chen indicated great concern for the thousands of distributors who relied upon Excel USA and its products in order to make a living and survive financially, and she indicated that she had attempted to reassure distributors that matters would stabilize. As of February 13, 2001, Dr. Chen's desire was that distributors would once again be able to obtain product from Excel USA's facility in Springville, Utah. Tr. 2/13/01, at 20-21.

OBSTRUCTION OF JUSTICE, SUBORNATION OF PERJURY AND PERJURY

88 On or about January 23, 2001, Ms. Stewart, Mr. Hu and Mr. Tzu 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. During the telephone conversation Ms. Stewart, Mr. Tzu and Mr. Hu discussed and agreed, among other things, as to what their testimony would be in the Preliminary Injunction proceeding then ongoing before this Court, including (1) the three of them would testify that Dr. Chen wanted to forge documents, even though they acknowledged that was not the case, (2) the three of them would testify falsely concerning statements Dr. Chen had purportedly made at meetings in October 2000 at the Provo Marriott, (3) Mr. Hu would falsely deny any involvement or ownership in the start-up distributorship in the Philippines, would attribute it to Paris Uy, would claim he had loaned money as between friends to Mr. Uy for unknown uses, (4) Mr. Hu would deny that Ms. Stewart had had any involvement in providing funds for the start-up company (even though during the conversation they acknowledged the funds had come from Ms. Stewart's aunt's Central Bank account), (5) the three of them would agree 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 "remember" whenever they wanted to thereafter, and (6) the three of them agreed that they would falsely testify that Dr. Chen and Barry Le had agreed to forge documents, and that as a result, Dr. Chen would go to jail. Dr. Chen and Ms. Stewart each retained experts who independently translated

the tape recording of the telephone conversation. The translations do not differ in any material aspect with respect to the statements and agreements described above. Exhibits 104, 276, 277.

89. During February 2001, a tape recording of a telephone conversation was anonymously delivered to plaintiff'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 scheduled 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. Tr. 2/13/01, at 57-60.

90. Mr. Hu testified in the Preliminary Injunction hearing on February 13, 2001. His 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, memorialized by the tape recording, Exhibit 104, Mr. Hu, after acknowledge he was under oath, was obliged to tell the truth and there could be harmful consequences if he did not tell the truth Tr. 2/13/01 (afternoon session), at 38-39, testified: he denied he had a current business relationship with Ms. Stewart, even though Ms. Stewart had admitted they were working together to establish a new distributorship network in the Phillippines. Tr. 2/13/01 (afternoon session), at

39; *see* Tr. 2/8/01, at 118; he denied he had any association with Excellent Essentials International Corp. Tr. 2/13/01, at 39; he denied knowing whether Paris Uy had any association with Excellent Essentials International Corp. Tr. 2/13/01, at 39-40; he admitted having loaned money to Mr. Uy, but denied knowing what was the purpose of the loan Tr. 2/13/01, at 39-41; 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 Tr. 2/13/01, at 39-42; 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 Mother Chen to give to Mr. Uy Tr. 2/13/01, at 42; 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 Tr. 2/13/01, at 43; 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 Tr. 2/13/01, at 43-44; he denied that Mr. Uy was fronting him, and that the new company was really his; 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 Tr. 2/13/01, at 44; 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; he denied having discussed with Ms. Stewart and Mr. Tzu what was said in meetings at the Marriott Hotel on October 19, 2000, between Mr. Tjandra and Dr. Chen Tr. 2/13/01, at 48-49; he denied having discussed with Ms. Stewart and Mr. Tzu whether

someone should go to jail. Tr. 2/13/01, at 48. The foregoing testimony is materially false, and was known by Mr. Hu to be false at the time the testimony was given. Ms. Stewart was present and heard Mr. Hu's testimony, and Ms. Stewart also knew the testimony was false. Tr. 2/13/01, at 39-52.

91. Thereafter, counsel presented Mr. Hu with proposed Exhibit 103, a translation of the above-referenced tape recording, Exhibit 104. Mr. Hu then admitted to 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, proposed Exhibit 104. Mr. Hu thereafter admitted that Mr. Tzu was a participant in the conversation. Tr. 2/13/01 (afternoon session), at 53-54. At this point, at the suggestion of counsel for plaintiff, 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 concerning all aspects of his testimony. Tr. 2/13/01 (afternoon session), at 52-69.

92. Following a recess during which Mr. Hu consulted with his counsel, cross examination resumed. In response to further questions put by plaintiff'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. Tr. 2/13/01 (afternoon session), at 69-71.

93. Mr. Hu nonetheless answered further questions from Ms. Stewart's counsel, and admitted he had been in Taiwan when the conversation took place, and he could not recall what day or time of day it had occurred, or who had placed the call. Tr. 2/13/01 (afternoon session), at 71-74.

94. On November 27, 2001, Ms. Stewart was again called as a witness and was asked further questions concerning her dealings with Messrs. Hu and Tzu. Ms. Stewart continued to deny complicity in an effort to mislead the Court. She testified:

Q. Now Ms. Stewart, the last time you were here on the witness stand, you were called, testifying about funds that were sent to Richard Hu and Sam Tzu. Do you recall that?

a. Yes. We talk about funds being sent to Richard Hu and Sam Tzu.

Q. Yes. And what was the source of those funds?

a. My mother. . . .

Q. You were involved in facilitating or helping transfer those funds by wire to Richard and Sam, weren't you?

a. Yes.

Q. As a matter of fact, on the wire instructions, you were the contract person, weren't you?

a. I help her, but I didn't know whether, you know, the bank needed to contact me or not.

Q. Okay. But because you speak English, you helped your mother facilitate the transfer of those funds; is that right?

a. Yes. . . .

Q Okay. It's true, isn't it, that on December 19th [2000], you assisted in the wiring of one million dollars to Sam Tzu from your aunt's Central bank account?

a. I really don't remember how many times or the amounts or the date.

Q Okay.

a. But I do remember in the assisting to send the wires. . . .

Q. Okay Now, today and the last time we were here, you testified about the transfer of funds to Richard and Sam, right? But on a previous occasion in this Court, you testified differently, didn't you, about transferring funds to Richard?

a. Oh, I don't remember. Um--I've been under a lot of pressure, but I do remember sending wires to Richard Hu and Sam Tzu.

Q You remember sending wires to Richard Hu and Sam Tzu?

a. Yes. I remember assisting to send wires.

Q. And when you testified here in February at that point in time, you remember[ed] at that point that you had wired money to Richard and Sam; right?

a. Oh. Um--I don't know, but I do remember helping to send wires.

Tr. 11/27/01, at 21-26. This testimony further establishes Ms. Stewart's perjured testimony on February 8, 2001, set forth above.

95. On November 27, 2001, Ms. Stewart further testified:

Q. It's true, isn't it, that during the telephone conversation with Richard and Sam, the three of you agreed that Mr. Hu, if he were asked the question, would falsely deny any involvement or ownership in the start-up distributorship in the Philippines. You and Mr. Hu and Mr. Tzu agreed to that in that telephone call; correct?

- a. I don't remember
- Q Okay It's also true, isn't it, that Mr Hu, in that telephone conversation, would attribute this new company to Paras Uy, you three agreed to that, didn't you?
- a. I did not remember Paras Uy is mentioned at that time That name does not ring a bell
- Q Okay You agreed in that telephone conversation with Richard and Sam that Mr Hu would claim that he had loaned money to Mr Uy for unknown uses You guys agreed to that, didn't you?
- a I do not remember exactly what was the conversations--
- Q Okay You--
- a. --regarding that
- Q --also agreed that you and Mr Hu would deny that you had any involvement in providing funds for the start up company if you were asked questions about that in court You agreed to that, didn't you?
- a I don't remember
- Q Okay You also agreed in that telephone conversation with Richard and Sam, that if they were asked questions that they did not want to answer, they would say, *I cannot remember now*, but then they could choose to remember whenever they wanted to thereafter. You guys agreed to that, didn't you?
- a. I don't remember that has been said, but I remember that they have never had any experience of testifying, and I was concerned that they--when they are put in the situation sometimes they don't remember something exactly, they would answer wrong So I was trying to let them know that they could--it's better to say not remembering rather than saying yes or no, because sometimes the things I don't remember sometimes would come back to me later

Tr 11/27/01, at 34-35 (emphasis supplied).

96. On July 24, 2001, Ms. Stewart signed her 3rd Affirmation in the HCA 2493/2001, in which she stated:

44. I wish to deal briefly with the tape recording of my conversation with Mr. Hu and Mr. Tzu, leaving aside the question of how such a recording was obtained by the Defendants. First of all, I regret very much attempting to mislead the Utah Court. At the time, I was angry with my sister, the 5th Defendant. As can be seen from the emails which I have exhibited, the relationship between 5th Defendant and I was very good and we along [sic] with each other very well. . . .
45. I apologize for my conduct, which in hindsight was very foolish, and I sincerely ask that the Court not to regard me as a dishonest or malicious person, which I am not, as the people who know me well will testify at trial.

Exhibit 406; Tr. 11/28/01, at 101-02. She made a virtually identical statement in her 4th Affirmation.

97. The Court is persuaded that Ms. Stewart's further testimony from November 27, 2001, is not forthright, and the testimony demonstrates Ms. Stewart continues to attempt to conceal the truth from the Court and the parties.

98. In 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 Exhibits 103 and 104 appeared to constitute evidence of subornation of perjury and a conspiracy to obstruct justice and defraud the Court in this very case and in the proceeding in which such exhibits were used. The Court explained that the issue of potential obstruction of 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 its Order dated June 5, 2001, the Court admitted Exhibit 104 into evidence.

EVENTS SURROUNDING ENTRY OF INTERIM ORDER; IMPLEMENTATION OF PLAN TO COMPETE AND TO DESTROY EXCEL USA

99. Ms. Stewart determined to establish a company to compete with Excel USA. Apogee, Inc. was Ms. Stewart's idea. Tr. 10/26/01, at 79-95, Tr. 11/27/01, at 79-82; Tr. 3/15/02, at 10-12. In addition to a number of nominees, Ms. Stewart used a number of individuals as her agents to act on her behalf in establishing the competing enterprise and in attempting to destroy Excel USA. Tr. 11/27/01, at 79-82, 129-131; Tr. 11/28/01, at 35, 145-97; Tr. 12/11/01, at 79-80, 237-38; Tr. 3/15/02, at 9, 12, 123-142; Tr. 5/8/02, at 10-11; Exhibit 528 (bates AP 901).

100. Ms. Stewart utilized various persons to act on her behalf or to cause results that she sought to be obtained:

a. Angela Barclay acted under Ms. Stewart's direction in connection with the shipments of product occurring during the pendency of the TRO as well as later. Ms. Stewart

failed to disclose to Ms. Barclay the existence of the TRO. Ms. Barclay caused significant shipments of product to be shipped in the name of Shannon River to Messrs. Hu and Tzu. Ms. Barclay's removal of all records on Shannon River from Excel USA offices and her delivery of such records to Ms. Stewart, demonstrate conclusively that Ms. Stewart used Ms. Barclay for these purposes.

b. The record is replete with facts demonstrating that Ms. Warner acted for Ms. Stewart. Ms. Warner's duties as office manager cannot be considered to include any of the questionable activities in which Ms. Warner participated. Ms. Warner did not act as a volunteer or without direction. Ms. Stewart maintained contact with Ms. Warner on a regular basis, both before and after February 21, 2001. Ms. Warner participated directly in the removal of Excel USA property and caused it to be delivered to Ms. Stewart. Ms. Warner turned off the surveillance cameras. Ms. Warner participated in and arranged for the deletion of e-mails, and admitted the same to various employees. The possibility that Ms. Warner was acting without direction from Ms. Stewart cannot stand in light of the direct involvement of Ms. Stewart and her family in these activities. Ms. Warner and her husband delivered documents, surreptitiously taken, to Ms. Stewart. Ms. Warner took a job with Apogee after Excel USA terminated her. She was centrally involved in registering the Apogee name, setting up the corporation and working with the contract manufacturer, distributors and causing product to be shipped from the contract manufacturer to Asia.

c. Dale Stewart performed many activities outside the scope of his duties as assistant plant manager. Each of these activities directly or indirectly benefitted Ms. Stewart or furthered objectives she sought. He removed Excel USA product, raw materials and other property from Excel USA. He also removed boxes of product or documents and delivered them to Ms. Barclay's residence. He concealed the continued use of Excel USA property by Ms. Stewart.

d. Bryan Hymas was a graphic artist for Excel USA. As with Dale Stewart and others, he performed many activities outside the scope of his duties, which activities directly or indirectly inured to Ms. Stewart's benefit or furthered her objectives. He removed Excel USA property and delivered it to Ms. Stewart, at her direction. He placed rodents in Excel USA's warehouse after product and raw materials were removed, both as a pretext and to harm Excel USA's standing with the FDA. By providing false information to a police officer, he undermined Excel USA's measures to secure its premises after the Interim Order came into effect. He stayed inside Excel USA's premises on a number of occasions after entry of the Interim Order. He damaged Excel USA property and returned it to the company in a damaged condition. His frequent contacts and associations with the Stewarts, and his ongoing work in Apogee, establish he was serving at Ms. Stewart's direction.

e. Taig Stewart was in charge of Excel USA's graphics department. He nominally served as an officer and director at Ms. Stewart's instruction and under her direction.

He purported to terminate a Territorial Owner during the pendency of the TRO at the instruction of Ms. Stewart. At Ms. Stewart's direction, he signed a letter on behalf of Dunnkirk instructing a Canadian bank to communicate exclusively through Beverly Warner, well after she had been terminated by Excel USA. He removed approximately \$100,000 worth of company-owned electronic equipment from Excel USA and stored much of it in the 7-car garage Ms. Stewart used. At Ms. Stewart's instruction and under her direction he designed Apogee marks and labels, and made cash payments to Ms. Warner and Dale Stewart for their work in Apogee after Ms. Stewart was enjoined from competing with Excel USA.

f. Ms. Smith signed a lease for the ATL warehouse on about February 20, 2001, and it was that warehouse into which Excel USA product, raw materials and other property were surreptitiously moved over the weekend before the Interim Order was entered. It was that warehouse that was used to conduct Apogee business until the new facility was constructed.

SHIPMENTS THROUGH SHANNON RIVER IN VIOLATION OF COURT ORDERS

101. As a result of Ms. Stewart's instructions which Ms. Stewart fully intended to survive her removal as acting president of Excel USA, Ms. Barclay caused Shannon River, Inc., as exporter, to ship additional Excel USA product to Messrs. Hu and Tzu. The purpose of this shipment was to sustain Messrs. Hu's and Tzu's distribution networks with product until product from the new competing company became available and to impair Excel USA's good will by "dumping" the product and undercutting the Territorial Owners' sales. Even though she was

responsible for preparing invoices that would go out when product was shipped, at no time did Ms. Barclay prepare invoices from Excel USA to Shannon River, Inc. Nor did Ms. Barclay in any way provide for the accounting of these shipments on the books and records of Excel USA. Tr. 10/25/01, at 66-77, 80, 110-11; Exhibits 214, 216 and 217.

102. On February 22, 2001, at the instruction of Mr. Tzu or his brother Jason Tzu, Ms. Barclay caused the shipment that had been invoiced to Mr. Hu at Excellent Essentials International Corp. on January 5, 2001 and boarded on ship in Los Angeles on January 19, 2001, during the pendency of the TRO, to be moved from the Philippines to Mr. Tzu in Hong Kong. Tr. 10/25/10, at 84-85, 122; Exhibit 207.

103. On February 23, 2001, Shannon River, Inc., 1966 S. Laguna Vista Drive, Orem Utah, 84058, invoiced Rich Universe Limited (Mr. Tzu) in Hong Kong for Excel USA product in the amount of HK \$283,545 52 together with another invoice for what appears to be HK \$32,769.64. The freight-forwarder received the shipment the same day. Both Ms. Stewart and Ms. Barclay believe Excel USA received the order from Mr. Tzu or his office approximately one to four weeks before the shipment was invoiced, which was prior to Ms. Stewart's removal as acting president. Tr. 10/25/01, at 66-71, 110-11; Tr. 10/26/01, at 52-53; Exhibits 214 and 216.

104. On February 28, 2001, Shannon River, Inc., 1966 S. Laguna Vista Drive, Orem Utah, 84058, invoiced Rich Universe Limited (Mr. Tzu) in Hong Kong for Excel USA product in the amount of HK \$205,920 00 Ms. Barclay could not say whether the order came into Excel

USA before or after February 21, 2001, although her testimony was orders typically came in one to four weeks before products were invoiced and shipped. The freight-forwarder received the shipment the same day. Tr 10/25/01, at 100; Exhibits 214 and 216.

105. On March 6, 2001, Shannon River, Inc., 1966 S. Laguna Vista Drive, Orem Utah, 84058, invoiced Nation Joy Leather Products Co. of Taipei, Taiwan (Mr. Tzu), for Excel USA product in the amount of US \$4,991.41. The freight-forwarder received the shipment the same day. Exhibit 217.

106. Excel USA has never received any payment or consideration of any kind for Excel USA's products that Ms. Stewart caused to be shipped to Messrs. Hu and Tzu, as memorialized in Exhibits 205, 207, 214, 216 and 217. Tr. 10/25/01, at 103-04; Tr. 11/27/01, at 52 to 59.

107 Ms. Stewart directly utilized Shannon River to advance her plan to undermine the Territorial Owners and to establish her new and competing company. Exhibits 214, 216, and 217. Ms Stewart claimed on the one hand that Shannon Heaton owns Shannon River, Inc., and on the other that it is owned by Excel USA. Shannon River, Inc., never had a directors' meeting. It had no agreement, written or otherwise, with Excel USA that it would serve as an exporter for or on behalf of Excel USA. Indeed, Ms. Stewart denied having instructed Ms. Barclay to ship Excel USA products through Shannon River, Inc., even though Ms. Barclay inexplicably identified Ms. Stewart's home address as that of Shannon River, Inc., on the invoices to Messrs. Hu and Tzu, rather than the address identified in the corporate documents to which Ms. Barclay had access.

Even though Ms. Stewart testified that Excel USA owns the accounts receivable that are in the name of Shannon River, Inc., which includes the right to collect on the invoices included in Exhibits 214, 216 and 217, Excel USA had no records in its possession that would place Excel USA on notice of the existence of those accounts receivable, and Ms. Stewart took no steps to notify Excel USA of the existence of those accounts receivable. The Shannon River, Inc., bank account also identified Ms. Stewart's home address as that of Shannon River, and she received Shannon River bank statements at her home and did not forward them to Excel USA until well into the OSC proceeding, only after Excel USA became aware of the invoices represented in Exhibits 214, 216 and 217. Tr. 11/27/01, at 52-59, 156-57.

108. Prior to leaving her employment with Excel USA, Ms. Barclay removed certain files from her computer, including all files referencing or relating to Shannon River. She also removed from Excel USA's premises all records of Shannon River, including records establishing shipments of Excel USA products through Shannon River to Messrs. Hu and Tzu, memorialized in Exhibits 214, 216 and 217. She did not make copies of the Shannon River documents for Excel USA. Two or three weeks later, she delivered all of the Shannon River documents and files to Ms. Stewart. Her reasoning for doing so was that "it is not under E. Excel letter head, and because I don't know what everything went on, so I just give to her and have her take care of it." She did not engage Ms. Stewart in conversation when she delivered the documents. She said, "[h]ere it is." Tr. 10/25/01, at 48, 114, 119-120, 124-26. Ms. Stewart has acknowledged that the

Shannon River, Inc., documents are the property of Excel USA. The documents and files were not returned nor was any effort made by Ms. Stewart to notify Excel USA of the existence of such documents and files until Ms. Barclay testified before the Court.

109. On July 24, 2001, Ms. Stewart signed her 3rd Affirmation in the HCA 2493/2001, in which she stated:

39. The Defendants also allege that the Company had not received any payment for certain goods shipped to the new Hong Kong and Philippines distributors which I had set up on behalf of the Company. I am not sure what the status of the payments is as Mr. Holman has taken over the Company since March this year. However, I vehemently deny that I deliberately failed to collect payment from them so that they may dump the Company's product onto the market. Such a claim is unsubstantiated, and I verily believe that it is the responsibility of Mr. Holman, as the Interim CEO and president of the Company since March of this year, to pursue such payments.

110. As with other explanations, Ms Stewart has not seen fit to acknowledge that she knew the specific reason that no payments had been made for the shipments surreptitiously sent through Shannon River. Ms. Stewart instead chose to represent that the failure of payment was Mr. Holman's responsibility. Mr. Holman could hardly be responsible for failing to collect an account that Ms. Stewart knew was not listed on the accounting records of Excel USA because Ms. Stewart's nominee, Ms. Barclay, had removed all of the records and delivered them to Ms. Stewart.

**OTHER ACTIVITIES INVOLVING IMPROPER USE AND DESTRUCTION OF
EXCEL USA ASSETS FOR THE PURPOSE OF COMPETITION.**

111. For some period of time prior to the summer of 2001, Ms. Barclay performed a number of services at the home where Ms. Stewart was living. Among the other persons living in the home was Ms. Stewart's mother Hwan Lan Chen. Among those services, she would file documents in filing cabinets in the basement of the home. On occasion, she would be asked to prepare checks on the account that was in Ms. Shen's name. The checks were kept in a filing cabinet in the basement of the home where Ms. Stewart was living. Ms. Warner took over the performance of the services previously rendered by Ms. Barclay after she was terminated from Excel. The procedures described by Ms. Warner suggests an effort by those occupying the home to deliberately limit the facts to which Ms. Warner would have knowledge and about which she could be required to testify. The events and the procedures used, including the necessity of utilizing both the Chinese and the English language, make it evident to the Court that all of the below described activities were accomplished with the knowledge and at the direction of Ms. Stewart. There was a location in the home on the floor where documents would be placed for Ms. Warner to file ("in-box"), and another location on the floor where Ms. Warner would place documents for others to review ("out-box"). Tr. 5/7/02, at 47-49. On occasion, Ms. Warner would receive an e-mail in the "in-box" that was written in Chinese, along with what purported to be Ms. Stewart's written translation of the e-mail. Ms. Warner does not read Chinese and therefore could not verify that what Ms. Stewart had written was, in fact, a translation of the e-

mail. The English instructions to Ms. Warner would be to write a check in a specified amount on the account that was in Ms. Shen's name and obtain cash in that amount. Ms. Warner would write the check, then leave it in the "out-box." Sometime thereafter, the check she had prepared would be in the "in-box," with the signature line stamped with the signature from the stamp of Ms. Shen that was in Ms. Stewart's possession. Ms. Warner would take the completed check to a local bank, obtain cash and hide it in a filing cabinet in the basement of the home where Ms. Stewart was living. Thereafter, Ms. Warner would receive another e-mail that was written in Chinese, along with what purported to be Ms. Stewart's written translation of the e-mail. Pursuant to the English instructions provided her, Ms. Warner would take the cash to a local bank and purchase money orders or cashiers checks in specified amounts, then place those instruments in the "out-box." Ms. Warner and Ms. Stewart both denied knowing or remembering the identities of any of the payees of the instruments. Ms. Warner does not know Ms. Shen. The performance of the foregoing duties occurred during the time Ms. Warner was involved in setting up and operating Apogee, Inc. Tr. 5/7/02, at 33-36, 47-68, 96-108, 125-27.

112. Also as part of her scheme to compete, both before and after she was removed as acting president of Excel USA, Ms. Stewart caused a number of events that would seriously damage and disrupt Excel USA's operations, as follows:

a. Ms. Warner turned off the camera surveillance system within a week to two weeks prior to the entry of the Interim Order, discussed below. Tr. 12/11/01, at 160-70, 192; Tr.

12/12/01, at 14 Although Ms Warner claimed her reason for turning off the camera surveillance system was because the available video tapes were worn out, that explanation is not credible, there was a full box of approximately 100 new, unopened tapes in the surveillance room Tr 12/11/01, at 167, Tr 2/21/02, at 169-70, 196 Turning off the surveillance system allowed a number of subsequent, disruptive events to occur

b Around the time the Court entered the Interim Order, Ms Warner removed numerous documents from the Excel USA facility to Ms Stewart's residence She did not return any of those documents to Excel USA Tr 12/11/01, at 66-69 She asked other Excel USA employees to assist in the removal of those documents Tr 3/15/02, at 60-63

c Dale Stewart, Angela Barclay, and Kent Maxwell removed substantial quantities of documents and products from the Excel USA facility, including moving product to the ATL warehouse in February 2001 Tr 3/15/02, at 123-142, Tr 12/10/01, at 130-135, Exhibit 215

d Beverly Warner deleted electronic data, such as e-mails to and from Ms Stewart and other electronic files from the computers of employees of Excel USA and asked other employees to assist her in that operation Tr 3/15/02, at 186-190, Tr 2/21/02, at 203-210 Her explanation of the deletion of computer files was to "protect" employees in the event there was new management, and to prevent Dr Chen's attorney's from accessing the information Tr 2/21/02, at 118-120, Tr 10/25/01, at 150-152

e A large quantity of Excel USA documents and property was removed or “disappeared” from the Excel USA facility, as inventoried in Exhibits 246 A, B, C, D, 260, 523 Tr 12/11/01, at 66-72 Such items include computer equipment, office furniture, fax machines, televisions and VCRs, file cabinets, desks and chairs, analytical reports, processing reports, toxicology reports, stability studies, laboratory reports, and large quantities of product labels Tr 2/21/02, at 122-123, Tr 10/25/01, at 136

f Ms Warner and Bryan Hymas often borrowed Taig Stewart’s black pick up truck for the purpose of hauling items Tr 3/13/02, at 29-30, 94-96, Tr 3/15/02, at 28-29

g Ms Stewart caused the removal of all non-compete and non-disclosure agreements from employees’ personnel files Tr 3/15/02, at 56-60

h Many of the freezers containing perishable products were unplugged, turned off, or turned “down” (meaning the power was turned down or the temperature inside the freezers was allowed to increase) Tr 3/18/02, at 63-65

i A large quantity of gel caps, used in the manufacturing of product, was removed from the Excel USA facility and later returned Tr 12/10/01, at 194-95

j Taig Stewart removed the extensive items listed in Exhibit 523 In addition to the items of furniture, computer hardware and software and other personal property, he took substantial quantities of intellectual property (photography, graphics, archives, CD-ROM’s) that belonged to Excel USA and which Excel USA had, over the years, used in its publications,

designs and promotional material. Brian Hymas, an Excel USA employee under Taig Stewart's supervision, assisted him. All of the items were the property of Excel USA. Taig Stewart agreed that Excel USA's photographs were important property of Excel USA, were the stock in trade of an art director, and that the art director should be very protective of the company's photography. Most of the equipment he and Mr. Hymas removed from Excel USA's premises was kept in the seven-car garage at the home where Ms. Stewart, her husband and her mother were living. Ms. Stewart regularly used that garage, as did her husband. Tr. 3/13/02, at 24-26, 31, 107-08, 126-30, 134; Tr. 3/15/02, at 11-28, 46. On October 11, 2001, nearly eight months after the entry of the Interim Order, Taig Stewart returned to Excel USA the items he had removed in February 2001, as listed on Exhibit 523, an inventory he prepared a couple of days prior to returning the property. While out of Excel USA's possession, these items were clearly in Ms. Stewart's custody and control. Tr. 3/13/02, at 117-118, 134; Tr. 3/15/02, at 12-17.

k. Bryan Hymas placed a number of tame rodents in the Excel USA warehouse, after the fact, as a pretext for removing Excel USA product to the ATL warehouse, and to damage Excel USA's standing with the FDA. Tr. 10/26/01, at 113-14; Tr. 2/21/02, at 113-115. When the rodents were discovered, Excel USA employees suggested to Beverly Warner that they review the surveillance videotapes, but she had shut off the surveillance system. At the time the rodents were planted at the facility, only Ms. Warner and Taig Stewart had keys to the room where the surveillance monitoring equipment was located. Tr. 2/21/02, at 243-45.

l. Brian Hymas removed property belonging to Excel USA, including two Epson 9000 printers, a personal computer, company files that were on the computer, an art table, laminator, scissors and knives, and similar items from Excel USA's art department. Tr. 12/11/01, at 158. The printers, too, were kept in the seven-car garage at the home where Ms. Stewart, her husband and her mother were living, the garage Ms. Stewart and her husband used on a regular basis. Taig Stewart "condoned" Mr. Hymas's conduct in removing Excel USA property. Much of this property was kept in the garage Ms. Stewart used. Tr. 3/13/02, at 62-63; 3/15/02, at 17, 26-27, 46.

m. Sometime shortly before October 11, 2001, Taig Stewart assisted Brian Hymas in loading the two Epson 9000 printers belonging to Excel USA into the back of Taig Stewart's pick-up truck for Mr. Hymas to return them to Excel USA. In transporting the printers, Mr. Hymas caused them to fall out of the back of the truck and to incur substantial damage. Tr. 3/13/02, at 134-35; Tr. 3/15/02, at 29-31, 40-41, 45-46.

n. In an Affidavit dated May 9, 2002, Ms. Stewart testified as follows:

I, Jau-Hwa Stewart, asked Brian Hymas to deliver the two Epson 9000 printers to E. Excel in his truck. It was a favor I requested of him simply because I could not transport the printers myself, nor had I a truck to do so with. I believe Mr. Hymas did as I asked of him with reasonable care. However, as Mr. Hymas was doing me a favor under my direction, I accept full responsibility for any damages that may have occurred to the printers while they were being delivered.

Ms. Warner notarized the Affidavit. Exhibit 578.

113. Ms. Stewart removed all of the files from her office with the assistance of Mr. Hymas. Whatever was there, she took, including company documents. She did not look through the files to distinguish between personal and company files. Tr. 11/27/01, at 139-43. Ms. Stewart testified on November 27, 2001, during which she admitted that ¶ 41 of her 3rd Affirmation--the assertion that she had never ordered anyone to remove records belonging to the company--was not true. Tr. 11/27/01, at 140-41.

114. All of the surreptitious events--from removing, deleting or sabotaging Excel USA documents, product and property, to shipping product to Messrs. Hu and Tzu rather than to Territorial Owners--were carried out by persons acting under Ms. Stewart's direction and control, on her behalf and in her stead. In fact, one of the most telling examples is Taig Stewart's testimony that Beverly Warner would do nothing substantive on her own without instruction or direction from Ms. Stewart, and Ms. Warner in fact did Ms. Stewart's "bidding." The conduct was also on her behalf and for her benefit because it advanced her cause and design to compete with Excel USA. Because the conduct was carried out by persons acting under Ms. Stewart's direction and control and on her behalf, Taig Stewart, Dale Stewart, Beverly Warner, Brian Hymas, and Angela Barclay were all acting as agents or nominees for Ms. Stewart, and their conduct is directly attributable to her.

