

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 Len Chen: Brief of Appellant

Utah Court of Appeals

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Michael R. Carlston; Snow, Christensen and Martineau; Attorneys for Appellee.

Daniel L. Berman; Stephen R. Waldron; Berman, Tomsic and Savage; H. Thomas Stevenson; Stevenson and Smith, P.C; Attorneys for Third Party.

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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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20020777

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

Michael R. Carlston  
Snow, Christensen & Martineau  
10 Exchange Place, Eleventh Floor  
P. O. Box 45000  
Salt Lake City, Utah 84145-5000  
Attorneys for Plaintiff/Appellee Jau-Fei Chen

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

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

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UTAH APPELLATE COURTS

2004

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Michael R. Carlston  
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10 Exchange Place, Eleventh Floor  
P. O. Box 45000  
Salt Lake City, Utah 84145-5000  
Attorneys for Plaintiff/Appellee Jau-Fei Chen

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

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

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

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

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

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

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

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## **APPELLATE JURISDICTION**

Appellant Hwan Lan Chen, a third-party defendant below, appeals from an August 20, 2002 Contempt Ruling and Order, including 127 pages of findings and conclusions of law entered in connection with that Order, all of which was entitled “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” (“Contempt Ruling and Order”). [R. 14317 (*see* Addendum to Brief of Appellant Hwan Lan Chen (“Addendum”), Tab A).] The Contempt Ruling and Order held defendant Jau-Hwa Stewart (“Ms. Stewart”) in civil and criminal contempt on two motions for contempt by plaintiff Jau-Fei Chen (“Ms. Chen”), and ordered: (1) the striking of Ms. Stewart’s Answer, Counterclaim, and Affirmative Defenses; (2) the entry of judgment on Ms. Chen’s claims for relief against Ms. Stewart, with the exception of damages; and (3) an award of attorney’s fees and costs to Ms. Chen.

Findings of the Contempt Ruling and Order were directed at Hwan Lan Chen and all of the Contempt Ruling and Order findings were expressly incorporated into and made findings of the “Findings of Fact and Conclusions of Law” that was the trial court’s preliminary injunction ruling against Hwan Lan Chen and others entered on the same day, August 20, 2002 (“Preliminary Injunction Ruling”). In addition to the explicit incorporation, the findings of the Preliminary Injunction Ruling substantially paralleled and built on the findings of the Contempt Ruling and Order. The Preliminary Injunction Ruling,

in turn, was the basis of the Preliminary Injunction entered on October 16, 2002 against Hwan Lan Chen and others. The Preliminary Injunction Ruling and Preliminary Injunction are being challenged in a separately pending interlocutory appeal, Case No. 20020927-SC. The record on this appeal and the appeal in Case No. 20020927 is the same record.

In addition, defendant/cross-claimant/third-party plaintiff E. Excel International, Inc., under the direction of the trial court's Rule 53 special master (the "Special Master/E. Excel"), on September 27, 2002 filed a still pending motion before the trial court to extend the Contempt Ruling and Order to Hwan Lan Chen and others. The Special Master/E. Excel, on the basis of the Contempt Ruling and Order findings, has moved to have entered against Hwan Lan Chen the same sanction of default that was imposed on Ms. Stewart by the Contempt Ruling and Order.

On November 25, 2002, this Court entered an Order on two motions to dismiss Hwan Lan Chen's appeal of the Contempt Ruling and Order, one by Ms. Chen and the other by the Special Master/E. Excel. Ms. Chen claimed that Hwan Lan Chen lacked standing to appeal the Contempt Ruling and Order. The Court deferred ruling on the standing issue "until plenary review," and invited Hwan Lan Chen "to raise the issue of [her] standing again in [her] brief to this court." The Court *sua sponte* dismissed the Special Master/E. Excel's motion on the basis that it was not a party to the contempt proceeding and lacked standing.

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2-2(3)(j) and 78-2a-3, and Rules 3 and 4 of the Utah Rules of Appellate Procedure. Ms.

Stewart and her husband, third-party defendant Taig Stewart, also appeal the Contempt Ruling and Order.

### **ISSUES ON APPEAL**

Hwan Lan Chen's appeal of the Contempt Ruling and Order presents the following issues:

1. Whether Hwan Lan Chen has standing to appeal the Contempt Ruling and Order when: (a) the findings of the Contempt Ruling and Order were directed against her and expressly incorporated into and made findings of the Preliminary Injunction Ruling that was entered against Hwan Lan Chen on the same day; and (b) the Contempt Ruling and Order is the sole basis of a pending motion before the trial court to extend the Contempt Ruling and Order to Hwan Lan Chen and enter the same sanction of default that was imposed on Ms. Stewart?

This issue was raised by this Court's Order dated November 25, 2002. The question of standing is a question of law decided for correctness. *In re H.J.*, 1999 UT App. 238, ¶ 14, 986 P.2d 115, 120.

2. Whether Hwan Lan Chen was fundamentally denied due process of law under the Utah and United States Constitutions when the findings of the Contempt Ruling and Order directed and used against Hwan Lan Chen were substantially based on an evidentiary record that was made before she became a party in the action below and without even giving her notice that the Contempt Ruling and Order would be directed and used against her as a party? [R. 9232-33; 11333-37; 11420-27; 14273 at 15-16.]

The applicable standard of review is correctness, with no deference to the determination of the trial court. *State v. Hubbard*, 2002 UT 45, ¶ 22, 48 P.3d 953, 962; *In re J.B.*, 2002 UT App. 268, ¶ 7, 53 P.3d 968, 970.

3. Whether the participation of the Special Master – a subordinate judicial officer – in the combined evidentiary proceeding on which the Contempt Ruling and Order was based as (a) a witness, (b) a Rule 53 special master whose admittedly “partisan” Rule 53(e) reports were received in evidence and extensively cited in the Contempt Ruling and Order, (c) an advocate against Hwan Lan Chen, and (d) the lead adverse party to Hwan Lan Chen, made the contempt proceeding so lacking in fairness and impartiality as to deprive Hwan Lan Chen of due process of law? [R. 9232-33; 11420-27.]

The applicable standard of review is correctness, with no deference to the determination of the trial court. *Hubbard*, 2002 UT 45, ¶ 22, 48 P.3d 953, 962; *In re J.B.*, 2002 UT App. 268, ¶ 7, 53 P.3d 968, 970.

### **DETERMINATIVE CONSTITUTIONAL PROVISIONS**

Article I, Section 7 of the Utah Constitution, and the 14th Amendment to the United States Constitution are controlling on this appeal. Article I, Section 7 of the Utah Constitution provides: “No person shall be deprived of life, liberty or property without due process of law.” Utah Const. art. I, § 7. The 14th Amendment to the United States Constitution provides, in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. XIV, § 1.

## **STATEMENT OF THE CASE**<sup>1</sup>

Hwan Lan Chen appeals the Contempt Ruling and Order on the grounds: (1) the Contempt Ruling and Order findings were directed and used against Hwan Lan Chen and the Contempt Ruling and Order is sought to be used against her in the pending motion for contempt by the Special Master/E. Excel; (2) the Contempt Ruling and Order findings were substantially based on an evidentiary record that was made before Hwan Lan Chen became a party in the action below and without giving her notice that the Contempt Ruling and Order findings would be directed and used against her; and (3) the evidentiary proceeding on which the Contempt Ruling and Order was based was fundamentally unfair and lacking impartiality as a result of the partisan participation of the Special Master, which permeated the record.

