

2002

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

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

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

Plaintiffs/Appellees,

vs.

JAU-HWA STEWART, et al.,

Defendants/Appellants.

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**UTAH SUPREME COURT  
BRIEF**

**UTAH  
DOCUMENT  
K F U**

**45.9**

**.59**

**DOCKET NO.**

Case No. 20020777-SC

**20020777-SC**

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**APPELLEE'S BRIEF IN RESPONSE TO BRIEF OF JAU-HWA AND TAIG STEWART**

---

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

---

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**FILED  
UTAH APPELLATE COURTS  
JUN 16 2004**

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IN THE UTAH SUPREME COURT

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## **I. PARTIES BELOW**

Plaintiff Jau-Fei Chen (or “Dr. Chen”), individually and as the natural guardian of her three minor children Chi Wei Zhang, E. Lei Zhang and E. E. Zhang (the “Zhang Children”), sued Jau-Hwa Stewart (or “Ms. Stewart”) and E. Excel International, Inc. (“Excel USA” or “E. Excel”) in the Fourth Judicial District Court, Case No. 010400098.

Third-Party Plaintiff Excel USA sued Third-Party Defendants Taig Stewart, Hwan Lan Chen (or “Madam Chen”), Beverly Warner (or “Ms. Warner”), Angela Barclay (or “Ms. Barclay”), Dale Stewart, Sam Tzu (or “Mr. Tzu”), Richard Hu (or “Mr. Hu”), Apogee, Inc. (or “Apogee”), Apogee Essence International Philippines, Inc., Excellent Essentials International Corp., USA Apogee, Ltd., Shannon River, Inc. (or “Shannon River”), Shannon Heaton, Sheue Wen Smith (or “Ms. Smith”), Bryan Hymas (or “Mr. Hymas”), Paul Cooper, Byron Murray (or “Dr. Murray”) and Kim O’Neill (or “Dr. O’Neill) in Case No. 01400098.

Ms. Stewart and Excel USA sued Dr. Chen, her husband, Rui-Kang Zhang (“Mr. Zhang”), E. Excel Limited (“Excel Ltd.”), E. Excel International (Taiwan) Inc. (“Excel Taiwan”), Huan-Hsin Le (or “Mr. Le”), Extra Excel (Malaysia) SDM BHD (“Excel Malaysia”) and Hendrik Tjandra (or “Mr. Tjandra”) in the Fourth Judicial District Court, Case No. 01400201. Case No. 01400201 was consolidated with Case No. 01400098 on February 21, 2002.

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#### **IV. JURISDICTION**

Jurisdiction is pursuant to Utah Code Ann. § 78-2-2(3)(j).

#### **V. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

A. In connection with the admission of a recording of a telephone conversation (the “Conversation” or “Exhibit 104”):

1. Did Ms. Stewart fail to overcome the presumption of admissibility of relevant evidence because she did not establish that Exhibit 104 was created or used in violation of state or federal law?

STANDARD OF REVIEW: The trial court’s factual determinations are reviewed under a “clearly erroneous” standard. *See State v. Pena*, 896 P.2d 932, 935 (Utah 1994).

2. Was Exhibit 104 properly admitted as impeachment evidence against Mr. Hu?

STANDARD OF REVIEW: Admissibility determinations are reviewed for abuse of discretion and will not be reversed unless the trial court so abused its discretion that there is a likelihood that injustice resulted. *State v. Gomez*, 2002 UT 120, ¶ 12, 63 P.3d at 72, 75; *State v. Comer*, 2002 UT App 219, ¶ 11, 51 P.3d 55. Legal conclusions are reviewed for correctness, *State v. Quinonez-Gaiton*, 2000 UT App 273, ¶ 9, 54 P.3d 139, 142, but the Court will “presume the discretion of the trial court was properly exercised unless the record clearly shows to the contrary.” *State v. Widdison*, 2000 UT App 185, ¶ 45, 4 P.3d 100, 111.

3. Did Ms. Stewart waive objection to use of Exhibit 104 as evidence of her obstruction of justice?

STANDARD OF REVIEW: Legal conclusions are reviewed for correctness and factual findings for clear error. *Nunley v. Westates Casing Services, Inc.*, 989 P.2d 1079 (Utah 2000); *Angelos v. Russell*, 671 P.2d 774 (Utah 1983) (trial court’s findings given “considerable deference”); *Pledger v. Gillespie*, 982 P.2d 572 (Utah 1999).

4. Was it proper for the trial court to consider Exhibit 104 as evidence of Ms. Stewart’s contempt?

a. Is Ms. Stewart precluded from raising for the first time on appeal the claim that the court improperly considered Exhibit 104 as evidence of her contempt?<sup>1</sup>

STANDARD OF REVIEW: Appellate courts will not consider an issue raised for the first time on appeal absent plain error. *See Ong Int’l (U.S.A.), Inc. v. 11<sup>th</sup> Ave. Corp.*, 850 P.2d 447, 455 (Utah 1993); *State v. Olsen*, 860 P.2d 332, 333 (Utah 1993).

b. Is Ms. Stewart barred from objecting to use of Exhibit 104 since she introduced her own translation and admitted she had tried to mislead the Utah court?

STANDARDS OF REVIEW: *See* Standard of Review, Issue A(2).

B. Did the court properly strike Ms. Stewart’s pleadings?

1. Did Ms. Stewart fail to preserve the issue of the court’s authority?

STANDARD OF REVIEW: *See* Standard of Review, Issue A(4)(a).

2. Did the trial court have the authority to strike Ms. Stewart’s pleadings?

STANDARD OF REVIEW: The decision is reviewed for correctness, allowing the

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<sup>1</sup>Ms. Stewart does not identify in her Statement of Issues where she preserved the issue that she argues at pages 47-48 of her Brief—that the court impermissibly considered evidence admitted to impeach Mr. Hu as substantive evidence of her contempt. She made no such objection and did not preserve the issue. She even submitted her own translation.

trial court some discretion in the application of the law to given facts. *See State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1995).

3. Did the trial court properly strike Ms. Stewart's pleadings?

STANDARD OF REVIEW: Exercise of the contempt power is within the sound discretion of the trial court, and in the absence of capricious and arbitrary conduct, the reviewing court will not disagree. *Shipman v. Evans*, 2004 UT 44, ¶¶ 39-41.

4. Did Ms. Stewart fail to marshal the evidence to support her claim that the trial court abused its discretion in striking her pleadings?

STANDARD OF REVIEW: The factual findings will not be disturbed unless they are against the clear weight of the evidence. *Young v. Young*, 1999 UT 38, ¶ 15, 979 P.2d 338. Where a trial court's rulings on fact-dependent issues are challenged, this Court grants the court broader than normal deference. *See State v. Pena*, 869 P.2d 932, 936-38 (Utah 1994). Where appellant fails to marshal, the Court assumes all findings are adequately supported by the evidence. *Utah Medical Products, Inc. v. Searcy*, 958 P.2d 228, 233 (Utah 1998).

- C. Were Ms. Stewart's due process rights violated?

1. Did Ms. Stewart fail to preserve the issue of her right to a jury?

STANDARD OF REVIEW: *See* Standard of Review, Issues A(3) and A(4)(a).

2. Did Ms. Stewart fail to preserve the issue of the scope of the evidence considered by the trial court?

STANDARD OF REVIEW: *See* Standard for Review, Issue A(4)(a).

3. Were Ms. Stewart's due process rights impaired by Mr. Holman's



involvement?

a. Are Ms. Stewart's arguments concerning the Special Master misdirected and inappropriate in this appeal? *See* November 2002 Order (Addendum D).

b. Did Ms. Stewart fail to preserve this issue below?

STANDARD OF REVIEW: *See* Standard of Review, Issue A(4)(a).

c. Are the Contempt Orders supported by competent evidence in the record independent of Mr. Holman's involvement?

STANDARD OF REVIEW: The determination is reviewed for correctness, except for the necessary subsidiary factual determinations which are reviewed under a clearly erroneous standard. *See State v. Hubbard*, 2002 UT 45, ¶ 22, 48 P.3d 958, 962; *State v. Parra*, 972 P.2d 924, 926-27 (Utah Ct. App. 1998); *see Jeffs v. Stubbs*, 970 P.2d 1234; 1244 (Utah 1998).

## **VI. STATEMENT OF THE CASE**

On January 10, 2001, Dr. Chen obtained a Temporary Restraining Order ("TRO"). Addendum A. The TRO was extended on January 24, 2001. R. 14222:171. The First Preliminary Injunction Hearing began January 19, 2001, and concluded with the entry of a stipulated order on February 21, 2001 "Interim Order." Addendum B. In the summer of 2001, Dr. Chen filed two contempt motions against Ms. Stewart ("Contempt Motion(s)"). The first dealt with violations of the TRO and of the Interim Order, and the second dealt with obstruction of justice. R. 2074; R. 14305-07. Hearings on the Contempt Motions began October 25, 2001, R. 14244, and concluded June 26, 2002 ("OSC Hearings"). R. 14276.

On August 20, 2002, the trial court entered Findings of Fact and Conclusions of Law on the Contempt Motions (“Contempt Orders” or “Contempt Findings”). R. 14317. The trial court found Ms. Stewart in contempt for violating the TRO and the Interim Order, and also in contempt for obstructing justice, R. 14317: 119-26, and struck Ms. Stewart’s pleadings. R. 14317: 126. Ms. Stewart filed a Notice of Appeal on September 19, 2002. R. 8777. Dr. Chen filed a Motion to Dismiss the appeal. Addendum C. This Court found the Contempt Orders included elements of criminal contempt and would be treated as final. Addendum D.

## **VII. STATEMENT OF FACTS**

### **A. UNLAWFUL SEIZURE OF CONTROL OF EXCEL USA.**

Dr. Chen and Ms. Stewart are sisters. Dr. Chen is the youngest of five children born to Yung-Yeuan Chen (deceased) and Madam Chen. R. 14293: 170. She is married to Mr. Zhang. *Id.* at 172. They are the parents of the Zhang Children. *Id.* at 169.

Dr. Chen obtained a Ph.D in microbiology with an emphasis in immunology from Brigham Young University at the age of 26. *Id.* at 170. She utilized her education to develop products to enhance health through “nutritional immunology.” *Id.* at 171-2. Excel USA filed its Articles of Incorporation on July 20, 1987. R. 14338: Ex. 18. Dr. Chen was its only shareholder from incorporation until the end of 1995. R. 14338: Exs. 19, 20.

Dr. Chen served as its president and chairperson of its board of directors from the time of Excel USA’s incorporation. R. 14230: 83. In the early 1990s, Dr. Chen’s sister, Ms. Stewart, became the vice-president of Excel USA and Excel USA’s third director, and Dr.

Chen's parents left the Board. R. 14293: 30, 63; R. 14245: 5-6.

Excel USA's business of manufacturing and selling health products grew from approximately 20 product lines to well over 100 product lines. R. 14293: 184. Excel USA marketed its products to distributors exclusively through Territorial Owners in places such as Taiwan, The Phillippines, Hong Kong, Malaysia, and Singapore. *Id.* at 174, 184-85.<sup>2</sup>

At the time of Ms. Stewart's "coup," Excel USA had exclusive contracts with certain Territorial Owners. R. 14226: 32-34, 36-37, 99-101, 105, 109; R. 14293: 158-59, 175-78; R. 14339: Exs. 38, 39; R. 14222: 13-18, 108-110, 147, 152; R. 14293: 158-59; R. 14230: 56-59; R. 14338: Ex. 1. Ms. Stewart knew this. R. 14293: 158-59, 180.<sup>3</sup> With Dr. Chen's time principally devoted to marketing Excel USA's products and developing Excel USA's distributorship capabilities, Ms. Stewart's duties involved handling the day-to-day administrative operations of Excel USA. R. 14223: 70; R. 14228: 66; R. 14255: 10-12, 14.

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<sup>2</sup>Dr. Chen was Excel USA's spokesperson and symbolic representative for its products. Photographs and articles featuring her as founder and associating her with Excel USA products were featured prominently in the publications and promotional materials of both Excel USA and the Territorial Owners. R. 14230: 86-90. Consumers and distributors of Excel USA products associated Dr. Chen with the products. R. 14226: 39-40. Dr. Chen traveled tirelessly, promoting "nutritional immunology," speaking at conventions, directing seminars and conducting training sessions in the countries where Excel USA products were sold. R. 14222: 18-19, 67-68, 152-53; R. 14293: 185; R. 14230: 62-63; R. 14339: Ex. 76; R. 14344: Ex. 547.

<sup>3</sup>In the first eight months of 2000, Excel USA sold approximately US \$20 million worth of product (at least US \$100 million at retail) on an annualized basis to the Territorial owners in Asia. R. 14277: 93-94. For 1999, Excel Taiwan had retail sales of approximately US \$40 million, and approximately the same amount for the period from January through September 2000. R. 14226: 40-42, 125. Excel Malaysia had annual sales in 1997 of approximately US \$70 million, in 1998 of approximately US \$45 million, in 1999 of approximately US \$45 million, and in 2000 through October 31, of approximately US \$47 million. R. 14222: 19-22.