115. Further, the scope and nature of the improper conduct of these parties and individuals demonstrates that the parties entered into a conspiracy to cause damage to Excel USA and Dr. Chen. The following elements are established:

a. There clearly existed a combination of two or more persons: Ms. Stewart, Taig Stewart, Beverly Warner, Brian Hymas, Dale Stewart, and even Angela Barclay .

b. These parties clearly had an object to be accomplished. Ms. Stewart had in mind a scheme to create an enterprise (Apogee) to compete with Excel USA, despite the restrictions of the TRO and the Interim Order, and to bring about the demise of, or at least damage to, Excel USA. This combination of members was formed to further that design.

c. There was a meeting of the minds among the co-conspirators with respect to the object or course of action. Evidence of this meeting of the minds includes, but is not limited to:

- i. Beverly Warner's undisputed loyalty to Ms. Stewart;
- ii The fact that Ms. Warner did none of the substantive actions without direction from Ms. Stewart;
- ii The fact that Brian Hymas informed Ms. Stewart that he had placed the tame rodents in the Excel facility so that people would believe Ms. Stewart, when in fact the entire rodent incident was an after-

the-fact pretext to explain Ms. Stewart's directive to move large quantities of product to the ATL Warehouse;

- iv The fact that Dale Stewart, despite his testimony to the contrary, was an employee of Apogee and, in that capacity, participated in a number of activities designed to further Apogee and compete with Excel USA.

d. All of the actions committed by these parties, at the direction of Ms. Stewart, constituted a series of unlawful, overt acts.

e. Finally, the actions of the parties were clearly the proximate cause of damages to Excel USA.

INTERIM ORDER AND ITS VIOLATION

116. On February 21, 2001, the 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. Ms. Stewart made no effort whatsoever to obtain a copy of Exhibit 202, learn of its contents or otherwise understand it. Tr. 10/26/01, at 104-06. 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. A receipt shall be provided by the Company to Jau Hwa Stewart for any item so returned.

Exhibit 202.

117. This Interim Order was negotiated among counsel for Dr. Chen and Ms. Stewart, signed by the Court and properly served on Ms. Stewart through her counsel pursuant to the Utah Rules of Civil Procedure.

118. On February 22, 2001, Dr. Murray tendered his resignation, effective immediately, as Associate Research Director for Excel USA. Tr. 3/18/02, at 97-99, Exhibit 524.

119. On February 26, 2001, Dr. O'Neill faxed a letter terminating his consulting agreement with Excel USA. At the time he resigned, he had virtually no contact with Dr. Chen, and all of his interactions with Excel USA, up to Ms. Stewart's removal, were with Ms. Stewart. Tr. 3/18/02, at 131-34.

120. Daniel Garcia ("Mr. Garcia"), a security guard employed by Quality Security, received the assignment from his employer to monitor certain activities at Excel USA's offices. He was instructed to go to the property on February 21, 2001, and not to permit anyone onto the property until normal business hours the following morning. Mr. Garcia arrived at Excel USA's premises at 9:50 p.m. on February 21, 2001. He parked his vehicle in the parking lot in front of the main entrance where he could observe most of the approaches to the property. At 10:15 p.m., an individual in a green 1995 GMC pickup with Oregon license plates, WUG 448, arrived at Excel USA's premises. That vehicle was registered to Brian Ray Hymas, 17785 NW Elk Run

Drive, Beaverton, Oregon 97229. The individual identified himself to Mr. Garcia as "Brian Johnson." Mr. Garcia explained to the individual he was not to permit anyone onto the Excel USA premises because of the legal proceedings. The individual said he was the general manager of Excel USA, he was aware of the legal proceedings, and they meant nothing to him. He claimed he was there to retrieve his coat and he was going to do so regardless. Tr. 3/15/02, at 168-173. Mr. Garcia asked the individual to leave and return the next morning in order to retrieve his coat. The individual called the Springville Police on a cell phone. A Springville City police officer arrived at 10:30 p.m. Mr. Garcia explained his assignment to the officer. The individual identified himself to the officer as "Brian Johnson," and again claimed he was the general manager of Excel USA and was there simply to retrieve his coat. The individual asked the officer to remove Mr. Garcia from the premises for trespassing, which the officer did not do. The officer allowed the individual to enter the premises for the purpose of retrieving his coat. The individual remained in the building throughout the night. Tr. 3/15/02, at 173. At 6:30 a.m. on February 22, 2001, Officer Mitchell of the Springville Police Department arrived at Excel USA's premises, informed Mr. Garcia a "Brian Johnson" had called the Springville Police Department and asked for assistance in leaving the premises. At 6:53 a.m. on February 22, 2001, Officer Mitchell informed Mr. Garcia that security could not legally stay on the premises. Mr. Garcia left. The individual claiming to be "Brian Johnson" was Brian Hymas. Mr. Hymas told Taig Stewart about this incident. Mr. Hymas in fact spent several nights in Excel USA's premises after Ms. Stewart's

removal as acting president. Tr. 3/15/02, at 164-74; Tr. 3/13/02, at 90-93; Exhibits 213, 215, p.

5. This evidence, coupled with evidence of extensive damage and disruption to Excel USA's operations and Mr. Hymas' close relationship with the Stewarts (often visiting them at their home), visiting them while the Stewarts knew efforts were being made to serve him with legal papers, and sending him sent out of town on errands for them when the Stewarts knew efforts were being made to serve him with legal papers, establishes both that he was acting on behalf of Ms. Stewart and that he was involved in causing the extensive damage and disruption.

121. On February 22, 2001, at approximately 6:10 p.m., Bryan Hymas drove his green GMC pickup truck through the high overhead door on the north side of the U-shaped loading dock area of Excel USA's premises, closed the door and remained inside for a period of time. Exhibit 215.

122. On February 23, 2001, Mr. Hymas exited Excel USA's premises with some boxes and placed them inside the cab of his pickup truck. Exhibit 215.

123. On Saturday, February 24, 2001, at approximately 2:20 p.m., Mr. Hymas again drove his pickup truck into Excel USA's premises at the north end of the U-shaped drive. Later that day, at 4:06 p.m., Taig Stewart's black Ford pick up and Beverly Warner's Dodge van, pulled into Excel USA's building through the overhead door. At approximately 5:00 p.m., Beverly Warner's Dodge van pulled out of the building and drove to 1929 South 180 West, Orem, Utah. The van pulled around to the back by the garages where several people exited,

including an Oriental female. The Oriental female carried some unidentifiable items into a garage, and an unidentified male wheeled some items into the garage. The van was then pulled into the garage. Exhibit 215.

TORTIOUS INTERFERENCE

124. On July 24, 2001, Ms. Stewart signed her 3rd Affirmation in the HCA 2493/2001, in which she stated:

37. After I assumed control of the Company, I attempted to restructure the company's distributorship channels so that the Company can have at least some degree of control and interest in its distributors. This brings me to the 5th Defendant's allegations that I was setting up "competing" businesses in various Asian countries. Such an allegation is misleading. I have never established any business that competed with the Plaintiff, but rather, when I was president, I established on behalf of this Plaintiff new distribution companies in Hong Kong and the Philippines.

125. On August 1, 2001, Ms. Stewart signed her 4th Affirmation that was filed in the Hong Kong action, HCA 2493/2001. Ms. Stewart stated:

42. Further, Mr. Holman has accused me of such petty acts as not returning printers and taking forklifts from the Corporation's premises, all of which I vehemently deny. *Mr. Holman also accused me of setting up a competing business, yet he was unable to produce any evidence when requested by my attorneys. Indeed, I live 15 minutes away from the Corporation's offices, and if I were setting up an competing business in Utah, surely he would have little difficulty in obtaining substantial evidence. . . .*

Tr. 11/28/01, at 20, 102-03; Exhibit 228.

126. On November 27, 2001, Ms. Stewart acknowledged that as of the time she signed her 4th Affirmation in Hong Kong Action, HCA 2493/2001, on August 1, 2001, contrary to the

representations set forth in that Affirmation, she was setting up a competing business in Utah, the land had been purchased, the building was under construction, she had ordered equipment and raw materials, she had caused Apogee, Inc. to come into existence, and she had filed a Motion with the Court seeking permission to compete. Tr. 11/27/01, at 38-39.

127. Commencing February 17, 2001, Ms. Stewart's sister, Sheue Wen Smith ("Ms. Smith"), leased a portion of a warehouse (the "ATL Warehouse") from B and E Trading. The ATL Warehouse is located at 1335 West 1600 North, Springville, Utah, 84663. The portion of the warehouse that was the subject of the lease was on the south side and consisted of approximately 27,810 square feet. The cost of the lease was \$132,000, to be paid in 12 equal installments of \$11,000, plus some common area expenses. The lease terminated February 28, 2002, unless renewed. Exhibit 278.

128. Scott Nelson ("Mr. Nelson") was employed by ATL Technology from August 1996 through December 2001. He was the shipping manager for ATL from approximately 1998 through December 2001. Mr. Nelson's supervisor instructed him that a new tenant would be moving into the south portion of the warehouse on Saturday, February 17, 2001, and that he would have to be at the ATL Warehouse for security purposes. Later in the day on February 17, 2001, Mr. Nelson received instructions that the new tenant would instead be moving in the next day, Sunday, February 18, 2001, and that he should be at the ATL Warehouse at 8:00 the next morning. Beginning at approximately 3:00 or 4:00 p.m. on February 18, 2001, and throughout

the course of that afternoon, evening and into the next morning, approximately six individuals were involved in delivering pallets of Excel USA product to the ATL Warehouse in Excel USA's box-trailer trucks. They utilized a forklift and pallet jack they had brought with them. Dale Stewart was one of the individuals involved in delivering the pallets of product to the ATL Warehouse. Tr. 3/15/02, at 135. When Mr. Nelson arrived at the warehouse on February 19, 2001, there were more pallets of product in the warehouse than there were when he left the warehouse at approximately 2:00 that morning. Mr. Nelson thought there were approximately 125 pallets of Excel USA product in the ATL warehouse. Tr. 3/15/02, at 123-142.

129. On February 20, 2001, Mr. Nelson saw Dale Stewart at the ATL Warehouse with two attorneys and another individual. They were engaged in an accounting of product. Tr. 3/15/12, at 141, 158-60.

130. On December 10, 2001, Dale Stewart testified as follows:

Q. There was an occasion, was there not, while you were employed in E. Excel where some product was removed from the premises of E. Excel, and then the product was supposedly returned?

a. Yes. . . .

Q. When the product was removed, did you have anything at all to do with the removal of product from the premises?

a. No, I did not.

Q. Did you know it was being removed prior to the time that it occurred?

a. No.

- Q. Do you know where the product was removed to?
- a. I learned after it was . . . after we learned it was removed.
- Q. And you learned that it was removed where?
- a. To a warehouse across the street, across the highway.
- Q. And did you also learn who had leased the warehouse?
- a. At that time, no.
- Q. Subsequently have you learned that?
- a. Yes.
- Q. And how did you learn who leased . . . had leased the warehouse? . . .
- a. I learned in a conversation. . . .
- Q. You learned from a conversation with whom?
- a. With Jau-Hwa Stewart.

Tr. 12/10/10, at 161-63.

131. Beginning in April 2001, Hwan Lan Chen gave Dale Stewart approximately \$3,000 cash per month. She would hand him the cash in an envelope, approximately \$1,500 every two weeks or so. Tr. 12/10/01, at 121-23.

132. Dale Stewart was deposed on November 15, 2001. During his deposition, he falsely denied that he had been receiving money from any source other than the ones he had disclosed. He did not disclose that he had been receiving approximately \$3,000 cash per month

beginning April 2001 from Hwan Lan Chen. He also asserted during his deposition that he had several thousand dollars cash saved in a drawer, and that he had not disclosed that to the bankruptcy court as part of his personal bankruptcy he had gone through. Tr. 12/10/01, at 111-20.

133. On December 10, 2001, Dale Stewart testified in the OSC proceeding. He admitted during his testimony that during his deposition he had lied about income he had received by failing to disclose as a source of income the approximately \$3,000 cash per month Hwan Lan Chen gave him in envelopes. He said:

Q. The testimony you gave with regard to income from any source since leaving E. Excel was not true at the time you gave it, was it?

a. That's right.

Q. And you know it wasn't true at the time that you gave it, didn't you?

a. Yes.

Q. And on that first day you also testified that you have approximately three to four thousand dollars cash that you kept in a drawer in your house; isn't that correct?

a. Yes.

Q. And you testified that you used that cash to meet various expenses since you had no income; isn't that correct?

a. Yes.

Q. And that testimony was not true at the time that you gave it, was it?

a. Right.

Q. And you knew it was not true, didn't you?

a. Yes.

Tr. 12/10/01, at 115-16.

134. On February 23, 2001, Dale Stewart assisted Ms. Barclay in transporting approximately 16 boxes from Excel USA's premises to Ms. Barclay's home. Exhibit 215, at 10-11.

135. On December 10, 2001, Dale Stewart testified that he had assisted Angela Barclay in carrying some boxes from Excel USA's premises to Ms. Barclay's home. He testified he had assisted her with, at the most, "three or four" boxes. He testified he did not know what was in the boxes. Tr. 12/10/01, at 130-32. Exhibit 219, a video surveillance tape, shows that Dale Stewart did assert in moving a number of boxes from Excel USA to the apartment of Angela Barclay and that the number of boxes would greatly exceed the number claimed by Ms. Stewart. The boxes and their contents were the property of Excel USA. The boxes were moved with the approval of Ms. Stewart.

136. Dale Stewart has testified falsely, and the Court does not deem that any of his testimony can be relied upon by the Court.

137. On February 21, 2001, at approximately 12:30 p.m., a large tractor trailer was backed up to the middle shipping dock at the ATL warehouse. The truck was owned by AMI Leasing Company, 926 West 2100 South, Salt Lake City, Utah 84104, License Plate Utah

091248. The plate on the trailer was Oregon 02093. Shortly thereafter, someone operating the forklift loaded the AMI trailer with pallets containing boxes. At 1:20 p.m., the AMI truck pulled away from the loading area and drove to Modus Media located at 500 South 500 West, Lindon, Utah. The AMI truck drove to the rear of the building and backed up to a dock that was marked "receiving." At approximately 2:00 p.m., the AMI truck pulled out of the unloading dock and drove to a residence at 4723 South 3280 West, West Valley City, Utah 84120. Two men exited the truck and went into the residence. The residence was recorded in the name of Kimball and Ramona L. Sherman. Exhibit 215. Given the timing and circumstances leading up to these events, this constitutes additional evidence of Ms. Stewart's conversion of Excel USA product and assets in order to establish a competing enterprise.

138. Sometime after February 20, 2001, Dale Stewart asked Mr. Nelson to store a forklift, which was the same forklift that had been used to maneuver pallets of Excel USA product at the ATL Warehouse beginning February 18, 2001. Mr. Nelson agreed to store the forklift. Tr. 3/15/01, at 144.

139. During the period of the lease, people would drive their cars into the ATL Warehouse and close the door. Sometime after February 20, 2001, the windows of the south part of the ATL Warehouse were covered with paper, which prevented visual access into the warehouse. Tr. 3/15/01, at 143.

140. Mr. Nelson was present at the ATL Warehouse on a number of occasions when deliveries were attempted, sometimes for the other tenant. As a result, he became familiar with some of the names associated with the other tenant. The names included Apogee and Excel USA. Mr. Stewart had given Mr. Nelson his cell phone number for Mr. Nelson to give to anyone needing access to the ATL Warehouse. Tr. 3/15/02, at 145-47, 157-58;

141. Immediately upon leaving Excel USA in February 2001, Ms. Stewart located a development site on which the new competing, manufacturing facility would be constructed. She began negotiations with Michael Beach ("Mr. Beach"), CFO of Wing enterprises for the acquisition of the property. The negotiations began sometime between February 22 and March 2, 2001. Mr. Beach spoke with no one other than Ms. Stewart in connection with the negotiations, and Ms. Stewart never represented that she was purchasing the property for anyone other than herself. Tr. 11/27/01, at 62-63; Tr. 12/11/01, at 107-36; Exhibit 419.

142. On March 5, 2001, \$3.439 million was wire transferred into the Central Bank account that was in Ms. Shen's name. Tr. 5/8/02, at 10-11, 16-18, 20-24; Exhibit 528 (bates AP 901). Ms. Stewart's mother provided Ms. Stewart several million dollars in order to help her prepare to establish a new company and manufacturing facility in order to compete with Excel USA. This would involve setting up a corporation in a nominee's name, purchasing land in a nominee's name, constructing a manufacturing facility to be paid for by nominees and through nominee bank accounts, and acquiring manufacturing equipment in nominees' names. In addition

to the nominees, Ms. Stewart would use a number of individuals as her agents and co-conspirators to act on her behalf in establishing the competing enterprise, including Dale Stewart, Angela Barclay, Beverly Warner, Brian Hymas and her husband Taig Stewart. Tr. 10/26/01, at 79-95; Tr. 11/27/01, at 79-82, 129-134; Tr. 11/28-01, at 145-97; Tr. 5/8/02, at 11-56, 63-78; Exhibit 262.

143. On March 12, 2001, \$1,209,144.14 was wire transferred out of the Central Bank account that was in Ms. Shen's name. Exhibit 528.

144. On April 3, 2001, Harold R. Wing and Brigitte Wing, trustees of The Harold R. Wing Living Family Trust, signed a Warranty Deed conveying approximately ten acres of land to Lung Chaum Kuo, in exchange for approximately \$1.21 million. The \$1.21 million was wired from the Central Bank account that was in Ms. Shen's name on April 12, 2001. Ms. Stewart personally had negotiated the purchase of this property for the purpose of establishing a manufacturing facility with which to compete with Excel USA. Tr. 11/27/01, at 65-67; Tr. 5/8/01, at 12-14; Exhibits 419, 420, 421, 428 (bates AP901) Tr. 12/11/01, at 107-36.

145. During the first week to ten days of March 2001, Mr. Stanley A. Houghton, Jr. ("Mr. Houghton"), president of the general contracting company Westland Construction, attended a number of meetings at the home where Ms. Stewart resided in order to discuss the possible construction of an 80,000 square foot warehouse in Springville, Utah, later to be identified as the "Scenic West" project. Mr. Houghton's company had also done construction

projects for Excel USA. The first couple of meetings were also attended by Ms. Stewart's sister Sheue Wen Smith ("Ms. Smith") and their mother Hwan Lan Chen. Beginning the third or fourth meeting, Ms. Stewart began attending, and thereafter gave input at each of the meetings. Beginning the fifth such meeting, Taig Stewart attended, and discussions then began concerning the possible construction of an office building, in addition to the warehouse. Tr. 12/13/01, at 14-16. During one of these meetings, Mr. Houghton was introduced to "Brian," whom he was told would be in charge of the telephone system for the buildings. Mr. Houghton was also introduced early on to Dale Stewart, whom he was told would be the "plant manager." Tr. 12/13/01, at 15-18. During the first few meetings, Ms. Stewart and others informed Mr. Houghton they were in a hurry to complete the warehouse. Mr. Houghton informed the attendees he thought construction of the warehouse would take at least six months. He also informed them he thought the combined Scenic West project--warehouse and office building--would cost between \$9 and \$10 million. Tr. 12/13/01, at 5-19, 21-22, 45-47, 95, 97-9; Tr. 11/27/01, at 67-71; Exhibit 419.

146. While the early meetings were going on, Mr. Houghton began lining up subcontractors, including an architectural firm, Dane & Associates, and a soils testing company, Earthtec Testing. Tr. 12/13/01, at 30-31.

147. No written contract for construction of the Scenic West warehouse and office building was entered, and it turned into essentially a cost-plus arrangement. Mr. Houghton came to an understanding concerning how his company would be paid for the construction work. Mr.

Houghton opened a personal bank account at Central Bank. Money would be wired into that account and would remain there until it was time for Westland Construction to pay its bills. Mr. Houghton then would write a check from the new account with Westland Construction as the payee. During the course of the construction project, Mr. Houghton received in his personal account five or six wire transfers from Chaung Yeuh Li, whom Mr. Houghton does not know. In his experience as a general contractor, he had never before made arrangements for payment in a fashion similar to the foregoing. Tr. 12/13/01, at 22-28, 93-94, 100, 110; Exhibits 425 and 426.

148. Westland Construction would ultimately construct as part of the Scenic West project a warehouse with approximately 100,000 square feet that would include warehouse areas, employees area, restrooms, locker rooms, shower areas and, at the core or center of the building, a manufacturing area. The office area was to be built separately. Tr. 12/13/01, at 88-89.

149. Dale Stewart assisted with the construction of the warehouse in the Scenic West project by serving as a liaison between Ms. Stewart and Mr. Houghton. Tr. 12/10/01, at 105-06. On July 10, 2001, Dale Stewart sent Mr. Houghton an e-mail in which he discussed a number of details in connection with mechanical specifications for construction of the warehouse. Tr. 12/13/01, at 61-62; Exhibit 433.

150. In an e-mail to Mr. Houghton, dated March 19, 2001, Ms. Stewart stated:

I appreciate you meeting with me today.

1) Since we are in such a rush, would you please start to bring [sic] in the dirt and do whatever preparation work that needs to be done right away?

2) Would you please submit the drawing into the City now and then [sic] meet with Dale for the final adjustment [sic] for the warehouse?

3) Once you give us the architecture [sic] books, we will come up with [sic] what we need for the office in 2 days.

4) If it would take a whole 6 months to build the warehouse that [sic] means we need to find some other place to do the manufacturing and this would [sic] also require modification to the rented place too, is there anyway to bring [sic] in larger crew to get the building done faster? My bishop who is also a general [sic] contractor, he has mentioned that he would be happy to help, do you think [sic] we might be able to get the job done faster if we have 2 crew cam in to work [sic] together? . . .

Thanks,
Jau Hwa

Tr. 12/13/01, at 40-52, 106; Exhibit 428.

151. On September 23, 2001, Ms. Stewart sent Mr. Houghton an e-mail in which she stated, "[o]ur lease for the warehouse end December, so please make sure that the building will be done by December." Tr. 12/13/01, at 62-64; Exhibit 434.

152. On October 12, 2001, Mr. Houghton was served with a Subpoena Duces Tecum, and therein instructed to bring with him to a deposition, scheduled for October 25, 2001, the following documents:

All documents, created on or after January 1, 1999, that mention, relate or refer to Jua-Hwa [sic] Stewart, Taig Stewart, Dale Stewart, Beverly Warner, Angela Barclay, Bryan Hymas, Hwan Lan Chen or Scott Tawzer, or to any entities in which they own, directly indirectly or beneficially, any interest, or ac as employees, advisors, consultants, independent contractors or representatives, including, but not limited to, USA Apogee or Apogee, Inc.

Tr. 12/13/01, at 66-67; Exhibit 436.

153. On October 17, 2001, Ms. Stewart e-mailed Mr. Houghton information concerning the identities of her attorneys in this proceeding and their contact information. Tr. 12/13/01, at 67-70; Exhibit 437.

154. On October 29, 2001, Ms. Stewart sent Mr. Houghton an e-mail in which she said: "Would you please delete my emails to you from now on once you read it?" Tr. 12/13/01, at 74-76; Exhibit 440.

155. As of the date he testified in the OSC proceedings, December 13, 2001, Mr. Houghton's company had been paid approximately \$2.2 million for work in connection with construction of the warehouse and was owed approximately another \$800,000. Mr. Houghton believed the total cost of the warehouse portion of the project would be \$4.7 million. His projection for completing the warehouse portion of the project was the end of January 2002. Tr. 12/13/01, at 37-38, 101-03.

156. Beginning in mid-March 2001, Ms. Stewart utilized Dale Stewart to implement her objectives. While still an employee of Excel USA, Dale Stewart, specifically at Ms. Stewart's instruction, contacted Mr. Boyver and asked him for price quotations for various components of manufacturing equipment to be used in creating, bottling, capping, filtering, packaging and otherwise processing food-type materials, including capsule products. Tr. 11/28/01, at 144-146. During March 2001, Mr. Boyver prepared a diagram of the sequence of requested components based upon the information Dale Stewart had provided him. Dale Stewart terminated his

employment with Excel USA on March 21, 2001, one week after Mr. Holman's appointment as Special Master. (Tr. 12/10/01, at 93.) On March 22, 2001, Dale Stewart informed Mr. Boyver he was no longer employed at Excel USA. In connection with Dale Stewart's request for price quotes and other information, Dale Stewart provided Mr. Boyver a number of different names of people and entities for which the products were destined or on whose behalf Dale Stewart was acting, including "Dale Stewart" (who utilized the address of the ATL Warehouse for shipping purposes), Kent Maxwell, Steve Lee, Inc., Wendell Enterprises (which utilized the address of the ATL Warehouse for shipping purposes). Dale Stewart, over the next several months, procured a number of pieces of manufacturing equipment for use in the competing enterprise. Dale Stewart was acting on behalf of Ms. Stewart and specifically at her request, in procuring the manufacturing equipment. Ms. Stewart has stipulated that the manufacturing equipment referenced above was destined for Apogee, Inc. Ms. Stewart herself ordered tons of raw material for the competing enterprise. Tr. 11/27/01, at 77-81; Tr. 11/28-01, at 145-97; Exhibit 262; Tr. 12/10/01, at 95-105, 173; Tr. 11/28/01, at 166.

157. During his testimony on December 10, 2001, Dale Stewart denied that he was employed by Apogee, Inc., despite receiving \$3,000.00 cash per month. He also denied that he had used the name "Apogee, Inc." with Mr. Boyver, even though Mr. Boyver's records reflect Dale Stewart had, in fact, used that name. Tr. 12/10/01, at 135-37; Exhibit 262 (JJ).

158. Dale Stewart, at Ms. Stewart's instruction, arranged for the equipment, as it was purchased, to be delivered to the ATL warehouse. Tr. 12/10/01, at 105.

159. Ms. Warner, at Ms. Stewart's direction, researched via the Internet the means by which to register the business name "Apogee." On April 17, 2001, at Ms. Stewart's instruction, Ms. Warner submitted an application with the State of Utah for reservation of the business name "Apogee, Inc." The original idea for setting up Apogee, Inc., was that of Ms. Stewart. It was that entity through which Ms. Stewart intended to compete with Excel USA. Tr. 3/15/02, at 10-12; Tr. 11/27/01, at 83-86; Tr. 12/11/01, at 73-76; Tr. 12/12/01, at 9-11; Tr. 3/13/02, at 18; Exhibit 400.

160. Ms. Stewart asked Messrs. Hu and Tzu to register in the Philippines and Hong Kong respectively the Apogee name and trademark that Taig Stewart had designed. They both did so. Tr. 10/26/01, at 82-85.

161. On May 10, 2001, Ms. Stewart caused Mr. Scott Tawzer ("Mr. Tawzer") to set up a corporation named Apogee, Inc. Tr. 11/27/01, at 81-83. Mr. Tawzer's is Bryan Hymas' brother-in-law. Mr. Tawzer is a roofing contractor. Mr. Tawzer was induced to play the same role with respect to Apogee, Inc., that Ms. Heaton had played with respect to Shannon River, Inc. He was identified as the owner, as the sole director, as the registered agent, and as the sole officer. He was a nominee, serving at Ms. Stewart's direction. He has no stock certificate memorializing ownership in Apogee, Inc. Apogee, Inc. has had no shareholder's meetings or

meetings of the board of directors. It had no money and no bank accounts, although, as will be shown, it had access to substantial sums of money provided by Ms. Stewart's mother for the acquisition of real and personal property through an account established by a friend of Ms. Stewart, Ms. Shen. There was no agreement in place with respect to when Mr. Tawzer will provide Ms. Stewart with ownership of Apogee. Tr. 10/26/01, at 86-89; Tr. 11/27/01, at 82-83, 88-92.

162. At Taig Stewart's request, Westland Construction hired the roofing company Scott Tawzer owned to be the roofing subcontractor for the Scenic West warehouse construction. Tr. 12/13/01, at 19-21.

163. In an "Exclusive Contract," notarized by Ms. Warner on September 5, 2001, but purportedly "executed" on "14 September, 2001," Scott Tawzer, purporting to act on behalf of Apogee, Inc., granted to Mr. Hu's company, Apogee Essence International Philippines, Inc., the exclusive right to distribute Apogee, Inc.'s products in the Philippines "on the condition that the Distributor does not promote, sell or represent product lines other than that of the Corporation." Exhibit 529 (bates AP000895).

164. On August 15, 2001, Mr. Tawzer, purporting to act on behalf of Apogee, Inc., signed an "Exclusive Contract" with Ultimate Formulations, Inc. dba Best Formulations. The document contained the Apogee logo. The contract appointed Best Formulations as the exclusive contract manufacturer of Apogee, Inc., products. Exhibit 529 (bates AP000892).

165. Taig Stewart became the art director for Apogee, Inc., filling the same position he had when he worked at Excel USA. He designed Apogee, Inc.'s logo. He took two months to design the labels for the anticipated Apogee, Inc., products. He interacted with Ms. Stewart, Dale Stewart and Beverly Warner in assisting to establish Apogee, Inc. Dale Stewart provided Ms. Stewart a photograph of himself that would be used for Apogee, Inc., marketing purposes, and in fact, would appear in Organization Charts showing Dale Stewart as the person in charge of Apogee, Inc.'s production. Tr. 12/10/01, at 107-10; Tr. 3/13/02, at 13-14, 16-18, 116-17, 139; Exhibit 529 (Bates AP000778-79); Exhibit 417.

166. In June or July 2001, Apogee, Inc., came up with a product line. Ms. Stewart collaborated with Charles Ung of Best Formulations, a contract manufacturer. Tr. 10/26/01, at 96-97; Exhibit 529. The initial arrangements with Best Formulations were made by Tei-Fu Chen. Tr. 3/19/02, at 43.

167. In July 2001, Ms. Stewart and Dr. O'Neill met and discussed the possibility of Dr. O'Neill consulting for Apogee, Inc., in a capacity similar to that he had occupied with Excel USA. He said he would agree to become a consultant. Over time--August and September, the discussions became more serious. Tr. 11/27/01, at 137-38; Tr. 3/18/01, at 140-47.

168. During the Summer of 2001, Dr. O'Neill approached Dr. Murray with a proposal to co-consult with him for Apogee, Inc. Tr. 3/18/02, at 99-100.

169. During June 2001, Drs. O'Neill and Murray traveled together to various countries in Asia and Southeast Asia, including Malaysia, Singapore, the Philippines, Hong Kong, and Taiwan. Their purpose was to give lectures, among other things. Mr. Hu and Excellent Essentials (Philippines) had invited them to the Philippines, and Jason Tzu, Mr. Tzu's brother, had invited them to Hong Kong. They were in Hong Kong on June 7, 2001, and Taiwan on June 11, 2001. Tr. 3/18/02, at 147-51, 173.

170. At the end of August or first part of September, 2001 (before Dr. O'Neill's deposition on October 4, 2001), Dr. O'Neill, on behalf of Ms. Stewart, approached Dr. Murray with a proposal that they together travel to Asia and promote Ms. Stewart's new company, Apogee, Inc. The trip was to take place in October 2001. Dr. Murray agreed to go on the promotional tour. Tr. 3/18/02, at 103-10.

171. In or about mid-September 2001, Ms. Stewart sought and Dr. O'Neill provided her recommendations on Apogee, Inc., product formulations. Ms. Stewart also provided him Apogee, Inc. products for testing. Dr. O'Neill discussed with her the beneficial qualities of certain ingredients. At the time of his deposition, October 4, 2001, Dr. O'Neill planned to conduct testing on Apogee products. Those tests were to include immune function tests, angiogenesis inhibition testing, DNA repair testing, TOSC and other assays, growth curve testing, and concentration gradients. He estimated the testing would take 400-500 man hours per Apogee, Inc., product. Tr. 3/18/02, at 152-57, 167-71.