### **A. Nature of the Case**

The action below was initiated on January 10, 2001 by Ms. Chen against her sister, Ms. Stewart, and originally involved only the two sisters and E. Excel as a putative defendant. [R. 24; 97.] Ms. Chen asserted derivative claims for relief against Ms. Stewart regarding Ms. Stewart's assumption of the control and management of E. Excel. [*Id.*]

Hwan Lan Chen, only a third-party defendant in the action below, is a 77 year old widow and mother of Ms. Chen and Ms. Stewart who does not read or speak English. [R. 4204 at ¶ 9; 9254.] Hwan Lan Chen was first and only named as a party in the action by the

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<sup>1</sup> The controlling facts on this appeal are all procedural facts. As a result, Hwan Lan Chen combines her statement of facts with her statement of the nature of the case, the course of proceeding, and disposition below. Hwan Lan Chen refers the Court to her appellant brief in Case No. 20020927-SC for a description of the action below.

Special Master/E. Excel in the Amended Third Party Complaint filed on October 29, 2001. [R. 4204 at ¶ 9; 4205 at ¶ 3.] The Special Master/E. Excel alleges damages of approximately \$17 million against Hwan Lan Chen. [See 5/21/03 Mtn. to Modify Stay and Require a Bond (filed in Case No. 20020927-SC) at 18 n.11.]

The plaintiff, Ms. Chen, never filed any claims for relief against her mother. [R. 24.] Ms. Chen never even contested by affidavit or testimony Hwan Lan Chen's position that Hwan Lan Chen is the principal equitable owner of E. Excel. [R. 9256; 14332, Reply Memo. at Ex. B (Interr. No. 5).]

The action below initially was assigned to the Honorable Fred D. Howard, who presided over the Contempt Ruling and Order and Preliminary Injunction Ruling proceedings and entered those rulings and order. The case was subsequently reassigned to the Honorable Lynn W. Davis pursuant to the Fourth Judicial District Court's rules regarding case assignments.<sup>2</sup>

**B. The Contempt Ruling And Order**

The Contempt Ruling and Order was entered on August 20, 2002 on Ms. Chen's: (1) June 22, 2001 "Motion for Order to Show Cause Why Jau-Hwa Stewart Should Not Be Held in Civil and Criminal Contempt of Court"; and (2) August 2, 2001 "Motion for Order Summarily Holding Ms. Stewart in Criminal Contempt of Court" (collectively "Ms. Chen's Motions for Contempt"). [R. 2074; 14306; 14317 at 3-5 (*see* Addendum, Tab A).] Ms.

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<sup>2</sup> Subsequent to the reassignment, Judge Howard entered the October 16, 2002 Preliminary Injunction, and heard and issued a January 24, 2003 Ruling on referral of Hwan Lan Chen's Motion to Vacate and Set Aside the Orders relating to the Special Master's appointment, empowerment, and actions. [R. 9145; 12770.]

Chen's June 22, 2001 Motion for Contempt sought to have Ms. Stewart held in civil and criminal contempt based on her alleged violations of: (1) a January 10, 2001 Temporary Restraining Order ("TRO") that Ms. Chen obtained against Ms. Stewart on the day Ms. Chen initiated the action; and (2) a February 21, 2001 Interim Order, which was stipulated to by Ms. Chen and Ms. Stewart in connection with a preliminary injunction proceeding between the two sisters held in January and February 2001.<sup>3</sup> [R. 2133-35.] Ms. Chen's July 31, 2001 Motion for Contempt sought to have Ms. Stewart summarily held in criminal contempt for allegedly committing and suborning perjury and obstructing justice in connection with the first preliminary injunction proceeding between her and Ms. Chen. [R. 14306-07.] Both of Ms. Chen's Motions for Contempt were filed months before Hwan Lan Chen was made a party in the action. [R. 2074; 4204 at ¶ 9; 14306.]

Judge Howard, with the Contempt Ruling and Order, held Ms. Stewart in civil and criminal contempt for subordination and commission of perjury and violations of the January 10, 2001 TRO and February 21, 2001 Interim Order. [R. 14317 at 118-26 (*see* Addendum, Tab A).] He did so based on findings of wrongful conduct directed not only against Ms. Stewart but also against Hwan Lan Chen and other third-party defendants. [*Id.* at 5-118.]

Judge Howard, based on his holding Ms. Stewart in civil and criminal contempt, ordered in the Contempt Ruling and Order that: (1) Ms. Stewart's Answer, Affirmative

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<sup>3</sup> The January 10, 2001 TRO ordered Ms. Stewart to fill the Territorial Owners' orders for E. Excel products and enjoined her from causing E. Excel to compete with, or violate its distribution contracts with, the Territorial Owners. [R. 56.] The February 21, 2001 Interim Order enjoined Ms. Stewart from tortiously interfering with any distribution contract of E. Excel and ordered her to return all of E. Excel's corporate assets in her custody or control. [R. 626-27 (¶¶ 12-13).]

Defenses, and Counterclaim be stricken; (2) judgment be entered against Ms. Stewart on Ms. Chen's claims for relief against her, with the exception of damages; and (3) Ms. Chen was awarded her attorney's fees and costs incurred in bringing and prosecuting her Motions for Contempt and her remaining attorney's fees and costs. [R. 14317 at 126-27 (*see* Addendum, Tab A).]

**C. The Contempt Ruling And Order Findings Were Directed And Used Against Hwan Lan Chen**

Findings of the Contempt Ruling and Order were directed against Hwan Lan Chen and, on the same day the Contempt Ruling and Order was entered against Ms. Stewart, its findings were used against Hwan Lan Chen when its findings were incorporated into and made findings of the Preliminary Injunction Ruling against Hwan Lan Chen.

Findings of the Contempt Ruling and Order were directed at Hwan Lan Chen. Hwan Lan Chen was found in the Contempt Ruling and Order to have: (1) been the cause of Ms. Stewart's "scheme" to remove Ms. Chen from E. Excel; (2) participated in that scheme by threatening Ms. Chen regarding her husband's affair, becoming an E. Excel director, and campaigning against Ms. Chen with the Territorial Owners at an October 2001 meeting; and (3) been the source of funds that Ms. Stewart used to establish new distributorships for E. Excel in place of the Territorial Owners. [R. 14317 at 25-26 (¶¶ 37, 39), 27 (¶ 40), 34 (¶ 55), 40 (¶ 61) (*see* Addendum, Tab A).] Hwan Lan Chen was found to be the source of funds used by Ms. Stewart to establish Apogee, Inc., which was intended to compete with E. Excel, to have participated in meetings regarding the construction of Apogee's offices



and warehouse, and to have supplied a member of a conspiracy with monthly \$3,000 payments. [*Id.* at 46 (¶ 68), 88-89 (¶¶ 131-33), 92 (¶ 142), 94 (¶ 145), 100 (¶ 161).]

All of the findings in the Contempt Ruling and Order were used against Hwan Lan Chen. On the same day Judge Howard entered the Contempt Ruling and Order, August 20, 2002, he entered the Preliminary Injunction Ruling against Ms. Stewart, Hwan Lan Chen, and the other third-party defendants. [R. 8112; 14318.] The Preliminary Injunction Ruling granted the Special Master/E. Excel's October 25, 2001 Motion for Preliminary Injunction against Ms. Stewart, Hwan Lan Chen, and the other third-party defendants. [*Id.* at 110.]

**All of the findings of the Contempt Ruling and Order were expressly incorporated into and made findings of the Preliminary Injunction Ruling.**<sup>4</sup> [R. 14318 at 89 (¶ 258) (*see* Addendum, Tab B).] Paragraph 258 of the findings in the Preliminary Injunction Ruling against Hwan Lan Chen expressly provided that:

**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 . . . hereby incorporated as findings for purposes of E. Excel's Motion for Preliminary Injunction as well.**

[*Id.* (emphasis added).]