In late 1995, Dr. Chen elected to transfer ownership of Excel USA to her children and to also give Ms. Stewart a minority ownership interest. Her gift to Ms. Stewart was an expression of appreciation for Ms. Stewart's work with Excel USA and for her help in caring for the Zhang Children. R. 14230: 54-56. On December 30, 1995, Dr. Chen endorsed her Stock Certificate 0001, transferring her entire 6,000 shares to "various individuals." *Id.* Ex. 19. On that date, Excel USA issued four new Certificates, 0002-0005, of 1,500 shares each to Ms. Stewart and to each of the Zhang Children in their individual names. *Id.* Ex. 20. Collectively, the Zhang Children then owned a 75% interest in Excel USA. *Id.* Exs. 19, 20. The newly issued Certificates were left in the possession of Lynn Gilbert, a C.P.A. who performed accounting services for Excel USA. R. 14228: 56-57.<sup>4</sup>

The close association between Dr. Chen, her sister Ms. Stewart and her mother ended early in the year 2000, R. 14222: 49, 63; R. 14228: 73, when Ms. Stewart and Madam Chen tried to force Dr. Chen to divorce Mr. Zhang. The intensity of their feelings and the methods Madam Chen and Ms. Stewart utilized in seeking dominion over Dr. Chen cannot be adequately captured in a legal brief. R. 14230: 6-13, 73-75; 14235: 17-18; 14255: 86-88. Dr. Chen did not capitulate. R. 14230: 12.

In the fall of 2000 while Dr. Chen and her husband Mr. Zhang were out of the United States, Ms. Stewart purported to remove Dr. Chen and her husband Mr. Zhang as directors of Excel USA. R. 14338: Ex. 22. She then purported to appoint her own husband, Taig Stewart, and Madam Chen as new directors (with such, collectively, including Ms. Stewart,

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<sup>4</sup>At the same time, trust documents were presented to Dr. Chen by Mr. Gilbert and signed, but no property was placed in trust. R. 14338: Exs. 21, 24.

referred to as the “Rogue Board of Directors”). *Id.* The Rogue Board of Directors, through “Action by Written Consent,” then purported to remove Dr. Chen as president and her husband, Mr. Zhang, as secretary, and to install Ms. Stewart as president and her husband as secretary. *Id.* Ex. 23; R. 14293: 63. Ms. Stewart then proceeded to usurp control of all Excel USA operations as its putative president and CEO, until she was removed by the Interim Order. R. 14293: 124; R. 14244: 104; R. 14245: 5-9; R. 14255: 10-12.

Ms. Stewart claimed authority to vote her nephew’s and nieces’ shares as of September 1, 2000, but at such time did not have the Zhang Children’s shares in her possession. She later obtained possession of the Zhang Children’s Certificates as well her own Certificate from Mr. Gilbert who personally delivered the Certificates to her in late October or early November 2000. R. 14228: 56-64. Although Ms. Stewart took possession of the Zhang Children’s Certificates, the Certificates did not support her claim of authority to act because they were titled in the Zhang Children’s individual names. To solve this, shortly after having obtained the Certificates from Mr. Gilbert, Ms. Stewart claimed she “lost” her nieces’ and nephew’s Certificates (but not her own). She then executed three separate Affidavits, each bearing the date December 15, 2000, falsely stating she had lost or misplaced the Zhang Children’s Stock Certificates. *Id.* Exs. 25, 26, 27; *see id.* Ex. 20. Ms. Stewart then caused Excel USA to issue replacement Certificates, replacing the names of the Children on the new Certificates with her own name as purported trustee. R. 14338: Ex. 28.

Perhaps wary of the tenuous nature of this “control” (her nieces and nephew still had 75% ownership), Ms. Stewart called a “Special Meeting of the [Rogue] Board of Directors,”

purportedly held December 15, 2000, *id.* Ex. 29, to dilute the ownership interest of the putative beneficiaries. At this meeting Excel USA entered into a Stock Subscription Agreement with Ms. Stewart for the purpose of issuing an additional 3,200 shares to her so that her total shares would be 4,700 (or 51.1% ownership, as compared with a combined total of 4,500 for the Zhang Children, or 48.9 % ownership). *Id.* Excel USA then issued Certificate number 0006, for 3,200 shares, to Ms. Stewart, on December 15, 2000, *id.* Ex. 31, purporting to give her personal voting control of Excel USA. For unknown reasons, her plans changed. Based upon a “Special Meeting of the [Rogue] Board of Directors,” purportedly held January 6, 2001, Excel USA released Ms. Stewart from her obligations under the Stock Subscription Agreement, Exs. 32, 33, and a new agreement was made between Excel USA and Madam Chen for the issuance of 3,200 shares,<sup>5</sup> *id.* Exs. 32, 33, 34, so that Ms. Stewart and Madam Chen would together control Excel USA.

Simultaneously, Ms. Stewart was actively disrupting Excel USA’s relationship with the Territorial Owners in Asia and undermining Excel USA itself: *first*, she cut off the flow of product to the Territorial Owners in Taiwan and Malaysia in order to weaken the distribution systems of the Territorial Owners who accounted for 90% of Excel USA’s worldwide sales; *second*, she transferred millions of dollars to Asia to the custody of Richard Hu and Sam Tzu, former managers of Territorial Owners, for the purpose of financing the establishment of distribution networks to compete with and undermine the existing network

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<sup>5</sup>Dr. Chen and her attorneys did not learn about the “mischief” associated with reissuing the Zhang Children’s shares in Ms. Stewart’s name and the Stock Subscription Agreements until after Dr. Chen commenced the litigation. R. 523-24. The shares contemplated to be issued to Madam Chen were never issued.

(“Rogue Distributors”); *third*, she caused millions of dollars in stolen Excel USA product to be shipped to the Rogue Distributors, depleting Excel USA’s assets and cash-flow, undercutting Excel USA’s sales and damaging Excel USA’s and the Territorial Owners’ good will; *fourth*, when it became evident that Ms. Stewart would lose control of Excel USA, she sabotaged and converted substantial quantities of Excel USA property, including intellectual property; *fifth*, she established (with Madam Chen’s assistance) an entity known as Apogee (on the broken back of Excel USA), to manufacture and distribute the same types of health supplements Excel USA manufactured and distributed for the purpose of competing with Excel USA, principally in the Asian markets.<sup>6</sup> Further information on each of these events is now provided.

**B. UNLAWFUL EFFORTS TO REPLACE TERRITORIAL OWNERS AND TO DESTROY EXCEL USA.**

**1. CUT OFF OF PRODUCT TO TERRITORIAL OWNERS.**

After usurping control, Ms. Stewart instructed Excel USA employees to not ship pending orders of product to the Territorial Owners in Malaysia and Taiwan. R. 14244: 87-89. Excel USA did not fill or ship confirmed orders of product to the Territorial Owners in

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<sup>6</sup>Ms. Stewart also brought litigation in Hong Kong against Dr. Chen, Dr. Chen’s husband and others in case no. 558 of 2001 in the High Court of the Hong Kong Special Administrative Region, Court of the First Instance, which was dismissed under a Master Settlement Agreement dated May 29, 2001, R. 14346: Ex. 534; and in case no. 2493 of 2001, which was dismissed pursuant to a Judgment dated August 30, 2001 (the “Hong Kong Case”). Ms. Stewart submitted a number of sworn Affirmations in those parallel proceedings which were admitted in these proceedings as admissions against interest, for impeachment or both, as further discussed below.

either Malaysia<sup>7</sup> or Taiwan<sup>8</sup> from approximately September 2000 to March 2001. Ms. Stewart confirmed receipt of orders from the Territorial Owners to deceive them from realizing that product shipments had been cut off until late in the fall 2000. R. 14244: 121-23; R. 14245: 66-67, 37-41. The consequences were devastating in that by January 15, 2001, Excel Malaysia's traditional five-month inventory supply was essentially depleted, and it found itself in the position of having received orders and payments for product from down-line distributors but unable to fill the orders. R. 14222: 32-36; R. 14338: Ex. 2. The refusal

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<sup>7</sup>Excel Malaysia, in accordance with established practice, R. 14222: 23-24, 27, 146-51, submitted four orders in September 2000 for Excel USA products, and Ms. Stewart confirmed receipt in the amount of US \$1.45 million, but did not ship the orders. R. 14222: 24-25, 56-57, 61-64; R. 14338: Ex. 3. Excel Malaysia submitted four orders in October 2000 for Excel USA products, and Ms. Stewart also confirmed receipt in the amount of US \$1.55 million, *see, e.g.* R. 14343: Ex. 406; R. 14341: Ex. 228 (Addendum G and H), but did not fill the orders. R. 14222: 24-25, 57-58, 64; R. 14338: Ex. 4. Excel Malaysia similarly submitted four orders for Excel USA products in the amount of U.S. \$1.8 million in November 2000 but received no confirmation, and Excel USA did not fill these orders. R. 14222: 26, 64. By January 1, 2001, Excel Malaysia had 12 outstanding orders for Excel USA product that Ms. Stewart had refused to allow Excel USA to fill. R. 14222: 24; R. 14338: Exs. 3, 4.

<sup>8</sup>Excel Taiwan's situation was similar. Consistent with the established practice, R. 14226: 44-45, 107, 109; R. 14293: 178, Excel Taiwan submitted five orders for Excel USA product during October 2000 in the amount of US \$441,440.86, and Ms. Stewart confirmed receipt, but did not fill the confirmed orders. R. 14226: 54-55, 58-60; R. 14339: Ex. 41. Excel Taiwan submitted five product orders in November 2000 to Excel USA in the total amount of US \$460,895.61, and Ms. Stewart confirmed receipt but did not fill these orders. R. 14226: 54-55, 58-61; R. 14339: Ex. 42. On January 2, 2001, Excel Taiwan submitted four product orders to Excel USA in the amount of US \$79,940.20. Ms. Stewart confirmed receipt and represented that the shipment would consist of 18 pallets of product, but she did not fill these orders. R. 14226: 54-55, 58-61; R. 14339: Exs. 44, 48.



to ship to Excel Taiwan had similar devastating effects on Excel Taiwan. R. 14226: 52-54.<sup>9</sup>

Ms. Stewart's strategy was in part intended to cause down-line distributors of the Territorial Owners to defect to the Rogue Distributors who had served as managers for the Territorial Owners in The Philippines and in Hong Kong. R. 14247: 20-35, 37-41; R. 14341: Ex. 228, at 6, 22 (Addendum H).<sup>10</sup> Ms. Stewart's actions caused Excel USA to breach its exclusive distribution contracts with Excel Taiwan, Excel Malaysia, Excel Hong Kong and Excel Philippines, *see* R. 14338: Ex. 1; 14339: Ex. 38, leaving these entities without any available source of Excel USA's products. R. 14300; R. 14317, ¶ 71. Ms. Stewart thereby exposed Excel USA to the risk of many millions of dollars in damages. R. 14300.

2. TRANSFER OF MILLIONS TO ESTABLISH ROGUE DISTRIBUTORS.

Ms. Stewart recruited Messrs. Hu and Tzu to establish Rogue Distributors in The Philippines, Hong Kong, Taiwan, and elsewhere. R. 14245: 17, 20-34; R. 14247: 117-21. To effect this part of her scheme, Ms. Stewart used what were ostensibly third-party bank accounts she had been instrumental in establishing. One of these accounts was in her

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<sup>9</sup>There was no shortage of product to fill the confirmed orders from Excel Malaysia and Excel Taiwan. The products shipped to Messrs. Hu and Tzu (Rogue Distributors) were the same products Messrs. Le and Tjandra had historically ordered. R. 14293: 158; R. 14245: 21-22.

<sup>10</sup>Parenthetically, Ms. Stewart caused certain adulterated product to be shipped and it arrived in Taiwan on January 9, 2001. Mr. Le was concerned that Excel USA, under Ms. Stewart's guidance, was changing the manufacturing and expiration dates on products, so he wanted quality assurance. If the products were contaminated or of poor quality, distributors would refuse to purchase product and the entire network would suffer. Mr. Le hired a laboratory to conduct testing on the products. Based upon the testing, Mr. Le returned the product to Excel USA. R. 14226: 70-78, 116-17.

Taiwanese aunt's name and one was in her Taiwanese uncle's name. The accounts were established at Central Bank in Provo, Utah.<sup>11</sup> Substantial sums were deposited into those accounts (\$8 million or more). She wired substantial amounts from these accounts to Messrs. Hu and Tzu for use in establishing the Rogue Distributors.<sup>12</sup>

3. SHIPMENT OF STOLEN PRODUCT TO ROGUE DISTRIBUTORS.

Ms. Stewart shipped Excel USA products to the Rogue Distributors in The Philippines, Hong Kong and Taiwan, without even a pretext for payment, at the time Excel USA had exclusive contracts with others (and supposedly was experiencing severe cash flow problems). R. 14293: 128-132; R. 14245: 53). R. 14244: 66-77, 105-106; R. 14341: Exs.

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<sup>11</sup>Ms. Stewart attempted to conceal her activities through the use of nominees. Her use of nominees is characteristic of her business dealings. This practice is illustrated by her use of her aunt and uncle to establish bank accounts after having persuaded Dr. Chen to assist her, saying the accounts were set up for the aunt's and uncle's benefit. R. 14293: 110. This is also illustrated by the use of Mr. Uy to front for the Rogue Distributor in The Philippines and to serve as its nominal owner. Mr. Hu would "loan" money 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." R. 14245: 50; R. 14340: Ex. 104, 276-77. Another example of Ms. Stewart's practice was the use of her friend's name, Ms. Shen, and her home address, to open a bank account through which Ms. Stewart and her mother funneled millions of dollars used to establish Apogee. R. 14344: Ex. 528; R. 14264: 5-10, 76-79.

<sup>12</sup>Ms. Stewart caused monies to be wired at least as follows: on November 30, 2000, \$100,000 was wired from her uncle's account to Mr. Tzu. R. 14342: Ex. 274, attachment B; on December 12, 2000, \$1,200,000 was wired from her uncle's account to Mr. Tzu. R. 14342: Ex. 274, attachment B; on December 19, 2000, \$400,000 was wired from her aunt's account to Mr. Hu. R. 14342: Ex. 274, attachment C; on December 19, 2000, \$1,000,000 was wired from her aunt's account to Mr. Tzu. R. 14342: Ex. 274, attachment C. Ms. Stewart was listed on the wire instructions as the "contact person." R. 14230: 51-53; R. 14250: 21-25, 30-33; R. 14342: Ex. 274A.