172. In early October 2001 , Drs. O'Neill and Murray, on behalf of Apogee, Inc., traveled to Best Formulations' manufacturing facility in California to conduct an inspection because Apogee, Inc., was interested in utilizing Best Formulations to manufacture products for Apogee, Inc., until Apogee, Inc.'s manufacturing facility in Springville, Utah came on line. Best Formulations was a company that did contract manufacturing of dietary supplements. Tr. 11/27/01, at 113-16; Tr. 11/28/01, at 52-53; Tr. 3/19/02, at 59-60.

173. In October 2001, Drs. O'Neill and Murray, on behalf of Apogee, Inc., traveled to Malaysia, Singapore, the Philippines, Hong Kong, and Taiwan. They met with the same people, including Messrs. Hu and Tzu and Jason Tzu, they had met with during their trip in June 2001. Tr. 11/27/01, at 137-38; Tr. 3/18/02, at 106-09.

APOGEE ACTIVATES

174. Beginning sometime in September 2001, Ms. Stewart began paying Ms. Warner as an employee of Apogee, Inc. Ms. Stewart would pay Ms. Warner \$1,500 cash, in hand, a couple of times a month. Tr. 12/11/01, at 80-81.

175. In September or October 2001, Ms. Warner came into contact with Mr. Hu concerning Apogee matters via telephone and e-mail. Tr. 5/8/01, at 75-77.

176. A promotional brochure for USA Apogee came out in the Fall of 2001. The brochure utilized photographs that Excel USA had paid for, that Taig Stewart, as art director for Excel USA, had previously utilized in Excel USA advertisements and publications, and that were

part of the Excel USA intellectual property Taig Stewart had removed from Excel USA's premises at about the time Ms. Stewart was removed as acting president. The brochure provided:

Established in 2001, USA Apogee is a multinational health products company. It is founded by a group of scientists, specialist doctors and seasoned marketing professionals. Our scientists come from a wide spectrum of scientific fields, namely, biochemistry, nutrition, immunology and Phytonutrition.

USA Apogee is based in Springville, Utah, USA, an area listed by the US government as a wildlife protection zone. It is pristine with no pollution from the outside world. Not only is it endowed with fresh air and clean water, it has also a most agreeable climate.

The brochure gave biographical information on Apogee, Inc.'s scientific consultants, Drs. O'Neill and Murray. The brochure then displayed and extolled the physiological virtues of nine capsule products Apogee, Inc., would be marketing-- Sang, La Vue, Repose, La Perle, Solace, Facile, Seve, Sante, Os Tr 3/13/02, at 31-45; Exhibit 253a.

177. On September 17, 2001, a paid commercial aired on ABS-CBN Television in the Philippines relating to Apogee Essence International Phils., Inc. On September 26, 2001, Mr. Alexander J. Villafuerte ("Mr. Villafuerte"), an employee of IP Manila Associates, Inc., received an assignment from Excel International Philippines, Inc., a client of IP Manila Associated, Inc. He went to the offices of ABS-CBN Television and obtained a copy of the segment that had aired on September 17, 2001. The paid commercial for Apogee Essence contains images of Excel USA products, including Triflora. The product order forms used at Apogee Essence bear the company name "Excellent Essentials International Corporation." Tr. 2/21/01, at 89-91; Exhibits 423, 423A.

178 On September 29, 2001, Mr Villafuerte visited the offices of Apogee Essence International Phils , Inc , located on the 14th floor of Lando Corporate Center Building at J P Laurel, Bajada, Davao City, Philippines In the lobby of the building, he was directed to Apogee's offices on the 14th floor He observed signs displaying the Apogee company name in the reception area of the offices. He made inquiry concerning the possibility of purchasing products of Apogee Essence International Phils , Inc He was able to purchase two Excel USA products Triflora health drink, and Elemente revitalizing facial cleanser. Tr 2/21/02, at 91-92

179 Winda S A Legaspi ("Ms Legaspi"), also an employee of IP Manila Associates, Inc , is a market researcher and does market surveys, which includes visiting factories, department stores, offices, shops and other retail outlets, and gathers information requested by clients E Excel International Philippines, Inc , is one of IP Manila Associates, Inc 's clients In carrying out an assignment from E Excel International Philippines, Inc , she went to the offices of Apogee Essence International Philippines, Inc , located at 22 F, Rufino Tower, 6784, Ayala Avenue, Makati City She was initially told that Apogee products were not yet available. She was also advised that in order to purchase product, she would have to become a member or distributor of Apogee Essence International Philippines, Inc Ms Legaspi filled out the registration information in order to become a member or distributor She then was informed she could purchase product, even though she had previously been told product was not yet available She gave a list of products she wanted to purchase, which included facial cleanser, body nourisher, moisturizing

bath oil, control cleansing foam, and intensive hair treatment. She made payment and received a paper bag with products contained therein. The paper bag bore the logo and name of E. Excel, and on the side, it contained information of the location and telephone contact details of Apogee, and of the branches of Apogee Essence International Philippines, Inc., in Makati, Lligan, Davao, Cebu, Baguio and Manila. The products in the bag bore the name and logo of E. Excel and the labels indicated that the products had been manufactured by E. Excel International, Inc., at 1198 North Spring Creek, Springville, Utah. There were stickers on the products that contained the information that the products had been imported by Excellent Essentials, Inc., 22 F, Rufino Tower, 6784, Ayala Avenue, Makati City, which was the same address as the business office of Apogee Essence International Philippines, Inc. She also was given three pamphlets containing, respectively, the profile of Apogee Essence International Philippines, Inc., Apogee Essence International Philippines, Inc.'s marketing style, and Apogee Essence International Philippines, Inc.'s product descriptions. Tr. 2/21/02, at 95-101, 103; Exhibit 424.

180. Exhibit 408, an Organization Chart for Apogee, portrayed the Apogee organization, including Drs. O'Neill and Murray in Research and Development Laboratories, Taig Stewart in charge of Creativity, Dale Stewart in charge of Production, and foreign Branches with Mr. Tzu responsible for distribution of Apogee products in Malaysia and Taiwan, Jason Tzu responsible for distribution of Apogee products in Hong Kong and Mr. Hu responsible for distribution of Apogee products in the Philippines. The Organization Chart for Apogee was accurate in most

respects, except that Ms. Stewart intended Sam Tzu to distribute Apogee products in Hong Kong, and both Messrs. Hu and Tzu to distribute Apogee products in Malaysia. Ms. Stewart's goal for Apogee, Inc., was to distribute Apogee products throughout the entire Asian market. Tr. 11/27/01, at 163, 165-74.

181. On October 31, 2001, the Court entered a TRO against Ms. Stewart, enjoining her from competing or preparing to compete against Excel USA.

182. On November 8, 2001, the Court entered a stipulated Order extending indefinitely the TRO against Ms. Stewart that was entered on October 31, 2001.

183. In November 2001, Ms. Warner received the cash payments from Taig Stewart rather than Ms. Stewart. Tr. 12/11/01, at 81-83; Tr. 3/13/01, at 22-23.

184. Shortly before Thanksgiving of 2001, Mr. Tzu ordered Apogee, Inc., product through Ms. Warner for shipment to Taiwan. Ms. Warner, without consulting with Hwan Lan Chen, arranged with Best Formulations to contract manufacture nine separate products and a total of 80,000 Apogee, Inc. product units (bottled), to be sent to Mr Tzu in Taiwan. She did so without learning the cost of the product to Apogee, the transportation costs, or the retail value of the product. Tr. 12/11/01, at 84-88, 220-21; Tr. 12/12/01, at 5-7.

185. In an invoice dated December 10, 2001, Best Formulations billed "Apogee, 1929 South 180 West, Orem, Utah 84058 U.S.A." \$156,734.59 for approximately 80,000 bottles of product it had contract manufactured for Apogee, Inc. The product was shipped via Dart Express

(AIR prepaid) to Rich Universe Ltd., in Hong Kong. Tr. 5/7/02, at 68-69, Exhibit 529 (bates AP000749).

186. On March 18, 2002, Mr. Crisostomo L. Rarugal, a Market Researcher for the firm IP Manila Associates, received an assignment on behalf of one of the firm's clients, Excel Philippines, which he understood to be the exclusive authorized distributor of Excel USA products in The Philippines. The assignment included visiting a company known as Apogee Essence International Philippines, Inc., ("Apogee Philippines"), located at the 32nd Floor, PBCOM Tower, Ayala Avenue corner Herrera Street, Makati City, in order to determine whether Apogee Philippines was selling products bearing the logo and trademarks of Excel USA. He did so on March 20, 2002, and applied to become a distributor for Apogee Philippines. He was initially told he could not purchase any such products because they were out of stock. Thereafter, a Mr. Marcelo "Mar" Pusod, who was in the Apogee Philippines offices, informed Mr. Rarugal he could provide Mr. Rarugal with Excel USA products and would attend to his order immediately. On April 3, 2002, Mr. Rarugal received a message from Mr. Pusod asking whether Mr. Rarugal was still interested in Excel USA products. Mr. Rarugal arranged a meeting for the next day, and the two men met. Mr. Rarugal purchased from Mr. Pusod a number of Excel USA products on April 4, 2002. On April 16, 2002, Mr. Rarugal met Mr. Pusod at Apogee Philippines' offices and purchased from him a number of products bearing the Apogee logo. Mr. Rarugal photographed the Excel USA and Apogee products he had purchased from Mr. Pusod and appended those

photographs to his Affidavit. The photographs, along with the distributorship agreement Mr. Rarugal entered, were also appended to his Affidavit. Mr. Rarugal was deposed on May 22, 2002, Philippine time, via telephone. His Affidavit and the exhibits thereto were made exhibits to his deposition. Thereafter, Mr. Rarugal sent the products to counsel for Excel USA. The product labels represent that the Excel USA products were manufactured in Springville, Utah and Excel USA's facility, and the Apogee products were imported through an Apogee entity in Malaysia. Exhibits 577 and 580.

MASTER SETTLEMENT AGREEMENT

187. On May 25, 2001, the Special Master submitted Report No. 3, which detailed his activities from May 10, 2001 through May 25, 2001. The Court had scheduled a hearing for June 1, 2001, for presentation of Report No. 3, which provides, in part:

The Special Master exercised his executive authority as set forth in said Orders [of May 11, 2001] and has entered into a comprehensive Master Settlement Agreement to settle all outstanding Asian related disputes and litigation which pertain to the Company and normalize all business relationships in the Asia region, conditioned on the approval of the board of directors which he believes will be granted prior to the June 1, 2001 hearing on this Report, and further conditioned on the approval of this Court.

The Special Master now comes before this Court with a request for the Court's approval of the Master Settlement Agreement, including settlement of the solitary and final piece of litigation which requires Court approval, the Hong Kong Action, pursuant to the grounds stated herein.

Exhibit 540, at 3. The Special Master explained his business judgment for recommending a global settlement of litigation, including Excel USA's claims against Excel Ltd. and others in Hong Kong. These points from Report No. 3 are summarized as follows:

188. The MSA would jump-start the business relationship between Excel USA and the historical Territorial Owners. The new Distribution Agreements for each Territorial Owner are separate agreements, binding on each Territorial Owner independently, and require that the Territorial Owners purchase all products from Excel USA, or from a manufacturer licensed by Excel USA, in which case Excel USA would receive a royalty of 1.5% on SV on all sales. The Territorial Owners would purchase a minimum of \$2.5 million for each year beginning 2001. Exhibit 540, at 11-15.

189. The MSA would result in the Territorial Owners' release of "Excel USA" for their damage claims against Excel USA for Ms. Stewart's failure to ship product pursuant to confirmed orders, in the amount of \$34.6 million, the Territorial Owners' damages claims for plant and equipment expenses in the amount of \$8 million, and Excel Ltd.'s counter claims against "Excel USA" for advances of \$5 million and business damages of \$9.9 million, for a total of \$57.5 million. Exhibit 540, 11-15.

190. The Territorial Owners would return to Excel USA all trademarks and intellectual property and would register such trademarks and property in Excel USA's name in the respective countries.

The Special Master further explained

The most controversial condition precedent to the Master Settlement Agreement being effective is the approval by this Court of the immediate dismissal of the Hong Kong action. As discussed above, the Company cannot afford the risk of this litigation. Furthermore, the Company cannot continue to do business in Asia in any substantial way without the immediate dismissal with prejudice of this case.

To enable the Company to continue as a prosperous business and obtain relief from all that threatens it, there is one condition that the Hong Kong Action be dismissed immediately. It's an interesting request from the Territorial Owners who are not a party to that litigation. The genesis of the request is in the relationships that have existed among the parties for over 7 years. The Territorial Owners currently obtain raw materials for manufacturing, including notably Chinese herbs through the same entity, E Excel Limited, which has been the source of such materials for the Company for the last 7 years. The sourcing of these raw materials is considered critical to the manufacturing of the products, and considered irreplaceable in volume and quality to satisfy the manufacturing requirements to supply over \$100,000,000 of retail value products annually, plus those products needed for the rest of Asia and North America. To allow the Hong Kong Action to continue endangers this critical source of supply for the Company. The Company faces critical shortages of key supplies which the minority shareholder was unable or unwilling to replenish while she controlled the Company. It is clear to the Special Master that the Company and the Territorial Owners need a good relationship with Limited. It is also clear that the Territorial Owners have better access to these resources currently, possibly to the detriment of the Company.

We have been furnished and examined an accountant prepared analysis of the commercial reasonableness of the financial arrangement between Limited, the Company and the Territorial Owners.

There is no question but that the Company cannot afford the risky litigation with Limited. It is overwhelmingly more desirable for the Company to settle that litigation, when coupled with the opportunity to get back into business with the Territorial Owners, and on a basis that address all of the points enumerated, including releases from liability.

In the alternative, let us consider the equities, based on Mrs. Stewart's conduct to see if she should be allowed to risk the Company for her personal litigation advantage.

1. Mrs. Stewart terminated distributors with whom the Company had a 10 year course of dealing without negotiating with them or giving a good business reason of which we are aware;
2. Mrs. Stewart installed new distributors who were former employees of the old distributors, the subject matter of several lawsuits and very controversial. These new distributors will not talk to us, account to us, order product or pay for product delivered. They continue to cause disruption in the markets;
3. Ms. Stewart refused to ship product even when ordered by the US court;
4. It is alleged that when the product was eventually shipped, it was adulterated (if not, why would the historical distributors now order from the Special Master?);
5. Mrs. Stewart appears to endorse the new distributors, even though we have enunciated a plan for a global settlement;
6. Mrs. Stewart is recorded on a disputed tape as endorsing destruction of the Company;
7. The records of the Company after Mrs. Stewart's departure are a fiasco . . . destroyed disc drives in three different departments ordered by her, graphics software, the printers and even the computers on which they were created, all gone, few if any original documents of any nature remaining, Twelve weeks into this matter and we still do not have the original Company records;
8. Missing equipment--computers, printers, mixers, forklift;
9. ATL warehouse under the control of Mrs. Stewart from where Company product was shipped according to the landlord;
10. Hundreds of thousands of dollars of Company product shipped to new distributors--again no records, employees report concealed/destroyed records, no payment, no explanation;
11. No help from Mrs. Stewart at the Company evaluating or locating records, helping with inventory sorting and other business issues which she handled, after repeated request to her series of three law firms;

- 12 No cooperation on return/assignment to the Company of the \$1.5 million clearly advanced by the Company to the Soldier Summit escrow per Company wire transfer records obtained from Central Bank, each furnished to prior and current counsel of Mrs. Stewart with a request for assignment (this with Mrs. Stewart being the sole payee on a \$3 million promissory [sic] under which the \$1.5 million advance was documented ,
- 13 A new Hong Kong Action filing (Amended Reply), which does not maintain status quo but rather asserts a still new basis of shareholder disagreement and misrepresents the Special Master's endorsement of her position,
- 14 Apparently, a new manufacturing facility under construction by Mrs. Stewart, as well as employee reported registration of trademarks of the Company in her individual name and instruction to employees reported to change certain applications in Asia to her personal name
- 15 Some of the foregoing is disputed. What is not disputed is the lack of cooperation with the Special Master from Mrs. Stewart, and the complete cooperation from Dr. Chen as evidenced by her agreements under the Master Settlement Agreement

The entire purpose of the appointment of the Special Master is to restore value to the Company. The Special Master has concluded in his best business judgment that the only logical course of such conclusion is through the Master Settlement Agreement, and recommends its approval by the Court.

Exhibit 540, at 16, 21-25

191 On May 30, 2001, Excel USA held a Board of Directors meeting in which Ms. Stewart participated as a director but voted against the action taken. The Board of Directors approved the proposed Master Settlement Agreement. Tr. 11/27/01, at 121-25

192 On June 1, 2001, the Court entered the following Order:

The Special Master, having made his Report No. 3 at the regularly scheduled hearing on June 1, 2001, the Court having considered the Special Master's Reports 1, 2 &

3, the proposed Master Settlement Agreement , related agreements and schedules, and the Exhibit Binder, being duly advised that the Board of Directors has met and approved the Special Master's recommendation as President and CEO that it into the Master Settlement Agreement, having heard arguments from the parties' counsel, and good cause appearing, it is now therefore Finds and Orders:

1. That under Utah Rules of Civil Procedure Rules 53(e)(2) and 6(d), based on the Report No. 3 of the Special Master and the entire record of this case, 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 an Order thereon at five calendar days, and that proper notice in accordance therewith has been given;
2. That Reports No. 1, 2 & 3 of the Special Master are hereby adopted in whole;
3. That due to the exposure to liabilities of E. Excel International, Inc. (the "Company") from various litigation described in the Special Master's Reports 1, 2 & 3, which liabilities exceed \$22,500,000, and the proposed settlement that will eliminate and discharge all such liabilities and enable the Company to recommence profitable business relationships with its former Asian business partners (known as "Territorial Owners" in the Reports), this Court accepts the conclusion of the business judgment made by the Special Master, acting as President and CEO of E. Excel International, Inc.;
4. Consequently, the Special Master 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 558 of 2001 on behalf of the Company; and
5. Based on the entire record, this Order should and will not be stayed by this Court pending any appeal thereof, unless and until a bond of cash or security approved by this Court is posted in a sum not less than \$22,500,000;
6. It is so Ordered and the Special Master shall go forward forthwith, this 1st day of June, 2001.

ONGOING VIOLATIONS OF INTERIM ORDER

193. On July 12, 2001, the Special Master submitted his Report No. 4, which detailed his activities for the period June 2, 2001 through July 6, 2001. The Special Master reported:

To date, the Company still does not have critical importing/exporting records, graphic department original artwork, software and equipment, computer software licenses and numerous other records relating to invoicing for sold products, trademarks and other categories . . . including but not limited to the invoice and sales records for the missing product described in Report No. 2 shipped to Mr. Hu's company in the Philippines and elsewhere in Asia. Special Master Report No. 4, at 6.

Many original Company documents have not been returned, . . . and in most instances even copies of Company records have not been included in what was returned. The result is that the Company still remains without originals of many important documents and without originals or copies of many other important records and documents. . . .

The collective list is substantial. Documents, records and assets of the Company still missing include:

1. Philippines, Taiwan and Hong Kong sales invoices and shipping records for 2001 for those items identified in earlier Reports and any others not discovered, whether under the name of the Company, Shannon River, Kormack or any other name for shipment of Company product.
2. Corporate books, stock ownership and any records for the apparent subsidiary of the Company in Hong Kong.
3. Records relating to a purported relationship with Yi Fu Corporation in Taiwan; all agreements, or other records between the Company and the distributor installed in the Philippines by Mrs. Stewart, Excellent Essentials International Corporation.
4. All software licenses for the Company's computers and servers.
5. Numerous (6 to 8) graphics computers, and graphics software for labeling, laminator and lamination table, and the equipment detailed on the extensive list of office equipment provided in the Exhibits.

6. Graphics department software disks for Company products, magazines, photodisc stock photography, desks, and certain scanners, computers, tools and oversize monitors, and printers returned damaged by Mrs. Stewart's agent, appearing to have been dropped and dragged. The collective replacement cost in the graphics department of the Company for this specialized equipment, as detailed in the attached Exhibit is \$70,700; and the replacement cost for the missing photodiscs is \$27,200. The value of other missing items and artwork has not been determined.
7. Certain accounts payable invoices for 2000 and 2001
8. Original Industrial Alcohol Users permit.
9. Approximately 95% of all import documents for 1997 through 2000 for the Company, Shannon River, Kormack, Inc. or Malcolm, Inc. for raw materials or products imported by the Company. With respect to any importation of raw materials three (3) original documents are received, two (2) are kept by the Company and one goes to the import broker. All of the Company originals have been removed and are missing, and we do not have copies, including:
 - broker invoices for payment on import shipments,
 - original overseas vendor invoicing, packing lists, bills of lading for ALL purchased by the Company (all needed to clear US Customs for import of rice powder, pearl powder, plumb beverage, food powders, mushroom powder, vanilla, gelatin caps, plastics--jars, bags, tubes, canisters, cosmetic bags), and
 - wire transfer and wire transfer confirmation receipts for each transaction.
10. Export documents including invoices, fax communication records, wire payment receivable records, communication faxes and letters regarding all product registrations, lab testing with foreign country Consulate Generals certifications, computer discs that recorded communications with offices of Territorial Owners
11. Original documents for certain key Analytical Reports, notarized Stability Reports, notarized Toxicology Reports, notarized Nutrition Fact Reports, Laboratory Reports for Eurofins Scientific, and Laboratory Certificates for Michelson Lab, for nearly all Company products The notarized Analytical Reports are essential

to export to foreign countries to satisfy their custom laws. Notarized (and Authenticated by the Philippines Consulate in the US) analytical Reports, Toxicology Reports, Processing Reports and Stability Studies signed by Mrs. Stewart for all Company products, as directed by Mrs. Stewart (known internally as the "New Name Project"). . . . The original Trademark Principal Registration Certificate for the key Company product known as "Millenium";

12. All original Patent grants and files relating thereto;
13. Hundreds of thousands of labels for Company products . . .
14. Numerous miscellaneous items, including paper shredder, pallet jack, fax machine, paper cutter, beta cam player, 6 product display booths with accompanying posters and supplies, and 10 heavy product tables, all items necessary to operate the business; and
15. Litigation files for all the cases in all the countries including Hong Kong Action 558.

Special Master Report No. 4, at 6-12.

194. In the Hong Kong Action, HCA 2493/2001, Judge Stone acknowledged that Hwan Lan Chen had received in excess of \$32 million into a Credit Suisse account on which Ms. Stewart held power of attorney.

195. On September 11, 2001, at Ms. Stewart's instruction, Taig Stewart signed a letter to the Bank of Montreal in his capacity as President of Dunnkirk, Inc., an Excel USA affiliate doing business in Canada. He did not prepare the letter. The document was prepared by Ms. Stewart, or by Ms. Warner at Ms. Stewart's direction and instruction. The letter stated: "In the past, I had assigned one of my staff to keep track of my account information with you. As such, I

do not have the account number/s available to me.” The letter then made certain inquiry concerning account information. The letter concluded:

As the only authorized individual for my accounts with your institution, I would appreciate it if you would keep all matters of my inquiry confidential. If you have any questions, feel free to contact my assistant, Beveriy Warner (801-636-8941). She is the only other individual I would authorize you to speak with regarding this matter.

The letter identified Dunnkirk’s return address as 1929 South 180 West, Orem, Ut 84058, Ms. Stewart’s home address, rather than Dunnkirk’s official corporate address, 1198 North Spring Creek Place, Springville, Utah 84663. The purpose for listing the home address was so that no correspondence having to do with Dunnkirk would go to Excel USA’s corporate offices.

Contrary to the contents of the letter, Taig Stewart in fact had never assigned a staff member to keep track of account information, and Ms. Warner was not his assistant, but was Ms. Stewart’s assistant. The Bank of Montreal responded to the inquiry in writing, but Taig Stewart had never seen the response reflected in the last page of Exhibit 513. Exhibit 513, Tr. 3/13/02, at 46-62, 78-81

II. CONCLUSIONS OF LAW

1. On June 22, 2001, plaintiff 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 in the first-filed action (“June 22, 2001 Motion”). On August 2, 2001, plaintiff filed a Motion For Order Summarily Holding Ms. Stewart In Criminal Contempt Of Court in the first-filed action (“August 2, 2001 Motion”). Plaintiff’s burden with respect to the criminal contempt

requires that all requisite elements be established by proof beyond a reasonable doubt. Plaintiffs burden with respect to the aspects of her motion seeking civil contempt is that all requisite elements be established by clear and convincing evidence.

2. With respect to the June 22, 2001 Motion, the evidence presented establishes each of the elements of criminal contempt by proof beyond a reasonable doubt, and *a fortiori*, establishes each of the elements of civil contempt by clear and convincing evidence, as a result of the specific conduct of Defendant Stewart, in violation of the Temporary Restraining Order of this Court (“TRO”), entered January 10, 2001, and the Interim Order of this Court on February 21, 2001 (“Interim Order”).

3. Taig Stewart, Beverly Warner, Brian Hymas, Dale Stewart, and Angela Barclay acted at the behest of, and under the direction and control of Ms. Stewart. Their conduct, as set forth herein, is attributable to Ms. Stewart as her agents or nominees.

4. The conduct of these individuals further constitutes a civil conspiracy, created to carry out plans and schemes authored by Ms. Stewart to cause damage to Excel USA and/or Dr. Chen in violation of this Court’s orders prohibiting such conduct. As such, all members of the conspiracy, including Ms. Stewart, are connected to that conduct and liable for those damages.

5. Excel Malaysia and Excel Taiwan, Excel Philippines and Excel Hong Kong, Territorial Owners, each had valid, written exclusive contracts with Excel USA; had the plaintiff not established the existence of valid, written exclusive contracts, the evidence establishes that

Excel Malaysia, Excel Taiwan, Excel Philippines and Excel Hong Kong each had exclusive contracts with Excel USA established through the many years under a course of performance.

TRO

6. During the Fall of 2000 and early 2001, Excel Malaysia and Excel Taiwan had placed numerous orders for product with Excel USA, which orders met all of the contractual requirements in order to be filled.

7. During the pendency of the TRO, Ms. Stewart intentionally failed to fill confirmed orders despite knowing what was required, and having the ability to fulfill such orders, thereby violating the Order that she “immediately . . . 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.”

8. During the pendency of the TRO, Ms. Stewart intentionally failed to fill confirmed orders of Territorial Owners despite knowing what was required, and having the ability to fulfill such orders, thereby violating the Order enjoining her “from directly or indirectly causing the Company to violate any of its exclusive contracts with territorial owners”

9. During the pendency of the TRO, Ms. Stewart intentionally caused and allowed shipments of product within her control to be shipped to Messrs. Hu and Tzu who were not affiliated with the Territorial Owners with which Excel USA had exclusive contracts, despite knowing what was required and having the ability not to ship such product, thereby violating the

Order enjoining her “from directly or indirectly causing the Company to violate any of its exclusive contracts with territorial owners”

10. During the Pendency of the TRO, Ms. Stewart intentionally caused and allowed shipments of product within her control to be shipped to Messrs. Hu and Tzu who were not affiliated with the Territorial Owners with which Excel USA had exclusive contracts, despite knowing what was required and having the ability not to ship such product, thereby violating the Order enjoining her “from directly or indirectly causing the company to . . . compete with territorial owners in violation of such contracts.”

11. During the pendency of the TRO, Ms. Stewart intentionally caused her husband Taig Stewart to take steps to terminate the exclusive contract Excel USA had with Excel Hong Kong, despite knowing what was required and having the ability not to cause Taig Stewart to take steps to terminate such contract, thereby violating the Order enjoining her “from directly or indirectly causing the Company to violate any of its exclusive contracts with territorial owners”

INTERIM ORDER

Paragraph 12 of the Interim Order

12. During the pendency of the Interim Order, Ms. Stewart intentionally caused shipments to be made through Shannon River, Inc. of Excel USA products, that were not her property, to Messrs. Hu and Tzu in the Philippines and Taiwan respectively, who were not affiliated with the Territorial Owners with which Excel USA had exclusive contracts, despite

knowing what was required and having the ability not to cause such shipments; the foregoing was done for an improper purpose and by improper means (including, without limitation, breaching her fiduciary duties as a director to Excel USA, converting corporate opportunities, converting Excel USA property, utilizing Excel USA property, intellectual property, good will, products, and distribution channels for the purpose of destroying Excel USA), thereby violating the Order enjoining her not to “tortiously interfere directly or indirectly with any contract determined by the Court at any time to exist between the Company and any distributor or any third party.”

13. During the pendency of the Interim Order, Ms. Stewart undertook to prepare for and cause competition with Excel USA, despite knowing what was required and having the ability not to prepare for and cause competition with Excel USA; the foregoing was done for an improper purpose and by improper means (including, without limitation, breaching her fiduciary duties as a director to Excel USA, converting corporate opportunities, converting Excel USA property, utilizing Excel USA property, intellectual property, good will, products, and distribution channels, and causing extensive damage to Excel USA’s operations through acts of destruction, all for the purpose of destroying Excel USA), thereby violating the Order enjoining her not to “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.”

14. During the pendency of the Interim Order, Ms. Stewart intentionally caused, developed and advanced a business relationship with Messrs. Hu and Tzu in the Philippines and

Taiwan respectively, who were not affiliated with the Territorial Owners with which Excel USA had exclusive contracts, despite knowing what was required and having the ability not to develop and advance a business relationship with Messrs. Hu and Tzu; the foregoing was done for an improper purpose and by improper means (including, without limitation, breaching her fiduciary duties as a director to Excel USA, converting corporate opportunities, converting Excel USA property, utilizing Excel USA property, intellectual property, good will, products, and distribution channels, and causing extensive damage to Excel USA's operations through acts of destruction, all for the purpose of destroying Excel USA), thereby violating the Order enjoining her not to "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 "

Paragraph 13 of the Interim Order

15 During the pendency of the Interim Order, Ms. Stewart intentionally caused shipments to be made through Shannon River, Inc. of Excel USA products that were not her property but were within her control to be shipped to Messrs. Hu and Tzu, who were not affiliated with the Territorial Owners with which Excel USA had exclusive contracts, despite knowing what was required and having the ability both to not cause shipments and to cause such shipments to be returned to Excel USA prior to their arrival and acceptance in the Philippines and Hong Kong, thereby violating the Order enjoining her to "immediately return to the Company's

headquarters any corporate assets in her custody or control including but not limited to all corporate records.”

16. During the pendency of the Interim Order, Ms. Stewart had within her custody and/or control the following corporate assets that were the property exclusively of Excel USA:

Shannon River, Inc. documents, including corporate records, bank records, shipping records, invoices to Messrs. Hu and Tzu, and accounts receivable records;

Extensive Excel USA records;

Extensive Computer hardware, software and graphics equipment;

Other items of personal property, such as tables, pallet jack and forklift;

Extensive Intellectual property;

Majority ownership in the distributorships she established through Messrs. Hu and Tzu;

\$1.925 million distributed from Excel USA’s money market account to her personal bank account on September 1, 2000 and September 28, 2001, in conflicted-interest transactions;

she knowingly and intentionally retained such property despite knowing what was required and having the ability to immediately return said property to Excel USA’s headquarters, thereby violating the Order enjoining her to “immediately return to the Company’s headquarters any corporate assets in her custody or control including but not limited to all corporate records.”