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<sup>4</sup> The findings of the Contempt Ruling and Order were incorporated into and made findings of the Preliminary Injunction Ruling at the request of the Special Master/E. Excel. [R. 14316 at 90 (¶ 258).] The Special Master/E. Excel subsequently asked Judge Howard to partially undo that incorporation in order to assist the Special Master's attempt to change the record in response to Hwan Lan Chen's Motion to Vacate and Set Aside. [R. 14287 at 74.] Judge Howard acquiesced, despite that the findings were then on appeal, and ruled in his January 24, 2003 Ruling that the incorporation was "not essential" to the Preliminary Injunction Ruling. [R. 12760.]

In addition to this express incorporation, the findings of the Preliminary Injunction Ruling against Hwan Lan Chen substantially paralleled the findings of the Contempt Ruling and Order. Reflecting the interconnection of the two sets of findings, the Preliminary Injunction Ruling against Hwan Lan Chen built on the findings of the Contempt Ruling and Order that were directed at Hwan Lan Chen.

The Contempt Ruling and Order found that Ms. Stewart acted directly and through a conspiracy to unfairly compete with E. Excel and to destroy E. Excel. [R. 14317 at 79-81 (¶¶ 114-15), 119 (¶¶ 3-4) (*see* Addendum, Tab A).] Based on the Contempt Ruling and Order findings, Hwan Lan Chen was expressly found in the Preliminary Injunction Ruling to have been a member of this conspiracy to unfairly compete with and destroy E. Excel. [R. 14318 at 17 (¶ 34), 89 (¶ 258), 106 (¶ 68) (*see* Addendum, Tab B).] Based on the Contempt Ruling and Order findings, it was found in the Preliminary Injunction Ruling that the conspiracy also was a racketeering enterprise under Utah's Pattern of Unlawful Activity Act. [*Id.* at 89 (¶ 258), 102-03 (¶¶ 50-51), 106 (¶ 68).] Based on the Contempt Ruling and Order findings, Hwan Lan Chen was found in the Preliminary Injunction Ruling to have engaged in multiple criminal acts of racketeering. [*Id.* at 89 (¶ 258), 103-06 (¶¶ 52-65).] These findings were made against Hwan Lan Chen despite that she was never deposed or testified and is a 77-year old widow who does not read or speak English and never was at E. Excel's facilities during the relevant time.<sup>5</sup>

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<sup>5</sup> Hwan Lan Chen challenges in Case No. 20020927-SC the sufficiency of the findings that she was a racketeer and conspirator and the evidence supporting the findings. As Hwan Lan Chen demonstrates in Case No. 20020927-SC, there is a clear lack of  
(continued...)

Judge Howard acknowledged that the findings of the Contempt Ruling and Order were the basis of the Preliminary Injunction Ruling. Judge Howard expressly ruled in his January 24, 2003 Ruling on the Motion to Vacate and Set Aside that Hwan Lan Chen was “found in the two Findings of Fact and Conclusions of Law entered in this case” to have been part of a conspiracy against E. Excel, referring to both the Contempt Ruling and Order and Preliminary Injunction Ruling.<sup>6</sup> [R. 12759.]

Based on the findings of both the Contempt Ruling and Order and the Preliminary Injunction Ruling, Judge Howard entered an Order of Preliminary Injunction on October 16, 2002, which, *inter alia*, enjoined Hwan Lan Chen from all competition with E. Excel and all competition in the entire dietary supplement, herbal, personal care, cosmetic, and hygiene products industries worldwide. [R. 9140 at ¶ 13.]

**D. The Contempt Ruling And Order Is Being Used To Extend To Hwan Lan Chen The Contempt Ruling And Order**

The Contempt Ruling and Order is also being used against Hwan Lan Chen as the sole basis for extending the Contempt Ruling and Order to her and striking her Answer and entering judgment against her with the exception of damages.

On September 27, 2002, the Special Master/E. Excel moved to have Hwan Lan Chen and certain of the other third-party defendants held in contempt of court and sanctioned

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<sup>5</sup>(...continued)  
evidence to support the findings that Hwan Lan Chen was a conspirator and racketeer.

<sup>6</sup> Judge Howard relied on this ruling that Hwan Lan Chen had been found to be a conspirator by the Contempt Ruling and Order findings as a basis for denying her Motion to Vacate and Set Aside. [R. 12758.]

(“Motion for Contempt and Sanctions”). [R. 8943; 8956.] The Special Master/E. Excel, with the Motion for Contempt and Sanctions against Hwan Lan Chen, has moved to extend to her the Contempt Ruling and Order and have entered against her the same sanction of default that was entered against Ms. Stewart by the Contempt Ruling and Order. [*Id.*]

The Special Master/E. Excel clearly states in the Motion for Contempt and Sanctions against Hwan Lan Chen that its basis is the Contempt Ruling and Order. The Motion states as its grounds that:

The Court should . . . enter default against the Co-Conspirators [including Hwan Lan Chen] **(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.

[R. 8942-43 (emphasis added) (*see* Addendum, Tab C).] The Special Master/E. Excel amplifies in its memorandum in support of its Motion for Contempt and Sanctions that the premise of that Motion is the Contempt Ruling and Order. The memorandum states:

The premise of E. Excel’s motion is simple. . . . **This Court has already entered default judgment against one member of the racketeering conspiracy, Jau-Hwa Stewart, for these activities.**

**The Court should now enter default judgment against the Co-Conspirators [including Hwan Lan Chen] precisely because E. Excel suffers the same prejudice with respect to the Co-Conspirators as it suffered with respect to Jau-Hwa Stewart.**

[R. 9015-16 (emphasis added) (*see* Addendum, Tab D).]

The Special Master/E. Excel did not offer or claim that there was any new evidence supporting its Motion for Contempt and Sanctions against Hwan Lan Chen. [R. 8980-9016 (*see* Addendum, Tab D).] Instead, the Special Master/E. Excel claims that the same default

sanction that was imposed on Ms. Stewart by the Contempt Ruling and Order can be imposed on Hwan Lan Chen by relying on the findings of the Contempt Ruling and Order.<sup>7</sup> [Id.] The Special Master/E. Excel has twice told the trial court that it can rely on the Contempt Ruling and Order findings to extend the Contempt Ruling and Order to Hwan Lan Chen rather than hold a new evidentiary hearing. [R. 14273 at 12; 14278 at 45.]

**E. The Contempt Ruling And Order Findings Were Directed and Used Against Hwan Lan Chen Even Though They Were Substantially Based On An Evidentiary Record Made Before She Became A Party In The Action Below And Without Notice To Her That The Findings Would Be Directed And Used Against Her**

The findings of the Contempt Ruling and Order directed and used against Hwan Lan Chen were substantially based on an evidentiary record made before she became a party in the action below and without even giving her notice that the Contempt Ruling and Order would be directed and used against her as a party.

The Contempt Ruling and Order was based on 34 days of evidentiary hearings. Judge Howard expressly stated this in the Contempt Ruling and Order.<sup>8</sup> [R. 14317 at 4 (*see*

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<sup>7</sup> The Special Master/E. Excel incorporated into its memorandum in support of its Motion for Contempt and Sanctions: (1) the Contempt Ruling and Order; (2) the Preliminary Injunction Ruling; and (3) an August 26, 2002 Ruling on the Special Master/E. Excel's Motion for Sanctions against Ms. Stewart. [R. 9014 at n. 3 (*see* Addendum, Tab D).] The Preliminary Injunction Ruling was expressly based on the Contempt Ruling and Order findings. [R. 14317 at 90 (¶ 258).] The August 26, 2002 Ruling: (1) merely extended the Contempt Ruling and Order to the Special Master/E. Excel's claims for relief against Ms. Stewart by defaulting her on those claims as she was sanctioned in the Contempt Ruling and Order with regard to Ms. Chen's claims for relief; and (2) expressly incorporated the Contempt Ruling and Order findings. [R. 8165-66.]