205, 207, 214, 216 and 217.<sup>13</sup> R. 14245: 23, 32.<sup>14</sup>

Concealed shipments were also made. Ms. Stewart caused Shannon River, a nominee company purportedly owned by Taig Stewart's sister, Shannon Heaton, to export stolen Excel USA products to Rogue Distributors. R. 14341: Exs. 214, 216, 217<sup>15</sup> Under direction from Ms. Stewart, Ms. Barclay caused Shannon River to ship Excel USA products to Mr. Tzu. These shipments were to be used to undermine the sales of Excel USA and the

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<sup>13</sup>Ms. Stewart denied that she was aware of specific shipments bound for the Rogue Distributors, R. 14245: 29, but the trial court found that denial wholly unconvincing, given that all product orders were received at a fax machine in Ms. Stewart's locked office and were not released to anyone else until Ms. Stewart personally reviewed and approved the orders. *See* R. 14254: 234; R. 14244: 54, 57; R.14245: 59-60.

<sup>14</sup>The first shipment to Mr. Tzu was invoiced December 29, 2001, to Extra Excel International (HK) Limited. The shipment was loaded on ship in Los Angeles on January 15, 2001, *but remained in the control of Excel USA and could have been stopped or redirected*. The invoiced amount was HK \$914,916.75. R. 14245: 9-15; R. 14341: Ex. 205. Ms. Stewart did not re-call or redirect the shipment represented by Exhibit 205 at any time. The shipment to Richard Hu was invoiced January 5, 2001 to Excellent Essentials International Corp. The shipment was loaded on ship in Los Angeles on January 19, 2001, *but remained in the control of Excel USA and could have been stopped or redirected*. The invoiced amount was US \$830,752.50. R. 14341: Ex. 207. Ms. Stewart did not re-call this shipment represented by Exhibit 207 at any time.

<sup>15</sup>Shannon River never had a directors meeting. R. 14317:107. It had no agreement, written or otherwise, with Excel USA that it would serve as an exporter for or on behalf of Excel USA. Ms. Barclay identified Ms. Stewart's home address as that of Shannon River on the invoices to Mr. Tzu. After her scheme was exposed, Ms. Stewart claimed that the Shannon River entity belonged to Excel USA, and not to Shannon Heaton. She further claimed that Excel USA owned the accounts receivable that were in the name of Shannon River, which included the right to collect on the invoices represented by R. 14341: Exs. 214, 216 and 217. No records at Excel USA existed that would corroborate Ms. Stewart's claim. The Shannon River 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 she found out that Excel USA had learned of the invoices represented in R. 14341: Exs. 214, 216 and 217. R. 14250: 52-59, 156-57.

Territorial Owners by “dumping” the product in strategic markets. R. 14244: 66-77, 110-11; R. 14341: Exs. 214, 216 and 217.<sup>16</sup>

Prior to leaving Excel USA, Ms. Barclay removed from her computer all files referencing or relating to Shannon River and she took from Excel USA’s premises all Shannon River records. R. 14341: Exs. 214, 216 and 217. Two or three weeks later, Ms. Barclay delivered all of the Shannon River documents and files to Ms. Stewart at her home. She explained she gave the documents and records to Ms. Stewart because, “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 claims she did not talk with Ms. Stewart when she delivered the documents, except to say, “[h]ere it is.” R. 14244: 114, 119-120, 124-26.<sup>17</sup>

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<sup>16</sup>The evidence of concealment and intentional misappropriation by Ms. Stewart utilizing Shannon River is overwhelming and un rebutted. On February 23, 2001, Shannon River, 1966 S. Laguna Vista Drive, Orem, Utah, 84058 (the address to Ms. Stewart’s home), 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. R. 14244: 66-71, 110-11; R. 14245: 52-53; R. 14341: Exs. 214 and 215. On February 28, 2001, Shannon River, 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 would not say whether the order came in to Excel USA before or after February 21, 2001; she testified orders typically came in one to four weeks before products were invoiced and shipped. The freight-forwarder received the shipment the same day. R. 14244: 100-103; R. 14341: Exs. 215 and 216. On March 6, 2001, Shannon River, 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. R. 14341: Ex. 217.

<sup>17</sup>If not for the fortuitous mention of Shannon River’s name by one of the staff at Excel USA, this part of the scheme may never have been discovered. R. 14256: 120-21.

Excel USA received no payment or consideration for the Excel USA's products that Ms. Stewart shipped to Messrs. Hu and Tzu. She made no effort to arrange with Messrs. Hu and Tzu for payment for this product or to create any record showing Excel USA was owed money. R. 14245: 6-20, 28-32, 103-04. Ms. Barclay did not prepare any invoices from Excel USA to Shannon River and did not account for these shipments in any way on the records of Excel USA. R. 14244: 76-77, 110-11; R. 14341: Exs. 214, 216 and 217.

#### 4. SABOTAGE OF EXCEL USA.

As a result of the evidence presented in the First Preliminary Injunction Hearing, it became clear "there was a strong possibility that Jau-Hwa would be removed as president of the company," R. 14262: 188. Faced with likely loss of control, Ms. Stewart tried to destroy Excel USA by orchestrating a number of events calculated to deliberately damage and disrupt Excel USA's operations.<sup>18</sup> Some of what she did follows.

Beverly Warner, an employee loyal to Ms. Stewart,<sup>19</sup> turned off the surveillance system that recorded activity at Excel USA, R. 14252: 56, 96, 160-70; R. 14248: 14, which made it possible for Ms. Stewart and her cohorts to commit acts of sabotage and theft at

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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.

<sup>18</sup>The trial court found that all of the surreptitious events explained below were carried out by persons acting under Ms. Stewart's direction and control, on her behalf and in her stead as her agents or nominees. R. 14317: ¶ 114.

<sup>19</sup>Sometime prior to the entry of the Interim Order, Ms. Warner told another Excel USA employee, "I would go to jail for Jau-hwa"; "I would lie for her"; and, "If the company is awarded to Jau-Fei, I'm out the door." R. 14244: 182.

Excel USA's premises without the risk that such activities would be caught on camera.<sup>20</sup>

Ms. Warner conducted the first known of the many suspicious document removals from Excel USA's offices in late January 2001, by removing numerous documents from the Excel USA facility and delivering them to Ms. Stewart's residence. She did not return any of such documents to Excel USA. R. 14252: 66-69; R. 14286: 3-4.

To substantiate her pretextual assertion that Excel USA had no written contracts with the Territorial Owners in Taiwan and Malaysia (purportedly relieving her of the obligation to ship product to them), Ms. Stewart, in the latter part of January 2001, caused Ms. Warner to remove Excel USA's written contracts with the Territorial Owners from Excel USA's files. R. 14248: 26-31, 39-40, 69-70. Ms. Stewart secreted the contracts in her own files off of Excel USA's premises and refused to produce them to Excel USA until February 2002. R. 5828: Ex. F.<sup>21</sup>

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<sup>20</sup>Although Ms. Warner claimed her reason for turning off the surveillance system was because the available video tapes were worn out, the court found that explanation was not credible for a number of reasons: there was a full box of approximately 100 new, unopened tapes in the surveillance room. R. 14252: 167; R. 14254: 169-70, 196; Ms. Warner never replaced the tapes nor turned the system back on during the remainder of her tenure at Excel USA, R. 14252: 66, despite the "highly unusual" events as set forth below. *See* R. 14252: 60-70; R. 14252: 22; R. 14254: 114-16; and R. 14252: 155-56, 171.

<sup>21</sup>Ms. Stewart's testimony during the First Preliminary Injunction Hearing created the false 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." R. 14293: 133-35. Ms. Stewart also gave the false impression that shipments to the Territorial Owners in Taiwan and Malaysia would resume if they simply signed "new" contracts with Excel USA. R.14339: Ex. 45. Ms. Stewart's assertion was revealed as a pretext by her lawyers in correspondence to counsel in Hong Kong: "The client has no objection to your dealing

The proof of theft and destruction of documents and records was substantial and un rebutted.<sup>22</sup> The theft and destruction was carried out in various ways. For example, Mary Spencer, an Excel USA employee, properly assisted lawyers representing Ms. Stewart and Excel USA in assembling and removing documents from the premises for discovery purposes. R. 14262: 60-63; R. 14286: 3-4; R. 14252: 67-68. She testified the documents assembled and removed were not what was returned.<sup>23</sup>

Electronic records were also deleted. Ms. Warner deleted electronic data, such as e-mails to and from Ms. Stewart, and other electronic files from employees' computers. R. 14262: 186-90; R. 14254: 203-10, 219-20, 233; R. 14286: 132, 138-39; R. 14244: 156.<sup>24</sup>

A large quantity of Excel USA documents and property was removed or

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with [Sam or Jason Tzu] because *the existing distributor will not be given the opportunity to enter into the new distributorship agreement you are reviewing.*" R. 14345: Ex. 572, at 2 (emphasis supplied).

<sup>22</sup>See also R. 2962, 2866, 2844, 2832, 2825, 2822, 2816, 2811, 2807, 2798, 2957, 2793, 2790, 2787, 2783, 2838, 3670 and 3416, Affidavits and Exhibits setting forth the specific documents and types of documents that went missing. (See Addendum E.)

<sup>23</sup>Ms. Spencer reported substantial and pervasive discrepancies between what the boxes contained when they were taken and what was in the boxes when they were returned. With respect to the first boxes returned, Ms. Spencer testified that the "things that had been sent off were useable files that were current or within the year that I kept in my office. . . . The things that came back were five and six and seven years old. . . . I started organizing them in my office by year, and that's how I found out that there wasn't complete years of anything." R. 14246: 70-71. The second group of returned boxes had even more documents missing. According to Ms. Spencer, "those boxes had things like old telephone books and just old Sunrider sample stuff and catalogs." R. 14246: 66.

<sup>24</sup>Ms. Stewart's explanation for deleting the computer files was to "protect" employees in the event there was new management, and to prevent Dr. Chen's attorneys from accessing the information. R. 14254: 118-20; R. 14244: 150-52, 156; R. 14286: 132, 138-39; R. 14262: 187, a clear example of spoliation.

“disappeared” from the Excel USA facility, as inventoried by Excel USA employees in Addendum E. R.14344: 66-72.<sup>25</sup>

Ms. Stewart, also during February 2001, instructed an employee to file original product registrations in Taiwan, Malaysia and The Philippines in Ms. Stewart’s name personally, and to switch the U.S. registrations to “her personal name instead of the company’s name.” R. 14244: 158-59.<sup>26</sup>

Ms. Spencer discovered the non-compete agreements that Excel USA employees were required to sign had been removed from employees’ personnel files. The files were kept in Ms. Spencer’s office, and Ms. Warner and Ms. Stewart were the only persons, beside Ms. Spencer, with keys. R. 14262: 54-60, 114; R. 14252: 64; R. 14252: 40.<sup>27</sup>

Taig Stewart removed the items set forth in R. 14344: Ex. 523 (Addendum F), and

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<sup>25</sup>Such items included computer equipment, office furniture, fax machines, televisions and VCRs, file cabinets, desks and chairs, scientific reports (analytical reports, processing reports, toxicology reports, stability studies and laboratory reports) that were kept in Ms. Stewart’s office that was “always locked” when Ms. Stewart was not present, and large quantities of product labels. R. 14245: 122-23; R. 14244: 136-37; R. 14286: 127.

<sup>26</sup>Also during February 2001, Ms. Stewart had Gina Lipe (or “Ms. Lipe”), another Excel USA employee, take three boxes of files from Ms. Stewart’s office to her car, R. 14286: 124-25, and had Ms. Lipe stay late into the evening to pull all of Excel USA’s original wire payment and invoice records for individual material suppliers. She has not seen them since. R. 14286: 125-27.

<sup>27</sup>When told of the missing agreements, Ms. Warner told Ms. Spencer “not [to] worry about it. They weren’t binding anyway.” R. 14262: 56-57. Less than two months later, Ms. Warner, Taig Stewart, Dale Stewart, Ms. Barclay and Brian Hymas were all overtly working on behalf of Ms. Stewart’s Apogee enterprise. Ms. Stewart herself admitted that those individuals would not legally have been able to provide her any assistance under the terms of the noncompetition agreements. R. 14250: 129; R. 14252: 69.



stored most of such in the seven-car garage he and his wife used.<sup>28</sup> He also removed every paper file from his office, which consisted of approximately a dozen boxes, and placed them in the basement of the residence where he lived with Ms. Stewart and Madam Chen. R. 14255: 25, 28. Mr. Hymas<sup>29</sup> removed additional property belonging to Excel USA.<sup>30</sup>

Ms. Stewart, with the help of others, removed 20 to 30 boxes of documents which soon joined the dozen boxes removed by Taig Stewart in the basement of the residence where the Stewarts lived. R. 14255: 27-29.<sup>31</sup>

Dale Stewart and Ms. Barclay removed property of Excel USA from the Excel USA

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<sup>28</sup>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-ROMs, computer programs) and royalty-free stock photography that had been purchased by 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. All of the items were the property of Excel USA. Most of the equipment he and Mr. Hymas removed from Excel USA's premises was stored 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. R. 14255: 24-26, 31, 107-08, 126-30, 134; R. 14262: 11-28, 46.

<sup>29</sup>Taig Stewart described Mr. Hymas as a good friend of Ms. Stewart's family and "like a little brother" to Mr. Stewart himself. R. 14255: 62.