August 2, 2001 Motion

17. With respect to the August 2, 2001 Motion, the evidence establishes each of the elements of criminal contempt by proof beyond a reasonable doubt.

18. Ms. Stewart suborned perjury and obstructed justice in her telephone conversation among her, Mr. Hu and Mr. Tzu, on or about January 23, 2001, during the pendency of the Preliminary Injunction hearings. Consistent with Ms. Stewart's suggestion and the agreement among the participants to that conversation that the participants would commit perjury, Mr. Hu testified falsely on February 13, 2001, concerning matters that were material to the proceedings then before the Court.

19. Ms. Stewart committed perjury herself during her testimony on February 8, 2001, in the Preliminary Injunction proceeding concerning material matters by intentionally, knowingly and falsely responding to questions while a witness, by denying that she knew monies that had been wired to Mr. Hu or the purpose for which such monies had been wired. At the time she testified on February 8, 2001, she knew that she had been instrumental in wiring money to Mr. Hu, and knew the specific purposes for the wire transfers to Mr. Hu. Ms. Stewart falsely testified that she did not know monies were wired to Richard Hu when in fact she had. She falsely testified that she did not know the purposes for which monies were wired to Mr. Hu when in fact she knew. Ms. Stewart testified that she was without knowledge of facts pertaining to the business purposes for which monies were wired when in fact she did know the business purposes. Ms. Stewart

respectively stated that she did not know the source of the monies wired when in fact she did know. In later Affirmations in the Hong Kong proceedings and in her testimony during the OSC and subsequent Preliminary Injunction proceedings, the fact of her false testimony and her guilty knowledge that it was false became clear. Ms. Stewart committed perjury by falsely denying any knowledge about Paris Uy. Ms. Stewart committed perjury by falsely denying the existence of written contracts with the Territorial Owners, and by falsely denying she had purported to terminate one such contract with Excel Hong Kong.

MS. STEWART'S ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM

Material aspects of Ms. Stewart's Answer, Affirmative Defenses and Counterclaim are untruthful and were made in bad faith.

III. REMEDIES

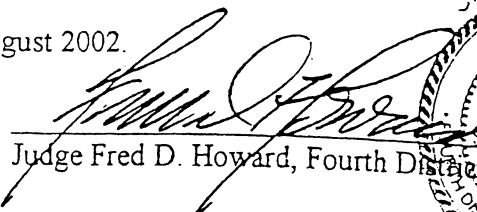
Based upon the foregoing Findings of Fact and Conclusions of Law holding Ms. Stewart in Criminal and Civil Contempt of Court pursuant to Dr. Chen's June 22, 2001 and August 2, 2001 Motions, the Court Orders the following:

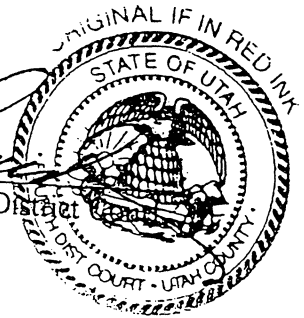
1. Ms. Stewart's Answer, Affirmative Defenses and Counterclaims are stricken;
2. Judgment on Dr. Chen's claims is hereby entered, with the exception of a determination of damages;
3. The Court will set a trial date for Dr. Chen's damages;

4. Dr. Chen is awarded her attorney's fees and costs in connection with her bringing and prosecuting the June 22, 2001 and August 2, 2001 Motions pursuant to the Court's inherent authority concerning contempt and Utah Code Ann. § 78-27-56;
5. Dr. Chen is awarded her remaining attorney's fees and costs pursuant to Utah Code Ann. § 78-27-56.

SO ORDERED on this 19th day August 2002.

By:


Judge Fred D. Howard, Fourth District Court



MAILING CERTIFICATE

I certify that true copies of the foregoing ruling were mail, postage prepaid, on the 20 day of August, 2002 to the following at the addresses indicated, to wit:

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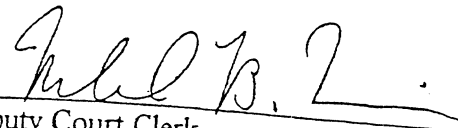
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Deputy Court Clerk

Tab B

8/20/02 MBT Deputy

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

JAU-FEI CHEN, et al.,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
Plaintiffs,	:	
vs.	:	(FILED UNDER SEAL)
	:	
JAU-HWA STEWART, et al.,	:	Civil No. 010400098
	:	
Defendants.	:	Judge Fred D. Howard
	:	

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INTRODUCTION

This matter came before the Court on the motion of E. Excel International, Inc. (“E. Excel”) for a preliminary injunction against Jau-Hwa Stewart and the Third-Party Defendants, and on Ms. Stewart’s motion for a preliminary injunction concerning E. Excel’s labeling. Given the unusual procedural posture of this case, the Court’s findings and conclusions do not constitute a final judgment at law or equity. Nevertheless, the Court notes for the record that it has heard approximately 40 days of live testimony in support of this matter, with no relaxation of the Rules of Evidence, and has had ample opportunity to observe the demeanor and credibility of witnesses. Although these findings must remain preliminary, they nevertheless represent this Court’s well-considered evaluation of the voluminous record before it.

FINDINGS OF FACT

Activity at E. Excel Prior to September 2000

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 product 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 product through a multi-level marketing network.

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

December 2000:
Jau-Hwa Stewart and Hwan Lan Chen
Attempt to Deprive the Children of Majority Control of E. Excel

32. Jau-Hwa Stewart claimed to exercise control of E. Excel through the purported trust shares of Jau-Fei Chen's three children. 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. Excel. Had this transaction been successfully completed, it would have immunized Ms. Stewart and Hwan Lan Chen against any challenge to the validity of the trusts by Jau-Fei Chen. Thus, in December 2000, the board of E. Excel (consisting of Jau-Hwa Stewart, her husband, and Hwan Lan Chen), proposed to issue 3200 new shares to Jau-Hwa Stewart or Hwan Lan Chen, sufficient to deprive the three minor children (for whom Ms. Stewart claimed to be acting as trustee) of their majority control. (Tr., Feb. 1, 2001, at 62-4; Tr. Feb. 8, 2001, at 37) (children would be left with 4500 shares and Ms. Stewart and Hwan Lan Chen would jointly control 4700 shares). Although the board set the purchase price at \$3 million, no valuation of the company was ever performed to determine the fairness of this price. (Tr., Feb. 7, 2001, at 61-2.) So far as it appears from the record, this transaction was abandoned because of the lawsuit initiated by Jau-Fei Chen in early January 2001.

January 2001:
Jau-Hwa Stewart Delivers Product to the "New Distributors"
in Violation of Court Order

33. On January 10, 2001, based upon Ms. 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].” (Exh. 201.)

34. As a result of this order and other events, Taig Stewart acknowledged, well before this Court restored Jau-Fei Chen and Rui-Kang Zhang to the Board of Directors, “that there was a strong possibility that Jau-Hwa would be removed as president of the company ” (Tr., Mar. 15, 2002, at 188.) 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.

35. If Jau-Hwa Stewart’s new distributors in Asia were to survive until they could be transferred over to the new company, however, they required product for their subdistributors to sell in the interim. In defiance of this Court’s order, therefore, the shipments that were prepared for the new distributors in late December were allowed to proceed on their way notwithstanding the Court’s January 10 order, Jau-Hwa Stewart and the Third-Party Defendants now taking some pains to conceal their efforts.

36. For instance, on January 15, 2001, Jau-Hwa Stewart allowed Pilot Marine Services to ship nearly six tons of product (valued at more than \$100,000) to the new distributor in Hong Kong. (Exh. 205.) Although the original invoices indicated that the product was to be

the Fifth Amendment when E Excel served her with interrogatories concerning her knowledge of and role in the labeling procedures while she was at E Excel (Warner Ans To Inter., at 7)

258 All findings of fact made by this Court in respect to Jau-Fei Chen's Motion for Order to Show Cause and Motion for Summary Criminal Contempt are, without subjecting those findings to seal, hereby incorporated as findings for purposes of E Excel's Motion for Preliminary Injunction as well

CONCLUSIONS OF LAW

1. Under Utah law, a movant can obtain temporary or preliminary injunctive relief upon showing that

(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

See Utah R. Civ. P. 65A(e). The drafters of this Rule stated that "[t]he standards set forth in [Utah R. Civ. P. 65A(e)] are derived from" Tenth Circuit precedent, namely, Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986), and Otero Savings & Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir. 1981). See Utah R. Civ. P. 65A, advisory committee note (regarding paragraph (e))

2. Under this Tenth Circuit precedent, if a movant can satisfy the first three elements of the preliminary injunction test, a more "liberal definition of the 'probability of success' requirement" applies. See Otero, 665 F.2d at 278. In such cases, a plaintiff can meet the probability of success requirement by "rais[ing] questions going to the merits so serious,

substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation ” Id

3. Both Jau-Hwa Stewart and E. Excel have made motions seeking preliminary injunctive relief. The Court will first address Jau-Hwa Stewart’s motion, and will then address E. Excel’s motion.

STEWART’S MOTION FOR PRELIMINARY INJUNCTION

4. Jau-Hwa Stewart seeks a preliminary injunction against E. Excel that would prevent E. Excel from manufacturing and distributing any products that are mislabeled and/or have not been subjected to the levels of testing required by the country into which the product is being shipped and distributed. The Court entered a temporary restraining order to this effect, at Jau-Hwa Stewart’s request, on December 19, 2001.

5. The question for the Court is whether Jau-Hwa Stewart, as the movant, can satisfy the four requirements (outlined above) for entry of preliminary injunctive relief under the facts presented during the hearing. The Court will examine the four elements in turn.

Irreparable Harm

6. The Court concludes that Jau-Hwa Stewart has not met her burden of demonstrating that she will be irreparably harmed if her requested preliminary injunction does not issue.

7. First, Jau-Hwa Stewart took an inordinately long amount of time to seek relief for these alleged misdeeds, having known about them for the better part of a decade. It is the well-established rule that “[a] party experiencing a legal harm should not delay in either commencing an action or in seeking preliminary injunctive relief” because “[c]ourts will assess the length of the movant’s delay in assessing whether to grant injunctive relief” 13 Moore’s Federal Practice §

65.22[1][b], at 65-48 (2000). A party who delays in seeking redress cannot in good faith argue that it will be irreparably harmed if forced to wait several more months—until the conclusion of the litigation—for relief. See GTE Corp. v. Williams, 731 F.2d 676, 678-9 (10th Cir. 1984) (denying an injunction where the movant had waited three years to file suit after discovering the alleged harm); see also Medtronic, Inc. v. Teletronics, Inc., 686 F. Supp. 838, 846 (D. Colo. 1987). Generally, any delay in excess of one year warrants the conclusions that any harm that exists is not irreparable, and can wait several more months until remedied. See, e.g., Jordache Enters., Inc. v. Levi Strauss & Co., 841 F. Supp. 506, 521 (S.D.N.Y. 1993); Le Sportsac, Inc. v. Dockside Research, Inc., 478 F. Supp. 602, 609 (S.D.N.Y. 1979).

8. Second, the types of harm that Jau-Hwa Stewart claims will occur without the injunction are either illusory or are compensable with money damages.

9. Jau-Hwa Stewart places great reliance on her argument that, without the injunction, there is a public health risk to the consumers around the world who purchase and consume E. Excel product. It was partly on this basis that the Court granted Jau-Hwa Stewart's request for a temporary restraining order. Since the entry of the TRO, however, Jau-Hwa Stewart has failed to produce any evidence at all in support of these claimed public health risks—she has not produced a single witness, expert or otherwise, to support her claims of health hazards. To the contrary, the company has produced detailed evidence, as stated in the Findings of Fact, of substantial ongoing efforts to assure compliance with FDA and foreign regulations and of its efforts to assure the health and safety of its consumers.

10. Jau-Hwa Stewart also claims that she will be harmed if the injunction does not issue because the value of her stock in E. Excel will allegedly plummet. Even if one were to assume that this scenario were true from a factual standpoint, the harm caused from a falling stock

price is compensable with money damages. See, e.g., FMC Corp. v. R. P. Scherer Corp., 545 F. Supp. 318, 322 (D. Del. 1982) (holding that a depreciated stock price was not irreparable harm because it could be compensated with money damages). The Utah Supreme Court has clearly stated that “[i]rreparable injury justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money.” See Hunsaker v. Kersh, 1999 UT 106, ¶9, 991 P.2d 67. The suggestion by Jau-Hwa Stewart is also inconsistent with the testimony of her own expert who testified the value of the company at the time of the hearing was near zero. (Tr., June 5, 2002, at 115.)

11. Jau-Hwa Stewart has not produced evidence of irreparable harm, and therefore cannot meet her burden on this element of the injunction standard.

Likelihood of Success on the Merits

12. The Court also concludes that Jau-Hwa Stewart has failed to meet her burden of showing a likelihood of success on the merits of her claim against E. Excel. Jau-Hwa Stewart’s lone claim against E. Excel is one for declaratory and injunctive relief. In essence, Jau-Hwa Stewart argues that E. Excel is “engaged in several questionable practices,” including allegedly mislabeling and failing to properly test its products before distribution. Cross-Claim, at 6-12. It is notable that at no time after she was removed as President by this Court’s order of February 21, 2001, until after she left the Board of Directors on June 19, 2001, did Jau-Hwa Stewart ever inform the company or its management of her alleged concerns, nor of the fact of the ongoing FDA compliance procedure. Indeed, the record is clear that Jau-Hwa Stewart never called to the attention of the company any health and safety concern, nor of any alleged mislabeling, nor of her own admitted false test reports until she had already sought this Court’s order enjoining the company.

13. However, Jau-Hwa Stewart nowhere points the Court to a specific substantive statute or regulation that E. Excel has allegedly violated. The closest she comes is by alleging that E. Excel's products are "misabeled in violation of federal truth in labeling laws, 21 C.F.R. § 101 *et seq.*, and the laws of the countries in which E. Excel USA products are distributed, including but not limited to, Malaysia, Thailand, Philippines, Taiwan, Hong Kong, Korea, etc." See Cross-Claim, at 8.

14. Jau-Hwa Stewart has not ever specified which provision of the federal "truth in labeling laws" E. Excel has allegedly violated, and has not ever specified which provisions of foreign law E. Excel has allegedly violated. In addition, Jau-Hwa Stewart presented no evidence to rebut the substantial evidence, as set forth in the findings, of the company's efforts to assure compliance with applicable laws.

15. Indeed, the evidence that has been provided to the Court demonstrates that E. Excel has been engaged in an ongoing federal regulatory compliance procedure with the Food and Drug Administration. E. Excel has hired specialized scientific and manufacturing supervisory personnel and has implemented a new labeling and testing procedure to ensure that its product is properly labeled and tested. Jau-Hwa Stewart has not produced evidence that would call into question E. Excel's recent efforts to properly label and test its products. Jau-Hwa Stewart has not shown a likelihood of success on the merits of her claim.

Balancing of Threatened Injury to Applicant vs. Damage to the Company

16. Jau Hwa Stewart's expert, Mr. John Brough, testified the value of the company was negligible, a fact which the Court credits. Based on the company's demonstrated efforts in regulatory compliance, the fact that Jau-Hwa Stewart's stock in the company has de minimis value today, and the substantial efforts of Jau-Hwa Stewart to damage the company, and thereby the value of its stock, the Court concludes that any conceivable damage to Jau-Hwa Stewart's stock value in the company is negligible.

Public Interest Element

17. The doctrine of primary jurisdiction provides that both federal and state courts should decline to rule on issues where an administrative agency has both the expertise and the opportunity to evaluate. Here, the court concludes that the FDA is actively engaged in a compliance procedure with the cooperation of the company. Moreover, the company has retained expert employees, independent consultants and attorneys to guide it in regulatory compliance, and is working with its business partners on their efforts to assure compliance with foreign regulatory bodies. Utah courts recognize the doctrine of primary jurisdiction. See, e.g., Union Pacific R. R. Co. v. Structural Steel & Forge Co., 9 Utah 2d 318, 320-321, 344 P 2d 157, 158-159 (Utah 1959); Mountain States Tel & Tel Co v. Atkin. Wright & Miles, Chartered, 681 P 2d 1258, 1262 (Utah 1984), see also, Rucker v. The St. Louis Southwestern R. Co., 917 F.2d 1233, 1237 (10th Cir. 1990). It is conceded by this Court that the FDA has the appropriate expertise on labeling and testing matters, and this Court concludes, based on the FDA's involvement, and the company's demonstrated efforts in foreign regulatory compliance, that it is preferable that this Court abstain from exercising further jurisdiction as to product testing and labeling issues.

18. For these reasons, the Court DENIES Jau-Hwa Stewart's motion for a preliminary injunction and dissolves the Temporary Restraining Order as "wrongful." Utah R. Civ. P. 65A(c)(1).

E. EXCEL'S MOTION FOR PRELIMINARY INJUNCTION

19. E. Excel seeks a preliminary injunction prohibiting Jau-Hwa Stewart and all of the third-party defendants from competing in any way with E. Excel until E. Excel is restored to its pre-September 2000 condition, and until Jau-Hwa Stewart and the Third-Party Defendants have relinquished all advantages that E. Excel alleges were improperly gained during the course of events.

20. The question before this Court is whether E. Excel, as the movant, can satisfy the four requirements for entry of preliminary injunctive relief under the facts presented during the hearing. The Court will examine the elements in turn.

Likelihood of Success on the Merits

21. The Court concludes that E. Excel has shown by clear and convincing evidence a substantial likelihood that it will prevail on the merits of its underlying claims, as described below.

A. Breach of Fiduciary Duties

22. Count VIII of E. Excel's Third-Party Complaint states a cause of action for breach of fiduciary duties against Jau-Hwa Stewart, Taig Stewart, and Hwan Lan Chen. See Amended Answer, Counterclaim and Third-Party Complaint of E. Excel International, Inc., at 37-38.

23. Jau-Hwa Stewart, Taig Stewart, and Hwan Lan Chen were directors and officers of E. Excel between September 1, 2000 and February 21, 2001. On February 21, 2001, Taig

Stewart and Hwan Lan Chen were removed as officers and directors, but Jau-Hwa Stewart continued to serve as a director until she resigned on June 19, 2001.

24. As corporate directors, these three individuals owed E. Excel duties of care, see FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332, 1334 (Utah 1979), and loyalty, see Nicholson v. Evans, 642 P.2d 727, 730 (Utah 1982).

25. A director cannot escape his or her fiduciary duties by claiming that he or she did not know of the activities being undertaken by the corporation. “Because directors are bound to exercise ordinary care, they cannot set up as a defense lack of the knowledge needed to exercise the requisite degree of care.” See Francis v. United Jersey Bank, 432 A.2d 814, 822 (N.J. 1981). “Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look ” Id.; see also 3 Fletcher’s Cyclopedia of the Law of Private Corporations § 837.50 (hereinafter “Fletcher’s”), at 177 (2002 rev. vol.) (stating that “a director who fails to take the steps necessary to acquire a rudimentary understanding of the business and activities of the corporation may be held liable for damage resulting from that ignorance”).

26. Moreover, where the transactions and activities in question had their inception while the fiduciary relationship was in existence, it does not matter that the director resigned or was removed from his or her office before the transactions and activities were consummated. See Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981); see also Dowell v. Bitner, 652 N.E.2d 1372 (Ill. Ct. App. 1995) (stating that “[t]he resignation of an officer will not sever liability for transactions completed after termination of the officer’s association with the corporation for transactions which (1) began during the existence of the relationship, or (2) were founded on information acquired during the relationship”); Opie Brush Co. v. Bland, 409 S.W.2d

752, 758-9 (Mo. Ct. App. 1966) (stating that the fiduciary obligation could not “be renounced at will by the termination of his directorship”); 3 Fletcher’s § 860, at 265 (stating that “[a] director is not relieved from liability by the fact that plans which were made and partially carried out while the director was in office are consummated after he or she has ceased to be a director”).

27. “The fiduciary obligations of a close corporation’s directors . . . [are] not relaxed any more than in other corporations.” 3 Fletcher’s § 844.20, at 204.

28. “While it is the general rule that the plaintiff carries the burden of proof on the complaint, where a violation of fiduciary duty is involved, the fiduciary must establish that his or her obligations were properly discharged.” 3 Fletcher’s § 837.50, at 176.

1. Duty of care

29. Corporate “directors, in administering [the] affairs [of the corporation], must exercise ordinary care, skill, and diligence” FMA Acceptance, 594 P.2d at 1334 (citing Warren v Robison, 57 P. 287 (Utah 1899)). Under this rule, “it is necessary for [directors] to give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances.” Id.

30. The Court concludes that, through their conduct described above, Jau-Hwa Stewart, Taig Stewart, and Hwan Lan Chen breached their fiduciary duty of care to E. Excel. Among other things, these directors caused E. Excel to cut off its highly successful relationships with its territorial distributors, and caused E. Excel to take other actions that were not done for legitimate business purposes.

2. Duty of loyalty

31. Corporate directors also owe a fiduciary duty of loyalty to the corporation, and this duty obligates directors to “use their ingenuity, influence, and energy, and to employ all the resources of the corporation, to preserve and enhance the property and earning power of the corporation, even if the interests of the corporation are in conflict with their own personal interests.” Nicholson, 642 P.2d at 730. Under this doctrine,

[any] action on the part of directors looking to the impairment of corporate rights, the sacrifice of corporate interests, the retardation of the objects of the corporation, and more especially the destruction of the corporation itself, will be regarded as a flagrant breach of trust on the part of the directors engaged therein.

Glen Allen Mining Co. v. Park Galena Mining Co., 296 P. 231 (Utah 1931).

32. While even ordinary employees have some level of fiduciary duty of loyalty to the corporation, see Restatement (Second) of Agency § 393, corporate officers and directors “stand on a different footing,” see Veco Corp. v. Babcock, 611 N.E.2d 1054, 1059 (Ill. Ct. App. 1993) (stating that “the law governing the right of former employees to compete is distinct from and irrelevant to a breach of fiduciary duty claim against officers”). Corporate officers and directors owe “a fiduciary duty of loyalty to their corporate employer not to (1) actively exploit their positions within the corporation for their own personal benefit, or (2) hinder the ability of a corporation to continue the business for which it was developed.” Id. These duties are heightened still further when the individual serves simultaneously as an officer and as a director. See 3 Fletcher’s § 837.50 (stating that “persons who hold positions simultaneously as officers and directors are held to standards even higher than the normal and demanding standards that apply to fiduciaries”).

33. Specifically, it is a violation of this duty of loyalty to set up a competing enterprise while still serving as a director, see Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991), and it is a violation of this duty of loyalty for a director to solicit employees of the corporation to join a new competing enterprise, see T.A. Pelsue Co. v. Grand Enters., Inc., 782 F. Supp. 1476, 1485 (D. Colo. 1991); see also Bancroft-Whitney Co. v. Glen, 411 P.2d 921, 935 & n.10 (Cal. 1966); Maryland Metals, Inc. v. Metzner, 382 A.2d 564, 568 (Md. 1978) (a director or other high-level employee must, prior to termination of his employment, “refrain from actively and directly competing with his employer for customers and employees, and must continue to exert his best efforts on behalf of his employer”).

34. In addition, “[w]hen those seeking to leave the corporation to form a rival business do so in a way which will cripple their former employer, this also constitutes a breach of fiduciary duty for which they will be liable.” 3 Fletcher’s § 856, at 241.

35. Finally, it is a breach of a director’s fiduciary duty to withhold information from, or fail to fully disclose information to, the corporation when the corporation has the right to have that information, including information relating to a director’s individual pursuit of a competing enterprise. See Aero Drapery of Kentucky, Inc. v. Engdahl, 507 S.W.2d 166, 169 (Ky. 1974); see also 3 Fletcher’s § 837.50, at 172-73, 174.

36. The Court concludes, on the record before it and based on the conduct described above, that Jau-Hwa Stewart, Taig Stewart, and Hwan Lan Chen breached their fiduciary duties of loyalty to E. Excel by, among other things, impairing E. Excel’s corporate rights and interest to the extent of seeking the destruction of the corporation itself, establishing a competing enterprise and soliciting E. Excel employees while they were still serving as directors of E. Excel, and by crippling E. Excel’s operations at the time of their departure.

37. The Court concludes that E. Excel has shown a substantial likelihood that it will prevail on the merits of its breach of fiduciary duties claim.

B. Usurpation of E. Excel's Corporate Opportunities

38. In Count VI of its Third-Party Complaint, E. Excel alleges that the three former directors (Jau-Hwa Stewart, Taig Stewart, and Hwan Lan Chen) usurped corporate opportunities belonging to E. Excel.

39. Corporate directors violate their duty of loyalty toward the corporation when they "acquir[e] for [their] own benefit an opportunity that would have been valuable and germane to the corporation's business, unless that opportunity is first offered to the corporation and declined by a disinterested board of directors" or "by action of the shareholders." Nicholson, 642 P.2d at 730-31; see also 3 Fletcher's § 837.50, at 174 (stating that "a director may not secure a private advantage at the expense of the corporation").

40. Under the circumstances of this case, and based on the conduct of Jau-Hwa Stewart, Taig Stewart, and Hwan Lan Chen as set forth above, the Court concludes that these directors pursued, for their own benefit, opportunities which should have been E. Excel's. The Court concludes that E. Excel has shown a substantial likelihood that it will prevail on the merits of its usurpation of corporate opportunities claim.

C. Unfair Competition

41. In Count IV of its Third-Party Complaint, E. Excel alleges that Jau-Hwa Stewart and the third-party defendants took steps to unfairly compete with E. Excel, alleging that the third-party defendants have misappropriated E. Excel's products, distribution information, goodwill, packaging, and other assets for use in competition with E. Excel.

42. Unfair competition through unlawful misappropriation is prohibited under Utah law. See, e.g., Procter & Gamble Co. v. Haugen, 947 F. Supp. 1551, 1554 (D. Utah 1996), aff'd in relevant part, 222 F.3d 1262 (10th Cir. 2000). A defendant engages in unlawful misappropriation when it “seize[s] for its own benefit something of value that the plaintiff had built up through time, money, or effort, which is then generally used to compete against the plaintiff.” Id. This “something of value” can be nearly anything, including information and services, goodwill, or anything that “sufficiently distinguish[es] one person’s goods from another’s,” such as “labels, packaging, [and] even the design of the product itself,” as well as “trade-names.” See Dan B. Dobbs, The Law of Torts § 457, at 1301 (2000) See also American Airlines v. Platinum World Travel, 769 F. Supp. 1203, 1207 (D. Utah 1990) (misappropriation of information and services), aff'd, 967 F.2d 410 (10th Cir. 1992); Budget Sys. v. Budget Loan & Fin. Plan., 361 P.2d 512, 514 (Utah 1961) (misappropriation of goodwill).

43. The Court concludes that Jau-Hwa Stewart and the Third-Party Defendants (including Apogee, Shannon River, Taig Stewart, Hwan Lan Chen, Dale Stewart, Beverly Warner, Angela Barclay, Brian Hymas, Sam Tzu, Richard Hu, and Sheue Wen Smith), have unlawfully misappropriated and converted E. Excel product, files, and other items, and have used those items to compete unfairly with E. Excel in the relevant marketplace.

44. Under these circumstances, the Court concludes that E. Excel has shown a substantial likelihood that it will prevail on the merits of its unfair competition claim.

D. Pattern of Unlawful Activity Act

45. In Count V of its Third-Party Complaint, E. Excel alleges that Jau-Hwa Stewart and the Third-Party Defendants have engaged in a pattern of unlawful activity, as that term is defined in Utah Code Ann. § 76-10-1602.

46. In order to succeed on a claim grounded in Utah's Pattern of Unlawful Activity Act (PUAA), E. Excel must demonstrate that one or more of the defendants, through an "enterprise," engaged in a "pattern of unlawful activity" that harmed E. Excel. See Utah Code Ann. §§ 76-10-1602, 1603; see also Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1287 (Utah 1993).

47. "Enterprise" is defined as "any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities." Utah Code Ann. § 76-10-1602(1).

48. "Pattern of unlawful activity" is defined as "engaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise." Utah Code Ann. § 76-10-1602(2).

49. "Unlawful activity" is defined as "directly engag[ing] in conduct or to solicit, request, command, encourage, or intentionally aid another person to engage in conduct which would constitute any offense described by the following crimes or categories of crimes, or to attempt or conspire to engage in an act which would constitute any of those offenses, regardless of whether the act is in fact charged or indicted by any authority or is classified as a misdemeanor or a felony." Utah Code Ann. § 76-10-1602(4). The statute lists 81 separate acts which qualify as "unlawful activity." Id.

50. As an initial matter, the Court concludes that Jau-Hwa Stewart and the Third-Party Defendants created an "enterprise," as that term is defined under Utah law, to compete with

E. Excel in the nutritional supplement and cosmetic market. That enterprise has, for a time, taken the form of Apogee, Inc., although the Court concludes that Apogee, Inc. is merely a shell corporation, and that the actual “enterprise” created by Jau-Hwa Stewart, Hwan Lan Chen, and the other Third-Party Defendants is something separate and apart from the Apogee shell corporation.

51. The Court concludes that the individuals and entities associated with this enterprise include, but are not necessarily limited to, Jau-Hwa Stewart, Hwan Lan Chen, Taig Stewart, Dale Stewart, Beverly Warner, Angela Barclay, Brian Hymas, Sam Tzu, Richard Hu, Sheue Wen Smith, Apogee, and Shannon River.

52. The Court further concludes that the individuals and entities associated with this enterprise engaged in a “pattern of unlawful activity,” as that term is defined under Utah law. To meet the definition, individuals associated with the enterprise must have committed at least three “unlawful” yet related acts in furtherance of the enterprise. The Court concludes that individuals associated with the enterprise committed the following “unlawful” acts:

1. Theft

53. Utah Code Ann. § 76-10-1602(4)(u) lists “theft” as one of the enumerated unlawful activities. Under Utah law, a person commits “theft” if he or she “obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.” See Utah Code Ann. § 76-6-404.

54. The individuals associated with the enterprise have committed several acts of theft, described above, including the misappropriation of E. Excel product, documents, computer files, and other items.

2. Receiving stolen property

55. Utah Code Ann. § 76-10-1602(4)(x) lists “receiving stolen property” as one of the enumerated unlawful activities. Under Utah law, a person commits “receiving stolen property” if he or she “receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling or withholding the property from the owner, knowing the property to be stolen, intending the deprive the owner of it.” See Utah Code Ann. § 76-6-408(1).

56. The individuals associated with the enterprise have committed several acts of receiving stolen property, including receiving misappropriated E. Excel product, documents, computer files, and other items, and including selling misappropriated E. Excel product in Asia.

3. Unlawful dealing with property by fiduciary

57. Utah Code Ann. § 76-10-1602(4)(gg) lists “unlawful dealing with property by fiduciary” as one of the enumerated unlawful activities. Under Utah law, a person commits “unlawful dealing with property by fiduciary” if he or she “deals with property that has been entrusted to him [or her] as a fiduciary . . . in a manner which he [or she] knows is a violation of his duty and which involves substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted.” See Utah Code Ann. § 76-6-513(2).

58. Jau-Hwa Stewart was a fiduciary of E. Excel from September 1, 2000 to June 19, 2001. Taig Stewart and Hwan Lan Chen were fiduciaries of E. Excel from September 1, 2000 to February 21, 2001. While these individuals were fiduciaries of E. Excel, they committed several acts of unlawful dealing with property by a fiduciary, including sending E. Excel product, through Shannon River and through other means, to Asia for distribution by the Apogee enterprise, and including misappropriating E. Excel files, documents, and other items.