<sup>8</sup> Judge Howard, in the Contempt Ruling and Order (and the Ruling entered on the same day, August 20, 2002, regarding the findings and conclusions that he was entering on (continued...)

Addendum, Tab A).] Ten days of evidentiary hearings relied on by Judge Howard in entering the Contempt Ruling and Order were held between January 19 and February 21, 2001, in the first preliminary injunction proceeding between Ms. Chen and Ms. Stewart.<sup>9</sup> Judge Howard stated this in the Contempt Ruling and Order:

As part of the OSC hearing . . . 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 . . . .

[R. 14317 at 4 (*see* Addendum, Tab A).] An additional seven days of evidentiary hearings held between October 25 and December 12, 2001 were relied on by Judge Howard. Judge Howard stated this in the Contempt Ruling and Order:

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 . . . 2001 . . . .

[*Id.*] Lastly, Judge Howard relied on one more day of evidentiary hearing held after December 12, 2001 and before January 15, 2002 (the date Hwan Lan Chen accepted service of process), which was the December 13, 2001 evidentiary hearing. This also is stated in the Contempt Ruling and Order: “The OSC Motions and Motion for Order Summarily

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<sup>8</sup>(...continued)  
that day), expressly listed the 24 days of evidentiary hearing on which the Contempt Ruling and Order is based, and expressly stated that, “[a]s part of the OSC hearing,” he took judicial notice of the evidentiary hearings held in the preliminary injunction proceeding between Ms. Chen and Ms. Stewart from January 19 through February 21, 2001. [R. 8111-12; 14317 at 4 (*see* Addendum, Tab A).]

<sup>9</sup> There is no dispute that there were 10 days of evidentiary hearings in the first preliminary injunction proceeding between the two sisters. [R. 14221-23; 14226-28; 14230-34; 14293-4; 12768.]

Holding Ms. Stewart in Contempt of Court . . . were also heard on . . . December . . . 13, 2001; . . .” [*Id.*]

Hwan Lan Chen was first named as a party in the action below when the Special Master/E. Excel filed its Amended Third Party Complaint on October 29, 2001. [R. 4204 at ¶ 9.] The Amended Third Party Complaint was not served on Hwan Lan Chen until she accepted service of process on January 15, 2002. [R. 5333 (*see* Addendum, Tab E).] On December 12, 2001, at the end of the evidentiary hearing held on that date, a counsel for Hwan Lan Chen stated that he **would be filing** an appearance for Hwan Lan Chen. [R. 14248 at 182.] That counsel, in fact, filed a notice of appearance for Hwan Lan Chen on December 17, 2001. [R. 5000 (*see* Addendum, Tab F).] The only day of evidentiary hearings held after December 12, 2001 and before January 15, 2002 was on December 13, 2001 – one day of evidentiary hearing. [R. 14317 at 4.]

In short, there were at least 17 days of evidentiary hearings conducted when Hwan Lan Chen was not a party in the action below, and 18 days of evidentiary hearings before she filed an appearance in the action (the evidentiary hearings on January 19, 23, and 24, 2001; February 1, 2, 7, 8, 13 and 20, 2001; October 25 and 26, 2001; November 27 and 28, 2001; and December 10, 11, 12 and 13, 2001). **DURING THE 17 DAYS OF EVIDENTIARY HEARINGS HELD BEFORE HWAN LAN CHEN WAS A PARTY IN THE ACTION, 76% OF THE TESTIMONY AND 67% OF THE EXHIBITS CITED IN THE CONTEMPT RULING AND ORDER WERE RECEIVED INTO EVIDENCE.** [Addendum, Tab G.] If the 18<sup>th</sup> day of evidentiary hearing conducted before

Hwan Lan Chen filed an appearance in the action (December 13, 2001) is included, 80% of the testimony and 72% of the exhibits cited in the Contempt Ruling and Order were received into evidence without Hwan Lan Chen. [*Id.*]

Findings of the Contempt Ruling and Order directed and used against Hwan Lan Chen were made “beyond a reasonable doubt” based on a substantial evidentiary record that was received without notice to Hwan Lan Chen or her having an opportunity to be heard. [R. 14317 at 119 (¶ 2) (*see* Addendum, Tab A).]

Even after she was made a party in the action below, Hwan Lan Chen never was given advance notice that the findings of the Contempt Ruling and Order would be directed and used against her. The contempt proceeding was only noticed for hearing on Ms. Chen’s Motions for Contempt against Ms. Stewart – those Motions never referred to Hwan Lan Chen, much less charged her with contempt or sought sanctions against her. [R. 2074; 14306; 14317 at 3-5.] On October 31, 2001, Judge Howard ruled – without notice to Hwan Lan Chen – that he would hear the Special Master/E. Excel’s Motion for Preliminary Injunction along with Ms. Chen’s Motions for Contempt. [R. 14243 at 64.] Hwan Lan Chen was never served the Special Master/E. Excel’s Motion for Preliminary Injunction and, just prior to Hwan Lan Chen’s appearance in the action below, the Special Master/E. Excel’s counsel told Judge Howard that it was not “seeking injunctive relief against [Hwan Lan Chen]” at that time. [R. 3718; 14249 at 180-81; 14264 at 96.]



**F. The Contempt Ruling And Order Findings Were Based On An Evidentiary Proceeding That Was Fundamentally Unfair And Lacking In Impartiality As A Result Of The Pervasive Partisan Participation By The Special Master**

The evidentiary proceeding on which the findings of the Contempt Ruling and Order were based was fundamentally unfair and lacking in impartiality due to the partisan participation of the Special Master – a subordinate judicial officer and the trial court’s “representative” – which permeated the record.<sup>10</sup>

On October 31, 2001, Judge Howard ordered that the Special Master/E. Excel’s Motion for Preliminary Injunction would be heard in evidentiary hearings along with Ms. Chen’s Motions for Contempt. [R. 14243 at 64.] The Special Master not only participated in the Preliminary Injunction proceeding, but participated in the contempt proceeding on Ms. Chen’s Motions for Contempt:

- The Special Master was a witness in the combined evidentiary proceeding, and testified as “special master.” [R. 14256 at 77-143.]
- The Special Master’s reports, which were submitted by the Special Master under Rule 53(e) in “his capacity as Special Master,” were made part of the record and extensively relied upon and cited by Judge Howard in the Contempt Ruling and Order. [R. 2033 at ¶ 2; 2721; 2953; 14297-98; 14300; 14302; 14309-10; 14317 at 47-48 (¶¶ 71-72),

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<sup>10</sup> As demonstrated by Hwan Lan Chen in Case No. 20020927-SC, the Special Master was expressly appointed as a Rule 53 special master and was identified as the trial court’s “representative,” as confirmed by the Orders appointing and empowering him, Judge Howard’s January 24, 2003 Ruling on the Motion to Vacate and Set Aside, and the Special Master’s and the parties’ actions and acknowledgments. [R. 703; 762; 1885; 2033 at ¶ 1; 2721; 14267 at 17; 14236 at 71; 12764-65; 14297-98; 14300; 14302; 14309-10.]