<sup>30</sup>He removed two Epson 9000 printers, a personal computer, company files that were on the computer, an art table, a laminator, scissors and knives, and similar items from Excel USA's art department. R. 14252: 158; R. 14255: 62-63; R. 14262: 27. The printers along with other items he removed were also kept in the seven-car garage. R. 14255: 62-63; R. 14262: 17, 26-27, 46.

<sup>31</sup>Ms. Stewart removed all of the files from her office with the assistance of Mr. Hymas. She did not distinguish between personal and company files. R. 14250: 139-43. Ms. Stewart testified on November 27, 2001, during the OSC Hearings, wherein she admitted that ¶ 41 of her Third Affirmation in the Hong Kong Case (Addendum G)--the assertion that she had never ordered anyone to remove records belonging to the company--was false. R. 14250: 140-41.

facility. R.14262: 123-42; R. 14295: 130-35; R. 14341: Ex. 215.<sup>32</sup>

The 74 cactus freezers containing perishable products were unplugged, turned off, or turned “down,” and when this problem was corrected one day, similar sabotage was repeated. R. 14257: 63-65, 78-79.

Commencing February 17, 2001, Ms. Stewart’s sister, Ms. Smith, leased a portion of a warehouse (the “ATL Warehouse”) for \$132,000,<sup>33</sup> located near Excel USA’s offices. R. 14342: Ex. 278.<sup>34</sup> Beginning at approximately 3:00 or 4:00 p.m. on Sunday 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

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<sup>32</sup>Dale Stewart testified at the OSC Hearings that he had assisted Ms. Barclay in carrying at the most “three or four” boxes to her home. R. 14295: 130-32. On February 23, 2001, however, he assisted Ms. Barclay in transporting approximately 16 boxes from Excel USA’s premises to Ms. Barclay’s home. R. 14341: 215, at 10-11. He claims that he did not know what was in the boxes. R. 14295: 130-32.

<sup>33</sup>In her initial Answer to the Third-Party Complaint, Ms. Smith implicated her mother Madam Chen in her decision to rent the facility, “affirmatively alleg[ing] that she was asked to lease the warehouse by her mother . . . and that she was not given an explanation as to the purpose of the warehouse.” R. 5607, ¶ 51. Two weeks later, Ms. Smith had a change of heart, and attempted to distance her mother from the lease transaction. (From September 1, 2000 to February 21, 2001, Madam Chen purported to serve as a director—and fiduciary--of Excel USA.) In her deposition, Ms. Smith said the lease had “[n]othing to do with any family member.” Instead, she asserted she had rented the facility for use as a salad dressing factory. R. 14257: 32-33, 51. Ms. Smith also admitted she had never acquired manufacturing equipment or raw materials, never used the warehouse for making salad dressing, never hired an architect or structural engineer, never talked with anyone about zoning ordinances governing use of the warehouse, and that the one-year lease provided insufficient time to recoup the investment in a capital-intensive manufacturing operation because the rental price of \$132,000 was “too expensive.” R. 14257: 32, 41- 46.

<sup>34</sup>Shortly after the lease was entered, windows in the leased portion of the ATL Warehouse were covered with dark material to prevent looking inside. R 14262: 143.

the ATL Warehouse in Excel USA's trucks. R. 14262: 130-135.<sup>35</sup>

The calculated, unlimited efforts to discredit and destroy even included having another "loyal" employee, Mr. Hymas, place a number of rodents in the Excel USA warehouse, after the fact, as a pretext<sup>36</sup> to justify the prior removal of Excel USA product to the ATL Warehouse, and to jeopardize Excel USA's relationship with the FDA. R. 14245: 113-15; R. 14254: 113-16, 243; R. 14343: Ex. 415, at 78; R. 14262: 237-38, 241; R. 14257: 55, 69, 72; R.14252: 10

5. COMPETITION WITH EXCEL USA.

Madam Chen provided Ms. Stewart millions of dollars to assist her in establishing Apogee. The steps taken, all through nominees, included setting up Apogee, purchasing land, constructing a manufacturing facility, and acquiring manufacturing equipment. Ms. Stewart also used agents including Dale Stewart, Ms. Barclay, Ms. Warner, Mr. Hymas and Taig Stewart. R. 14245: 79-95; R. 14250: 79-82, 129-131; R. 14247: 145-97; R. 14264: 11-56, 63-78; R. 14341: Ex. 262.

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<sup>35</sup>Approximately 125 pallets of Excel USA products were moved to the ATL Warehouse. R. 14262: 123-42; *see also* 14341: Ex. 215 (establishing transfer of product from the ATL Warehouse via semi truck/trailer to an exporter on February 21, 2001, for shipment to a Rogue Distributor); R. 14262: 143, 145-47, 157-58.

<sup>36</sup>It was not company procedure to remove product from a warehouse when rodents were found. R. 14343: Ex. 415, at 78; R. 14264: 241. Moreover, there was no evidence of rodents in Excel USA's warehouse prior to the removal of product. R. 14257: 72. The type of product that was removed—all in glass bottles or steel drums—was not subject to rodent infestation. R. 14252: 10; R. 14262: 216. Finally, Ms. Warner left the facility without setting the alarms to accommodate Mr. Hymas' placement of the domesticated rodents, which were found there in large numbers the next day. R. 14257: 55, 62, 69; R. 14262: 237-38; R. 14254: 114-16.

Outside professionals having relationships with Excel USA were recruited to join Ms. Stewart shortly after this date.<sup>37</sup> Ms. Stewart also used Excel USA employee Dale Stewart (while he was employed with Excel USA), to begin acquiring equipment for manufacturing food-type materials, including capsule products. R. 14247: 144-46.<sup>38</sup> When purchased, this equipment was delivered to the ATL Warehouse. R. 14295: 105; R. 14250: 77-81; R. 14247: 145-97; R. 14341: Ex. 262; R. 14295: 95-105, 173; R. 14247: 166.

Ms. Stewart selected a site on which to construct the new manufacturing facility. R. 14250: 62-63; R. 14252: 107-36; R. 14343: Ex. 419.<sup>39</sup>

Westland Construction (or “Westland”) was hired as the general contractor for what would be known as the “Scenic West” project. R. 14249: 14-18; R. 14249: 15-18; R. 14249:

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<sup>37</sup>Immediately following Ms. Stewart’s removal, Dr. Murray, a professor at BYU and a paid consultant for Excel USA, immediately tendered his resignation as Associate Research Director for Excel USA. R. 14257: 97-99, R. 14344: Ex. 524. On February 26, 2001, Dr. O’Neill, also a professor at BYU and a paid consultant for Excel USA, faxed a letter terminating his consulting agreement with Excel USA. R. 14257: 131-34.

<sup>38</sup>Beginning in April 2001, Madam 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. R. 14295: 121-23. Dale Stewart was deposed on November 15, 2001. During his deposition, he lied by not disclosing that he had been receiving approximately \$3,000 cash per month beginning April 2001 from Madam Chen. He later admitted the lie. R. 14295: 115-16.

<sup>39</sup>On March 5, 2001, \$3.439 million was wired into the nominee Central Bank account in the name of a friend of Ms. Stewart, Ms. Shen. R. 14264: 10-11, 16-18, 20-24; R. 14344: Ex. 528 (bates AP 901). On March 12, 2001, \$1,209,144.14 was wire transferred out, R. 14344: Ex. 528, for the purchase of approximately ten acres of land by nominee Lung Chaum Kuo. Ms. Stewart personally negotiated the purchase of this property. R. 14250: 65-67; R. 14264: 12-14; R. 14343: Exs. 419, 420, 421, 428 (bates AP901); R. 14252: 107-36.

5-19, 21-22, 30-31, 45-47, 95, 97-99; R. 14250: 67-71; R. 14343: Ex. 419.<sup>40</sup>

On April 17, 2001, at Ms. Stewart's instruction, Ms. Warner applied with the State of Utah to reserve the name "Apogee, Inc." R. 14262: 10-12; R. 14250: 83-86; R. 14252: 73-76; R. 14248: 9-11; R. 14255: 18; R. 14343: Ex. 400.<sup>41</sup> On May 10, 2001, Ms. Stewart caused Scott Tawzer ("Mr. Tawzer") to set up Apogee. R. 14250: 81-83.<sup>42</sup> In June or July 2001, Apogee revealed its product line.<sup>43</sup>

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<sup>40</sup>Westland was paid in a manner calculated to disguise Ms. Stewart's involvement. R. 14249: 22-28, 93-94, 100, 110; R. 14343: Exs. 425 and 426. The facility Ms. Stewart caused Westland to construct consisted of approximately 100,000 square feet.

<sup>41</sup>Messrs. Hu and Tzu at Ms. Stewart's direction registered the Apogee name and the trademark in The Philippines and Hong Kong respectively. R. 14245: 82-85.

<sup>42</sup>Mr. Tawzer was Bryan Hymas' brother-in-law. He was induced to play the same nominee role with respect to Apogee that Ms. Heaton had played with respect to Shannon River. R. 14245: 86-89; R. 14250: 82-83, 88-92. At Taig Stewart's request, Westland hired the roofing company Scott Tawzer owned to be the roofing subcontractor for the Scenic West warehouse construction. R. 14249: 19-21.

<sup>43</sup>On July 24, 2001, Ms. Stewart signed her Third Affirmation in the Hong Kong Case in which she stated:

This brings me to the . . . 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.

Addendum G, ¶ 37 (emphasis supplied). On August 1, 2001, Ms. Stewart signed her Fourth Affirmation in the Hong Kong Case. Ms. Stewart stated therein:

*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 any competing business in Utah, surely he would have little difficulty in obtaining substantial evidence. . . .*

Taig Stewart became the art director for Apogee, filling the same position he had at Excel USA. He designed Apogee's logo and the labels for the Apogee products. R.14295: 107-10; R. 14255: 13-14, 16-18, 116-17, 139; R. 14344: Ex. 529 (Bates AP000778-79); R. 14343: Ex. 417.

On August 15, 2001, Mr. Tawzer signed an "Exclusive Contract" with Ultimate Formulations, Inc. dba Best Formulations ("Best") a California company. The contract appointed Best as the exclusive contract manufacturer of Apogee products. R. 14344: Ex. 529 (bates AP000892). Best would contract-manufacture products until Apogee's manufacturing facility came on line. R. 14250: 113-16; R. 14247: 52-53; R. 14256: 59-60.

In an "Exclusive Contract," notarized by Ms. Warner on September 5, 2001, Mr. Tawzer granted Apogee Essence International Philippines, Inc., Mr. Hu's company, the exclusive right to distribute Apogee's products in The Philippines. R. 14344: Ex. 529.

In early October 2001, Drs. O'Neill and Murray, on behalf of Apogee, traveled to Best's manufacturing facility in California for an inspection. R. 14250: 113-16; R. 14247: 52-53; R. 14256: 59-60. They also traveled to Malaysia, Singapore, The Philippines, Hong Kong, and Taiwan where they met with the same people they had met with during their trip in June 2001.<sup>44</sup> R. 137-38; R. 14257: 106-09.

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Addendum H, ¶ 42 (emphasis supplied). Ms. Stewart later acknowledged that at the time she signed her Fourth Affirmation, she was in the middle of setting up a competing business in Utah, and at that time the land had been purchased, the building was under construction, she had ordered equipment and raw materials, and she had organized Apogee. R. 14250: at 38-39.

<sup>44</sup>During June 2001, Drs. O'Neill and Murray traveled together to Malaysia, Singapore, The Philippines, Hong Kong, and Taiwan. Mr. Hu and Excellent Essentials

A promotional brochure for USA Apogee, R. 14341: Ex. 252, was released in the fall of 2001. The brochure utilized photographs Excel USA had purchased and previously used in its advertisements and publications, and were part of the Excel USA intellectual property Taig Stewart had taken from Excel USA's premises. 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's consultants, Drs. O'Neill and Murray. And, the brochure displayed and extolled the physiological virtues of nine capsule products Apogee would be marketing. R. 14255: 31-45; R. 14341: Ex. 253a.<sup>45</sup>

Shortly before Thanksgiving of 2001, Mr. Tzu ordered Apogee products through Ms. Warner for shipment to Taiwan. Ms. Warner arranged with Best to manufacture nine separate products and a total of 80,000 Apogee product units (bottles), that were sent to

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(Philippines) had invited them to The Philippines, and Jason Tzu, Mr. Tzu's brother, had invited them to Hong Kong. R. 14257: 147-51, 173.

<sup>45</sup>On September 17, 2001, a paid commercial aired on television in The Philippines relating to Apogee Essence International Phils., Inc. ("Apogee Essence"). The paid commercial contained images of Excel USA products. R. 14254: 89-91; R. 14343: Exs. 423, 423A. As of September 29, 2001, Excel USA products that had been manufactured by Excel USA at 1198 North Spring Creek, Springville, Utah were available for distribution through Apogee Essence without Excel USA's approval. R. 14254: 91-92; R. 14254: 95-101, 103; R. 14343: Ex. 424.

Taiwan. R. 14252: 84-88, 220-21; R.14248: 5-7; R. 14265: 68-69; R. 14344: Ex.529.<sup>46</sup>

C. COURT ORDERS.

1. TRO.

The TRO obtained by Dr. Chen on January 10, 2001, provides in part:

The Defendant Stewart, her agents . . . are enjoined and restrained: . . . (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.*

Addendum A (emphasis supplied). Ms. Stewart was served with the TRO on January 11, 2001. R. 92; R. 14317: ¶ 75. On January 16, 2001, the trial court modified the TRO by striking subpart (3) at Ms. Stewart's attorney's request, precisely so Ms. Stewart would have corporate authority to *immediately fill pending orders so she would not be found in contempt.*

R. 14224: 7, 18.<sup>47</sup>

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<sup>46</sup>As late as April 4, 2002, Apogee Essence, through a distributor, sold Excel USA products that were manufactured at Excel USA's facility in Springville, Utah. As late as April 16, 2002, Apogee Essence, through a distributor, sold products bearing the Apogee logo. R. 14345: Exs. 577, 580.