4. False or inconsistent material statements

59. Utah Code Ann. § 76-10-1602(4)(vv) lists “false or inconsistent material statements” as one of the enumerated unlawful activities. Under Utah law, a person makes “false or inconsistent material statements” if he or she “makes a false material statement under oath or affirmation . . . and he does not believe the statement to be true.” See Utah Code Ann. § 76-8-502(1).

60. The individuals associated with the enterprise have committed several acts of making false or inconsistent material statements, including, but not limited to, Richard Hu’s false statement on the witness stand about the telephone conversation; Sheue Wen Smith’s statement about her reasons for renting the ATL facility; and Dale Stewart’s statement at his deposition about receiving income from the enterprise.

5. Written false statements

61. Utah Code Ann. § 76-10-1602(4)(xx) lists “written false statements” as one of the enumerated unlawful activities. Under Utah law, a person makes a “written false statement” if he or she “makes a written false statement which he does not believe to be true on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable” or if he or she, “with intent to deceive a public servant,” “makes any written false statement which he does not believe to be true” or “submits or invites reliance on any writing which he knows to be lacking in authenticity.” See Utah Code Ann. § 76-8-504.

62. Jau-Hwa Stewart has committed one act of making a written false statement, when she submitted her Fourth Affirmation to the Hong Kong court, under oath, an affirmation that she later admitted was not accurate.

6. Selling or dealing with article bearing registered trademark or service mark with intent to defraud

63. Utah Code Ann. § 76-10-1602(4)(kkk) lists “selling or dealing with article bearing registered trademark or service mark with intent to defraud” as one of the enumerated unlawful activities. Under Utah law, a person commits this act if he or she “without the consent of the owner of an article bearing the owner’s validly registered trademark or service mark, knowingly sells or traffics in the articles.” See Utah Code Ann. § 76-10-1006.

64. The individuals associated with the enterprise have committed many acts of selling or dealing with articles bearing registered trademarks or service marks with intent to defraud. Among other things, and as described above, the individuals associated with the enterprise have misappropriated E. Excel product and associated trademarks, and are now selling that E. Excel product in Asia through the enterprise’s distribution networks.

65. Under these circumstances, the Court concludes that E. Excel has shown a substantial likelihood that it will prevail on the merits of its pattern of unlawful activity claim.

E. Civil Conspiracy

66. In Count I of its Third-Party Complaint, E. Excel alleges that Jau-Hwa Stewart and all of the Third-Party Defendants have engaged in civil conspiracy, as that term is defined under Utah common law.

67. To prove civil conspiracy, E. Excel must make a five-part showing: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof. See Alta Indus., 846 P.2d at 1290 n.17.

68. The Court concludes that the enterprise, described above, is a combination of two or more persons, and that the individuals associated with the enterprise have been working toward

the object of unlawfully disabling E. Excel in order to enhance their own competitive prospects, and that, in furtherance of the enterprise, the individuals have committed several unlawful, overt acts causing damage to E. Excel.

69. Under these circumstances, the Court concludes that E. Excel has shown a substantial likelihood that it will prevail on the merits of its civil conspiracy claim.

F. Constructive Trust

70. In Count XI of its Third-Party Complaint, E. Excel requests that any E. Excel property still in the hands of any of the Third-Party Defendants be placed in a constructive trust in favor of E. Excel.

71. “A constructive trust may be imposed when an employee breaches his or her fiduciary duty by competing with his or her employer during employment.” See Veco Corp. v. Babcock, 611 N.E.2d 1054, 1062 (Ill. Ct. App. 1993); see also 3 Fletcher’s § 856, at 237 (stating that “[w]here the director or officer has breached his or her trust to the corporation . . . , equity will intervene to impress a trust for the benefit of the corporation”).

72. This constructive trust is often impressed upon, *inter alia*, the compensation paid to the breaching director during the period in which he or she breached his or her duties, and “the profits arising from the competitive business itself.” See 3 Fletcher’s § 856, at 237-38. In addition, E. Excel seeks impression of the trust upon all items of E. Excel property currently in the possession of Jau-Hwa Stewart or any of the third-party defendants.

73. Given the Court’s conclusions that the former directors of E. Excel have breached their duties, the Court also concludes that E. Excel has shown a substantial likelihood that it will prevail on the merits of its constructive trust claim.

74. With respect to each of the causes of action upon which E. Excel relies, the Court also concludes that actions of Jau-Hwa Stewart and the Third-Party Defendants were done willfully and maliciously. By contrast, the Court also concludes that the Special Master, Mr. Larry Holman, has acted in the best interests of E. Excel in confronting the activities of Jau-Hwa Stewart and the Third-Party Defendants, and in discharging his duties under the Court's orders.

Irreparable Harm

75. The Court concludes that E. Excel has been irreparably harmed by the conduct of Jau-Hwa Stewart and the Third-Party Defendants, and that this irreparable harm has taken several forms.

76. First, the Court concludes that E. Excel has lost a great deal of its reputation and goodwill as a direct result of the conduct, described above, of Jau-Hwa Stewart and the Third-Party Defendants. The loss of goodwill is irreparable harm, and only an injunction can provide an appropriate remedy for the loss of goodwill. See, e.g., By-Rite Distributing Inc. v. The Coca-Cola Co., 577 F. Supp. 530, 541 (D. Utah 1983) (stating that “[t]here are few things in our commercial life more valuable than a company’s reputation, goodwill, and trademarks” and noting that the loss of these things would be “irreparable harm”); Hunsaker v. Kersh, 1999 UT 106, ¶10, 991 P.2d 67 (stating that “[l]oss of business and goodwill may constitute irreparable harm susceptible to injunction”); Systems Concepts, Inc. v. Dixon, 669 P.2d 421, 428 (Utah 1983) (stating that “threatened misappropriation of [the movant’s] confidential information and goodwill” would constitute irreparable harm, because “the damages that may result . . . could be estimated only by conjecture and not by any accurate standard”).

77. Second, the Court concludes that, through their conduct described above, Jau-Hwa Stewart and the Third-Party Defendants have crippled E. Excel’s ability to fairly compete in

the market going forward. The loss of the ability to fairly compete, because a former employee or insider breaches duties toward the corporation, is irreparable harm that can only be cured through equitable relief. See, e.g., Perceptron, Inc. v. Sensor Adaptive Machines, Inc., 221 F.3d 913, 921-22 (6th Cir. 2000); Lowry Computer Prods., Inc. v. Head, 984 F. Supp. 1111, 1116 (E.D. Mich. 1997); RAM Prods. Co. v. Chauncey, 967 F. Supp. 1071, 1085-6 (N.D. Ind. 1997).

78. The Court finds that the case of Alexander & Alexander Benefits Servs., Inc. v. Benefit Brokers & Consultants, Inc., 756 F. Supp. 1408 (D. Or. 1991), is particularly relevant to this case. In that case, under similar facts, the court noted that “[a]bsent injunctive relief, [the movant] will suffer irreparable injury in the form of its inability to fairly compete with [the former employees’ new company] because of the misappropriation and continuing misuse of [the movant’s] confidential information . . . and because of the continuing injury to [the movant’s] business caused by the defendants’ raid of its workforce and client base.” *Id.* at 1415. The court noted that “[g]ranted the [injunction] will permit [the movant] an opportunity to regroup” so that it can eventually fairly compete in the market. *Id.*

79. The Court concludes that E. Excel has been irreparably harmed by Jau-Hwa Stewart and the Third-Party Defendants, in that E. Excel has lost much of its reputation and goodwill, and has lost the ability to fairly compete in the market going forward. Only an injunction can prevent further erosion of E. Excel’s reputation, goodwill, and ability to compete going forward by giving it a certain amount of breathing space so that it can “regroup” from the harm caused by Jau-Hwa Stewart and those acting with her.

Balance of Hardships

80. The Court concludes, on the facts of this case, that the balance of hardships tips in favor of the issuance of injunctive relief in E. Excel's favor. Jau-Hwa Stewart and the Third-Party Defendants have gained an unfair advantage in the market through their unlawful actions. An injunction against these individuals and entities will allow E. Excel to regain its reputation and goodwill, so that the parties may, in the future, fairly compete with one another. The Court concludes that the balance of the equities requires that injunctive relief be entered so that a level playing field may be restored.

Public Interest

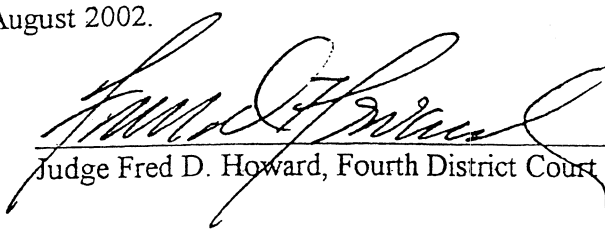
81. The Court concludes that an injunction would not be adverse to the public interest. The public interest is well-served by the imposition of equitable relief that prevents wayward corporate fiduciaries and those who join them in racketeering activities from reaping the fruits of their labors. In this case, an injunction against Jau-Hwa Stewart and with the Third-Party Defendants would not be adverse to the public interest.

CONCLUSION

For these reasons, the Court GRANTS E. Excel's Motion for Preliminary Injunction. The Court will issue a separate Order specifically describing the form and duration of the injunctive relief.

SO ORDERED on this 19th day August 2002.

By:


Judge Fred D. Howard, Fourth District Court

Tab C

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

JAU-FEI CHEN, et al.,	:	MOTION FOR SANCTIONS AND
	:	FOR ORDER TO SHOW CAUSE
Plaintiffs,	:	WHY CERTAIN THIRD-PARTY
vs.	:	DEFENDANTS SHOULD NOT BE
	:	HELD IN CIVIL CONTEMPT
JAU-HWA STEWART, et al.,	:	
	:	Civil No. 010400098
Defendants.	:	Judge Lynn W. Davis
	:	

E. Excel International, Inc. ("E. Excel"), by and through its undersigned counsel of record, hereby files this Motion for Sanctions And For Order to Show Cause Why Certain Third-Party Defendants Should Not Be Held In Civil Contempt.

As grounds therefore, E. Excel states the following:

1. This Court has found after approximately 40 days of combined hearings that are members of a criminal racketeering enterprise that has: (1) masterminded the whole spoliation of evidence to prevent E. Excel from proving its case; (2) thoroughly polluted the record with perjurious testimony intended to conceal the activities of the conspiracy, and (3) engaged in specific and repeated violations of this Court's orders.

2. The Court should therefore enter default against the Co-Conspirators (as it already has against another member of the criminal racketeering enterprise, Jau-Hwa

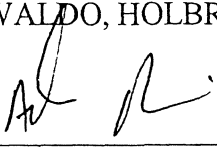
Stewart), in the exercise of its inherent powers to control the litigation before it, and as a sanction for civil contempt of this Court's orders.

E. Excel's motion is more fully explained in the accompanying memorandum of points and authorities.

DATED this 27 day of September, 2002.

JONES, WALDO, HOLBROOK & McDONOUGH

By


Deno G. Himonas

Adam B. Price

Attorneys for E. Excel International, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of September 2002, I caused a true and correct copy of the foregoing **MOTION FOR SANCTIONS AND FOR ORDER TO SHOW-CAUSE WHY CERTAIN THIRD-PARTY DEFENDANTS SHOULD NOT BE HELD IN CIVIL CONTEMPT** to be served, on the following:

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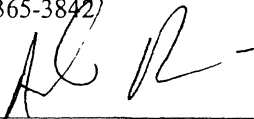
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**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH**

JAU-FEI CHEN, et al.,	:	<u>ERRATA TO MOTION FOR</u>
	:	SANCTIONS AND FOR ORDER TO
Plaintiffs,	:	SHOW CAUSE WHY CERTAIN
vs.	:	THIRD-PARTY DEFENDANTS
	:	SHOULD NOT BE HELD IN CIVIL
JAU-HWA STEWART, et al.,	:	CONTEMPT
	:	
Defendants.	:	Civil No. 010400098
	:	Judge Lynn W. Davis

E. Excel International, Inc. ("E. Excel"), by and through its undersigned counsel of record, hereby files this Errata to Motion for Sanctions And For Order to Show Cause Why Certain Third-Party Defendants Should Not Be Held In Civil Contempt. Paragraph No. 1 should be amended to read as follows:


1. This Court has found after approximately 40 days of combined hearings that Taig Stewart, Beverly Warner, Angela Barclay, Hwan Lan Chen, Apogee, Inc., and Sheue Wen Smith (the "Co-Conspirators") are members of a criminal racketeering enterprise that has: (1) masterminded the whole spoliation of evidence to prevent E. Excel from proving its case; (2) thoroughly polluted the record with perjurious testimony

intended to conceal the activities of the conspiracy, and (3) engaged in specific and repeated violations of this Court's orders.

DATED this 1 day of October, 2002.

JONES, WALDO, HOLBROOK & McDONOUGH

By


Deno G. Himonas

Adam B. Price

Attorneys for E. Excel International, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of October 2002, I caused a true and correct copy of the foregoing **ERRATA TO MOTION FOR SANCTIONS AND FOR ORDER TO SHOW-CAUSE WHY CERTAIN THIRD-PARTY DEFENDANTS SHOULD NOT BE HELD IN CIVIL CONTEMPT** to be served, on the following:

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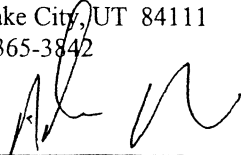
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FILED 10-2-02
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
Deputy

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

	:	MEMORANDUM IN SUPPORT OF
	:	MOTION FOR SANCTIONS AND
JAU-FEI CHEN, <i>et al.</i> ,	:	FOR ORDER TO SHOW CAUSE
	:	WHY CERTAIN THIRD-PARTY
Plaintiffs,	:	DEFENDANTS SHOULD NOT BE
Vs.	:	HELD IN CIVIL CONTEMPT
	:	
JAU-HWA STEWART, <i>et al.</i> ,	:	Civil No. 010400098
	:	Judge Lynn W. Davis
Defendants.	:	
	:	
	:	
	:	
	:	

INTRODUCTION

Defendant and third-party plaintiff, E. Excel International, Inc. ("E. Excel"), respectfully submits this Memorandum in Support of Motion For Sanctions And For Order To Show Cause Why Certain Third-Party Defendants Should Not Be Held In Civil Contempt. The specific third-party defendants that are the subject of the present motion are: Taig Stewart, Beverly Warner, Angela Barclay, Hwan Lan Chen, Apogee, Inc., and Sheue Wen Smith (the "Co-Conspirators").

The premise of E. Excel's motion is simple. For purposes of determining the appropriateness of sanctions and injunctive relief, this Court has already found that the Co-

Conspirators are members of a criminal racketeering enterprise that has: (1) masterminded the wholesale spoliation of evidence in this case to prevent E. Excel from proving its case, (2) thoroughly polluted the record with perjurious testimony intended to conceal the activities of the conspiracy, and (3) engaged in specific and repeated violations of this Court's orders. This Court has already entered default judgment against one member of the racketeering conspiracy, Jau-Hwa Stewart, for these activities.¹

The Court should now enter default judgment against the Co-Conspirators precisely because E. Excel suffers the same prejudice with respect to the Co-Conspirators as it suffered with respect to Jau-Hwa Stewart. First, Co-Conspirators not only assisted Jau-Hwa Stewart in the spoliation of evidence, but benefit from it every bit as much as Jau-Hwa Stewart did; E. Excel is still in the untenable position of being required to prove the existence of a racketeering enterprise after much of the documentary evidence relating to the enterprise's criminal activities has been destroyed. Second, Co-Conspirators not only committed perjury in concert with Jau-Hwa Stewart to conceal their joint activities, but benefit from it every bit as much as Jau-Hwa Stewart; any effort by the jury to reach a verdict will necessarily be handicapped by the pervasive instances of perjury in the record. Finally, Co-Conspirators have directly participated in and facilitated activities in contempt of at least three of this Court's orders.²

Jau-Hwa Stewart did not act alone. And those who acted with her to pervert and thwart justice should be subject to sanction. It is appropriate, therefore, for this Court to enter default

¹ Indeed, this Court has defaulted another member of the racketeering enterprise, Bryan Hymas, for his utter disregard of the Court's directives and repeatedly sanctioned the enterprise itself, Apogee, for its contumacious behavior in the litigation.

² E. Excel has brought a separate motion against known agents and affiliates of the racketeering enterprise (Jason Tzu, Apogee World, and Hamida Pharma) for contempt of a fourth restraining order after the close of the evidentiary hearing conducted by Judge Howard. That motion is currently pending before this Court.

judgment against the Co-Conspirators, either in the exercise of its inherent powers to control the litigation before it, or as a sanction for civil contempt of this Court's orders, or both.

FACTS³

1. On January 10, 2001, this Court issued a temporary restraining order against Jau-Hwa Stewart and those in active concert or participation with her. That order, obtained by Plaintiff Jau-Fei Chen, reads in relevant part as follows: "The Defendant Stewart, her agents, servants, representatives, and any persons in active concert or participation with her are enjoined and restrained: . . . (2) from directly or indirectly causing [E. Excel] to violate any of its exclusive contracts with territorial owners or to compete with territorial owners in violation of such contracts." (Jan. 10, 2001, Order, attached hereto as Exh. A.)

2. Shortly thereafter, Jau-Hwa Stewart, her mother, third-party defendant Hwan Lan Chen, and her husband, third-party defendant Taig Stewart, all three of whom were then directors of E. Excel, "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." (Findings of Fact and Conclusions of Law, dated August 19, 2002 (hereinafter "Findings" or "Conclusions"), at ¶ 34, attached hereto as Exh. B.)⁴

3. In furtherance of this criminal racketeering enterprise, Jau-Hwa Stewart, Hwan Lan Chen, and Taig Stewart engaged in a concerted pattern of defiance of this Court's orders,

³ E. Excel incorporates fully by reference: (1) this Court's Findings of Fact and Conclusions of Law, dated August 19, 2002; (2) this Court's Findings of Fact and Conclusions of Law in Connection with Plaintiff's Motion for Order to Show Cause, dated August 19, 2002; (3) this Court's Ruling Regarding Findings of Fact and Conclusions of Law, dated August 19, 2002; and (4) this Court's Ruling and Order re: E. Excel's Motion for Sanctions Against Jau-Hwa Stewart, dated August 26, 2002;

⁴ Except where otherwise noted, E. Excel has omitted the internal record citations found in this Court's Findings of

including the shipment of more than \$1,000,000 of E. Excel's product to "new distributors" controlled by them in Asia. "**In defiance of this Court's order** . . . shipments that were prepared for the new distributors in late December were allowed to proceed on their way notwithstanding the Court's January 10 order. " (Findings, at ¶ 35, attached hereto as Exh. B) (emphasis added).

4. Third-Party defendant Angela Barclay, a personal assistant to Ms. Stewart, assisted the other Co-Conspirators to violate the Court order: "Although the original invoices indicated that the product was to be shipped to Extra Excel International (HK), Ltd., the 'new distributor,' Angela Barclay requested that the product not be delivered directly to the 'new distributor,' but to a front company: 'Winboard Investments, Ltd, Attn: Sam Tzu.'" (Findings, at ¶ 36, attached hereto as Exh. B.)

5. On behalf of the criminal racketeering enterprise, Taig Stewart also violated this Court's January 10 order by purporting to terminate one of E. Excel's "historical" distributors after the entry of that order. "On January 18, 2001, **in violation of the Court's January 10 order**, Taig Stewart, acting as corporate secretary, sent a letter purporting to terminate the exclusive contract of E. Excel's historical distributor in Hong Kong, and to substitute the 'new distributor,' Extra Excel International (HK), Ltd., established by Sam Tzu." (Findings, at ¶ 37, attached hereto as Exh. B) (emphasis added).

6. Third-Party defendant Beverly Warner, who was office manager of E. Excel at the time, then commenced the removal of critical evidence on behalf of the criminal racketeering enterprise in order to conceal their activities at E. Excel. "Sometime in the latter part of January

2001, Ms. Warner organized the first of many suspicious document removals from the offices of E. Excel.” (Findings, at ¶ 48, attached hereto as Exh. B.)

7. In furtherance of the criminal racketeering enterprise, “[i]n the month of February, as described below, Jau-Hwa Stewart and the . . . [Co-Conspirators] combined for the purpose of disabling E. Excel through one or more overt, unlawful acts before Ms. Stewart lost control of the corporation.” (Findings, at ¶ 51, attached hereto as Exh. B.)

8. In furtherance of the racketeering enterprise, and to allow the wholesale spoliation of evidence, Ms. Warner disabled E. Excel’s surveillance system. “For the most part, the events of February, as described below, could not have occurred, however, without one critical enabling act: at the end of January or the beginning of February, Beverly Warner, by her own admission, turned off the surveillance system that recorded activity at E. Excel. That single event made it possible for Jau-Hwa Stewart and the . . . [Co-Conspirators] to take whatever steps they deemed necessary at the E. Excel premises without concern for having their activities recorded on camera.” (Findings, at ¶ 52, attached hereto as Exh. B.)

9. The Court also found that Ms. Warner committed perjury when she explained her rationale for disabling the security cameras. “Ms. Warner claims that she turned off the surveillance system because the videotapes had been overused, causing the images to become blurry. Her explanation is subject to considerable doubt for several reasons. First, assuming that the videotapes were no longer useable, it is noteworthy that Ms. Warner never replaced the tapes, nor turned the system back on during the remainder of her tenure at E. Excel—not even when employees began to report to her that documents, including noncompetition agreements, were disappearing from the office facilities, that 60-70 pallets of product were being removed from the premises while the company was closed, that tame rodents were being let loose in the facility at

night, and that computer files were being deleted. It is undisputed that the surveillance system covered all of the areas where these unusual activities were taking place, and would have been of substantial assistance in identifying the culprits if only Ms. Warner had turned the system back on.” (Findings, at ¶ 53, attached hereto as Exh. B.)

10. “Second, the cost of replacing the videotapes, a few hundred dollars, was miniscule compared to the losses E. Excel suffered as a result of these unlawful activities. Beverly Warner’s claim that she did not replace the videotapes because she could not get authorization from Ms. Stewart to spend the money is not credited by the Court because it fails any test of common sense.” (Findings, at ¶ 54, attached hereto as Exh. B.)

11. “Third, after the entry of the interim order on February 21, 2001, Ms. Warner was given express authorization by the terms of the order to make expenditures of up to \$1000 without further approval. After that date, Ms. Warner still failed to replace the surveillance videotapes, failed to reactivate the security system, and never informed Mr. Holman, after his arrival, that she had turned the system off.” (Findings, at ¶ 55, attached hereto as Exh. B.)

12. “The Court therefore finds that Ms. Warner’s deactivation of the surveillance system was done deliberately to conceal the activities of her coconspirators that followed.” (Findings, at ¶ 57, attached hereto as Exh. B.)

13. “Having commenced the disablement of E. Excel, Ms. Stewart and Hwan Lan Chen also determined to start their own competing enterprise (Apogee). Starting a new company from scratch presented certain problems for Jau-Hwa Stewart and the Third-Party Defendants, however. For instance, they could not maintain the full-fledged distribution networks of Richard Hu and Sam Tzu that they had paid for in Asia [the “new distributors”] when they were not yet set up to manufacture their own product.” (Findings, at ¶ 58, attached hereto as Exh. B.)

14. In violation of this Court's order to maintain the status quo, Jau-Hwa Stewart, Hwan Lan Chen, and others, determined to steal millions of dollars of product from E. Excel and use it for the benefit of their new enterprise, Apogee. "The solution for Ms. Stewart and the [Co-Conspirators] lay in the fact that Ms. Stewart still controlled E. Excel, a company with a ready supply of product and raw material. By transferring these items from E. Excel to Apogee, Ms. Stewart could simultaneously disable E. Excel while ensuring the success of her Apogee enterprise. But, in light of the progress of the litigation, Ms. Stewart knew she would need to act quickly; her time at E. Excel was running short." (Findings, at ¶ 59, attached hereto as Exh. B.)

15. Third-Party defendant Dale Stewart, who was at the time an assistant plant manager for E. Excel, then joined with the other members of the criminal racketeering enterprise to deprive E. Excel, in violation of Court order, of product that it would need to fulfill its own contracts. "In February 2001, Dale Stewart, the assistant plant manager for E. Excel, instructed E. Excel warehousemen to load gel capsules from E. Excel onto a truck for removal to offsite storage. This instruction was but the first in a series of unusual product movements at E. Excel during the month of February 2001." (Findings, at ¶ 60, attached hereto as Exh. B.)

16. "On the day after the first shipment of capsules was removed from the facility, Dale Stewart again instructed Mr. Kelley and others to prepare a second shipment to be taken off site. In the middle of this process, Dale Stewart did an about face and ordered the gel capsules returned immediately to the warehouse before the arrival of lawyers for Jau-Fei Chen." (Findings, at ¶ 61, attached hereto as Exh. B.)

17. "Then on the weekend of February 17-18, 2001, large quantities of E. Excel's Millennium product and other raw materials, totaling approximately 60 to 70 pallets, were removed from the E. Excel facility, as described below. The circumstances under which this

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product was removed, and the reasons offered for the movement are worth discussing at length because they shed light on the willful, deliberate, and serious nature of the conspiracy against E. Excel.” (Findings, at ¶ 63, attached hereto as Exh. B.)

18. “In the days leading up to the removal of the E. Excel product, attorneys for Jau-Hwa Stewart had been negotiating with attorneys for Jau-Fei Chen the precise language of the order that would lead to Ms. Stewart’s removal as president.” (Findings, at ¶ 64, attached hereto as Exh. B.)

19. “During that same period of time, Ms. Stewart, her mother, her sister, [Third-Party Defendant] 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. On Saturday, February 17, 2001, Sheue Wen Smith took the first step in the plan by signing a check for \$23,000 as an initial payment to rent a facility known as the ATL warehouse where the product could be stored.” (Findings, at ¶ 65, attached hereto as Exh. B.)

20. “Scott Nelson, a former employee of ATL Technology, in Springville, testified that he was instructed by his superior to assist the new tenant on February 17, 2001, to move into a portion of the ATL warehouse. Later Mr. Nelson was informed that the move would take place on Sunday, February 18, 2001.” (Findings, at ¶ 66, attached hereto as Exh. B.)

21. The Court also found that Dale Stewart committed perjury when he denied his involvement in the movement of product to the ATL warehouse on behalf of the criminal racketeering enterprise. “On the appointed day, Mr. Nelson met Dale Stewart and some other workers at the ATL warehouse. From approximately 3 p.m. until 2 a.m. on Monday morning, fully 11 hours, Mr. Nelson described how Dale Stewart and the others made repeated trips to and

from the ATL warehouse, each time arriving with pallets of E. Excel pills, ‘cactus juice or cactus nectar’ (Millennium), and other product. Despite Mr. Nelson’s identification of Dale Stewart, Mr. Stewart himself denied being at the ATL warehouse on the weekend that the product was moved from E. Excel. In all approximately 60-70 pallets of product were moved, nearly one-third of the total pallets in the warehouse.” (Findings, at ¶ 67, attached hereto as Exh. B.)

22. “That Monday morning, February 19, 2001, the fact of the missing product was discovered by attorneys for Jau-Fei Chen, who appeared in Court on Tuesday, February 20, 2001, to seek contempt. Counsel for Ms. Stewart then represented that the product had been moved because of the presence of rodents at the E. Excel facility.” (Findings, at ¶ 68, attached hereto as Exh. B.)

23. “Meanwhile, having learned that the plan had been uncovered, Dale Stewart was doing everything he could to return the product to the E. Excel warehouse as surreptitiously as possible. He approached Ms. Patty Jensen, a warehouse supervisor, and, according to Ms. Jensen, told her ‘[t]hey were going to move the product back to the warehouse that had come up missing and—um—I was asked if we could have a couple of warehouse workers, a couple of them that could be discrete [sic] that could help move the product back.’ Dale Stewart also instructed Ms. Jensen that if Paul Cooper, E. Excel’s highest ranking plant manager, should inquire about the removal and return of these products, she ‘was to tell him that it was none of his damn business.’” (Findings, at ¶ 69, attached hereto as Exh. B.)

24. “Ultimately, Dale Stewart asked [Third-Party Defendant] Brian Hymas, a graphics employee who had never performed any warehouse work (and who shortly thereafter commenced to do work for Apogee), to supervise the retrieval of the missing product from the ATL warehouse. According to Mr. Kelley, Mr. Hymas came to him and said that Dale Stewart

had recommended Mr. Kelley as someone who could be ‘discreet.’ Mr. Hymas then took Mr. Kelley and others to the ATL warehouse where they retrieved the product, including pallets of Millennium, that had gone missing from E. Excel’s warehouse.” (Findings, at ¶ 70, attached hereto as Exh. B.)

25. “Aside from the irregular circumstances under which the product was removed from E. Excel, and the secrecy urged by Dale Stewart and Brian Hymas upon its return, the Court finds good reason to disbelieve the claim that the product was removed because of the presence of rodents in the facility.” (Findings, at ¶ 71, attached hereto as Exh. B.)

26. “Ms. Kathy Hansen, who grew up on a farm chasing wild rodents, recognized that the rodents were definitely domesticated and therefore urged Ms. Warner to turn the surveillance cameras back on. Ms. Warner did not respond.” (Findings, at ¶ 75, attached hereto as Exh. B.)

27. “Ron Hughes, the shipping supervisor at E. Excel, also suggested to Beverly Warner that she check the video surveillance system to determine the source of the rodents in the facility. Mr. Hughes’s concern about the rodents arose from the fact that a pet store box was discovered on E. Excel’s premises. Ms. Warner informed Mr. Hughes that the surveillance cameras were turned off, and, when he inquired why, Ms. Warner ‘changed the subject.’” (Findings, at ¶ 76, attached hereto as Exh. B.)

28. “Finally, and most important for the Court’s determination concerning the rodents, Ms. Stewart admitted in this proceeding that Brian Hymas was responsible for placing the rodents in the facility.” (Findings, at ¶ 77, attached hereto as Exh. B.)

29. Significantly, even though Ms. Stewart admits she knew of Mr. Hymas’ responsibility for the rodent infestation while she was still president of E. Excel, and even though she also admits that the presence of these rodents ‘present[ed] a potentially big problem of E.

Excel USA with the FDA,' Ms. Stewart: (1) took no disciplinary action against Mr. Hymas, (2) failed to report her knowledge to new management while under a fiduciary duty to do so, and (3) amazingly, then decided to ask Mr. Hymas both to remove additional items from E. Excel throughout February, and to perform work for the new Apogee enterprise.” (Findings, at ¶ 78, attached hereto as Exh. B.)

30. “The Court therefore finds that the movement of product to the ATL warehouse on Sunday, February 18, 2001, was not done for a legitimate business purpose. Instead, the Court finds that the product was moved both to deprive E. Excel of access to necessary goods and raw materials less than three days before the Interim Order (removing Ms. Stewart as president) was submitted to, and signed by, the Court, and also to ensure that the same goods and raw materials would be available for use by the Apogee enterprise as it got under way.” (Findings, at ¶ 79, attached hereto as Exh. B.)