109-117 (¶¶ 187-90, 192-93).] Eight of the findings of the Contempt Ruling and Order cite to and/or quote extensively from the Special Master’s Rule 53(e) reports. [R. 14317 at 47-48 (¶¶ 71-72), 109-117 (¶¶ 187-90, 192-93) (*see* Addendum, Tab A).] Judge Howard: (a) quoted verbatim almost five pages from the Special Master’s Report No. 3 regarding the Special Master’s allegations of missing E. Excel corporate assets and documents; (b) quoted verbatim almost six pages from the Special Master’s Report No. 4 regarding the Special Master’s continued allegations of missing E. Excel corporate assets and documents; and (c) cited the Special Master’s Report No. 3 – in which the Special Master attempted to justify the Territorial Owners’ manufacturing of counterfeit E. Excel products – as the only evidence for the critical finding that the Territorial Owners’ unlawful actions were justified. [*Id.*] **The Special Master’s counsel admitted after the Contempt Ruling and Order findings were entered – at the January 10, 2003 hearing on the Motion to Vacate and Set Aside – that these Rule 53(e) reports were “partisan” reports filed by a “partisan” Special Master.** [R. 14287 at 117, 125.]

- The Special Master took and advocated positions adverse to Hwan Lan Chen with regard to the Contempt Ruling and Order. [*E.g.*, R. 14291 at 15, 20-21, 68, 74, 81-87; 14316 at 90 (¶ 258).] For example, the Special Master’s counsel requested that the findings of the Contempt Ruling and Order be incorporated into and made findings of the Preliminary Injunction Ruling, a request which Judge Howard adopted verbatim. [R. 14316 at 90 (¶ 258); 14317 at 89 (¶ 258).]

- The Special Master/E. Excel was the lead party in the combined evidentiary proceeding on which the Contempt Ruling and Order was based. Jones, Waldo, Holbrook & McDonough (“Jones Waldo”) expressly represented the Special Master in the proceeding on Ms. Chen’s Motions for Contempt both before and after October 31, 2001 – Jones Waldo is listed as expressly appearing on behalf of the Special Master in 21 out of 23 transcripts prepared for the evidentiary hearings held on and after October 25, 2001. [R. 14244 at 5; Addendum, Tab H.] Jones Waldo called 22 out of the 33 witnesses called by Ms. Chen and the Special Master/E. Excel in the combined evidentiary proceeding. [Addendum, Tab I.] Jones Waldo called almost all of the lead witnesses, including Dale Stewart, Beverly Warner, Taig Stewart, and the Special Master himself. [*Id.*; R. 14256 at 77-78.] Jones Waldo participated in the examination of five of the 11 witnesses called by Ms. Chen in the combined evidentiary proceeding. [Addendum, Tab I.] Jones Waldo offered 87 out of the 113 exhibits that were introduced by Ms. Chen and the Special Master/E. Excel and admitted in the combined evidentiary proceeding. [Addendum, Tab J.]

In short, the Special Master participated as a subordinate judicial officer and “representative” of the trial court at the same time that he participated as an adversary of Hwan Lan Chen in connection with entry of the Contempt Ruling and Order findings directed and used against her.

### **SUMMARY OF ARGUMENT**

Hwan Lan Chen has standing to appeal the Contempt Ruling and Order. The settled rule is that an appellant has standing to appeal a ruling or order if the appellant has a

personal interest at stake before the trial court, was a party below, and was aggrieved by the ruling or order. *Society of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1171 (Utah 1987). Hwan Lan Chen, a party below, manifestly has a personal interest at stake in the action below and manifestly has been aggrieved by the Contempt Ruling and Order – the Contempt Ruling and Order findings were directed and used against her. Findings of the Contempt Ruling and Order were expressly directed against Hwan Lan Chen. At the same time the Contempt Ruling and Order was entered against Ms. Stewart, all of its findings were incorporated into and made findings of the Preliminary Injunction Ruling against Hwan Lan Chen. Reflecting this incorporation, the Preliminary Injunction Ruling findings paralleled and built on the Contempt Ruling and Order findings directed against Hwan Lan Chen. Hwan Lan Chen has been found to be a conspirator and racketeer and has been enjoined based on the Contempt Ruling and Order findings. Judge Howard expressly ruled that Hwan Lan Chen had been found to be a conspirator by the findings of the Contempt Ruling and Order in his January 24, 2003 Ruling on the Motion to Vacate and Set Aside.

In addition, Hwan Lan Chen has been aggrieved by the Contempt Ruling and Order because it is the sole basis for the Special Master's pending Motion for Contempt and Sanctions before the trial court to extend the Contempt Ruling and Order to her. The Special Master/E. Excel has moved, based on the findings of the Contempt Ruling and Order, to have the same sanction of default entered against Hwan Lan Chen that was entered against Ms. Stewart by the Contempt Ruling and Order. The Special Master/E. Excel offers no evidence to support its Motion for Contempt and Sanctions against Hwan Lan Chen and,

instead, claims that the same default sanction can be entered based on the Contempt Ruling and Order findings rather than a new evidentiary hearing.

Hwan Lan Chen was fundamentally denied due process of law under the Utah and United States Constitutions in connection with the findings of the Contempt Ruling and Order directed and used against her. The basic and absolute requirement of due process of law is timely and adequate notice and a full and fair opportunity to be heard. *Plumb v. State*, 809 P.2d 734, 743 (Utah 1990). It is fundamentally inconsistent with this absolute requirement of due process to receive testimony and exhibits against a person and hold a proceeding that results in findings against the person before they are made a party in the action. *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Murphy Bros. Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999); *Eakins v. Reed*, 710 F.2d 184, 187 (4th Cir. 1983); *Salt Lake County v. Murray City Redevelopment*, 598 P.2d 1339, 1345 n.12 (Utah 1979). After a person is made a party in an action, it is equally fundamentally inconsistent with the absolute due process requirement of notice and opportunity to be heard to hold an evidentiary proceeding that results in findings against the party without advance notice to the party. *Plumb*, 809 P.2d at 743; *In re H.J.*, 1999 UT App. 238 at ¶ 46, 986 P.2d at 126.

In fundamental violation of these clear rules of due process, the findings of the Contempt Ruling and Order directed and used against Hwan Lan Chen were substantially based on an evidentiary record that was made before she became a party in the action below.

**Over 70% of the evidence cited in the Contempt Ruling and Order was received before Hwan Lan Chen was made a party in the action below.** At least 17 days of evidentiary hearings on which the Contempt Ruling and Order findings were based were conducted before Hwan Lan Chen became a party in the action below. Moreover, even after she became a party in the action below, she never was given advance notice that the findings of the Contempt Ruling and Order would be directed and used against her. The Special Master incredibly seeks to deprive Hwan Lan Chen of the opportunity to defend the claims for relief against her solely based on the Contempt Ruling and Order that was entered without notice to her or her having the opportunity to be heard.

In addition, the evidentiary proceeding on which the findings of the Contempt Ruling and Order were based was fundamentally unfair and lacking in impartiality contrary to the requirements of due process under the United States and Utah Constitutions. Due process of law absolutely requires a fair and impartial tribunal and, as a result, absolutely forbids a judicial officer from participating in a proceeding as both judge or subordinate judicial officer and an adversary to any party – the partisan participation of a judge or subordinate judicial officer in a proceeding before the judge is fundamentally unfair and a basic violation of due process. *Tumey v. Ohio*, 273 U.S. 510, 534 (1927); *In re Murchison*, 349 U.S. 133, 136 (1955); *Plumb*, 809 P.2d at 743-44. In addition, the Code of Judicial Conduct expressly forbids a special master from acting an adversary or being unfair and partial. *Plumb*, 809 P.2d at 743; Utah Code Judicial Conduct, Canon 2, Canon 3 B.(5), (7), (8).