<sup>47</sup>Successfully arguing for the modification, Ms. Stewart's attorney explained:

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* . . .

R. 14224: 7 (emphasis supplied).



## 2. INTERIM ORDER.

Ms. Stewart stipulated to the principal relief sought by Dr. Chen. The trial court entered the Interim Order on February 21, 2001. Addendum B. Among other things, the Interim Order provided:

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

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

*Id.* (emphasis supplied). The Interim Order also reinstated the board of directors as it existed prior to September 1, 2000, which meant Ms. Stewart remained as a director--and fiduciary--of Excel USA without interruption. *Id.*

## D. MS. STEWART'S CONTUMACIOUS CONDUCT.

### 1. VIOLATIONS OF THE TRO.

#### a. REFUSAL TO FILL ORDERS.

While the TRO was in effect (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. Despite this, Ms. Stewart ignored her duty to comply with the TRO. She claims she did not tell anyone at Excel USA about TRO or show anyone at Excel USA the TRO. R. 14341: Ex. 201. R. 14245: 102-03. Ms. Stewart did not at any time take action to comply with the TRO.<sup>48</sup>

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<sup>48</sup>Ms. Stewart specifically did not (1) provide or show certain employees a copy of the TRO, R. 14341: Ex. 201, (2) inform employees there was a TRO in place that must be

b. TERMINATION OF HONG KING DISTRIBUTOR.

On January 18, 2001, Taig Stewart, at his wife's direction, signed a letter purportedly terminating Excel USA's exclusive distributorship agreement with Extra Excel International (HK) Limited ("Excel Hong Kong"). R. 14341: Ex. 206. At the time he signed the termination notice, R. 14341: Exhibit 206, he was aware the trial court had entered a TRO, which enjoined Ms. Stewart from "directly or indirectly causing the Company to violate any of its exclusive contracts with territorial owners . . ." Addendum A; R. 14245: 73-74; R. 14255: 73-78, 132-33.

2. VIOLATION OF THE INTERIM ORDER.

a. TORTIOUS INTERFERENCE WITH CONTRACTS.

Ms. Stewart violated the Interim Order by tortiously interfering with the existing contracts between Excel USA and the Territorial Owners; she orchestrated the theft of property, including intellectual property, and used Excel USA's property to establish a competing enterprise; she orchestrated the theft of Excel USA products to be used by Rogue Distributors to undermine the Territorial Owners' existing markets and to damage Excel USA's and the Territorial Owners' good will; she orchestrated the theft of property

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followed, (3) inform employees that Excel USA had certain duties imposed by the court with respect to filling orders; (4) rescind her instructions precluding the shipment of products to the Territorial Owners in Taiwan and Malaysia, (5) instruct any employee or agent of Excel USA to cause products that were en route to the Rogue Distributors to be returned to the company or to be re-routed in order to comply with the TRO, or (6) instruct employees or anyone else to fill confirmed orders from the Territorial Owners in Taiwan and Malaysia. Ms. Barclay admitted that despite the lawsuit, she continued to follow Ms. Stewart's instructions, including the directive not to ship product to the Territorial Owners in Malaysia and Taiwan. R. 14244: 57-59, 106-07; R. 14245: 7-15, 63-67, 76-78, 102-03; R. 14252: 172-74, 181-82.

belonging to Excel USA, depriving it of the ability to use such property in its operation or to obtain needed cash flow; she recruited employees and former employees of Excel USA in violation of non-competition contracts; she utilized Excel USA resources, including employer and proprietary information, and breached her fiduciary duties in the establishment of Apogee; and, she recruited Territorial Owners' managers, Messrs. Hu and Tzu, Rogue Distributors, to compete with and undermine the Territorial Owners' markets.

b. REFUSAL TO RETURN EXCEL USA'S PROPERTY.

Only after substantial harm had accrued to Excel USA, some of the property was returned. On October 11, 2001, two weeks before the OSC Hearings began, Taig Stewart returned certain of the items he had removed in February 2001, as listed in Addendum F. These items had been in Ms. Stewart's custody and control. R. 14255: 117-18, 134; R. 14262: 12-17. Shortly before October 11, 2001, Mr. Hymas returned the two Epson 9000 printers. In transporting the printers, Mr. Hymas caused them to incur substantial damage. R. 14255: 134-35; R. 14262: 29-31, 40-41, 45-46. 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. . . 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.

R. 14345: Ex. 578.

The list of documents and things *not* returned to Excel USA in violation of the Interim Order is material and extensive. *See* R. 14302: 6-12; R. 14256: 95-100. *Compare*

Addendum E (Affidavits and Exhibits listing missing property), *with* Addendum F (list of property Taig Stewart returned, including condition of certain property).

**E. OBSTRUCTION OF JUSTICE AND PERJURY.**

In latter January 2001, Ms. Stewart, Mr. Hu and Mr. Tzu convened a conference telephone call. The Conversation occurred while Mr. Hu was in Taiwan and while Ms. Stewart and Mr. Tzu were in Ms. Stewart's office at Excel USA in Springville, Utah. R. 14232: 53-55. This trio agreed concerning how they would testify in the ongoing First Preliminary Injunction Hearing. (None of the three at the time of the Conversation had yet testified.) They each agreed they would testify falsely concerning numerous material matters. R. 14342: Ex. 277 (Addendum K). It was also agreed that if asked questions they did not wish to answer or which if answered would expose aspects of the scheme, the three would simply say they could not remember or make other statements to avoid answering truthfully. *Id.*

Following the Conversation but prior to counsel for Dr. Chen learning about it, Ms. Stewart gave testimony in the proceedings on February 8, 2001. Her testimony was faithful to her agreement with Messrs. Hu and Tzu but unfaithful to her duty to testify truthfully. Here is part of what she said under oath:

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. 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. . . .

R. 14293: 108-09, 113-14, 116-17, 119-20, 145.

A tape recording of the Conversation was delivered anonymously to Dr. Chen's residence in Singapore. R. 14232: 84-85. Dr. Chen's counsel received the recording on February 12, 2001. R. 14232: 83-87. Messrs. Hu and Tzu were scheduled to testify in the First Preliminary Injunction Hearing on February 13, 2001. R. 14232. Based upon the content of the tape, Dr. Chen and her counsel discovered that Ms. Stewart and her witnesses likely had commenced carrying out and would likely continue to carry out a plan to obstruct justice. R. 14232: 55-58. *See also* R. 14232: 39-70; Addendum K.<sup>49</sup>

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<sup>49</sup>The Conversation was in Mandarin Chinese. Addendum K consists of the translation of the Conversation presented by the expert witness for Dr. Chen, Ex. 276

On February 13, 2001, Mr. Hu was called as the first witness for Ms. Stewart (and purportedly Excel USA) in the First Preliminary Injunction Hearing. Mr. Hu's testimony adhered to the conspiratorial agreement he, Ms. Stewart and Mr. Tzu had reached to testify falsify. After acknowledging he was under oath, was obliged to tell the truth and that there could be adverse consequences if he did not tell the truth, Mr. Hu testified on cross examination as follows<sup>50</sup>: (1) he falsely denied he had a current business relationship with Ms. Stewart; R.14232: 39; (2) he falsely denied he had any association with Excellent Essentials International Corp., *id.* at 39; (3) he falsely denied knowing whether Paris Uy had any association with Excellent Essentials International Corp., *id.* at 39-40; (4) he admitted having loaned money to Mr. Uy, but falsely denied knowing the purpose of the loan, *id.* at 40; (5) he falsely claimed he had borrowed the money from "Mother Chen," and falsely claimed that Ms. Stewart had played no part in his securing the loan from her mother, *id.* at 40-42; (6) he falsely denied ever having 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, *id.* at 42; (7) he falsely denied having had a conversation with Ms. Stewart concerning whether people would find out that Ms. Stewart had arranged money for him for use in the new company, *id.* at 43; (8) he falsely denied that Ms. Stewart had told him the money he received to put into a new company was coming from Ms. Stewart's aunt, *id.* at

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(Addendum I), and the translation presented by the expert witness for Ms. Stewart. Ex. 504 (Addendum J). The translations were presented in a side-by-side format in Exhibit 277 so the respective translations could be compared.

<sup>50</sup>Each of Mr. Hu's lies under oath was contradicted by the Conversation. Addendum K.

43; (9) he falsely denied that Mr. Uy was fronting for him, and denied that the new company was really his, *id.* at 43-44; (10) he falsely denied having discussed and agreed with Ms. Stewart and Mr. Tzu that if they were asked about the wired money, he would simply say the money was loaned between friends from Mr. Hu to Mr. Uy for unknown purposes, *id.* at 44-45; (11) he falsely denied having discussed with Ms. Stewart and Mr. Tzu what testimony he would offer if he were called as a witness in this proceeding, *id.* at 44-45; (12) he falsely denied having discussed with Ms. Stewart and Mr. Tzu what was said in meetings at the Provo Marriott Hotel on October 19, 2000, between Mr. Tjandra and Dr. Chen, *id.* at 47-48; and (13) he falsely denied having discussed with Ms. Stewart and Mr. Tzu whether someone should go to jail, *id.* at 48-49; Addendum K.

Dr. Chen's counsel presented Mr. Hu with a translation of the Conversation, proposed Exhibit 103,<sup>51</sup> to "refresh [his] recollection about a conversation that was held [among Mr. Hu], Jau-Hwa Stewart . . . and Sam Tsue [sic] on or about January 23<sup>rd</sup> of [2001]." R. 14232: 52. The court sustained an objection to use of the document for that purpose. *Id.* To lay foundation for the admission of Exhibit 103, Dr. Chen's counsel showed Exhibit 103 to Mr. Hu and asked whether he *had* had the Conversation with Ms. Stewart and Mr. Tzu in latter January 2001 where they discussed the items reflected in Exhibit 103. Mr. Hu said he did not remember. *Id.* He was asked the question again. After looking at Exhibit 103, he answered, through the interpreter, "I don't remember that I talked so much." *Id.* Counsel asked him again whether he remembered the Conversation, and he answered affirmatively:

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<sup>51</sup>Proposed Exhibit 103 has not been admitted into evidence.



“I have a telephone conversation with Jau-Hwa.” *Id.* at 53-54. He denied recalling whether Mr. Tzu had participated in the Conversation, so counsel played a brief portion of the tape recording. *Id.* at 52-53. Mr. Hu in response identified the voices of Ms. Stewart, Mr. Tzu and himself on the tape recording and admitted the three of them *had* had a telephone conference. *Id.* at 53-54. At this point, at the request of counsel for Dr. Chen, the court instructed Mr. Hu concerning his constitutional rights. *Id.* at 54-62. The court then appointed a criminal defense attorney from the Legal Defenders Association to assist Mr. Hu in connection with his remaining testimony. *Id.* at 62.

Cross examination resumed after a recess. Mr. Hu admitted having reviewed the first two pages of Exhibit 103, but on Fifth Amendment grounds declined to answer whether it accurately set forth the Conversation. *Id.* at 69. He admitted having been placed under oath and swearing to tell the truth in the proceeding then ongoing, but on Fifth Amendment grounds declined to answer whether he had testified truthfully. *Id.* at 69-70. Mr. Hu then stated he would continue to decline to answer further questions put by counsel for Dr. Chen concerning the Conversation on Fifth Amendment grounds, so without the opportunity to conduct a complete and thorough examination of Mr. Hu in connection with the Conversation, Dr. Chen’s counsel passed the witness. *Id.* at 67.<sup>52</sup>

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<sup>52</sup>Even though Mr. Hu refused to answer any further questions put to him by Dr. Chen’s counsel, Mr. Hu answered some foundational questions put to him by Ms. Stewart’s and Excel USA’s counsel. He admitted he was in Taiwan when the Conversation took place, *id.* at 72; he admitted he was at his home in Taipei when the Conversation took place, *id.* at 73; he did not recall what time of day it was when the Conversation took place, *id.* at 72; and he could not recall who had placed the call to initiate the Conversation. *Id.* at 73. When asked whether Dr. Chen had the ability to tape record the Conversation, his response, over objection, was, “In Asia maybe.” *Id.* at 71.

Counsel for Ms. Stewart and Excel USA objected to admission of the Conversation on foundational grounds and on the wholly unsupported assertion that the recording might have been obtained in violation of state or federal law. *Id.* at 74. Dr. Chen’s counsel proposed that the tape of the Conversation be played so counsel could ask Mr. Hu whether the it accurately reflected the Conversation. *Id.* at 76. Mr. Hu’s counsel said she would advise him not to answer such question, even though Mr. Hu had already testified he would answer no further questions from Dr. Chen’s counsel on the subject. *Id.* at 77. Therefore, Dr. Chen was prevented from making further inquiry into the content of the tape recording—although Mr. Hu had already authenticated the Conversation. The court responded as follows:

For the record, I would expect that I would allow you to play the tape, that question would be posed and that would be your advice as counsel. He then would not answer the question. And then I think it raises the dilemma . . . of whether or not the plaintiff should be prohibited from foundation on a tape for a civil proceeding based on a defense for a criminal—suggested criminal proceeding, and I don’t think that should be the case.

So given what I’ve heard to date, I would probably receive the tape . . . I’m not going to require you to play it and pose the question . . . Absent this kind of refusal to answer the question, his answer would probably be, “Yeah.” He would—you would be able to lay the foundation for the civil case . . .