31. Third-Party defendant Sheue Wen Smith, the sister of Jau-Hwa Stewart, identified her mother, Hwan Lan Chen, as the author of the ATL scheme. “On February 20, the same day that Jau-Fei Chen’s lawyers were in Court seeking contempt for the removal of product and one day before Hwan Lan Chen was removed as a director, Sheue Wen Smith signed the lease for the ATL warehouse. From February 17 to the present that facility has been used exclusively in furtherance of the conspiracy and on behalf of the Apogee enterprise. 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.’” (Findings, at ¶ 81, attached hereto as Exh. B.)

32. After submitting her Answer, Ms. Smith then attempted to conceal her mother's role in the racketeering enterprise by submitting perjurious testimony in her deposition. "Only two weeks after providing this Answer, however, Ms. Smith apparently had a change of heart. In an effort to distance the ATL lease transaction from her mother (who still owed fiduciary duties to E. Excel prior to February 21, 2001), Ms. Smith in her deposition now asserted that the rental of the ATL warehouse had '[n]othing to do with any family member.' Instead, Ms. Smith now asserted that she had rented the facility for use as a salad dressing factory. Ms. Smith's revision of her story sinks, however, on the facts of the case. Ms. Smith admitted that she never actually acquired any manufacturing equipment, never acquired any raw materials for salad dressing, never used the ATL warehouse for making salad dressing, never hired any architect or structural engineer, never talked to anybody about zoning ordinances governing the use of the ATL warehouse, and cannot remember even visiting the ATL warehouse at any time between February 17, 2001, and February 28, 2002. Most tellingly, Ms. Smith admitted that she signed a one-year lease, insufficient time to recoup the investment in a capital-intensive manufacturing operation, because the rental price of \$132,000 per year was 'too expensive.'" (Findings, at ¶ 82, attached hereto as Exh. B.)

33. "Especially, given Ms. Smith's other involvement with the Apogee endeavor (including her role in the construction of the Apogee facility, described below), the Court does not find Ms. Smith's about-face convincing. The Court therefore concludes that Ms. Smith's initial Answer in this matter comes closer to the mark: that prior to February 17, 2001, Ms. Smith was instructed by Hwan Lan Chen to rent the ATL facility both for storing product intended to be removed from E. Excel and for any other purposes necessary to the fulfillment of the Apogee enterprise." (Findings, at ¶ 83, attached hereto as Exh. B.)

34. “Shortly after taking possession of the ATL warehouse, Ms. Stewart and Hwan Lan Chen caused the construction of an interior wall around the leased portion of the warehouse and blacked out the windows in order to maintain the secrecy of their endeavors.” (Findings, at ¶ 84, attached hereto as Exh. B.)

35. On February 21, 2001, this Court signed the Interim Order, which reads in relevant part as follows:

12. Jau-Hwa Stewart shall not tortiously interfere directly or indirectly with any contract determined by the Court at any time to exist between [E. Excel] 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.

(Interim Order, attached hereto as Exh. C.)

36. Despite the Interim Order, and in furtherance of the criminal racketeering enterprise, members of the criminal racketeering enterprise removed all or virtually all of the noncompetition agreements from E. Excel’s employee files in violation of the provisions of the Interim Order requiring the return of all corporate assets to E. Excel. “The disappearance of the noncompetition agreements is not easily explained absent the involvement of Ms. Stewart and those conspiring with her. As Ms. Spencer testified at the hearing, the door to her office (where the noncompetition agreements were kept) was always locked when she was not present. Moreover, according to Ms. Spencer, the only persons with keys to that office, beside herself, were Jau-Hwa Stewart and Beverly Warner.” (Findings, at ¶ 90, attached hereto as Exh. B.)

37. “The Court further infers Ms. Warner’s involvement in the removal of the noncompetition agreements from Ms. Warner’s lackadaisical response upon being informed of

their disappearance. According to Ms. Spencer, when she informed Ms. Warner of the missing agreements, Ms. Warner responded that Ms. Spencer should ‘not worry about it. They weren’t binding anyway.’” (Findings, at ¶ 91, attached hereto as Exh. B.)

38. “Less than two months after making this statement, Ms. Warner, Taig Stewart, Dale Stewart, Angela Barclay, and Brian Hymas were all overtly working on behalf of Jau-Hwa Stewart’s Apogee enterprise. Ms. Stewart herself admits that these individuals would not have been able to provide her with any assistance under the terms of E. Excel’s noncompetition agreements.” (Findings, at ¶ 92, attached hereto as Exh. B.)

39. “Ms. Warner admits she never informed Mr. Holman or his new management team of the missing noncompetition agreements upon their arrival at E. Excel or at any other time before she left E. Excel’s employ.” (Findings, at ¶ 93, attached hereto as Exh. B.)

40. “The removal of these documents, then, is strong evidence that beginning no later than early February 2001, Ms. Stewart, and those working with her, were already paving the way for the creation of Apogee later in the year.” (Findings, at ¶ 94, attached hereto as Exh. B.)

41. Beverly Warner also engaged in the deliberate spoliation of many computer records at E. Excel to prevent such evidence from being presented to the jury to demonstrate the activities of Jau-Hwa Stewart and the Co-Conspirators in furtherance of the criminal racketeering enterprise. “Also at this time, computer files began to disappear from employee computers. Ms. Heather Turner, for instance, explained that all of her emails to and from Jau-Hwa Stewart were removed from her computer, as was the log she kept of every item ordered so that she could ‘refer back to it if that item came back up to reorder.’” (Findings, at ¶ 98, attached hereto as Exh. B.)

42. "In February 2001, Ms. Lipe also discovered that all of the email and other files on her computer that could be accessed from the network had been deleted. When Ms. Lipe asked Ms. Warner about the missing computer files, Ms. Warner responded that the files 'had been removed from [the] computer for my protection They were worried that Jau-Fei Chen's lawyers might be able to come in and use them against Jau-Hwa.'" (Findings, at ¶ 99, attached hereto as Exh. B.)

43. "Ms. Grow also testified that in February, shortly before the removal of Ms. Stewart by this Court, she discovered that all of the electronic files on her computer were missing. When she spoke to the office manager, Beverly Warner, about this problem, Ms. Warner stated that 'the files had been removed for our protection; that she did not want Jau-Fei's lawyers to get their hands on them.'" (Findings, at ¶ 101, attached hereto as Exh. B.)

44. "Ms. Kathy Hansen, then a personal assistant to Jau-Hwa Stewart, also discovered that a number of files had been deleted from employee computers. According to Ms. Hansen, when she and other employees met with Ms. Warner to discuss the matter, Ms. Warner indicated that the deletions had been intentional, stating to the employees that 'it was for our protection, that these were taken in case new management came in.'" (Findings, at ¶ 102, attached hereto as Exh. B.)

45. "The account of Ms. Warner's scheme to remove critical email evidence is also supported by the testimony of Mr. Lynn Walker, the head of the E. Excel graphics department. According to Mr. Walker, Ms. Warner requested that he delete any emails in his department that were to or from Jau-Hwa Stewart. Later that same week, Ms. Warner told Mr. Walker 'to go ahead and delete all old email.' Mr. Walker complied with Ms. Warner's instruction resulting in

the destruction of evidence that the Court presumes would have shed further light on the conspiracy led by Ms. Stewart.” (Findings, at ¶ 103, attached hereto as Exh. B.)

46. After the issuance of the Interim Order, the members of the criminal racketeering enterprise only accelerated their efforts, both removing property in violation of Court order, and destroying further evidence of their activities. “On February 21, 2001, this Court issued the Interim Order, removing Jau-Hwa Stewart as President, and leaving Beverly Warner officially in charge of the company until Mr. Holman arrived. As it turns out, the three-week period during which Ms. Warner oversaw the company’s operations witnessed the pace of the conspiracy accelerate even further.” (Findings, at ¶ 105, attached hereto as Exh. B.)

47. “Beginning on or around February 21, 2001, Mr. and Ms. Stewart began preparations to vacate their offices in compliance with the Court’s order. As it was actually conducted, however, the removal of Mr. and Ms. 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.” (Findings, at ¶ 109, attached hereto as Exh. B.)

48. “For instance, when Taig Stewart left E. Excel, he removed every paper file from his office, approximately a dozen boxes in all, and placed them in the basement of the residence where he lived with Jau-Hwa Stewart and Hwan Lan Chen.” (Findings, at ¶ 110, attached hereto as Exh. B.)

49. “In addition, Mr. Stewart acknowledged that he removed: large quantities of E. Excel’s intellectual property (as it existed on the hard drives of the computers that he took from the premises), nearly 30 computer programs (used largely for performing graphics work), and over 90 disks containing royalty-free stock photography that had been purchased by E. Excel. At hearing, Mr. Stewart expressly disclaimed any ownership of the computer files he removed and

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he acknowledged such intellectual properties were 'important documents' that belonged solely to E. Excel itself." (Findings, at ¶ 111, attached hereto as Exh. B.)

50. "Ron Hughes, a warehouseman with E. Excel, testified that when Ms. Stewart's lawyers returned documents to the premises of E. Excel, Ms. Warner asked for his assistance to load them back onto Taig Stewart's truck for immediate removal." (Findings, at ¶ 116, attached hereto as Exh. B.)

51. "Even by her own admission, Ms. Warner reviewed those files returned by Ms. Stewart's attorneys, segregated ones that she deemed to belong to 'unrelated entities,' including [Third-Party Defendant] Shannon River (discussed below), and then delivered those documents directly to Jau-Hwa Stewart before they could be returned to the E. Excel files from which they had originally been removed." (Findings, at ¶ 117, attached hereto as Exh. B.)

52. Angela Barclay, who was at the time a personal assistant to Jau-Hwa Stewart, directly participated in the violation of the Interim Order by making shipments of E. Excel product through a front-company controlled by Ms. Stewart in violation of Court order requiring the return of all corporate property to E. Excel. In furtherance of the criminal racketeering enterprise, Ms. Barclay then destroyed the evidence of her activities in order to prevent E. Excel and the Court from discovering the unlawful activities. "With the issuance of the Interim Order, there came an immediate change in product shipping patterns at E. Excel. E. Excel product was no longer shipped directly from E. Excel or directly to the 'new distributors.' On February 23, 2001, Angela Barclay invoiced more than \$30,000 of E. Excel product to a company called Rich Universe Ltd. in Hong Kong, a front company affiliated with the new distributor, Sam Tzu. Contrary to all prior business practice, Angela Barclay did not prepare an invoice from E. Excel

for the E. Excel product shipped. Instead, the entire shipment was invoiced by another entity called Shannon River, Inc.” (Findings, at ¶ 123, attached hereto as Exh. B.)

53. “On February 28, 2001, through Angela Barclay’s efforts, Shannon River shipped another \$4,000 of E. Excel product to Rich Universe.” (Findings, at ¶ 124, attached hereto as Exh. B.)

54. “Then on March 6, 2001, Shannon River shipped another \$5,000 of E. Excel product to an entity in Taiwan called National Joy Leather Products Co.” (Findings, at ¶ 125, attached hereto as Exh. B.)

55. “No record of these shipments was ever made in the books and records of E. Excel. Moreover, when Ms. Barclay resigned from E. Excel, shortly after the arrival of Mr. Holman, she removed all of the records relating to the Shannon River shipments from the premises of E. Excel and delivered them to Jau-Hwa Stewart. Then, to remove the last evidence of her activities, Ms. Barclay erased all of the remaining computer files pertaining to Shannon River on her way out the door.” (Findings, at ¶ 126, attached hereto as Exh. B.)

56. “As it turns out, Shannon River, Inc., is a shell corporation. No shares have ever been issued, and so far as the record discloses, Shannon River has no functioning directors, no officers, no employees, and no assets. It is undisputed, however, that the corporation known as Shannon River was formed by Jau-Hwa Stewart and that the address for Shannon River is Ms. Stewart’s home address.” (Findings, at ¶ 127, attached hereto as Exh. B.)

57. “Ms. Barclay’s decision to delete all computer files pertaining to Shannon River and to remove the remaining hard files from the premises and deliver them to a former president removed from office by court order is not the type of action that most employees take when they terminate their employment with a company; to the contrary, such actions demonstrate an acute

consciousness of guilt. Moreover, regardless of the shipper used, the fulfillment of orders placed by Mr. Tzu in Hong Kong, **in violation of the Interim Order**, could not have occurred unless Ms. Stewart removed those fax orders from her office and handed them to Ms. Barclay. The Court must conclude, therefore, that both Ms. Stewart and Ms. Barclay understood that they were acting in furtherance of the conspiracy, and with deliberate intent to conceal their actions, when the Shannon River shipments were made to the front companies designated by Mr. Tzu.” (Findings, at ¶ 129, attached hereto as Exh. B) (emphasis added).

58. After the removal of Jau-Hwa Stewart from the office of the president, Beverly Warner became the top management official at E. Excel pending the arrival of Special Master Holman some three weeks later. Ms. Warner deliberately failed to use her new position of authority to implement any of the Court’s orders. “Moreover, once Beverly Warner agreed to serve under the terms of the Interim Order, she took no action to countermand any orders or directions given by Jau-Hwa Stewart to Angela Barclay regarding foreign shipments, nor to investigate and determine what orders had been given by Jau-Hwa Stewart to Angela Barclay regarding foreign shipments. **The Court concludes that Ms. Warner’s failure to take any action to ensure Ms. Barclay’s compliance with the Interim Order was a deliberate and intentional effort to further the purposes of the conspiracy.**” (Findings, at ¶ 130, attached hereto as Exh. B) (emphasis added).

59. “At the same time as Jau-Hwa Stewart and the other members of the conspiracy were actively converting E. Excel’s property in the wake of the Interim Order, parallel efforts to commence the Apogee enterprise continued apace.” (Findings, at ¶ 136, attached hereto as Exh. B.)

60. Hwan Lan Chen not only orchestrated the direction of the criminal racketeering enterprise, but also provided it with critical funding of millions of dollars. “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.” (Findings, at ¶ 137, attached hereto as Exh. B.)

61. “In preparation for the Apogee enterprise, Hwan Lan Chen arranged for a wire of \$3.5 million into a Central Bank account, No. 42407353 (the “424 account”), which account is held in the name of a nominee, Su-Chiu Kuo Shen. 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. The account was then administered by Jau-Hwa Stewart who, by her own admission, holds and uses a signature stamp for Su-Chiu Kuo Shen to arrange for the transfer of funds into and out of the Central Bank account.” (Findings, at ¶ 138, attached hereto as Exh. B.)

62. “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.” (Findings, at ¶ 139, attached hereto as Exh. B.)

63. “[I]t is undisputed that monies from the account have been used by Ms. Kuo Shen herself (though none of the funds appear to belong to her), by Apogee for a variety of business expenses, and by Ms. Stewart for personal expenses, including the payment of the legal fees of her attorneys at Larsen & Mooney. The ‘424 account’ serves, then, as a common fund upon which members of the conspiracy may draw.” (Findings, at ¶ 140, attached hereto as Exh. B.)

64. Ms. Warner participated with Ms. Stewart in removing additional evidence from this jurisdiction to conceal activities related to the common fund account. “In other instances, money from the ‘424’ account simply disappeared in untraceable transactions. Both Ms. Stewart and Ms. Warner have testified how, repeatedly, Ms. Stewart instructed Ms. Warner to withdraw sums from the ‘424 account’ just shy of \$10,000 in cash. According to Ms. Warner, she would then convert this cash into money orders, though she insisted she did not remember the identity of any of the payors or payees, nor the name or location of any of the institutions from which the money orders were obtained. Ms. Warner then claims to have delivered these money orders to their intended recipients, giving the documentary receipts to Ms. Stewart. Ms. Stewart, for her part, claims she mailed the receipts to the nominee, Ms. Kuo Shen, in Taiwan, leaving no record whatsoever in this country of how the money was spent.” (Findings, at ¶ 141, attached hereto as Exh. B.)

65. “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.’” (Findings, at ¶ 144, attached hereto as Exh. B.)

66. Sheue Wen Smith also participated in the preparations for the criminal racketeering enterprise. “In ‘the first part of March 2001’ Stan Houghton, of Westland Construction, was hired to be the building contractor for the Apogee manufacturing facility. As with the rental of the ATL warehouse, Jau-Hwa Stewart’s sister, Sheue Wen Smith, was the person who initiated the transaction on Apogee’s behalf.” (Findings, at ¶ 145, attached hereto as Exh. B.)

67. “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.” (Findings, at ¶ 146, attached hereto as Exh. B.)

68. “No later than the fifth or sixth meeting with Mr. Houghton, Dale Stewart and Brian Hymas were also in attendance at the Orem residence. Dale Stewart was introduced to Stan Houghton as the ‘plant manager’ for Apogee.” (Findings, at ¶ 147, attached hereto as Exh. B.) The record is replete with other evidence that the criminal racketeering enterprise was headquartered at Hwan Lan Chen’s residence in Orem.

69. “Hwan Lan Chen paid the costs of construction for the Apogee facility.” (Findings, at ¶ 148, attached hereto as Exh. B.)

70. “On March 19, 2001, Jau-Hwa Stewart sent an email to Mr. Houghton asking him to ‘please submit the drawing into the City now and then meet with Dale for the final adjustment to the warehouse.’ As of March 19, the date of the email, Dale Stewart was still the plant manager for E. Excel.” (Findings, at ¶ 149, attached hereto as Exh. B.)

71. “When Mr. Holman arrived, he found that Jau-Hwa Stewart and the other members of the conspiracy had taken all the documents E. Excel needed to operate. As Mr. Holman described it, there were:

no manufacturing records. There were no records of importation of raw materials. There were no financial records. I had a draft balance sheet and P&L [profit and loss statement] for 2000. That was the only financial information There was no—on that balance sheet, there was no information with respect to subsidiary corporations, and there was no information in the office with respect to subsidiary corporations. There was no test information with respect to products. There was nothing in the office related to litigation. Basically, there was nothing ***** We had no financial records. We had no records related to the bank, Zion’s Bank. We had—records were missing relating to manufacturing.”

(Findings, at ¶ 153, attached hereto as Exh. B.)

72. “The absence of these records impacted every facet of E. Excel’s business, including sales tax reporting, inventory calculations for tax purposes, manufacturing processes, and basic bookkeeping functions. According to Mr. Holman, these missing records placed (and continue to place) E. Excel at a significant disadvantage because it cannot, for instance, respond adequately to periodic government audits, nor even accurately reconstruct its own prior course of dealing with its customers and suppliers.” (Findings, at ¶ 154, attached hereto as Exh. B.)

73. “Ms. Lipe also discovered around the time of Mr. Holman’s arrival that hard copies of invoices for accounts payable transactions were all missing, even though the existence of the transactions themselves was clearly reflected in the company’s computer files.” (Findings, at ¶ 155, attached hereto as Exh. B.)

74. “Beginning in late February or early March 2001, while Mr. Hu and Mr. Tzu [the “new distributors” who had received stolen E. Excel product through the Shannon River front company] were ‘dumping’ E. Excel product on the market, Jau-Hwa Stewart assisted in wiring

funds to them for the ‘specific purpose of setting up sales distribution networks in Hong Kong and the Philippines.’” (Findings, at ¶ 162, attached hereto as Exh. B.)

75. “According to Ms. Stewart, the money for the new distribution arms, a ‘few million dollars,’ came from Hwan Lan Chen and was to be used to ‘to help [Jau-Hwa Stewart] to prepare to compete with E. Excel.’” (Findings, at ¶ 163, attached hereto as Exh. B.)

76. “At the same time, Jau-Hwa Stewart also asked Dale Stewart, Brian Hymas, and Beverly Warner to ready Apogee for competition in the United States.” (Findings, at ¶ 165, attached hereto as Exh. B.)

77. “Although Dale Stewart began to work for Ms. Stewart and Apogee even before he resigned from E. Excel, after his resignation from E. Excel on March 21, 2001, he redoubled his efforts. On the day after he resigned from E. Excel, Mr. Stewart contacted an equipment vendor, Gary Bovyer. Mr. Dale Stewart solicited Mr. Bovyer to provide bids for the machinery that Apogee would need to manufacture herbal products. Mr. Bovyer responded by providing numerous bids to Mr. Stewart commencing only a week later, on March 30, 2001. Mr. Stewart solicited these bids at the ‘specific instruction of Jau-Hwa Stewart.’” (Findings, at ¶ 166, attached hereto as Exh. B.)

78. “As with the nominee bank account and the nominee land purchase, Mr. Stewart concealed his activities on behalf of Apogee by using a variety of company names, including Kent Maxwell, Inc., Steve Lee, Inc., and Wendell Enterprises. In each instance, Mr. Stewart changed the name of his company affiliation at the specific instruction of Jau-Hwa Stewart, for whom he understood each of these names to be ‘aliases.’” (Findings, at ¶ 167, attached hereto as Exh. B.)

79. “Beginning on May 11, 2001, Mr. Stewart in fact purchased equipment from Mr. Bovyer, and instructed Mr. Bovyer to deliver that equipment to the ATL warehouse, rented by Sheue Wen Smith, at 1335 West 1650 North in Springville. Mr. Nelson, the ATL employee, recalled that drivers would occasionally pull up with a delivery and a bill of lading for ‘Apogee.’ On those occasions, Mr. Nelson would assist the drivers to contact Dale Stewart, who would then come and open the ATL warehouse.” (Findings, at ¶ 169, attached hereto as Exh. B.)

80. “[O]n May 17, 2001, articles of incorporation for Apogee, Inc., were filed with the State Division of Corporations. As with the land purchase, the equipment purchases, and the ‘424 account,’ another nominee was used for the incorporation documents. The nominee, Mr. Scott Tawzer, is the brother-in-law of Brian Hymas According to Mr. Tawzer, however, his entire participation in the Apogee enterprise—as the incorporator, sole shareholder, and president—was done as an accommodation to Hwan Lan Chen.” (Findings, at ¶ 174, attached hereto as Exh. B.)

81. “Whatever the case may be, Apogee is a shell, and attorneys representing both Apogee and Ms. Stewart have asserted the same in these proceedings. No stock certificates have ever been issued for Apogee, there have been no shareholder meetings, there are no directors and there have been no board meetings, Apogee has no money or bank accounts, and Mr. Tawzer, the only officer of the corporation, has no involvement in its operations other than to sign papers presented to him.” (Findings, at ¶ 175, attached hereto as Exh. B.)

82. In furtherance of the criminal racketeering enterprise, Taig Stewart also participated in the removal of key witnesses from the jurisdiction. “Sometime after the incident with the printers, Taig Stewart arranged for Mr. Hymas to travel out of this jurisdiction (specifically to Texas) during the period of time when both Mr. Stewart and Mr. Hymas knew

that E. Excel was attempting to serve a summons upon Mr. Hymas.” (Findings, at ¶ 178, attached hereto as Exh. B.)

83. Dale Stewart also commenced a campaign of corporate espionage on behalf of the criminal racketeering enterprise, and in violation of the Court’s command that Ms. Stewart and those in active concert with her refrain from tortiously interfering with E. Excel’s ability to perform its own contracts. “During this time, Dale Stewart engaged in activities that amount to corporate espionage. In early June, Mr. Stewart contacted an employee of E. Excel, Belizario Martinez, to obtain information about the specific formulation of Nutrifresh. When asked by Mr. Larsen whether he had offered to pay Mr. Martinez for that confidential information, Mr. Stewart replied: ‘I told him that could be a possibility.’ After a break in the proceedings, taken to advise Mr. Stewart of his Fifth Amendment rights, Mr. Stewart recanted his testimony—but only partially. After the break, Mr. Stewart admitted that he had offered Mr. Martinez money only to learn whether one specific ingredient was contained in the current formulation of Nutrifresh.” (Findings, at ¶ 181, attached hereto as Exh. B.)

84. “The day after Ms. Stewart announced her intention to compete with E. Excel, Angela Barclay (who had been responsible for the shipments through Shannon River and the removal of the Shannon River records) delivered a cashier’s check for \$63,000 to Mr. Gary Bovyer to purchase equipment on behalf of Apogee. The name of the payor on the check was Ms. Su-Chiu Kuo Shen, the nominee. According to Ms. Barclay, she delivered ‘at least five’ other cashiers checks to vendors and other suppliers of Apogee. In each instance, Ms. Barclay undertook this activity at Jau-Hwa Stewart’s specific direction.” (Findings, at ¶ 188, attached hereto as Exh. B.)

85. “Jau-Hwa Stewart paid Ms. Warner for the services that she provided for Apogee. Beginning in approximately September 2001, Ms. Stewart paid Ms. Warner from \$1200 to \$1500 twice per month. The payments were always in cash.” (Findings, at ¶ 197, attached hereto as Exh. B.)

86. Dale Stewart denied that he was receiving cash payments similar to those received by Ms. Warner, placing more perjurious testimony in the record to prevent proper adjudication of this matter. “At his deposition in October 2001, Dale Stewart claimed to have been unemployed since leaving E. Excel some six months earlier, living off of cash he kept in a drawer. On the stand, however, Mr. Stewart admitted that his deposition testimony had been perjurious:

Q: The testimony you gave [at deposition] with regard to income . . . since leaving E. Excel was not true at the time you gave it, was it?

A: That’s right.

Q: And you knew it wasn’t true at the time that you gave it, didn’t you?

A: Yes.

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.” (Findings, at ¶ 199, attached hereto as Exh. B.)

87. “Nevertheless, the difference is ultimately not material; 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.’” (Findings, at ¶ 200, attached hereto as Exh. B.)

88. In furtherance of the criminal racketeering enterprise, Beverly Warner and Taig Stewart prepared additional correspondence for the purpose of tortiously interfering with E. Excel's ability to operate, and to prevent the discovery of evidence that might be used in this proceeding. "On September 11, 2001, while Ms. Warner was on the Apogee payroll, she prepared a letter for Taig Stewart's signature concerning a company called Dunkirk, Inc. According to Taig Stewart, the nominal president of the company, Dunkirk was the name under which 'E. Excel does business in Canada or stores its goods in Canada.' Moreover, according to Mr. Stewart, the employees of Dunkirk were, in fact, paid by E. Excel, and as Mr. Stewart has all but admitted, Dunkirk is a shell operation—which has never conducted board meetings or observed other corporate formalities—operated for the sole benefit of E. Excel." (Findings, at ¶ 202, attached hereto as Exh. B.)

89. "Despite the fact that Dunkirk operated as a shell on behalf of E. Excel, the September 11 letter prepared by Ms. Warner for Mr. Stewart's signature instructed the Canadian bank that held Dunkirk's deposits not to speak with anybody concerning Dunkirk's accounts except for Ms. Warner or Mr. Stewart himself." (Findings, at ¶ 202, attached hereto as Exh. B.)

90. In violation of the Interim Order, members of the criminal racketeering enterprise continued to sell stolen E. Excel product, rather than return such corporate property to E. Excel. "As Apogee opened for business in Asia in mid-September, the Apogee products being manufactured by Best Formulations were not ready yet. As described below, however, Richard Hu and Sam Tzu solved the problems created by lack of product by selling E. Excel goods that had been shipped to them by Jau-Hwa Stewart, either directly from E. Excel or through Shannon River. These sales of E. Excel product not only allowed Mr. Hu and Mr. Tzu to maintain a large distribution chain in the absence of any product to sell from Apogee itself, but it also gave their

new Apogee distributors another important boost during this formative period: Apogee was able to identify itself in the minds of the consuming public with the goodwill of the E. Excel brand.” (Findings, at ¶ 204, attached hereto as Exh. B.)

91. “This effort by Apogee to capitalize on E. Excel’s goodwill is widespread. On September 17, 2001, for example, a news segment aired on the Philippine television program ‘TV Patrol.’ The news segment intermixed various images of the grand opening of Apogee with images of E. Excel product for sale.” (Findings, at ¶ 206, attached hereto as Exh. B.).

92. “On September 29, 2001, a market researcher retained by E. Excel Philippines, Mr. Alexander Villafuerte, visited the office of Mr. Hu’s company, Apogee Essence International Phils., Inc., in Davao City. Mr. Villafuerte asked if he could ‘purchase some products of the Apogee Essence.’ The Apogee representative instead sold Mr. Villafuerte two products manufactured by E. Excel: E. Excel Elemente Revitalizing Facial Cleanser and E. Excel Triflora Health Drink.” (Findings, at ¶ 207, attached hereto as Exh. B.)

93. The criminal racketeering enterprise also continued to make use of E. Excel’s intellectual property, which had been removed from E. Excel’s offices by Taig Stewart, and which had not been returned in compliance with the Interim Order. “On September 30, 2001, a representative of Apogee Malaysia, Mr. Gary Lim, attempted to recruit an E. Excel subdistributor, Mr. Tan Mook Ching, to work for Apogee Mr. Lim also gave Mr. Ching a CD-ROM with a PowerPoint slide show prepared by Apogee Malaysia and shown to potential MLM distributors there. This CD-ROM, admitted in evidence as Exhibit 422-A, contains slides depicting the following: Slide 1 displays the distinctive Apogee logo with the ‘orbital’ design around the letter ‘O . . . ;’ Slide 8 is the photograph of Drs. O’Neill and Murray, and their research team, that was taken by Mr. Philbrick for E. Excel (with the E. Excel logos airbrushed

out); Slide 13 is the photograph of Dale Stewart given by himself to Jau-Hwa Stewart, next to the caption 'Production Director, U.S.A.'; Slide 14 is a photograph of Taig Stewart next to the caption 'Creativity Director, U.S.A.'; Slide 15 is a photograph of Sam Tzu, General Manager of 'Apogee World, Malaysia'; Slide 16 depicts Richard Hu, General Manager of 'Apogee World Essence, Philippines'; Slide 17 depicts Jason Tzu, General Manager of 'Apogee World, Hong Kong;' and Slide 18, which has been separately admitted as Exh. 422-A(1), depicts the organization chart for 'Apogee, Inc., U.S.A.' and its Asian affiliates." (Findings, at ¶ 209, attached hereto as Exh. B.)

94. "Taig Stewart admitted that the organization chart contained on Slide 18 accurately reflects the relationship among the various members of the Apogee enterprise. Although he could not explain how it had happened, Taig Stewart further admitted that the photographic images that he had removed from the premises of E. Excel were, in fact, used in Apogee marketing materials, less the identifying E. Excel logos." (Findings, at ¶ 210, attached hereto as Exh. B.)

95. "On October 11, 2001, Taig Stewart returned the numerous computers and other items removed from E. Excel in February 2001. Mr. Stewart acknowledged that he was 'not seriously contending' that he owned many of the items that had been removed, and that many of them clearly 'belonged to E. Excel.' The Court's Interim Order of February 21, 2002, had required Ms. Stewart to 'immediately return to the Company's headquarters any corporate assets.'" (Findings, at ¶ 214, attached hereto as Exh. B.)

96. "On October 12, 2001, Jau-Hwa Stewart asked Best Formulations to ship product to USA Apogee, Ltd. In Hong Kong." (Findings, at ¶ 215, attached hereto as Exh. B.)

97. “On October 26, a market researcher retained by E. Excel Philippines, Ms. Winda Legaspi, visited the office of Apogee Philippines in Makati City. After Ms. Legaspi paid a fee to join the Apogee enterprise, she was allowed to purchase product. The product was handed to her in a paper bag with the logo of E. Excel on the front, and the shipping address for Excellent Essentials on the side. The products sold to Ms. Legaspi were all manufactured by E. Excel at its United States headquarters, and all bore the stickers stating that they were imported by Excellent Essentials, the ‘new distributor’ established by Ms. Stewart and Mr. Hu approximately a year earlier. In other words, as of late October 2001, the Apogee enterprise continued to misappropriate E. Excel’s goodwill, and undercut the market for its goods, by selling the product that had been shipped by Ms. Stewart to her ‘new distributors’ after the entry of the January 10, 2001, and February 21, 2001, restraining orders.” (Findings, at ¶ 218, attached hereto as Exh. B.)