The Special Master's participation as both subordinate judicial officer and adversary of Hwan Lan Chen in the evidentiary proceeding on which the Contempt Ruling and Order is based permeated the record and resulted in that proceeding being fundamentally unfair and markedly lacking in impartiality. The Special Master was a subordinate judicial officer and admittedly the trial court's "representative." At the same time: (1) the Special Master was a witness in the combined evidentiary proceeding on which the Contempt Ruling and Order was based; (2) the Special Master's admittedly "partisan" Rule 53(e) reports were made part of the record and extensively relied upon and cited by Judge Howard in the Contempt Ruling and Order; (3) the Special Master took and advocated positions adverse to Hwan Lan Chen with regard to the Contempt Ruling and Order; and (4) the Special Master was the lead adverse party to Hwan Lan Chen in the combined evidentiary proceeding on which the Contempt Ruling and Order is based.

Due process of law and the Code of Judicial Conduct prevented the Special Master from participating as he did as both a subordinate judicial officer and an adversary of Hwan Lan Chen in connection with the Contempt Ruling and Order findings directed and used against her. As a result, due process of law and the Code of Judicial Conduct require that those findings be vacated and set aside with regard to Hwan Lan Chen. At minimum, the Special Master's dual participation as both subordinate judicial officer and adversary warrants the exercise of this Court's inherent supervisory power.

## ARGUMENT

### **I. HWAN LAN CHEN HAS STANDING TO APPEAL THE CONTEMPT RULING AND ORDER BECAUSE SHE IS A PARTY BELOW AND HAS BEEN AGGRIEVED BY THE FINDINGS OF THE CONTEMPT RULING AND ORDER**

Hwan Lan Chen, a party below, has standing to appeal the Contempt Ruling and Order because the Contempt Ruling and Order findings were directed and used against her. An appellant has standing to appeal a ruling or order entered by the trial court if: (1) the appellant had standing to proceed before the trial court – which requires that the appellant have had a personal interest at stake in the proceeding before the trial court; and (2) the appellant was a party below and was aggrieved by the ruling or order. *Bullock*, 743 P.2d at 1171-72. If findings are used against a party to an action – even if the proceeding that resulted in the findings was noticed for a different purpose – that party necessarily has standing to appeal the findings. By definition, that party has a personal stake in the outcome of the proceeding and their rights and duties have been determined by the findings – they have been aggrieved. *In re H.J.*, 1999 UT App. 238, ¶¶ 46-47, 986 P.2d at 126.

Hwan Lan Chen manifestly satisfies this test for appellant standing. Once she was made a party in the action below by the Special Master/E. Excel, she plainly had a personal interest at stake in the proceeding below so as to have standing to proceed before the trial court. Moreover, Hwan Lan Chen, a party below, has been aggrieved by the Contempt Ruling and Order. The findings of the Contempt Ruling and Order were directed and used against Hwan Lan Chen.



Findings of the Contempt Ruling and Order were expressly directed against Hwan Lan Chen. For example, Hwan Lan Chen was found in the Contempt Ruling and Order to have participated in Ms. Stewart's "scheme" to remove Ms. Chen from E. Excel and to have funded the conspiracy to destroy and compete against E. Excel that was found to have existed in the Contempt Ruling and Order. The findings of the Contempt Ruling and Order were used against Hwan Lan Chen. At the same time the Contempt Ruling and Order was entered against Ms. Stewart, all of its findings were incorporated into and made findings of the Preliminary Injunction Ruling against Hwan Lan Chen. Reflecting this incorporation, the Preliminary Injunction Ruling and Order findings substantially paralleled and built on the Contempt Ruling and Order findings directed against Hwan Lan Chen. Based on the Contempt Ruling and Order findings, Hwan Lan Chen was expressly found in the Preliminary Injunction Ruling to be part of the conspiracy that was found to exist in the Contempt Ruling and Order. Based on the Contempt Ruling and Order findings, that conspiracy was found in the Preliminary Injunction Ruling to be a racketeering enterprise and Hwan Lan Chen a racketeer. Hwan Lan Chen was enjoined from all competition with E. Excel and all competition in several industries worldwide based on the Contempt Ruling and Order findings. Judge Howard expressly acknowledged that the Contempt Ruling and Order findings were the basis of the Preliminary Injunction Ruling when he ruled that Hwan Lan Chen had been found by the findings of both the Contempt Ruling and Order and Preliminary Injunction Ruling to be a conspirator.

Hwan Lan Chen also has been aggrieved by the Contempt Ruling and Order because it is the sole basis of the Special Master/E. Excel's **pending** Motion for Contempt and Sanctions against Hwan Lan Chen. The Special Master/E. Excel has moved to extend the Contempt Ruling and Order to Hwan Lan Chen and have the same sanction of default entered against her that was entered against Ms. Stewart by the Contempt Ruling and Order. The Special Master/E. Excel clearly expresses in its Motion for Contempt and Sanctions and supporting memorandum that the premise of the Motion is the Contempt Ruling and Order:

The Court should . . . enter default against the Co-Conspirators [including Hwan Lan Chen] **(as it already has against another member of the criminal racketeering enterprise, Jau-Hwa Stewart)** . . . .

[R. 8942-43; 8953; 8956 (emphasis added).]

The premise of E. Excel's motion is simple. . . . **This Court has already entered default judgment against one member of the racketeering conspiracy, Jau-Hwa Stewart, for these activities. The Court should now enter default judgment against the Co-Conspirators [including Hwan Lan Chen]** precisely because E. Excel suffers the same prejudice with respect to the Co-Conspirators as it suffered with respect to Jau-Hwa Stewart.

[R. 9015-16 (emphasis added).] The Special Master/E. Excel does not offer or claim that there is any new evidence to support its Motion for Contempt and Sanctions against Hwan Lan Chen. Instead, the Special Master/E. Excel claims that the same sanction that was imposed on Ms. Stewart should be imposed on Hwan Lan Chen based on the Contempt Ruling and Order findings rather than a new evidentiary hearing. The Special Master/E. Excel makes clear that, absent the Contempt Ruling and Order, there would be no Motion for Contempt and Sanctions against Hwan Lan Chen.

In sum, Hwan Lan Chen has standing to appeal the Contempt Ruling and Order because she has a personal interest at stake before the trial court and is a party to the action below who has been substantially aggrieved by the Contempt Ruling and Order findings.

**II. THE CONTEMPT RULING AND ORDER FINDINGS WERE DIRECTED AND USED AGAINST HWAN LAN CHEN IN CLEAR DENIAL OF HER RIGHT TO DUE PROCESS OF LAW UNDER THE UTAH AND UNITED STATES CONSTITUTIONS**

The Contempt Ruling and Order must be vacated and set aside as to Hwan Lan Chen because, in fundamental denial of her right to due process of law, the findings of the Contempt Ruling and Order were directed and used against her even though the findings were the product of: (1) an evidentiary record that was made before she became a party in the action and without her being notified that the findings would be used against her; and (2) an evidentiary proceeding that was fundamentally unfair and lacking in impartiality due to the pervasive partisan participation of the Special Master in that proceeding.

**A. The Contempt Ruling And Order Findings Were Directed And Used Against Hwan Lan Chen In Fundamental Denial Of Her Due Process Right To Timely Notice And A Full And Fair Opportunity To Be Heard**

The Contempt Ruling and Order findings were directed and used against Hwan Lan Chen in fundamental denial of her due process right under the United States and Utah Constitutions to timely notice and a full and fair opportunity to be heard. The findings of the Contempt Ruling and Order directed and used against Hwan Lan Chen were substantially based on an evidentiary record made before she became a party in the action below and without even giving her notice that the Contempt Ruling and Order would be directed and used against her as a party.