*Id.* at 77-78.<sup>53</sup>

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<sup>53</sup>Dr. Chen, who traveled from Singapore and testified earlier in February 2001, retook the witness stand to dispel any assertion that she had been involved in recording or *obtaining* the recording of the conversation. Her testimony was that she recognized the voices on the tape as those of Ms. Stewart, Mr. Hu and Mr. Tzu. R. 14232: 82. On the prior Thursday evening (after Ms. Stewart had perjured herself), February 8, 2001, she learned from her husband by telephone that the recording had been delivered by mail anonymously to their home in Singapore, and she had made arrangements with her husband to express ship it to the United States. *Id.* at 83. She knew nothing about the

## F. DENIAL OF MS. STEWART'S MOTION TO STRIKE.

On February 19, 2001, Ms. Stewart filed a Motion to Strike, objecting to Dr. Chen's proposed admission of the Conversation into evidence, to suppress use of the Conversation in future hearings, and for sanctions against Dr. Chen and her counsel for using the tape.<sup>54</sup>

R. 604-620. In opposing the Motion, counsel for Dr. Chen explained:

The receipt of information indicating that a party and identified witnesses . . . had conspired . . . to obstruct justice imposed upon plaintiff's counsel a great burden and professional obligation . . . to determine whether it was proper for counsel to disclose the existence of the conspiracy . . . or whether, . . . plaintiff's counsel was required to stand silent and allow the conspirators to defraud the Court. . . .

Prior to disclosing the existence of the tape recording at the hearing in this case, plaintiff's counsel was required to consider (1) the existence of an obvious conspiracy to defraud the Court; (2) counsel's responsibilities as officers of the Court to disclose, and not to conceal, material having evidentiary value in the administration of justice; and (3) applicable law, . . . with respect to the recording, disclosing, and using recorded telephone conversations . . . [P]laintiff's counsel conducted their own due diligence, and concluded the law to be as follows:

1. If a telephone conversation is recorded by a participant or by someone authorized by a participant, the recording is not a violation of Federal or Utah law and is not subject to the Acts' exclusionary rules . . . .
2. To determine whether a conversation has been lawfully recorded, it is the point of interception that governs. . . .
3. There is no presumption of illegality. . . . [T]he party claiming the recording was obtained in violation of the Acts has the burden of proof.

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circumstances of the tape being made. *Id.* at 83. Her husband express shipped it directly to her lawyers and it arrived February 12, 2001. *Id.* at 83.

<sup>54</sup>Ms. Stewart submitted the Affidavit of Mr. Hu wherein he boldly asserted from half a world away (Taiwan) not to know the origin of the recording. The trial court struck Mr. Hu's Affidavit because he had previously invoked the Fifth Amendment.

4. [For] . . . use . . . to be a violation . . . , the user must know or have reason to know the recording was obtained in violation of the law.

R. 698-700. (emphasis in original).

The court heard argument on the Motion to Strike on March 26, 2001. Ms. Stewart's counsel then admitted, "*We do not know where the interception took place.*"<sup>55</sup> R. 14236: 10 (emphasis supplied). Her counsel argued the Motion should be granted and the Conversation wholly disregarded because "[t]his Court does not know [where the conversation was recorded], so the Court is going to have to make a judgment call. It needs to err on the side of the integrity and honesty of the proceedings" (asking the court to presume illegality). *Id.* The court denied the Motion, R. 14236: 68, and the Order was signed July 5, 2001, admitting Exhibit 104 into evidence. R. 2148, 2153.

The trial court also struck the Affidavit Mr. Hu had submitted supporting the Motion, as follows:

Mr. Hu cannot now submit an affidavit, . . . which purports to discuss matters as to which he invoked his right against self-incrimination. The negative inferences the Court has drawn and may draw concerning what Mr. Hu's answers would have been . . . cannot now be overcome by the after-the-fact submission of an affidavit that is not subject to cross-examination . . . [Exhibit 104's] disclosure and use for the purpose of impeaching the testimony of Mr. Hu was proper. R. 2148-9.

#### **G. THE CONTEMPT MOTIONS.**

The Conversation was brought before the court in the Hong Kong Case. In two of the

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<sup>55</sup>The recording most likely occurred in Asia. The tape was delivered via mail to an address in Southeast Asia. The Court is encouraged to listen to the tape because when the single male speaks (Mr. Hu, who was in Taiwan), as compared to the female and male on the other end (Ms. Stewart and Mr. Tzu, who were in Utah), the voice does not sound as though it is through a telephone and children can be heard in the background. When the others speak, they sound as though they are on a telephone.

Affirmations Ms. Stewart filed in that case, she authenticated the Conversation and apologized to that court for attempting to “mislead the Utah court.” In an Affirmation, dated July 24, 2001, she states:

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 so angry with my sister . . . . As can be seen from the emails which I have exhibited, the relationship between [Dr. Chen] and I was very good and we [got] along with each other very well. . . .

I apologise [sic] for my conduct, which in hindsight was very foolish, and I sincerely ask that the Court not regard me as a dishonest or malicious person, which I am not, as the people who know me well will testify at trial.

Addendum G, ¶¶ 44-45. Ms. Stewart made a virtually identical statement in her Affirmation dated August 1, 2001. Addendum H, ¶¶ 126-127.<sup>56</sup> She later testified that her Affirmations in the Hong Kong Case were true, and that she would not have signed a document containing untruthful statements. Ex. 263 (deposition), at 223-26.<sup>57</sup>

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<sup>56</sup>Addendum G and Addendum H would later be admitted as evidence in the Contempt Proceedings without objection. R. 14250: 15 l; R. 14250: 39-40.

<sup>57</sup>Exhibit 263 was admitted without objection in the OSC Hearings. Contrary to Ms. Stewart’s February 8, 2001 testimony during the First Preliminary Injunction Hearing, on August 1, 2001, Ms. Stewart signed her Fourth Affirmation in the Hong Kong Case, Addendum H, wherein she stated:

- (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.

The first Contempt Motion, dated June 22, 2001, referenced Ms. Stewart's multiple violations of the TRO and the Interim Order. The second Contempt Motion, dated July 31, 2001, dealt with the evidence established in part by the Conversation and Ms. Stewart's admissions that she had attempted to mislead the Utah court. R. 14305-14307.

In Ms. Stewart's Memorandum in Opposition to the Second Contempt Motion, dated August 10, 2001, Ms. Stewart made no claim that (1) Exhibit 104 was improperly admitted as impeachment evidence against Mr. Hu, or (2) Exhibit 104 could not or should not be considered as evidence of Ms. Stewart's obstruction of justice in the OSC Hearings. R. 2280-2285. This was filed after she had authenticated the tape in her Third and Fourth Affirmations, and had apologized for having attempted to mislead the Utah court. Addendum G, ¶¶ 44-45; Addendum H, ¶¶ 126-127. In Ms. Stewart's referenced Memorandum, she made essentially the same concessions. R. 2282.

The OSC Hearings began October 25, 2001, R. 14244, and concluded June 26, 2002. R. 14276. During the OSC Hearings, Ms. Stewart contradicted her testimony of February 8, 2001, but persisted in attempting to mislead the trial court. Ms. Stewart's sworn testimony, both before and after the existence of the Conversation was found out, shows disdain for the judicial process and disregard to the fundamental duty of a witness to speak truthfully. *See* Addendum N (R. 14250: 21-26, 34-35); Addendum K.

After the Contempt Motions were filed, Ms. Stewart had every incentive and

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Upon later examination in this proceeding, Ms. Stewart claimed, in essence, she had forgotten to complete the necessary paperwork, leaving Excel USA with no ownership of, and no control over, the entities that had received millions of dollars in cash and product from Ms. Stewart. R. 14245: 44-45.

opportunity to retain an expert to evaluate whether the tape recording had been altered or tampered with in any way. No such witness testified in Ms. Stewart's behalf. Neither did Ms. Stewart produce evidence that the tape recording had been obtained in violation of state or federal law. At no time during the evidentiary portion of the OSC Hearings did Ms. Stewart or any other witness assert that the tape recording was (i) inaccurate in any respect, (ii) incomplete, (iii) had been altered or tampered with, or (iv) that the chain of custody was in some way flawed. Her conduct during the OSC Hearings was entirely consistent with the fact that Exhibit 104 was an accurate and complete recording of the Conversation. Ms. Stewart affirmatively used the contents of the Conversation in her defense to the Contempt Motions. She did so by submitting her own expert's translation of the Conversation. R. 14344: Ex. 504 (Addendum J). Not only did Ms. Stewart submit her own expert's translation, she submitted his expert testimony concerning why the court should determine his translation was more accurate than the translation submitted by Dr. Chen's expert.<sup>58</sup> Ms. Stewart did not object to the admission of Dr. Chen's translation. R. 14254: 32-33; R. 14342: Ex. 276 (Addendum I). The court admitted Addendum J over objection. R. 14286: 38, 42.

At no time before or during the OSC Hearing did Ms. Stewart demand a jury in writing or otherwise.

After many days of evidence and argument, on August 20, 2002, the trial court

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<sup>58</sup>The trial court found the translations were not materially different. R. 14286: 41-42. *See* Addendum K.

entered the Stewart Contempt Orders, striking her pleadings as a remedy. R. 14317.<sup>59</sup>

### **VIII. SUMMARY OF ARGUMENT**

Ms. Stewart attempted to undermine the administration of justice through a scheme to obstruct justice and defraud the trial court. Evidence of her scheme is embodied in the Conversation, which was properly admitted and considered to impeach Mr. Hu, and as substantive evidence of Ms. Stewart's contempt. Ms. Stewart failed to overcome the presumption of admissibility afforded by the Rules of Evidence. She waived her claim that the Conversation was obtained and used in violation of state and federal law, and she cannot now, for the first time on appeal, assert a claim with respect to the use of the Conversation as substantive evidence of her contumacious behavior in light of her admissions against interest and her own affirmative use of the Conversation. Ms. Stewart also willfully and intentionally violated two Orders.

The trial court properly struck her pleadings as a sanction for her pervasive contempt. The trial court had the power and the authority to do so, and acted properly within its discretion by striking her pleadings because her contumacious conduct undermined the integrity of the very same proceeding, causing great harm to other litigants. Ms. Stewart cannot successfully raise, for the first time on appeal, an argument that the court did not have authority to levy such a sanction in response to her willful disregard for the trial court's authority, its Orders, and her disregard for the integrity of the judiciary.

Finally, Ms. Stewart was accorded due process. She was not entitled to a jury trial on

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<sup>59</sup>The court awarded Dr. Chen attorney's fees under Utah Code Ann. § 78-27-56, and not as a contempt sanction. R. 14317.



the contempt issues because she did not request one in writing as mandated by applicable rules. The evidence, independent of Mr. Holman's involvement, fully supports the Stewart Contempt Orders.

## **IX. ARGUMENT:**

### **THE CONTEMPT ORDERS SHOULD BE AFFIRMED**

#### **A. EXHIBIT 104 WAS PROPERLY ADMITTED AND USED.**

Ms. Stewart admits the Conversation occurred. Even viewing the Conversation in the light most favorable to her (*i.e.*, accepting the translation she submitted into evidence, Addendum J), in her words she admitted trying "to mislead the Utah court." The Conversation clearly demonstrates Ms. Stewart's perpetration of a scheme to defraud the court through obstructing justice. The testimony of witness Hu and of Ms. Stewart reveals without question that they sought to carry out this plan.

##### **1. MS. STEWART FAILED TO OVERCOME THE PRESUMPTION OF ADMISSIBILITY.**

The Rules of Evidence favor the admission of relevant evidence, and *presume* its admissibility. *United States v. Sowards*, 370 F.2d 87, 90 (10th Cir. 1966); *State v. Bluff*, 2002 UT 66, ¶ 45, 52 P.3d 1210, 1225 (referencing "general presumption of admissibility favored by the Rules of Evidence"). Defendant's argument that Exhibit 104 was improperly admitted into evidence wrongly assumes, *with no evidentiary support whatsoever*, (1) that the recording was obtained in violation of Utah's Interception of Communications Act ("Utah Act") or its Federal counterpart, the Omnibus Crime Control and Safe Streets Act ("Federal Act") (or collectively the "Acts"); *and* (2) that Dr. Chen or her counsel knew or

had reason to know it had been obtained and was being used in violation of the Acts, thereby invoking the Acts' exclusionary provisions. *See* Utah Code Ann. § 77-23a-4(1)(b) (i-iv), 18 U.S.C. § 2511(1)(c) & (d) & (2)(d).<sup>60</sup>

It was and is Ms. Stewart's burden to overcome the presumption of admissibility establishing the Conversation was obtained in violation of one or both Acts. In considering this, it is important to note: (1) no violation of the Acts occurs when a participant records or authorizes the recording, and (2) interception outside the territorial jurisdiction of the United States is not a violation of the Acts.<sup>61</sup> During the proceedings, Ms. Stewart's attorney conceded it is unknown how or where the recording of the Conversation was obtained. Ms. Stewart also conceded this at various points in her Brief.<sup>62</sup> *Stewarts' Brief*, at 5 (“*potentially*

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<sup>60</sup>The Federal Act, 18 U.S.C. § 2515, and the Utah Act, Utah Code Ann. § 77-23a-7, both provide that whenever a wire or oral communication has been intercepted, no part of the contents may be received in evidence in any trial if the “disclosure of that information would be in violation of this chapter.” The apparent purpose for the extreme remedies of suppression under exclusionary rules is to defer privacy-invading misconduct by denying wrongdoers the fruits of their misconduct, but exclusion is authorized only when interception of wire or oral communications was unlawful.