98. On October 31, 2001, this Court entered an additional restraining order, preventing Jau-Hwa Stewart “her agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with her” 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.” (October 31, 2001, Order, attached hereto as Exh. D.)

99. “**Despite the restraining order** against Jau-Hwa Stewart (including her agents and those in active concert with her), Taig Stewart continued to pay Beverly Warner to operate Apogee. With her own cash salary in hand, on December 10, 2001, Beverly Warner caused Best Formulations to ship more than \$150,000 worth of product—80,000 bottles in all—to Rich Universe, Ltd., in Hong Kong. According to Ms. Warner, she had the product shipped to Rich

Universe at the request of Sam Tzu. It does not escape the Court's attention that there is a marked parallel between the December 10 shipment from Apogee to Rich Universe, and the shipment by Shannon River to Rich Universe on February 23, 2001, only two days after the entry of the Interim Order. Moreover, **the Court finds that the December 10 shipment of product violated the restraining order against Jau-Hwa Stewart, either under an 'active concert' theory, or because Jau-Hwa Stewart is one of the principals of Apogee, an admitted corporate shell.**" (Findings, at ¶ 221, attached hereto as Exh. B) (emphasis added).

100. In furtherance of the criminal racketeering enterprise, Sheue Wen Smith again committed perjury by denying that she had any knowledge of the Apogee enterprise during her deposition. "On March 14, 2002, Jau-Hwa Stewart's sister, Sheue Wen Smith, was deposed in this matter. In attempting to distance her rental of the ATL warehouse from the Apogee enterprise, Ms. Smith claimed that at the time of the ATL rental, and for the year and a half since, she has remained completely unaware of Ms. Stewart's intention to form a competing business:

Q: When is the first time you ever heard of the name Apogee?

A: What is Apogee?

Q: Have you ever heard of Apogee before?

A: No. Never.

Q: Have you ever spoken to Jau-Hwa about her desire to start a new company since leaving E. Excel?

A: No.

In light of Ms. Smith's involvement in the construction of the Apogee warehouse and her involvement in the rental of the ATL facility for Apogee's use, the Court cannot credit her testimony in this regard." (Findings, at ¶ 229, attached hereto as Exh. B.)

101. On December 14, 2001, this Court entered an additional restraining order on the same terms as the October 31 restraining order, but now expressly identified Apogee as an entity "in active concert and participation with Jau-Hwa Stewart." Despite the presence of three orders that now prohibited Apogee from tortiously competing with E. Excel (the Interim Order, and October 31 order, and the December 14 order), Apogee at the behest of Jau-Hwa Stewart and Hwan Lan Chen, and in furtherance of the criminal racketeering enterprise, continued its competitive activities. "On March 18, 2002, E. Excel Philippines sent another market researcher to the Apogee offices in Makati City, Philippines. At the Apogee office, the researcher, Mr. Crisostomo Rarugal, met an Apogee representative, Mr. Marcelo Pusod. Mr. Pusod ultimately sold Mr. Rarugal both Apogee and E. Excel products. The products purchased by Mr. Rarugal are in evidence as Exhibit 577A-577M, and deserve some description. Exhibit 577, the bag in which Mr. Rarugal received his products from the Apogee representative has the E. Excel logo on front and back, and lists the address for the "new distributor" Excellent Essential offices on either side. Exhibit 577A, a smaller bag in which Mr. Rarugal received product, depicts the distinctive Apogee logo designed by Mr. Taig Stewart." (Findings, at ¶ 231, attached hereto as Exh. B.)

102. "Exhibits 577B-I are Apogee products (such as Coeur, Calme, and Sante). Each of these contains a label that notes that it was manufactured for Apogee, Inc., by Best Formulations in City of Industry, California. Even though Mr. Rarugal purchased the Apogee product in the Philippines, these labels also note that the product was imported by Apogee World

USA in Malaysia. The Court finds the presence of this Malaysian product in the Philippines further evidence of the close cooperation among all members of the Apogee enterprise.” (Findings, at ¶ 232, attached hereto as Exh. B.)

103. “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.” (Findings, at ¶ 233, attached hereto as Exh. B.)

104. Taig Stewart, Dale Stewart, and Beverly Warner have each failed to produce email correspondence between and among members of the criminal racketeering enterprise, despite discovery requests requiring them to do so. “On May 7, 2002, Ms. Warner admitted on the stand that she had conducted email correspondence with Richard Hu, Sam Tzu, Dale Stewart, Taig Stewart, and Jau-Hwa Stewart since she left E. Excel in March 2001. It is undisputed that Ms. Stewart never produced any of this correspondence, even though she was served with a discovery request for all documents that ‘mention, relate, or refer to . . . [Apogee].’ Significantly, Taig Stewart and Dale Stewart never produced their copies of correspondence with Ms. Warner either, even though they were served with the same discovery request.” (Findings, at ¶ 234, attached hereto as Exh. B.) Although the Court’s findings do not specifically reference Ms. Warner’s own copies of this correspondence, it is also undisputed that Ms. Warner has never produced her correspondence with other members of the criminal racketeering enterprise, either.

105. In addition, Jau-Hwa Stewart has, on behalf of the criminal racketeering enterprise, “destroyed and hidden evidence, committed perjury, suborned perjury, and obstructed justice. Such acts were egregious and, when considered in their historical context, substantially served to prejudice E. Excel.” (Ruling and Order re: E. Excel’s Motion for Sanctions Against Jau-Hwa Stewart, at 2, attached hereto as Exh. E.)

106. In addition to these factual findings, the Court also reached a number of legal conclusions that are germane to the determination of the present motion. First, “[t]he Court concludes, on the record before it and based on the conduct described above, that Jau-Hwa Stewart, Taig Stewart, and Hwan Lan Chen breached their fiduciary duties of loyalty to E. Excel by, among other things, impairing E. Excel’s corporate rights and interest to the extent of seeking the destruction of the corporation itself, establishing a competing enterprise and soliciting E. Excel employees while they were still serving as directors of E. Excel, and by crippling E. Excel’s operations at the time of their departure.” (Conclusions, at ¶ 36, attached hereto as Exh. B.)

107. Second, the Co-Conspirators behaved contumaciously, appropriating E. Excel property in violation of Court orders requiring the return of such property, and using such property to compete with E. Excel in violation of Court orders forbidding such competition. “The Court concludes that Jau-Hwa Stewart and the Third-Party Defendants (including Apogee, Shannon River, Taig Stewart, Hwan Lan Chen, Dale Stewart, Beverly Warner, Angela Barclay, Brian Hymas, Sam Tzu, Richard Hu, and Sheue Wen Smith), have unlawfully misappropriated and converted E. Excel product, files, and other items, and have used those items to compete unfairly with E. Excel in the relevant marketplace.” (Conclusions, at ¶ 43, attached hereto as Exh. B.)

108. Third, “the Court concludes that Jau-Hwa Stewart and the Third-Party Defendants created an “enterprise,” as that term is defined under Utah law, to compete with E. Excel in the nutritional supplement and cosmetic market. That enterprise has, for a time, taken the form of Apogee, Inc., although the Court concludes that Apogee, Inc. is merely a shell corporation, and that the actual “enterprise” created by Jau-Hwa Stewart, Hwan Lan Chen, and the other Third-Party Defendants is something separate and apart from the Apogee shell corporation.” (Conclusions, at ¶ 50, attached hereto as Exh. B.)

109. Fourth, “The Court concludes that the individuals and entities associated with this enterprise include, but are not necessarily limited to, . . . Hwan Lan Chen, Taig Stewart, Dale Stewart, Beverly Warner, Angela Barclay, . . . Sheue Wen Smith, [and] Apogee.” (Conclusions, at ¶ 51, attached hereto as Exh. B.)

110. Fifth, the Court found the evidence to be “overwhelmingly persuasive” to the position of E. Excel. (Ruling Regarding Findings of Fact and Conclusions of Law, at 3, attached hereto as Exh. F.)

111. Finally, it is worth noting that the Court’s efforts to remedy certain of the Co-Conspirator’s conduct through less drastic sanctions has proved unavailing. The Court’s order, for instance, that Apogee pay monetary fines by a date certain has been wholly ignored. “On November 27, 2001, this Court ordered Apogee to provide expedited discovery to E. Excel. Apogee failed to comply with the Court’s order.” (Order of Sanctions Against Apogee (hereinafter “Sanctions Order”), at ¶ 1, attached hereto as Exh. G.)

112. On December 13, 2001, this Court “ordered Apogee to pay, as a sanction, the reasonable fees and costs incurred by E. Excel in connection with its discovery efforts against Apogee up to that time.” (Sanctions Order, at ¶ 5, attached hereto as Exh. G.)

113. On June 3, 2002, the Court liquidated the amount of attorney's fees resulting from its first order of sanction at \$5512.41. In addition, because of continued discovery abuses, this Court entered a second award of attorney's fees against Apogee in the amount of \$3267.50. The Court further ordered that Apogee "will be required to pay the total amount due and owing [from both sanction awards] no later than June 17, 2002." (Sanctions Order, at ¶ 5, attached hereto as Exh. G.)

114. The time for Apogee's performance under the Court order has passed, and Apogee has neither paid the attorney's fees required by the Court's order, nor moved for relief from the order, nor even conferred with counsel for E. Excel in an effort to resolve the matter without resort to the offices of the Court. (Price Aff., at ¶ 3, attached hereto as Exh. H.) Moreover, the fact that Apogee is a corporate shell with Hwan Lan Chen as its principal means that Apogee's failure to comply with the Court's order of payment is, in fact, Hwan Lan Chen's failure to comply with the Court's order of payment. The Court has tried to impose monetary sanctions twice now, to no avail. Additional sanctions are therefore warranted.

ARGUMENT

I. Jau-Hwa Stewart and the Co-Conspirators Have Acted Jointly and Should Be Sanctioned Jointly.

Jau-Hwa Stewart, Hwan Lan Chen, and the Co-Conspirators have acted jointly, as part of a criminal racketeering enterprise, both in defiance of this Court's orders and to destroy and pollute the evidentiary record to such an extent as to render fair adjudication impossible. Given that the actions of the conspiracy have been coordinated and that E. Excel still suffers the deleterious effects of the conspiracy's activities, it is appropriate to jointly sanction all those who committed or facilitated the commission of the acts that led to the present circumstances. Each

of the Co-Conspirators have participated knowingly and fully in the criminal racketeering enterprise, and have reaped the benefits of the enterprise's activities, including the furtherance of the enterprise through violation of court orders, and the wholesale destruction of evidence that could have been used to prove the full extent of the conspiracy itself.

As the Utah Supreme Court has explained, such coconspirators are liable for each other's actions in furtherance of the conspiracy:

It is axiomatic that "where several combine together to commit an unlawful act, each is responsible for the acts of his associates or confederates committed in furtherance thereof or in the prosecution of the common design for which they combined." Furthermore a conspirator who desires to avoid further liability by withdrawing from the conspiracy must take some affirmative action to withdraw from, or thwart, the conspiracy.

State v. Peterson, 881 P.2d 965, 970 (Utah App. 1994) (internal citations omitted). See also Tompkins v. Cyr, 202 F.3d 770, 783 (5th Cir. 2000) ("each of the . . . defendants is jointly and severally liable for the actions of the others because all were found to be co-conspirators in a civil conspiracy"); Operation Rescue-National v. Planned Parenthood of Houston and South-East Texas, Inc., 975 S.W.2d 546, 561 (Tex. 1998) ("a conspiracy finding obviates the necessity of demonstrating the propriety of injunctive relief against each co-conspirator"). The Co-Conspirators therefore should be subject to sanction not only for their own individual acts, but for all those sanctionable acts committed in furtherance of the criminal racketeering enterprise. See also Johnson v. State, 725 P.2d 1270, 1273 (Okla. Crim. App. 1986) ("Withdrawal requires letting the other parties know of one's abandonment **and doing everything in one's power to prevent the commission of the crime**") (cited with approval by Utah Court of Appeals in Peterson, 881 P.2d at 970) (emphasis added).

What is most notable, and shocking, about the willful misconduct of the Co-Conspirators, as outlined above for pages, is that the acts of which E. Excel complains all occurred AFTER this Court ordered them to stop.

II. The Court Should Enter Default Against the Specified Co-Conspirators in the Exercise of its Inherent Powers for Spoliation of Evidence and for Perjury.

The courts have “inherent powers not derived from any statute” to control the proceedings before them. See Griffith v. Griffith, 985 P.2d 255 (Utah 1999) (citing In re Evans, 130 P. 217, 224-5 (Utah 1913)). As the Utah Supreme Court has explained, “Such inherent powers of courts are necessary to the proper discharge of their duties [A] constitutional court of general and superior jurisdiction may exercise such powers and summary jurisdiction as the necessity of the case may require, and in manner comporting with a proper discharge of its duties in the premises.” In re Evans, 130 P., at 224-5. See also Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc., 682 F.2d 802, 806 (9th Cir. 1982) (“It is firmly established that the Courts have inherent power to dismiss an action or enter a default judgment to ensure the orderly administration of justice and the integrity of their orders”).

A. Members of the Racketeering Enterprise Have Repeatedly Spoliated Evidence and Committed Perjury.

Members of the racketeering enterprise have repeatedly destroyed critical evidence in this case and committed perjury, to the manifest prejudice of E. Excel, and the benefit of the criminal racketeering enterprise. Among the documented episodes of spoliation and perjury are the following:

i. Spoliation.

- Beverly Warner disabled E. Excel’s security system and removed any documentary evidence contained on the videotapes then present.

- Beverly Warner and/or Jau-Hwa Stewart removed E. Excel's noncompetition agreements with its employees, including its agreements with several of the Co-Conspirators themselves.

- Beverly Warner personally destroyed certain email correspondence on E. Excel's computers and ordered employee Lynn Walker to destroy the remainder. Ms. Warner undertook this action, in her own words, because "she did not want Jau-Fei's lawyers to get their hands on them."

- Angela Barclay destroyed records of unlawful shipments at E. Excel as they existed on E. Excel's computer files, and then removed the hard copies of those same transactions to Jau-Hwa Stewart. The documents removed by Ms. Barclay have not been seen since then.

- Jau-Hwa Stewart, individually and as agent for Apogee, delivered copies of Apogee documents, including specifically, purchase orders and invoices for Apogee manufacturing equipment, to Co-Conspirator Dale Stewart. After the documents were delivered into Mr. Stewart's possession, they simply disappeared, and Mr. Stewart now claims not to have the documents in his possession. (Exhibits C and D to Motion for Sanctions Against Jau-Hwa Stewart.)

- Jau-Hwa Stewart, Beverly Warner, Taig Stewart, and Dale Stewart, individually, and as agents of Apogee, have destroyed copies of email correspondence between them concerning Apogee operations.

- Jau-Hwa Stewart and Beverly Warner, individually and as agents for Apogee, conspired to remove from this jurisdiction to Taiwan all of the documentary evidence relating to tens of thousands of dollars of untraceable cash transactions originating from the bank account used to fund Apogee.

- Jau-Hwa Stewart, individually and as agent for Apogee, sent an email to the general contractor for the Apogee facility, Mr. Stan Houghton, asking him to "delete my emails to you from now on once you read it." (Stewart Email, attached hereto as Exh. I.)

- Jau-Hwa Stewart, individually and as agent for Apogee, has destroyed extensive email correspondence with Apogee's general contractor, Apogee's private label manufacturer (Best Formulations), and E. Excel's former counsel in Hong Kong (Mr. Clement Tang).

- No documentation has ever been produced by Apogee, Jau-Hwa Stewart, or any other Co-Conspirator concerning communications with Apogee's Asian distributors, Sam Tzu, Jason Tzu, and Richard Hu. Given the fact that Ms. Stewart and the Co-Conspirators established a multimillion dollar distribution network on behalf of Apogee in Asia, it is inconceivable that there would never have been a single written communication between Apogee and its foreign distributors; in light of the other

demonstrated evidence of spoliation, the most reasonable inference is that these communications have been destroyed as well. (See, E. Excel's Memorandum In Support of Motion for Sanctions Against Jau-Hwa Stewart, at 5-6, attached hereto as Exhibit J.)

ii. Perjury.

- Dale Stewart committed perjury when he stated that he had received no funds for his work on the Apogee enterprise; in fact, he had been receiving regular cash payments from Hwan Lan Chen.
- Dale Stewart also committed perjury when he denied that he had been involved in the unlawful movement of E. Excel to Apogee's storage facility at the ATL warehouse; Mr. Stewart was identified by a third-party witness, Mr. Scott Nelson, as one of the persons who delivered E. Excel product to the ATL warehouse.
- Beverly Warner committed perjury when she denied deliberately deleting email from E. Excel's computers.
- Beverly Warner also committed perjury when she stated that she turned off the surveillance system at E. Excel because the videotapes had become worn out.
- Sheue Wen Smith committed perjury when she denied that her family members, and particularly her mother, Hwan Lan Chen, had played any role in her decision to rent the ATL warehouse.
- Sheue Wen Smith also committed perjury when she denied having any knowledge of the Apogee enterprise, especially in light of the testimony of Apogee's general contractor that Ms. Smith played an integral role in the construction of the new Apogee facility.
- Angela Barclay committed perjury when she stated that she had no understanding that her shipment of E. Excel product through the front company, Shannon River, was improper. As the Court has already found, "both Ms. Stewart and Ms. Barclay understood that they were acting in furtherance of the conspiracy, and with deliberate intent to conceal their actions, when the Shannon River shipments were made to front companies." (Findings, at ¶ 129, attached hereto as Exh. B..)
- Jau-Hwa Stewart committed numerous instances of perjury, including: falsely describing how certain critical documents were discovered, falsely describing her knowledge of E. Excel's product formulations, and falsely describing the time at which she learned of certain alleged problems with E. Excel's testing regime. (See, E. Excel's Memorandum In Support of Motion for Sanctions Against Jau-Hwa Stewart, at 15-20, attached hereto as Exh. J; and Ruling and Order re: E. Excel's Motion for Sanctions Against Jau-Hwa Stewart, at 2, attached hereto as Exh. E..)
- In addition, Ms. Stewart also suborned perjury when she advised her coconspirator, Mr. Richard Hu, to answer "I don't remember" when subject to a question that he would simply prefer not to answer.

B. Members of the Criminal Racketeering Enterprise Violated Their Affirmative Obligation to Preserve Evidence and to Refrain From Committing Perjury.

By destroying relevant email and other evidence after the onset of litigation, members of the criminal racketeering enterprise violated the duty to preserve evidence—a fundamental principle necessary to ensure the jury an opportunity to reach a fair verdict after a review of all relevant evidence. Struthers Patent Corp., 558 F. Supp. 747, 765 (D.N.J. 1981) (“The proper inquiry here is whether defendant, with knowledge that this lawsuit would be filed, willfully destroyed documents which it knew or should have known would constitute evidence relevant to the case”) (internal citations omitted). The Struthers court is not alone in imposing on litigants the obligation to preserve evidence for the jury’s ultimate consideration. To the contrary, the duty of litigants to preserve evidence is recognized nationwide. See, e.g., 7 Moore’s Federal Practice, § 37A.11[3][a] (3rd Ed. 2002) (“duty to preserve evidence arises when a party is aware or should be aware that evidence in its possession or control is relevant to litigation or potential litigation”); Winters v. Textron, 187 F.R.D. 518, 520 (M.D. Pa. 1999) (defendant “violated its fundamental duty to preserve evidence critical to the plaintiff’s case The law is clear that a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action”); Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (a litigant “is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request”); Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1112 (8th Cir. 1988) (“if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved”).

The duty to preserve evidence is imposed in order to ensure the proper functioning of the judicial system and to protect for the jury its role as fact-finder. Willful or malicious disregard of this obligation by a party, i.e., spoliation of evidence, may be grounds for default:

It has long been recognized that sanctions may be proper where a party . . . willfully places himself in such a position that he is unable to comply with a subsequent discovery order. [S]ome duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery. The proper inquiry is whether the defendant, with knowledge that this lawsuit would be filed, willfully destroyed documents which it knew or should have known would constitute evidence relevant to this case.

Bowmar Instrument Corp., et al. v. Texas Instruments Incorporated, 25 Fed. R. Serv. 2d. 423, 427 (N.D. Ind. 1977) (internal citations omitted). See also Computer Assoc. International, Inc. v. American Fundware, Inc., 133 F.R.D. 166, 170 (D. Colo. 1990) (“Destruction of evidence cannot be countenanced in a justice system whose goal is to find the truth through honest and orderly production of evidence”).

Although the entry of default is a harsh sanction, it is perhaps the only available sanction where the destruction of documents is so widespread as to prevent any lesser measure from remedying the harm:

Applying these [inherent power] principles, courts generally respond to document destruction or alteration with the ultimate sanction of . . . default in two types of cases: where the destroyed document is dispositive of the case, so that an issue-related sanction effectively disposes of the merits anyway . . . ; and where the guilty party has engaged in such wholesale destruction of primary evidence regarding a number of issues that the district court cannot fashion an effective issue-related sanction.

Shepherd v. American Broadcasting Companies, Inc., 62 F.3d 1469, 1479 (D.C. Cir. 1995).

This case is precisely the type of case where default judgment will be the only effective remedy.

Virtually all of the documentary evidence relating to Apogee has been destroyed, as have most of

the documents relating to the activities of the criminal conspiracy as it functioned at E. Excel.

Under such circumstances, it will be impossible for a jury instruction to paper over the massive gaps in the evidentiary record.

Courts have reached the same conclusion with regard to widespread perjury in the record:

Courts have inherent equitable powers to . . . enter default judgments for . . . abusive litigation practices Appellant's elaborate scheme involving perjury clearly qualifies as willful deceit of the court. Although the perjury occurred before the trial began, it infected all of the pretrial procedure and interfered egregiously with the court's administration of justice. The court sanctioned Heidenthal [by entering default judgment] not only to punish him, but to enable the court to proceed to hear and decide the case untainted by further interference and possible further perjury on the part of Heidenthal.

Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 916-17 (9th Cir. 1987). In this case, not only is the presence of perjury in the record widespread, but there is every reason to believe that the members of the racketeering enterprise will continue to perjure themselves if this case is allowed to reach a jury. Under such circumstances, default is the appropriate sanction to impose upon the Co-Conspirators, just as this Court has already found that it was the appropriate sanction to impose upon Jau-Hwa Stewart..

III. The Members of the Criminal Racketeering Enterprise Should Be Defaulted Because They Are in Civil Contempt of at Least Four Orders of this Court.

As identified above, the members of the criminal racketeering enterprise have conspired to pursue their own purposes in violation of at least four orders of this Court:

On January 10, 2001, this Court issued an order prohibiting Jau-Hwa Stewart and those in active concert with her from "directly or indirectly causing [E. Excel] to violate any of its exclusive contracts with territorial owners or to compete with territorial owners in violation of

such contracts.” The Court has already found the following acts in contempt of the January 10 order:

- “**In defiance of this Court’s order** . . . shipments that were prepared for the new distributors in late December were allowed to proceed on their way notwithstanding the Court’s January 10 order,” (Findings, at ¶ 35) (emphasis added).

- “On January 18, 2001, **in violation of the Court’s January 10 order**, Taig Stewart, acting as corporate secretary, sent a letter purporting to terminate the exclusive contract of E. Excel’s historical distributor in Hong Kong, and to substitute the ‘new distributor.’” (Findings, at ¶ 37) (emphasis added).

- “The Court therefore finds that the movement of product to the ATL warehouse on Sunday, February 18, 2001, was not done for a legitimate business purpose. Instead, the Court finds that the product was moved both to deprive E. Excel of access to necessary goods and raw materials less than three days before the Interim Order” (Findings, at ¶ 79.) In other words, the product was moved, at least in part, to prevent E. Excel from performing its own contracts.

On February 21, 2001, this Court issued its interim order, requiring Jau-Hwa Stewart and those in active concert to: (1) refrain from tortiously interfering, directly or indirectly, with E. Excel’s ability to perform its contracts, and (2) immediately return all corporate property to E. Excel (and to refrain from removing it again). The Court has already found the following acts in contempt of its February 21 order:

- “Beginning on or around February 21, 2001, Mr. and Ms. Stewart began preparations to vacate their offices in compliance with the Court’s order. As it was actually conducted, however, the removal of Mr. and Ms. 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.” (Findings, at ¶ 109.)

- “[T]he fulfillment of orders placed by Mr. Tzu in Hong Kong, **in violation of the Interim Order**, could not have occurred unless Ms. Stewart removed those fax orders from her office and handed them to Ms. Barclay. The Court must conclude, therefore, that both Ms. Stewart and Ms. Barclay understood that they were acting in furtherance of the conspiracy, and with deliberate intent to conceal their actions, when the Shannon River shipments were made to the front companies designated by Mr. Tzu.” (Findings, at ¶ 129) (emphasis added).

- **“The Court concludes that Ms. Warner’s failure to take any action to ensure Ms. Barclay’s compliance with the Interim Order was a deliberate and intentional effort to further the purposes of the conspiracy.”** (Findings, at ¶ 130) (emphasis added).

- “As Apogee opened for business in Asia in mid-September, the Apogee products being manufactured by Best Formulations were not ready yet Richard Hu and Sam Tzu solved the problems created by lack of product by selling E. Excel goods that had been shipped to them by Jau-Hwa Stewart, either directly from E. Excel or through Shannon River. These sales of E. Excel product not only allowed Mr. Hu and Mr. Tzu to maintain a large distribution chain in the absence of any product to sell from Apogee itself, but it also gave their new Apogee distributors another important boost during this formative period: Apogee was able to identify itself in the minds of the consuming public with the goodwill of the E. Excel brand.” (Findings, at ¶ 204.)

On October 31, 2001, this Court additionally restrained Jau-Hwa Stewart and those in active concert with her from “competing or preparing to compete with E. Excel.” This Court has already found the following contempts of its October 31 order:

- **“Despite the restraining order** against Jau-Hwa Stewart (including her agents and those in active concert with her), Taig Stewart continued to pay Beverly Warner to operate Apogee.” (Findings, at ¶221.)

- “[O]n December 10, 2001, Beverly Warner caused Best Formulations to ship more than \$150,000 worth of product—80,000 bottles in all—to Rich Universe, Ltd., in Hong Kong **[T]he Court finds that the December 10 shipment of product violated the restraining order against Jau-Hwa Stewart, either under an ‘active concert’ theory, or because Jau-Hwa Stewart is one of the principals of Apogee, an admitted corporate shell.**” (Findings, at ¶ 221) (emphasis added).

- Hwan Lan Chen, the other principle of Apogee, provided critical financial support for the Apogee operation, likely nearing ten million of dollars, in order to ensure that Apogee was able to function, and, along with Jau-Hwa Stewart, managed Apogee’s operations. Scott Tawzer, the president of Apogee, testified that Hwan Lan Chen “is in charge of Apogee and anything related to it.” (Tr., 3/19/02, at 19, attached hereto as Exh. K.) Beverly Warner, the office manager for Apogee, testified, all Apogee activity took place “under the direction of [Jau-Hwa Stewart’s] mother.” (Tr., 12/11/01, at 76-7, attached hereto as Exh. L.) Dale Stewart, the production manager for Apogee, testified that Hwan Lan Chen “owns or runs the Apogee Project.” (Tr., 12/10/01, at 181-2, attached hereto as Exh. M.) Jau-Hwa Stewart, the other principal of Apogee, testified that Apogee “is all my mother’s idea.” (Tr., 11/27/01, at 75, attached hereto as Exh. N.) Taig Stewart, the “creativity” manager for Apogee, testified that “Jau-Hwa Stewart and her mother are [Apogee]. I think they share a role in that.” (Tr., 3/13/02, at 18, attached

hereto as Exh. O.) Even Mark Larsen, attorney for Jau-Hwa Stewart, admitted that certain product “formulas . . . are being used in the Apogee Project by Madam Chen.” (Tr., 12/10/01, at 24, attached hereto as Exh. P.)

On November 27, 2001, this Court ordered Apogee to provide expedited discovery. Apogee failed to comply with this Order. On December 13, 2001, this Court again ordered Apogee to provide expedited discovery. Apogee again failed to comply with the order. On June 3, 2002, this Court sanctioned Apogee for defiance of its two prior orders by requiring Apogee to pay fines of over \$8000 “no later than June 17, 2002.” As of the present day, Apogee has made no payment of the fine, and is in contempt of the Court’s June 3 order.

The law of civil contempt is well-settled. A party may be held in civil contempt to compensate or remediate the aggrieved party for harms flowing from the contumacious conduct. “If it is for civil contempt the punishment is remedial and for the benefit of the complainant If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court.” Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 631-2 (1985) (expressly adopted as Utah law by Von Hake v. Thomas, 759 P.2d 1162, 1168 & n.5 (Utah 1988) (“A contempt order is civil if it has a remedial purpose . . . to compensate an aggrieved party for injuries resulting from the failure to comply with an order”)). See also 317 W. 87 Associates v. Dannenberg, 552 N.Y.S.2d 236, 237 (S. Ct. App. Div. 1990) (“Fraudulent and perjurious conduct during the course of judicial proceedings may also warrant punishment by contempt”). Finally, under Utah law an “order relating to contempt of court is a matter that rests within the sound discretion of the trial court.” Dansie v. Dansie, 977 P.2d 539, 540 (Utah App. 1999).

In order to impose civil contempt, the Court must find that three elements are satisfied: “As a general rule, in order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and

intentionally failed or refused to do so.” Von Hake, 759 P.2d, at 1172. In imposing a civil contempt, the Court must be satisfied that these elements have been demonstrated by clear and convincing evidence.⁵ Id.

In this case, the members of the racketeering enterprise have repeatedly, knowingly, and willfully acted in violation of multiple court orders by removing product and critical documents from E. Excel, by organizing and operating Apogee so as to tortiously interfere with E. Excel’s ability to perform its own contracts, by shipping Apogee product in violation of the Court’s orders, and by causing Apogee to repeatedly violate this Court’s discovery orders. Hwan Lan Chen, Apogee, Taig Stewart, Beverly Warner, Angela Barclay, and Sheue Wen Smith, each members of the criminal racketeering enterprise should therefore be held in civil contempt and should have default judgment entered as sanction for that contempt.

Moreover, in addition to being directly liable for her own contempt of court and as a member of the criminal racketeering enterprise, Hwan Lan Chen is also liable for Apogee’s contempt. Apogee operated using product stolen from E. Excel in violation of this Court’s Interim Order, shipped its own product in violation of the Court’s December 13, 2001, order, and has failed to comply with this June 2, 2002, Court’s order to pay monetary sanctions by a date certain. Apogee, however, is an admitted corporate shell, as this Court has already found (Finding, at ¶ 179)—no shares have been issued, no directors meetings held, no shareholders meetings conducted, and no capitalization. The true principals-in-interest of the Apogee shell are Hwan Lan Chen and Jau-Hwa Stewart. Alman v. Danin, 801 F.2d 1, 4 (1st Cir. 1986) (finding that both principals of a shell corporation could be held liable for the shell’s actions)

⁵ This Court has deemed the evidence adduced by E. Excel “overwhelmingly persuasive,” an endorsement that goes far beyond that required for a finding by clear and convincing evidence.