The core and absolute requirement of due process of law is timely notice and an opportunity to be heard before a ruling. *Mullane*, 339 U.S. at 314 (“The fundamental requisite of due process of law is the opportunity to be heard.” (internal quotations omitted)); *Plumb*, 809 P.2d at 743 (“In our judicial system . . . all parties are entitled to notice . . . and to an opportunity to present evidence and argument on that issue before decision.”). It is fundamentally contrary to this core requirement to receive testimony and exhibits against a person, and to conduct an evidentiary proceeding that results in findings against the person, without the person being made a party in the action. As the United States Supreme Court has explained:

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . [J]udicial action enforcing [a judgment] against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

*Hansberry*, 311 U.S. at 40-41. Before a person is made a party in an action by service of process, there is no notice to that person as a matter of law and a court is utterly powerless to conduct an evidentiary proceeding against that person. *Id*; *Zenith Radio*, 395 U.S. at 110 (“The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.”); *Martin v. Wilks*, 490 U.S. 755, 763 (1989) (holding that, even though a non-party has knowledge of an action, “a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined . . .”); *Murphy Bros.*, 526 U.S. at 350 (“[Absent] service of process . . . a court ordinarily may not exercise power over a party the complaint

names as a defendant.”); *Eakins*, 710 F.2d at 187 (“Although [a late-joined defendant] had notice of the lawsuit, he did not know that he was a defendant until the trial was virtually concluded.”); *Murray City Redevelopment*, 598 P.2d at 1345 n.12 (stating rule that proper notice to non-parties requires satisfaction of formal requirements for notice). Any ruling or order that is entered in violation of an aggrieved party’s right to due process must be vacated and set aside. *Nelson v. Jacobsen*, 669 P.2d 1207, 1214 (Utah 1983); *Eakins*, 710 F.2d at 185.

The findings of the Contempt Ruling and Order directed and used against Hwan Lan Chen were substantially based on an evidentiary record that was made before she became a party in the action below, in fundamental violation of this clear rule of due process of law. **Over 70% of the evidence cited in the Contempt Ruling and Order was received before she was made a party in the action below. At least 17 days of evidentiary hearings on which the Contempt Ruling and Order findings were based were conducted before Hwan Lan Chen was made a party in the action below.**

Moreover, even after Hwan Lan Chen became a party in the action below, she was not given notice required as a matter of due process in connection with the Contempt Ruling and Order findings directed and used against her. Fundamentally, advance notice that findings will be direct and used against a party is an absolute requisite of due process of law. A party must be notified that an evidentiary proceeding will be used to determine their rights and duties sufficiently in advance to allow the party an opportunity to prepare and be heard – which means that a proceeding can only be used for its noticed purpose. *Sakon v. Andreo*,

119 F.3d 109, 114 (2d Cir. 1997) (holding that, to comport with due process, “before the court imposes ‘any kind of sanctions,’ it must afford the person to be sanctioned due process, including notice that sanctions might be imposed.”); *Plumb*, 809 P.2d at 743; *In re H.J.*, 1999 UT App. 238 at ¶ 46, 986 P.2d at 126 (“[D]ue process concerns are implicated when a hearing for one purpose serves a second purpose involving different issues. . . . Due process is not met when notice is ambiguous or insufficient to identify the issues to be considered, thus impeding a party’s preparation for the proceedings.”). As this Court has explained:

In our judicial system, . . . all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision. . . . Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him [or her] or not give sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process. **Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.**

*Plumb*, 809 P.2d at 743 (emphasis added) (citations and internal quotation marks omitted). Fundamentally, “[t]he right which an accused has to be heard on the merits is before, not after, he is condemned.” *Herald-Republican Publ’g Co. v. Lewis*, 129 P. 624, 632 (Utah 1913).

Hwan Lan Chen never was given advance notice that the findings of the Contempt Ruling and Order would be directed and used against her. The Contempt Ruling and Order was entered on Ms. Chen’s Motions for Contempt that were directed at only Ms. Stewart. The contempt proceeding on Ms. Chen’s Motions for Contempt was never noticed for the different purpose of directing and using findings against Hwan Lan Chen. That contempt

proceeding was combined with the Preliminary Injunction proceeding without notice to Hwan Lan Chen. Hwan Lan Chen was never served the Special Master/E. Excel's Motion for Preliminary Injunction. Immediately before she appeared below, the Special Master/E. Excel told the trial court that it was "not seeking injunctive relief against [Hwan Lan Chen]" at that time. As late as May 8, 2002 – the 27th day of evidentiary hearings in the 34 day evidentiary record on which the Contempt Ruling and Order is based – Judge Howard did not have an understanding that the Special Master/E. Excel was seeking injunctive relief against Hwan Lan Chen. [R. 14264 at 96.]

In sum, Hwan Lan Chen was provided neither the notice nor the opportunity to be heard required by due process of law with regard to the findings of the Contempt Ruling and Order directed and used against her. As a result, those findings must be vacated and set aside as to Hwan Lan Chen.

**B. The Contempt Ruling And Order Findings Were Directed And Used Against Hwan Lan Chen In Violation Of Her Fundamental Due Process Right To A Fair Adjudication As A Result Of The Pervasive Partisan Participation By The Special Master In The Contempt Proceeding**

The Contempt Ruling and Order findings also were directed and used against Hwan Lan Chen in fundamental denial of her due process right under the United States and Utah Constitutions to a fair adjudication. The evidentiary proceeding on which the Contempt Ruling and Order findings were based was fundamentally unfair and lacking in impartiality

due to the pervasive participation of the Special Master in that proceeding as both a subordinate judicial officer and an adversary of Hwan Lan Chen.<sup>11</sup>

The touchstone of due process is “fundamental fairness,” *State v. Redd*, 2001 UT 113 ¶ 13, 37 P.3d 1160, 1163, and parties have an inviolable due process right to a fair and impartial tribunal and adjudication.<sup>12</sup> *Murchison*, 349 U.S. at 136 (“A fair trial in a fair tribunal is a basic requirement of due process.”). Any procedure that even makes possible that a judge or subordinate judicial officer will not be fair and impartial denies a litigant due process of law. *Id.* (“[O]ur system of law has always endeavored to prevent even the probability of unfairness.”); *Tumey*, 273 U.S. at 532. As the United States Supreme Court has stated:

That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. . . . Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance, nice, clear and true between the State and the accused, denies the latter due process of law.”

*Tumey*, 273 U.S. at 522, 532.

As a result, a party is fundamentally denied due process of law when findings are directed and used against them based on an evidentiary proceeding in which the judge or a

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<sup>11</sup> This appeal does not raise the issue of the Special Master’s unlawful appointment, empowerment, and actions; that issue is the subject of the appeal in Case No. 20020927-SC. Nonetheless, this appeal necessarily raises **the impact** of the Special Master’s pervasive exercise of unlawful non-judicial powers because that exercise cannot be separated from Hwan Lan Chen being bound by the Contempt Ruling and Order.

<sup>12</sup> “The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).



subordinate judicial officer also participated as an adversary, advocate, or partisan participant. *Tumey*, 273 U.S. at 534 (“A situation in which an official performs two practically and seriously inconsistent positions, **one partisan and the other judicial**, necessarily involves a lack of due process of law . . . .” (emphasis added)); *Murchison*, 349 U.S. at 136 (“[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”); *Plumb*, 809 P.2d at 743-44 (holding that a special master may not “fulfill an adversary role”); *Figueroa Ruiz v. Delgado*, 359 F.2d 718, 721-22 (1st Cir. 1966) (“We are satisfied that a federal or state court procedure, by which the judge was the one to introduce the government’s evidence, and cross-examine on the government’s behalf . . . would deny the accused due process of law.”); *State v. Martinez*, 523 P.2d 120, 121 (Colo. 1974) (“The duty to be impartial cannot be fulfilled where, by his active role in the presentation of the prosecution’s case, a trial judge calls witnesses, presents evidence and cross-examines defense witnesses. These are the acts of an advocate and not a judge.”); *Wounded Knee v. Andera*, 416 F. Supp. 1236, 1240 (D.S.D. 1976) (“[A] fair trial cannot be had when the judge also has the duty of prosecuting.”).