<sup>61</sup>The party objecting to the use of the recording has the burden to establish that the interception was obtained in violation of the Acts. *United States v. Ross*, 713 F.2d 389, 391 (8th Cir. 1983); *State v. Childs*, 728 N.E.2d 379, 391 (Ohio 2000); *United States v. Ruppel*, 666 F.2d 261, 271(5th Cir. 1982), *cert. denied*, 458 U.S. 1107 (1982). *Cf. State v. Atwood*, 831 P.2d 1056, 1058 n.1 (Utah Ct. App. 1999) (proponent of motion to suppress has burden of establishing his Fourth Amendment rights were violated; “[e]vidence sought to be excluded is admissible . . . until the accused has established that his rights . . . have been invaded”); *State v. Peterson*, 841 P.2d 21 (Utah Ct. App. 1992) (defendant failed to establish in suppression motion that interception did not comply with wiretap order). Where the objecting party fails to meet that burden, the Acts' exclusionary rules cannot serve as the basis for excluding the evidence. *State v. Johnson-Howell*, 881 P.2d 1288, 1301 (Kan. 1994).

<sup>62</sup>Utah appellate courts have not addressed many of the issues herein. Federal law and the law of other states interpreting similar provisions is instructive.

illegally obtained audiotape”) (emphasis supplied), 18.<sup>63</sup>

The burden is two-fold. First, the person seeking exclusion of the evidence must prove the communication was obtained in violation of the Acts. Second, that person must prove that the person using the communication knew or had reason to know it was obtained in violation of the Acts. There is no presumption of illegality. Rather, the presumption under the Rules of Evidence is one of admissibility. In *Thompson v. Dulaney*, 838 F. Supp. 1535, 1541-42 (D. Utah 1993), a civil action brought for the alleged violation of the Federal Act, the court explained:

[I]n order for a plaintiff to prevail on a use or disclosure claim, the plaintiff must prove: (1) that the defendant ‘knew or should have known’ that the information was the product of an illegal wiretap, and (2) that the defendant had knowledge of the facts and circumstances surrounding the interception so that he ‘knew or should have known’ that the interception was prohibited under Title III.

. . . . Mere knowledge that the information allegedly used or disclosed came from a wiretap is insufficient unless additional circumstantial proof is introduced that would enable the inference to be drawn that the defendant knew or should have known that the wiretap was an illegal one under Title III.

a. NO VIOLATION OCCURS WHEN A PARTICIPANT RECORDS OR AUTHORIZES THE RECORDING.

The Utah and Federal Wiretap Acts are meant to protect privacy. Participants to conversations have no expectation of privacy vis-a-vis other participants. Utah’s Interception of Communications Act provides:

(7) (b) A person not acting under color of law *may intercept* a wire, electronic, or oral communication if that person is a party to the communication or one of the parties to

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<sup>63</sup> “[T]here is *no evidence* in the over 20,000 pages of record that identifies who taped the conversation, where the conversation was taped . . . .” (Emphasis supplied.)

the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal law. . . .

Utah Code Ann. § 77-23a-4(7)(b) (emphasis supplied).

The Federal Act is similar:

(2)(d) It *shall not be unlawful* under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis supplied).

- b. THERE IS NO VIOLATION WHEN INTERCEPTION OCCURS OUTSIDE THE TERRITORIAL JURISDICTION OF THE UNITED STATES.

Both Acts focus upon the point of “interception.” Utah Code Ann § 77-23a-4; 18 U.S.C. § 2511. If a conversation is intercepted outside the territorial jurisdiction of the United States, the interception and use of a recording of such conversation does not violate the Acts even if the intercepted telephone conversation travels in part over this Country’s communication system and even if the recording would have been a violation of the Acts if intercepted here. In *United States v. Cotroni*, 527 F.2d 708 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976), defendants were convicted based in part upon wiretaps obtained by Canadian police without judicial authorization. The intercepted communications were provided to authorities in the United States. Defendants’ efforts to exclude the intercepted communications were unsuccessful. The court stated:

The District Judge also held that, although the intercepted telephone conversation traveled in part over our country’s communication system, their

introduction into evidence was not proscribed by Title III. . . . Thus, it is not the route followed by foreign communications which determines the application of Title III; it is where the interception took place.

*Id* at 711.<sup>64</sup>

c. MS. STEWART DID NOT MEET HER BURDEN.

There were three parties to the Conversation. Two of the participants, Ms. Stewart and Mr. Tzu, were at Ms. Stewart's office in Springville, Utah, and the third, Mr. Hu, was at his home in Taiwan. Ms. Stewart claims she did not record or agree to the recording of the Conversation. Mr. Tzu and Mr. Hu could have given complete testimony on the subject, but neither did so while in the United States because they would have been subjected to cross-examination and would have further incriminated themselves.<sup>65</sup>

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<sup>64</sup>In *United States v. Angulo-Hurtado*, 165 F. Supp. 2d 1363 (N.D. Ga. 2001), the court held that Title III standards do not apply outside the territorial jurisdiction of the United States. *Id.* at 1369 (stating the Federal Act evidences congressional intent to exclude from Title III's coverage foreign surveillance: "Congress intended Title III to protect the integrity of United States communications systems against unauthorized interceptions *taking place in the United States*") (emphasis supplied) (and quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.")). *See also* *United States v. Delaplane*, 778 F.2d 570, 573 (10th Cir. 1985), *cert. denied*, 479 U.S. 827 (1986); *United States v. Romano*, 706 F.2d 370, 376 (2d Cir. 1983); *United States v. Tirinkian*, 502 F. Supp. 620, 627 (D.N.D. 1980), *aff'd sub nom.*, *United States v. Wentz*, 686 F.2d 653 (8th Cir. 1982); *People v. Capolongo*, 623 N.Y.S.2d 778 (N.Y. 1995) (interpreting New York's Privacy Act).

<sup>65</sup>Ms. Stewart disputes the foundation for admission of Exhibit 104 (audiotape). Stewart's Brief, at 39-42. She urges for the first time on appeal that Utah courts adopt a multi-step test for establishing the foundational requirements for admission of audio-tapes. The purpose served by foundation is, as conceded by Ms. Stewart, to authenticate or identify evidence. Here, the requirement of authentication and identification was more than adequately fulfilled by the admissions of Ms. Stewart and Mr. Hu as well as the adverse inferences drawn by the trial court. Both identified participants in the Conversation and admitted that the Conversation took place. R. 14232: 53-54; R. 14341: Ex. 228; ¶ 126; R. 14343: Ex. 406; ¶ 44. Dr. Chen also identified all three voices on the

Ms. Stewart admits it is unknown who recorded the Conversation, by what means it was recorded and where it was recorded. Ms. Stewart's counsel supported this admission by asking the court to presume it had been obtained illegally, ironically suggesting that the court do so to "err on the side of the integrity and honesty of the proceedings." R. 14236: 10. *See also* Stewarts' Brief, at 5, 18. Mr. Hu authenticated the Conversation on February 13, 2001.<sup>66</sup> The other conspirators, Ms. Stewart and Mr. Tzu, filed after-the-fact, self-serving Affidavits claiming they did not authorize the recording. Mr. Hu, the third conspirator, invoked the Fifth Amendment and refused to submit to proper examination concerning the Conversation as to which the trial court properly drew adverse inferences. In addition, the court had no reason to rely on the Affidavits.<sup>67</sup>

Mr. Hu had ample reason to continue testifying falsely, including denying he had recorded the conversation or authorized its recording. He had been caught in multiple lies on the witness stand. Assuming Mr. Hu recorded the Conversation, it is likely he did not want Ms. Stewart or Mr. Tzu to know he had surreptitiously recorded the Conversation. And all three persons who submitted Affidavits of denial in an effort to prevent Exhibit 104's admission had strong motives to want Exhibit 104 *not* admitted into evidence—it was direct, unequivocal evidence of their conspiracy to obstruct justice, and suborn and commit perjury.

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tape. The other proposed requirements are either meaningless or were waived.

<sup>66</sup>Ms. Stewart later authenticated the Conversation in her Third and Fourth Affirmations. Addendum H, ¶¶ 126-127; Addendum G, ¶¶ 44-45.

<sup>67</sup>The myriad examples of demonstrable perjury and subornation of perjury in the record establish that the court understandably was not required to rely upon anything they said or wrote under oath as resembling the truth.

Ms. Stewart submitted no affirmative evidence whatsoever elucidating the circumstances of how and where the Conversation was acquired.

The responsibility to meet the burden is explained in *Peavy v. Dallas Independent School Dist.*, 57 F. Supp. 2d 382 (N.D. Tex. 1999), where a person anonymously delivered to District Trustees copies of an audio tape (the “Tape”) of an intercepted conversation(s) between Peavy and another person. *Id.* at 386. District staff transcribed the Tape the same day, and that evening, the transcript was read into the record of a Board meeting. Kress, president of the Board, did not attempt to prevent the Trustees from reading the transcript into the record. *Id.* Peavy resigned a week later, then sued Kress and the District under the Federal Act. The court granted Kress’ Motion for Summary Judgment, and explained:

To prevail . . . Peavy must establish that the disclosure or use “was intentional, that the information . . . was obtained from an intercepted communication, and that the defendant knew or should have known that the interception was illegal.” . . . Peavy must not only establish that Kress knew he was disclosing or using information from an intercepted communication but also that Kress knew that neither party to the intercepted conversation had consented to its interception thereby making it illegal.

. . . The court has pored over the entire summary judgment record and finds that the record is totally devoid of any *competent* evidence that Kress knew or should have known that the Tape was the result of an illegal interception, or that Kress knew that neither party to the intercepted conversation had consented to its interception. . . . *[N]othing in the record indicates that Peavy himself knew that the Tape was illegally obtained. . . .*

*[A] reasonable person would not have known or had reason to know the manner in which the Tape was received established that neither party to the conversation consented to its recording. . . . In the real world, recordings of confidential, secret, or private conversations frequently are made by one party without the other party’s knowledge and consent, and such a recording is perfectly permissible insofar as the Act and laws of the State of Texas are concerned. . . .*

Plaintiff confuses “private,” “secret” and “confidential” with “illegal.” . . . At

best, Plaintiff has a subjective belief, suspicion, or assumption that Kress knew or should have known that the tape was obtained illegally in violation of the Act. Such belief, opinion, suspicion, or assumption, without specific competent summary judgment evidence, is too slender a reed for a reasonable jury to make a finding of liability against Kress. . . .

*Id.* at 388-89 (emphasis supplied and in original) (quoting *Forsyth v. Barr*, 19 F.3d 1527, 1538 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994)).<sup>68</sup> Here, even more compelling than in *Peavy*, Ms. Stewart has established neither illegality nor that Dr. Chen had any reason to believe the recording was obtained illegally.<sup>69</sup>

Plaintiff's counsel found themselves in the unenviable position of having received information concerning an apparent and ongoing conspiracy to obstruct justice in the very court proceeding in which they were participating.<sup>70</sup> Defense counsel found themselves in the unenviable position of seeking to suppress evidence that irrefutably established a conspiracy to defraud the court in the immediate proceeding. Against the backdrop of these

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<sup>68</sup>*See also United States v. Nietupski*, 731 F. Supp. 881 (C.D. Ill. 1990) (surreptitious tape recordings of illegal drug activities which were made by coconspirator in furtherance of conspiracy did not have to be suppressed under Federal Act), *aff'd*, 33 F.3d 1454 (7th Cir. 1994), *cert. denied*, 515 U.S. 1126 (1995).

<sup>69</sup>This Court has not addressed whether an impeachment exception exists to one or both Acts. *Cf. United States v. Echavarria-Olarte*, 904 F.2d 1391, 1397 (9th Cir. 1990); *United States v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992); *Frio v. Superior Court*, 250 Cal. Rptr. 819, 828 (Cal. Ct. App. 1988) ("The repugnance of an opportunity for a witness who was recorded to lie in this situation is akin to the circumstance of a criminal defendant who testifies at variance with an earlier statement ruled inadmissible because of a violation of *Miranda*.").

<sup>70</sup>Counsel has been unable to locate any reported decision where the subject matter of the intercepted communication revealed a conspiracy to undermine the integrity of the very court proceeding then underway. The Rules of Professional Conduct give some guidance, but mostly in very general terms. The Rules do not and cannot contemplate every conceivable situation. *See Utah Rules of Professional Conduct: Preamble: A Lawyer's Responsibilities; Scope; Rule 3.3; Rule 3.4.*



circumstances, it is essential to note that candor toward the tribunal supersedes virtually every other duty a lawyer has, including one's duty to the client. As explained in *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 457-58 (4th Cir. 1993):

*[L]awyers, who serve as officers of the court, have the first line task of assuring the integrity of the process . . . The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end . . . [T]he lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed by an act of deceit . . .*

*Neither [Rule 3.3 and 3.4] nor the entire Code of Professional Responsibility displaces the broader general duty of candor and good faith required to protect the integrity of the entire judicial process . . .*

The Supreme Court stated, "It is appropriate to remind counsel that they have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation."

*Id.* at 457-58 (emphasis supplied and in original) (citation omitted).

Neither plaintiff nor her counsel knew how and where the recording took place, and could not assume the recording was made in violation of the law. Plaintiff's counsel was on notice that it was possible Ms. Stewart and at least two of her witnesses were conspiring to perpetrate a fraud on the court, actively undermining the integrity of the judicial process. Given the attacks on the integrity of the court, use of the recording comported with counsels' duties as officers of the court and the Utah Rules of Professional Conduct.