(cited with approval in Press Publishing, Ltd. v. Matol Botanical International, Ltd., 37 P.3d 1121, 1128 (Utah 2001)). See also Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979) (“the corporation is, in fact, the alter ego of one or a few individuals”).

Given that the corporate form should not be respected in the case of a sham corporation, it was Hwan Lan Chen’s affirmative duty as principal to ensure that Apogee did not violate this Court’s orders. In the face of this duty, Hwan Lan Chen either affirmatively ordered Apogee to commit the contumacious acts, or, at least, sat passively by while the Apogee did, in fact, engage in the contumacious conduct. Such a course of action was insufficient. Hwan Lan Chen did not appear to explain her conduct, while her counsel appeared consistently, representing Hwan Lan Chen and the other Third-Party Defendants who continuously implicated her in the conspiracy. Hwan Lan Chen cannot now complain that she was not heard, and she was continuously well-represented, and has provided affidavits in this proceeding when it served her purposes.

In the case of In re Dolcin Corp., the Dolcin corporation was ordered to modify its advertising policy to bring it into compliance with applicable law. Two of the officers of Dolcin, Shimmerlik and Wantz, took no steps to effectuate the order while a third officer, van der Linde, continued Dolcin’s unlawful advertising practices. The Dolcin court found this inactivity on the part of Shimmerlk and Wantz to justify the imposition of criminal contempt:

Shimmerlik and Wantz say they had no reason to know that their inaction would result in violation of this Court’s order by the corporation. Dolcin’s advertising policy was—they say—completely controlled by Victor van der Linde But this Court did not impose an obligation on Shimmerlik and Wantz that they could discharge by remaining inert. We imposed an affirmative obligation upon them, individually and as officers of Dolcin, to take all reasonable steps to effect compliance with this Court’s order Whatever the order of this court directed Shimmerlik and Wantz to do, it did not permit them to stand idly by while the Dolcin Corporation—their corporation—continued to flout our

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order Shimmerlik and Wantz should not be permitted to use their own inertia as a shield against the force of the court's decree. We will thus not vacate our finding that petitioners are guilty of criminal contempt.

In re Dolcin Corp., 247 F.2d 524, 534 (D.C. Cir. 1956) (cited with approval in United States v. Phelps Dodge Indus., Inc., 589 F. Supp. 1340, 1365 (S.D.N.Y. 1984)). See also United States v. Johnson, 541 F.2d 710, 712-13. (8th Cir. 1976) (requiring CEO of corporation to do "everything in his power . . . to assure [the corporation's] compliance with the F.T.C. order"); United States v. Swingline, Inc., 371 F. Supp. 37, 44-5 (E.D.N.Y. 1974) (finding "a lack of diligent effort to comply with the order is significant They were required to take energetic steps to see that the orders of the court were carried out").

Having organized, funded, and overseen the operations of Apogee, an admitted corporate shell, Hwan Lan Chen was not free either to directly cause Apogee to violate the Court's order, or to sit passively by while Apogee engaged in such conduct. Hwan Lan Chen, along with Jau-Hwa Stewart, is the controlling force behind Apogee; she is therefore liable not only individually, and as a member of the criminal racketeering enterprise for the actions of her coconspirators (including Jau-Hwa Stewart), but also (as the principal of a shell corporation) for Apogee's contempts of court order.

CONCLUSION

Jau-Hwa Stewart and the Co-Conspirators have, in furtherance of their criminal racketeering enterprise: (1) engaged in the wholesale spoliation of evidence, (2) committed perjury repeatedly, and (3) committed willful and malicious contempt of at least four orders of this Court. The Court should therefore enter default against each of the Co-Conspirators, either in the exercise its inherent powers, or as a sanction for civil contempt. In addition, Hwan Lan

Chen is subject to these sanctions not only individually and as a participant in the criminal racketeering enterprise, but as the principle of Apogee, a shell corporation and contemnor.

DATED this 27 day of September, 2002.

Jones Waldo Holbrook & McDonough

By AL Price

Deno G. Himonas

Adam B. Price

Attorneys for Defendant E. Excel International, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September 2002, I caused a true and correct copy of E.

**EXCEL'S MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS AND FOR ORDER TO
SHOW CAUSE WHY CERTAIN THIRD-PARTY DEFENDANTS SHOULD NOT BE HELD IN CIVIL
CONTEMPT, to be served on the following:**

BY HAND

Clark W. Sessions
Matthew A. Steward
CLYDE, SNOW, SESSIONS & SWENSEN PC
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Jonathan O. Hafen
Justin P. Matkin
PARR WADDOUPS BROWN GEE &
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BY FACSIMILE

Scott Berry
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TAB A

MICHAEL R. CARLSTON (A0577)
RICHARD A. VAN WAGONER (4690)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

DATE 1-11-01 TIME 10:50pm
ADDRESS SERVED E. E. Zhang
SERVICE BY Holly Johnson
SERVICE RECEIVED BY [Signature]

Attorneys for Plaintiff

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

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

TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE

Plaintiffs,

vs.

Civil No. 010400098

IAU-HWA STEWART and DOES I
through X,

Judge Fred D. Howard

Defendants.

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

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

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

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

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

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

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

IT IS HEREBY ORDERED as follows:

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

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

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

DATED this 16th day of January, 2001.

BY THE COURT:

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

DATE: 17 Jan 2001

Christine M. Allen
DEPUTY COURT CLERK



David J. Smith
Fourth District Court Judge



TAB B

Tab E

Deno G. Himonas (USB #5483)
Adam B. Price (USB #7769)
Christian D. Austin (USB #9121)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Defendant E. Excel International, Inc.

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

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

Plaintiffs,

vs.

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

Defendants.

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Cross-Claimant

vs.

JAU-HWA STEWART,

Cross-Defendant

E. EXCEL INTERNATIONAL, INC., a Utah
corporation

Third-Party Plaintiff

vs.

TAIG STEWART, BEVERLY WARNER,

**ACCEPTANCE OF SERVICE OF
PROCESS OF HWAN LAN CHEN**

Civil No. 010400098

Judge Fred D. Howard

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

Third-Party Defendant Hwan Lan Chen, by and through the undersigned counsel
of record, hereby accepts service of the attached Summons and Amended Answer,
Crossclaim, and Third-Party Complaint of E. Excel International, Inc. (Exhibit A), in the
above-captioned matter. In doing so, Hwan Lan Chen expressly waives any and all
defenses of insufficiency of process and insufficiency of service of process.

DATED this 15th day of January, 2002.

CLYDE, SNOW, SESSIONS, & SWENSEN

By


Clark W. Sessions

Matthew A. Steward

Attorneys for ~~Dale Stewart~~

HUAN LON CHEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 09 day of January, 2002, I caused a true and correct copy of the foregoing **ACCEPTANCE OF SERVICE OF PROCESS OF HWAN LAN CHEN** to be served, via the following means, to the following:

HAND DELIVERY

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

Mark A. Larsen
Jerome Mooney
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

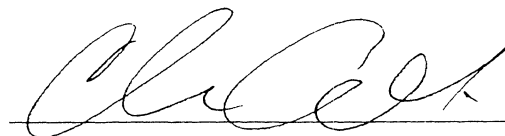
Michael R. Carlston
Richard A. VanWagoner
David L. Pinkston
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Salt Lake City, Utah 84145

Paul T. Moxley
Christine T. Greenwood
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FIRST CLASS MAIL

Shannon Heaton
3312 Antigua Drive
Eugene, OR 97408

Shannon River, Inc.
Lynn Gilbert, Registered Agent
190 West 800 North, Suite 100
Provo, UT 84601

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

Tab F

Clark W. Sessions (2914)
Matthew A. Steward (7637)
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201 South Main Street
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Fax No.: (801) 521-6280

*Attorneys for Third-Party Defendants Beverly Warner, Angela Barclay,
Dale Stewart, Sheue Wen Smith, Paul Cooper, Kim O'Neill, Byron Murray,
Hwan Lan Chen and Apogee, Inc., a Utah corporation*

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

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

Plaintiffs, :

vs. :

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

Defendants. :

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

Cross-Claimant :

vs. :

JAU-HWA STEWART, :

Cross-Defendant :

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

Third-Party Plaintiff :

vs. :

**NOTICE OF ENTRY OF
APPEARANCE OF COUNSEL**

Civil No. 010400098

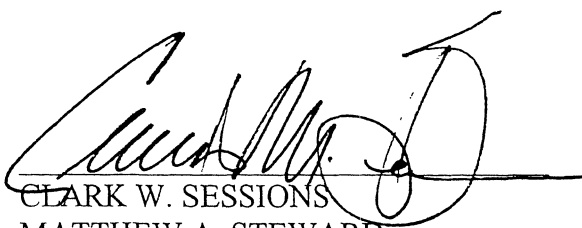
Judge Fred D. Howard

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	:
INTERATIONAL CORPORATION, a	:
Philippine corporation, USA APPOGEE, 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	:

Clark W. Sessions and Matthew A. Steward of and for CLYDE SNOW SESSIONS & SWENSON ,
attorneys at law, hereby enter an appearance as counsel of record for the Third-Party Defendants
Hwan Lan Chen and Apogee, Inc., a Utah corporation.

DATED this 17th day of December 2001.

CLYDE SNOW SESSIONS & SWENSON



CLARK W. SESSIONS
MATTHEW A. STEWARD

Attorneys for Third-Party Defendants
Beverly Warner, Angela Barclay, Dale Stewart,
Sheue Wen Smith, Paul Cooper and Kim O'Neill
Byron Murray, Hwan Lan Chen and
Apogee, Inc., a Utah corporation

CERTIFICATE OF SERVICE

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 **NOTICE OF ENTRY OF APPEARANCE OF COUNSEL** was served by:

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

 Hand delivery; and/or

 Facsimile transmission.

upon the following on this 18th day of December 2001:

Deno G. Himonas, Esq.
Adam B. Price, Esq.
Ryan M. Harris, Esq.
JONES WALDO HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, UT 84145-0444

Mark A. Larsen, Esq.
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, UT 84101

Michael R. Carlston, Esq.
Richard A. Van Wagoner, Esq.
David L. Pinkston, Esq.
SNOW, CHRISTENSEN & MARTINEAU
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Salt Lake City, UT 84145

Christine T. Greenwood, Esq.
HOLME ROBERTS & OWEN
111 East Broadway, Suite 1100
Salt Lake City, UT 84111



Tab G

OVER 70% OF THE EVIDENCE CITED IN THE CONTEMPT RULING AND ORDER FINDINGS WAS RECEIVED BEFORE HWAN LAN CHEN WAS NAMED AS A PARTY IN THE ACTION BELOW

- A. 76% OF THE TESTIMONY CITED IN THE CONTEMPT RULING FINDINGS WAS RECEIVED BEFORE HWAN LAN CHEN WAS MADE A PARTY IN THE ACTION BELOW (177 of 232 Total Testimony Citations). 80% OF THE TESTIMONY CITED IN THE CONTEMPT RULING AND ORDER FINDINGS WAS RECEIVED BEFORE HWAN LAN CHEN ACCEPTED SERVICE OF PROCESS (188 of 232 Total Testimony Citations).**

(**"Bolded"** Testimony Citations Were Received Prior to Hwan Lan Chen's Acceptance of Service)

<u>Number</u>	<u>R. 14319, Findings (111)</u>	<u>Date Cited Testimony Was Received</u>
1	76	01/16/01
2	11	01/24/01
3	17	01/24/01
4	18	01/24/01
5	19	01/24/01
6	23	01/24/01
7	25	01/24/01
8	51	01/24/01
9	52	01/24/01
10	56	01/24/01
11	77	01/24/01
12	86	01/24/01
13	41	02/01/01
14	45	02/01/01
15	11	02/02/01
16	13	02/02/01
17	15	02/02/01
18	16	02/02/01

19	23	02/02/01
20	25	02/02/01
21	39	02/02/01
22	53	02/02/01
23	55	02/02/01
24	56	02/02/01
25	69	02/02/01
26	70	02/02/01
27	86	02/02/01
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40	14	02/08/01
41	15	02/08/01
42	17	02/08/01
43	25	02/08/01
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45	46	02/08/01
46	54	02/08/01

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48	63	02/08/01
49	80	02/08/01
50	90	02/08/01
51	1	02/09/01
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55	17	02/09/01
56	23	02/09/01
57	24	02/09/01
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62	58	02/09/01
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65	90	02/13/01
66	91	02/13/01
67	92	02/13/01
68	93	02/13/01
69	177	02/21/01
70	183	03/13/01
71	138	03/15/01
72	139	03/15/01
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76	48	10/25/01
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78	50	10/25/01
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125	126	11/27/01
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127	142	11/27/01
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129	145	11/27/01
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131	159	11/27/01
132	161	11/27/01
133	167	11/27/01
134	172	11/27/01
135	173	11/27/01
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188	112	02/21/02
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212	159	03/15/02
213	30	03/18/02
214	31	03/18/02
215	32	03/18/02

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217	118	03/18/02
218	119	03/18/02
219	167	03/18/02
220	168	03/18/02
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223	171	03/18/02
224	173	03/18/02
225	166	03/19/02
226	172	03/19/02
227	111	05/07/02
228	185	05/07/02
229	68	05/08/02
230	99	05/08/02
231	142	05/08/02
232	33	05/10/02

- B. **67% OF THE EXHIBITS CITED IN THE CONTEMPT RULING AND ORDER FINDINGS WERE RECEIVED BEFORE HWAN LAN CHEN WAS MADE A PARTY IN THE ACTION (104 of 156 Total Exhibit Citations). 72% OF THE EXHIBITS CITED IN THE CONTEMPT RULING AND ORDER FINDINGS WERE RECEIVED BEFORE HWAN LAN CHEN ACCEPTED SERVICE OF PROCESS (112 of 156 Total Exhibits Citations).**

(**"Bolded"** Exhibit Citations Were Received Prior to Hwan Lan Chen's Acceptance of Service)

<u>Number</u>	<u>R. 14317, Findings (¶¶)</u>	<u>Cited Exhibit</u>	<u>Date Admitted</u>
1	23	1	01/24/01
2	71	1	01/24/01
3	52	2	01/24/01
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6	51	4	01/24/01
7	52	4	01/24/01
8	39	5	01/24/01
9	39	10	01/24/01
10	5	17	01/24/01
11	5	18	01/24/01
12	5	19	01/24/01
13	40	22	01/24/01
14	41	23	01/24/01
15	5	37	02/01/01
16	42	37	02/01/01
17	25	75	02/01/01
18	13	38	02/02/01
19	71	38	02/02/01
20	13	39	02/02/01
21	53	41	02/02/01

22	53	42	02/02/01
23	69	43	02/02/01
24	53	44	02/02/01
25	39	45	02/02/01
26	53	48	02/02/01
27	39	53	02/02/01
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29	21	71	02/08/01
30	20	72	02/08/01
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32	11	76	02/09/01
33	12	76	02/09/01
34	91	103	02/13/01
35	98	103	02/13/01
36	67	104	02/13/01
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38	90	104	02/13/01
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74	107	217	10/25/01
75	108	217	10/25/01
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79	73	228	11/27/01
80	42	228	11/27/01
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82	156	262	11/28/01
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85	58	274C	11/28/01
86	165	419	11/28/01
87	144	420	11/28/01
88	36	504	11/28/01
89	62	274	12/12/01
90	159	401	11/27/01
91	36	405	11/27/01
92	33	406	11/27/01
93	73	406	11/27/01
94	96	407	11/27/01
95	36	409	11/27/01
96	36	411	12/10/01
97	36	414	12/10/01
98	47	415	12/10/01
99	47	417	12/10/01
100	144	421	12/11/01
101	144	423	12/11/01
102	177	423A	12/12/01
103	177	424	12/12/01
104	179	425	12/12/01
105	147	426	12/13/01

106	147	428	12/13/01
107	144	433	12/13/01
108	149	434	12/13/01
109	151	436	12/13/01
110	152	437	12/13/01
111	153	440	12/13/01
112	154	501	12/13/01
113	85	206	03/13/02
114	120	213	03/15/02
115	112	215	03/19/02
116	120	215	03/19/02
117	121	215	03/19/02
118	122	215	03/19/02
119	123	215	03/19/02
120	134	215	03/19/02
121	135	219	03/19/02
122	112	246A-D	02/21/02
123	67	276	02/21/02
124	88	277	02/21/02
125	67	277	02/22/02
126	88	278	02/22/02
127	127	400	03/18/02
128	195	523	03/13/02
129	112	524	03/15/02
130	118	528	03/18/02
131	68	528	05/07/02
132	99	528	05/07/02
133	142	528	05/07/02

134	143	528	05/07/02
135	163	529	05/07/02
136	164	529	05/07/02
137	165	529	05/07/02
138	166	529	05/07/02
139	185	529	05/07/02
140	72	534	05/07/02
141	187	540	05/31/02
142	188	540	05/31/02
143	189	540	05/31/02
144	189	540	05/31/02
145	30	546	06/04/02
146	11	547	06/04/02
147	30	547	06/04/02
148	31	547	06/04/02
149	39	571	06/07/02
150	64	571	06/07/02
151	65	571	06/07/02
152	65	574	06/07/02
153	66	575	06/07/02
154	186	577	06/07/02
155	112	578	06/07/02
156	186	580	06/07/02

Tab H

**JONES WALDO APPEARED FOR THE SPECIAL MASTER IN 21 OUT OF 23
TRANSCRIPTS PREPARED FOR THE EVIDENTIARY HEARINGS HELD IN
THE COMBINED PRELIMINARY INJUNCTION/CONTEMPT PROCEEDING
AFTER THE SPECIAL MASTER WAS APPOINTED**

R. 14244 October 25, 2001 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14245 October 26, 2001 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14250 November 27, 2001 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14247 November 28, 2001 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14295 December 10, 2001 hearing

Jones Waldo appearance (at 2):

“FOR DEFENDANT E. EXCEL INTERNATIONAL, INC.”

R. 14252 December 11, 2001 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14248 December 12, 2001 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14249 December 13, 2001 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14254 February 21, 2002 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14286 February 22, 2002 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14255 March 13, 2002 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14262 March 15, 2002 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14257 March 18, 2002 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14256 March 19, 2002 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14258 April 17, 2002 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14265 May 7, 2002 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14264 May 8, 2002 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14279 May 10, 2002 hearing

Jones Waldo appearance (at 2):

**“FOR E. EXCEL INTERNATIONAL, INC. AND
SPECIAL MASTER, LARRY C. HOLMAN”**

R. 14267 May 31, 2002 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14268 June 4, 2002 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R.14277 June 5, 2002 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

R. 14291 June 25, 2002 hearing

Jones Waldo appearance (at 2):

“FOR THE DEFENDANT”

R. 14276 June 26, 2002 hearing

Jones Waldo appearance (at 2):

“FOR E. EXCEL AND SPECIAL MASTER HOLMAN”

Tab I

WITNESSES CALLED BY PLAINTIFF OR JONES WALDO DURING COMBINED PROCEEDINGS

October 25, 2001

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Angela Ku Barclay		1	Plaintiff R. 14244 at 45	No.
Devon Grow		2	Plaintiff R. 14244 at 132	No.
Brandon Lewis		3	Plaintiff R. 14244 at 192	No.

October 26, 2001

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Jau-Hwa Stewart		4	Plaintiff R. 14245 at 4	No.

November 27, 2001

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Jau-Hwa Stewart		4	Plaintiff	Yes. Himonas. R. 14250 at 62

November 28, 2001

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Jau-Hwa Stewart		4	Plaintiff	No.
John Gary Bovyer		5	Plaintiff R. 14247 at 141	Yes. Price. R. 14247 at 164

December 10, 2001

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Jau-Hwa Stewart		4	Plaintiff	Yes. Himonas. R. 14295 at 6
Dale Stewart	1	6	Jones Waldo R. 14295 at 93	

December 11, 2001

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Dale Stewart	1	6	Jones Waldo	
Karen Moosman	2	7	Jones Waldo R. 14252 at 23	
Beverly Warner	3	8	Jones Waldo R. 14252 at 62	
Michael Beach	4	9	Jones Waldo R. 14252 at 107	
Beverly Warner (cont'd.)	3	9	Jones Waldo	

December 12, 2001

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Beverly Warner	3	9	Jones Waldo	
Holly Johnson		10	Plaintiff R. 14248 at 130	No.
Melvin Ashton		11	Plaintiff R. 14248 at 184	No.

December 13, 2001

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Stanley Houghton	5	12	Jones Waldo R. 14249 at 5	

February 21, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Eric Cheng		13	Plaintiff 14254 at 15	Yes. Himonas. 14254 at 34
Chan Mook Ching	6	14	Jones Waldo 14254 at 70	
Alexander J. Villafuerte	7	15	Jones Waldo 14254 at 89	
Winda S.A. Legaspi	8	16	Jones Waldo 14254 at 95	
Kathy Hansen	9	17	Jones Waldo 14254 at 109	
Heather Turner	10	18	Jones Waldo 14254 at 200	
Ronald L. Hughes	11	19	Jones Waldo 14254 at 236	

February 22, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Gina Lipe	12	20	Jones Waldo R. 14286 at 126	

March 13, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Taig Stewart	13	21	Jones Waldo R. 14255 at 6	

March 15, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Taig Stewart	13	21	Jones Waldo	
Mary Spencer	14	22	Jones Waldo R. 14262 at 53	
Scott Nelson		23	Plaintiff R. 14262 at 124	Yes. Himonas. R. 14262 at 152
Daniel Garcia		24	Plaintiff R. 14262 at 164	No.
Lynn Walker	15	25	Jones Waldo R. 14262 at 184	
Wayne Kelley	16	26	Jones Waldo R. 14262 at 206	

March 18, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Sheue-Wen Smith		27	Plaintiff R. 14257 at 13	No.
Patty Jensen	17	28	Jones Waldo R. 14257 at 53	
Byron Murray	18	29	Jones Waldo R. 14257 at 93	
Kim L. O'Neill	19	30	Jones Waldo R. 14257 at 120	
Allison Chambers	20	31	Jones Waldo R. 14257 at 158	

March 19, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Larry Holman	21	32	Jones Waldo R. 14256 at 78	

May 7, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Beverly Warner	3	32	Jones Waldo	

May 8, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Jau-Hwa Stewart	22	33	Jones Waldo R. 14264 at 4	

June 7, 2002

Witness	# of	Total	Called by	Cross Exam by Jones Waldo?
Jau-Hwa Stewart	22	33	Jones Waldo	

Tab J

EXHIBITS INTRODUCED BY PLAINTIFF OR JONES WALDO DURING COMBINED PROCEEDINGS

# of	Total	Exhibit #	Date	Introduced By	Record Cite
	1	201	10/25/01	Plaintiff	R 14244 at 46
	2	202		Plaintiff	R 14244 at 46
	3	205		Plaintiff	R 14244 at 194
	4	217		Plaintiff	R 14244 at 198
	5	214		Plaintiff	R 14244 at 196
	6	207		Plaintiff	R 14244 at 195
	7	216		Plaintiff	R 14244 at 80, 196
	8	269		Plaintiff	R 14244 at 94
	9	270		Plaintiff	R 14244 at 94
	10	260		Plaintiff	R 14244 at 150
	11	204	10/26/01	Plaintiff	R. 14245 at 70
	12	225		Plaintiff	R. 14245 at 84
	13	220		Plaintiff	R. 14245 at 86
	14	218	11/27/01	Plaintiff	R. 14250 at 60
1	15	400		Jones Waldo	R. 14250 at 108
2	16	401		Jones Waldo	R. 14250 at 109-110
3	17	402		Jones Waldo	R. 14250 at 118-119
4	18	403		Jones Waldo	R. 14250 at 122
5	19	404		Jones Waldo	R. 14250 at 122
6	20	405		Jones Waldo	R. 14250 at 127-128
7	21	406		Jones Waldo	R. 14250 at 149-151
8	22	407		Jones Waldo	R. 14250 at 149-151
	23	273	11/28/01	Plaintiff	R. 14247 at 100
	24	262		Plaintiff	R. 14247 at 142
9	25	409	12/10/01	Jones Waldo	R. 14295 at 13

EXHIBITS INTRODUCED BY PLAINTIFF OR JONES WALDO DURING COMBINED PROCEEDINGS

# of	Total	Exhibit #	Date	Introduced By	Record Cite
10	26	410	12/10/01	Jones Waldo	R. 14295 at 13
11	27	411		Jones Waldo	R. 14295 at 29
12	28	412		Jones Waldo	R. 14295 at 29
13	29	413		Jones Waldo	R. 14295 at 89-90
14	30	414		Jones Waldo	R. 14295 at 89-90
15	31	415		Jones Waldo	R. 14295 at 91
16	32	416		Jones Waldo	R. 14295 at 91
17	33	420	12/11/01	Jones Waldo	R. 14252 at 122-123
18	34	421		Jones Waldo	R. 14252 at 128
19	35	419		Jones Waldo	R. 14252 at 129-130
	36	274	12/12/01	Plaintiff	R. 14248 at 122
20	37	422, A, B		Jones Waldo	R. 14248 at 122-123
21	38	422 (A)1		Jones Waldo	R. 14248 at 125
22	39	423, A		Jones Waldo	R. 14248 at 125-126
23	40	424		Jones Waldo	R. 14248 at 126-127
24	41	425	12/13/01	Jones Waldo	R. 14249 at 27
25	42	426		Jones Waldo	R. 14249 at 31
26	43	427		Jones Waldo	R. 14249 at 32-33
27	44	428		Jones Waldo	R. 14249 at 41-42
28	45	429		Jones Waldo	R. 14249 at 52
29	46	430		Jones Waldo	R. 14249 at 56
30	47	431		Jones Waldo	R. 14249 at 58
31	48	432		Jones Waldo	R. 14249 at 61-62
32	49	433		Jones Waldo	R. 14249 at 61-62

EXHIBITS INTRODUCED BY PLAINTIFF OR JONES WALDO DURING COMBINED PROCEEDINGS

# of	Total	Exhibit #	Date	Introduced By	Record Cite
33	50	434	12/13/01	Jones Waldo	R. 14249 at 63-64
34	51	435		Jones Waldo	R. 14249 at 64
35	52	436		Jones Waldo	R. 14249 at 70
36	53	437		Jones Waldo	R. 14249 at 70
37	54	438		Jones Waldo	R. 14249 at 72
38	55	439		Jones Waldo	R. 14249 at 73
39	56	440		Jones Waldo	R. 14249 at 74-75
40	57	441		Jones Waldo	R. 14249 at 85
41	58	442		Jones Waldo	R. 14249 at 86
	59	275	2/21/02	Plaintiff	R. 14254 at 28, 32
	60	276		Plaintiff	R. 14254 at 33
42	61	246A		Jones Waldo	R. 14254 at 128-129
43	62	246D		Jones Waldo	R. 14254 at 128-130
44	63	246B		Jones Waldo	R. 14254 at 130, 133
45	64	246C		Jones Waldo	R. 14254 at 130, 134
46	65	511	3/13/02	Jones Waldo	R. 14255 at 52
47	66	513		Jones Waldo	R. 14255 at 60-61
48	67	514		Jones Waldo	R. 14255 at 66-67
49	68	515		Jones Waldo	R. 14255 at 72
	69	206		Plaintiff	R. 14255 at 76
50	70	523	3/15/02	Jones Waldo	R. 14262 at 18
51	71	238A		Jones Waldo	R. 14262 at 58, 60
	72	213A		Plaintiff	R. 14262 at 170-171
	73	213		Plaintiff	R. 14262 at 174
52	74	508		Jones Waldo	R. 14262 at 186

EXHIBITS INTRODUCED BY PLAINTIFF OR JONES WALDO DURING COMBINED PROCEEDINGS

# of	Total	Exhibit #	Date	Introduced By	Record Cite
	75	278	3/18/02	Plaintiff	R. 14257 at 32
	76	279		Plaintiff	R. 14257 at 41-42
53	77	524		Jones Waldo	R. 14257 at 97-98
	78	215	3/19/02	Plaintiff	R. 14256 at 7-8
	79	219		Plaintiff	R. 14256 at 6-8
54	80	526		Jones Waldo	R. 14256 at 68
55	81	525		Jones Waldo	R. 14256 at 71
56	82	527	5/7/02	Jones Waldo	R. 14265 at 31-32
57	83	528		Jones Waldo	R. 14265 at 67
58	84	529		Jones Waldo	R. 14265 at 92
59	85	536	5/8/02	Jones Waldo	R. 14264 at 54-55
60	86	541	5/31/02	Jones Waldo	R. 14289 at 30- 34
61	87	542		Jones Waldo	R. 14289 at 30-34
62	88	543		Jones Waldo	R. 14289 at 30-34
63	89	558	6/7/02	Jones Waldo	6/07/02 at 39
64	90	570		Jones Waldo	6/07/02 at 183-184
65	91	571		Jones Waldo	6/07/02 at 235
66	92	573		Jones Waldo	6/07/02 at 239
67	93	574		Jones Waldo	6/07/02 at 240
68	94	575		Jones Waldo	6/07/02 at 244
69	95	578		Jones Waldo	6/07/02 at 248-249
70	96	577		Jones Waldo	6/07/02 at 250
71	97	577A		Jones Waldo	6/07/02 at 250
72	98	577B		Jones Waldo	6/07/02 at 250
73	99	577C		Jones Waldo	6/07/02 at 250

EXHIBITS INTRODUCED BY PLAINTIFF OR JONES WALDO DURING COMBINED PROCEEDINGS

# of	Total	Exhibit #	Date	Introduced By	Record Cite
74	100	577D	6/07/02	Jones Waldo	6/07/02 at 250
75	101	577E		Jones Waldo	6/07/02 at 250
76	102	577F		Jones Waldo	6/07/02 at 250
77	103	577G		Jones Waldo	6/07/02 at 250
78	104	577H		Jones Waldo	6/07/02 at 250
79	105	577I		Jones Waldo	6/07/02 at 250
80	106	577J		Jones Waldo	6/07/02 at 250
81	107	577K		Jones Waldo	6/07/02 at 250
82	108	577L		Jones Waldo	6/07/02 at 250
83	109	577M		Jones Waldo	6/07/02 at 250
84	110	579		Jones Waldo	6/07/02 at 298
85	111	580		Jones Waldo	6/07/02 at 298
86	112	581		Jones Waldo	6/07/02 at 298
87	113	582		Jones Waldo	6/07/02 at 298

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2004, a true and correct copy of **APPENDIX TO BRIEF OF**

APPELLANT HWAN LAN CHEN was mailed, postage prepaid, to:

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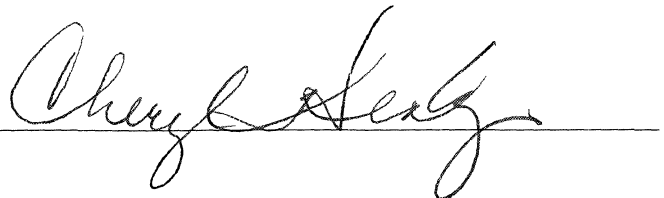
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A handwritten signature in cursive script, appearing to read "Cheryl A. Hertz", is written over a horizontal line.