Moreover, the Code of Judicial Conduct absolutely requires that judges and special masters: (1) be impartial and without bias; (2) provide the parties a full and fair opportunity to be heard; and (3) act fairly. *Plumb*, 809 P.2d at 743; Utah Code Judicial Conduct, Canon 2, Canon 3 B.(5), (7), (8). The outcome of any proceeding that was fundamentally unfair due to the partisan participation of a judge or judge’s representative and/or which involved violations of the Code of Judicial Conduct must be vacated and set aside. *Tumey*, 273 U.S.

at 535; *Murchison*, 349 U.S. at 139; *Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 257-58 (Utah 1992) (adopting “bright line proscription” of automatically vacating and setting aside a decision or order involving judicial misconduct.)

Special Master Larry C. Holman was a subordinate judicial officer and the trial court’s “representative.” *See Plumb*, 809 P.2d at 743 (holding that a special master is a subordinate judicial officer bound by the Code of Judicial Conduct). The March 13, 2001 Order appointing him expressly provided that Mr. Holman was selected to serve “as a special master for and on behalf of the court.” [R. 703.] The Special Master’s “Special Counsel” told Judge Howard that the Special Master “is, in effect, . . . a Judge and is the Judge’s representative.” [R. 14236 at 71.] The Special Master expressly invoked and acted under Rule 53. [R. 1885; 2033 at ¶ 1; 2721; 14297; 14298; 14300 at 2-3, 25; 14302 at 2; 14309 at 23; 14310 at 2; 14267 at 17.] Judge Howard ruled that the Special Master was a Rule 53 special master. [R. 12764-65.] *See Turner v. Ott*, 722 F.2d 661, 664 (11th Cir. 1984) (holding that a judicial officer who is appointed and referred to as a “special master” is a Rule 53 special master).

However, at the same time he was a subordinate judicial officer and Judge Howard’s “representative,” the Special Master was a witness in the combined evidentiary proceeding on which the Contempt Ruling and Order findings are based. At the same time he was a subordinate judicial officer and Judge Howard’s “representative,” the Special Master’s Rule 53(e) reports, which were subsequently admitted to be “partisan” reports, were made part of the record and were extensively relied upon, in large part verbatim, by Judge Howard in

the Contempt Ruling and Order findings. Judge Howard quotes verbatim almost eleven pages from the Special Master's reports in the Contempt Ruling and Order findings. At the same time he was a subordinate judicial officer and Judge Howard's "representative," the Special Master took and advocated positions adverse to Hwan Lan Chen with regard to the Contempt Ruling and Order findings, including requesting that those findings be incorporated into and made findings of the Preliminary Injunction Ruling against Hwan Lan Chen. Finally, at the same time he was a subordinate judicial officer and Judge Howard's "representative," the Special Master was the lead adverse party to Hwan Lan Chen in the combined evidentiary proceeding on which the Contempt Ruling and Order findings were based. The Special Master's counsel called almost all of the lead witnesses, including the Special Master, participated in the examination of Ms. Chen's witnesses in that proceeding, and offered most of the exhibits that were admitted in the combined evidentiary proceeding. Hwan Lan Chen was not litigating against other private parties, but against Judge Howard's "representative."

In sum, the Special Master acted both as a subordinate judicial officer and an adversary of Hwan Lan Chen with regard to the Contempt Ruling and Order findings directed and used against her. The Special Master's dual participation in the contempt proceeding as subordinate judicial officer and adversary permeated the record, was fundamentally unfair and lacking in impartiality, and constituted systematic violations of the Code of Judicial Conduct. The Special Master's dual participation in the contempt proceeding as subordinate judicial officer and adversary matched if not far exceeded the

partisan or adversary participation by judges found by other courts to result in a fundamentally unfair proceeding in violation of due process. *See Tumey*, 273 U.S. at 534 (holding that the mere possibility of unfairness and lack of partiality as a result of mayor sharing in the fees and costs imposed on a defendant prevented the mayor from serving as a judge as a matter of due process); *Ward v. Village of Monroeville*, 409 U.S. 57, 59 (1972) (extending *Tumey* to prevent mayor from serving as a judge based on mayor's indirect interest in town's general fund); *Delgado*, 359 F.2d at 721-22 (holding that there was a denial of due process when the judge assumed the role of district attorney and introduced evidence and called and examined witnesses); *Martinez*, 523 P.2d at 121 (same).

At minimum, even if the Court was not inclined to vacate and set aside on constitutional grounds, the Court should exercise its inherent supervisory power to disallow a Rule 53 special master from also participating in the matter in which he is appointed as an adversary. *See State v. Bennett*, 2000 UT 34, ¶ 13, 999 P.2d 1, 3; *State v. Gordon*, 913 P.2d 350, 353-54 (Utah 1996). As the Court has noted, it is especially appropriate to exercise its inherent supervisory power when fundamental values – such as the need for an impartial and fair tribunal and trial – are threatened by a mode of proceeding. *State v. James*, 767 P.2d 549, 557 (Utah 1989); *State v. Bishop*, 753 P.2d 439, 499 (Utah 1988) (Zimmerman, J., concurring).

Either as a matter of constitutional law, the Code of Judicial Conduct, or the Court's inherent supervisory power, the Special Master's pervasive dual role in the contempt proceeding provides an independent basis for vacating the Contempt Ruling and Order

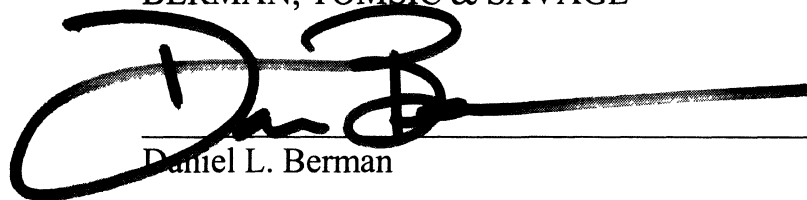
findings directed and used against Hwan Lan Chen, as well as sharply underscores the denial of Hwan Lan Chen's fundamental right to notice and an opportunity to be heard in connection with those findings.

**CONCLUSION**


Based on the foregoing, Hwan Lan Chen respectfully submits that the Contempt Ruling and Order findings directed and used against Hwan Lan Chen must be vacated and set aside with regard to her.

DATED this 1st day of March, 2004.

BERMAN, TOMSIC & SAVAGE



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Daniel L. Berman



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Stephen R. Waldron  
50 South Main, Suite 1250  
Salt Lake City, Utah 84144  
Attorneys for Hwan Lan Chen

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2004, a true and correct copy of **BRIEF OF APPELLANT**

**HWAN LAN CHEN** was mailed, postage prepaid, to:

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

Patrick Hoog  
1198 North Spring Creek Place  
Springville, Utah 84663

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

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

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

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

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

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

Shannon Heaton  
3312 Antigua Drive  
Eugene, Oregon 97408

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

Angela Barclay  
7442 South Spruce Street  
Midvale, Utah 84047

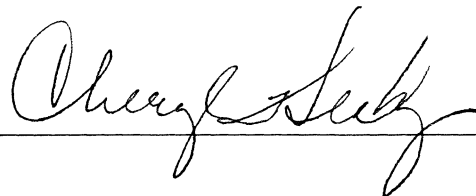
Apogee, Inc.  
c/o Scott E. Tawzer, Registered Agent  
6958 East 1255 North  
Huntsville, Utah 84317

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

Dale Stewart  
199 North 1350 East  
Springville, Utah 84663

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

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



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