## **2. EXHIBIT 104 WAS PROPERLY ADMITTED TO IMPEACH.**

Ms. Stewart called Mr. Hu as her first witness during the First Preliminary Injunction Hearing. He admitted he *had* had the Conversation with Ms. Stewart and Mr. Hu. He acknowledged he was at his home in Taiwan at the time of the Conversation. He invoked

the Fifth Amendment and refused to answer further questions posed by Dr. Chen's counsel. Ms. Stewart's counsel objected to admission of Exhibit 104 on foundational grounds. Dr. Chen's counsel proposed to play the entire tape so Mr. Hu could answer whether the recording was accurate. Mr. Hu's counsel said Mr. Hu would invoke the Fifth Amendment. The court concluded Dr. Chen should not be prevented from establishing foundation for Exhibit 104 by Mr. Hu's refusal and drew an adverse inference from Mr. Hu's invocation of the Fifth Amendment to the effect that if Mr. Hu answered the question, his answer would have confirmed the accuracy of the Conversation. R. 14232: 75-76.

In civil cases, silence in the face of an accusation is a relevant fact that is not barred from consideration by the Fifth Amendment. *See First Federal Savings & Loan Ass'n v. Schamanek*, 684 P.2d 1257, 1267 (Utah 1984) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976))<sup>71</sup>; *Mid-America's Process Service and Lynn Whitefield v. Ellison*, 767 F.2d 684 (10th 1985) (parties may unquestionably assert this constitutional privilege in a civil case, but "may have to accept certain bad consequence which flow from that action"); *SEC v. Wolfson*, 2004 WL 985948, n.2 (D. Utah April 7, 2004).

The policies supporting the Fifth Amendment apply with even less force when a non-party witness testifies in a civil proceeding and thus, the Amendment will not work to preclude an adverse inference in this situation. *See RAD Servs., Inc. v. Aetna Casualty &*

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<sup>71</sup>*Rosebud Sioux Tribe v. A & P Steel*, 733 F.2d 509, 521 (8th Cir. 1984) ("the law of privileges tends to suppress truth. As a result, 'privileges must be strictly construed and accepted' only to the very limited extent that permitting a refusal to testify . . . has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth" (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980))).

*Sur. Co.*, 808 F.2d 271, 275 (3d Cir. 1986). A court may properly draw an adverse inference for the purpose of impeachment against a non-party witness who invokes the Fifth Amendment. *United States v. Kaplan*, 832 F.2d 676, 684 (1<sup>st</sup> Cir. 1987) (holding that even in a criminal case, where non-party witness invokes the Fifth Amendment, the invocation “acts as a form of impeachment.”).

3. MS. STEWART WAIVED HER CLAIM THAT USE OF THE RECORDING WAS ILLEGAL.

The recording was properly received into evidence. Use of the recording and the translations was also proper because Ms. Stewart made affirmative use of the Conversation. The court admitted Addendum J over objection, without limiting its evidentiary use. R. 14286: 42. Ms. Stewart also offered, and the court admitted, Exhibit 503, a hand-written Chinese transcription provided to Dr. Chen’s expert to assist him in his translation, once again without limiting its use. R. 14254: 59. When a party requests the court to admit relevant information and it is admitted, the party is bound to accept the consequences that follow, good or bad. *See Ohler v. United States*, 529 U.S. 753 (2000).<sup>72</sup> *See also United*

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<sup>72</sup>“Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted.” *Ohler*, 529 U.S. at 755. *See also United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1099 (10th Cir, 2002) (“As to the ruling on the admissibility of Mr. Lee’s prior conviction under Rule 609, our conclusion is dictated by the holding of *Ohler v. United States* . . . . In *Ohler*, the trial court denied the defendant’s in limine motion to preclude the government’s use of a prior conviction for impeachment purposes. The defendant then testified on direct examination as to the prior conviction. The Court held that a party who ‘preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error.’”) (citation omitted). *See also Pettiford v. Durm*, 175 F.3d 1020 (7th Cir. 1999) (unpublished opinion) (Addendum M) (“Introducing harmful evidence before it is elicited by the opposing party is sometimes considered a wise trial strategy, but its legal effect is to waive the issue of the admissibility of the evidence. . . . If a party wishes

*States v. Ciocca*, 106 F.3d 1079, 1085 (1<sup>st</sup> Cir. 1997) (“A party waives a right when it makes an intentional relinquishment or abandonment of it”).<sup>73</sup>

Ms. Stewart also waived any objection to the Conversation by not objecting to the admission of the translation made by the expert engaged by Dr. Chen. *See State v. Smedley*, 2003 UT App. 79, ¶ 10, 67 P.3d 1005, 1007-08 (and authorities cited therein); *State v. Beason*, 2000 UT App. 109, ¶ 14, 2 P.3d 459, 461-62 (and authorities cited therein).

Finally, Ms. Stewart is bound by the admissions against interest she made in her Third and Fourth Affirmations concerning the Conversation which were admitted into evidence without objection. Addendum G, H.<sup>74</sup>

4. THE TRIAL COURT PROPERLY CONSIDERED EXHIBIT 104 AS EVIDENCE OF MS. STEWART’S CONTEMPT.
  - a. MS. STEWART CANNOT CLAIM, FOR THE FIRST TIME ON APPEAL, THE COURT IMPROPERLY CONSIDERED EXHIBIT 104 AGAINST HER.

In her Motion to Strike, Ms. Stewart objected to the use of Exhibit 104 to impeach Mr. Hu on the wholly unsupported assertion that it had been obtained illegally. R. 14232: 72. Her Motion to Strike was considered and denied prior to the filing of the Contempt Motions.

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to preserve for appeal an objection to certain evidence, he must refrain from offering the evidence himself, wait to see if it is offered by the opposing party, and if so enter an objection.”).

<sup>73</sup>When Mr. Hu was testifying, Ms. Stewart’s counsel, on re-direct, asked Mr. Hu foundational questions which he answered. *See State v. Tuttle*, 399 P.2d 580, 582 (Utah 1965) (where defendant made use of questioned evidence and conducted examination on basis of such evidence before stating objection to it, he waived objection).

<sup>74</sup>*See* Utah Rules of Evidence, 801(d)(2). The rule recognizes the inherent reliability of a party’s admissions against interest.

At no time during the trial court's consideration of the Contempt Motions did Ms. Stewart object to the use of Exhibit 104 as substantive evidence of her contempt. Nor did she object to the admission of Dr. Chen's translation at any time. R. 14254: 32-33. Ms. Stewart is barred from raising the issue now.

Ms. Stewart also did not object to the admission of her Affirmations from the Hong Kong Case. The Affirmations also authenticated Exhibit 104 and were admissions that she attempted to mislead the court. With an admission in evidence, Dr. Chen filed the Contempt Motion referencing Exhibit 104, clearly making substantive use of its contents as evidence of Ms. Stewart's obstruction of justice. Now for the first time on appeal, Ms. Stewart makes the impeachment vis-a-vis substantive evidence argument.

This Court will not consider issues raised for the first time on appeal, including constitutional issues. *Julian v. State*, 966 P.2d 249, 258 (Utah 1998); *see also Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996). To properly preserve an issue for appeal, a party must raise it in a manner in which the "trial court [is] offered an opportunity to rule on [the] issue." *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998). "A trial court has the opportunity to rule if the following three requirements are met: (1) 'the issue must be raised in a timely fashion;' (2) 'the issue must be specifically raised;' and (3) a party must introduce 'supporting evidence or relevant legal authority.'" *Id.* (citation omitted).<sup>75</sup> Ms. Stewart satisfied none of these conditions. There is no basis for the Court to consider such

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<sup>75</sup> The only exceptions to the preservation requirement are plain error and manifest injustice, neither of which is applicable here. *See State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994).

belated claim now.

b. THE TRIAL COURT PROPERLY CONSIDERED EXHIBIT 104 AS EVIDENCE OF MS. STEWART'S CONTEMPT.

(1) Ms. Stewart Authenticated Exhibit 104.

Ms. Stewart authenticated the Conversation in her Third Affirmation in the Hong Kong Case before Dr. Chen filed the Contempt Motion relating to the Conversation. Her Fourth Affirmation makes the same authentication. Those Affirmations are admissions against interest. *See* Utah Rules of Evidence, 801(d)(2).

(2) Ms. Stewart Affirmatively Used Exhibit 104.

Ms. Stewart made affirmative use of the Conversation, engaging the services of an expert translator, which translation was admitted into evidence. Addendum J. She also did not object to the admission of the translation prepared by Dr. Chen's expert.

(3) The Adverse Inference Was Properly Extended.

The court also properly admitted Exhibit 104 as impeachment evidence against Mr. Hu after he invoked the Fifth Amendment on foundational questions, and then properly extended the adverse inference to Ms. Stewart. In *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997) (cited in *SEC v. Wolfson*, 2004 WL 985948, n.2 (D. Utah April 7, 2004)), Ms. LiButti brought a wrongful levy action. The IRS had assessed unpaid taxes against her father and believed he was the "effective owner" of Devil His Due, a race horse, and levied against the horse and its earnings. *Id.* at 113. Her father refused to answer deposition questions about whether he owned some interest in the horse. *Id.* 117-18. Concerning extending adverse inferences to a party when a non-party witness invokes the Fifth Amendment in civil

cases, *id.* at 120-25, the court suggested “a number of non-exclusive factors which should guide a trial court,” including: (a) “The Nature of the Relevant Relationships”<sup>76</sup>; (b) “The Degree of Control of the Party Over the Non-Party Witness”<sup>77</sup>; (c) “The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation”<sup>78</sup>; and (d) “The Role of the Non-Party Witness in the Litigation.”<sup>79</sup> *Id.* at 123-24.<sup>80</sup>

Considering these factors,<sup>81</sup> the adverse inference from Mr. Hu’s invocation of the Fifth Amendment is attributable to Ms. Stewart: (a) Ms. Stewart recruited Mr. Hu from his

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<sup>76</sup>This factor “should be examined . . . from the perspective of a non-party witness’ loyalty to the . . . defendant . . . . The closer the bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.” 107 F.3d at 123.

<sup>77</sup>“The degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed. R. Evid. 801(d)(2), and may accordingly be viewed . . . as a vicarious admission.” 107 F.3d at 123.

<sup>78</sup>“The trial court should evaluate whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.” 107 F.3d at 123.

<sup>79</sup>“Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the court.” 107 F.3d at 123-24.

<sup>80</sup>The court concluded: “the circumstances of this case compel the admissibility and consideration by the trial court of Roberts’ refusal to answer the questions addressed to him that struck directly at the only issue before the court—whether he or his daughter was the effective owner of . . . Devil His Due.”

<sup>81</sup>*See also Parker v. Olympus Health Care, Inc.*, 264 F. Supp. 2d 998, 1001-02 (D. Utah 2003) (discussing similar factors); *Garrish v. United Auto.*, 284 F. Supp. 2d 782 (E.D. Mich. 2003) (discussing same factors).

position as manager of a Territorial Owner, transferred hundreds of thousands of dollars to him to establish a Rogue Distributor, misappropriated Excel USA product and surreptitiously shipped it to him to sustain his Rogue Distributorship until products from her competing enterprise became available, and utilized his services to undercut Territorial Owners' sales and damage their good-will in critical markets. R. 14247:41-43; 118-121; R. 14245: 24-34, 37-40, 58-9, 79; R. 14342: Ex. 274; (b) the factors discussed in (a) above establish a closely allied relationship in which Ms. Stewart exercised a high degree of control over Mr. Hu in exchange for his loyalty in destroying Territorial Owners and, ultimately, Excel USA; (c) the litigation was brought in order to end the mischief Ms. Stewart and those working in active concert and participation with her were causing Excel USA and the Territorial Owners. Mr. Hu clearly has the same interest in the outcome of the litigation as does Ms. Stewart; and (d) Mr. Hu was a key figure and played a controlling role with respect to the underlying aspects of the litigation. Ms. Stewart deemed him of such significance to her defense that she called him as her first witness.

**B. EXERCISE OF THE COURT'S CONTEMPT POWER WAS PROPER.**

The heralded purpose of the judicial system is to dispense justice, according all impartial and unbiased consideration. Ms. Stewart's calculated violation of court Orders and her deliberate and wilful concealment and destruction of evidence made it impossible for Dr. Chen and her children to ever be accorded a fair trial. Striking Ms. Stewart's pleadings for her willful violation of two Orders and her obstruction of justice was required.



1. MS. STEWART CANNOT CLAIM, FOR THE FIRST TIME ON APPEAL, THE COURT LACKED AUTHORITY TO STRIKE HER PLEADINGS.

Ms. Stewart asserts that she preserved the issue of the court's authority to strike her pleadings as a sanction for contempt at R. 7182-7438 (Trial Brief), R. 14291: 127-214 (oral argument), R. 6060-6094 (Motion to Dismiss for failure to produce Dr. Chen and Mr. Zhang). Dr. Chen respectfully disagrees that Ms. Stewart preserved such issue at any of those references. This Court should decline to consider the claim now, since it is raised for the first time on appeal.

2. THE COURT'S ACTION WAS NEITHER CAPRICIOUS NOR ARBITRARY.

Ms. Stewart willfully violated the TRO. She willfully violated the Interim Order. She conspired to obstruct justice and carried out her plan. She displayed contempt for the court's authority and for the oath she swore to tell the truth. Her plan to prevent Dr. Chen, her children and other litigants from having the opportunity to present their grievances and receive a fair hearing nearly succeeded. Her actions made it impossible for such to now ever occur. She defrauded the court through the spoliation of evidence which, to this day, has not been returned. The "missing" evidence would undoubtedly further confirm the wrongful nature of the identified acts. The trial court could protect innocent litigants and the integrity of cases entrusted to the court in no other way.

The trial court has broad discretion in the exercise of its contempt power, both civil and criminal, which will not be disturbed except for action "which is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of . . . discretion." *Shipman v.*

*Evans*, 2004 UT 44, ¶¶ 39-41 (citations omitted). This Court stated in *Von Hake v. Thomas*, 759 P.2d 1162, 1166-67 (Utah 1988):

Utah law on the subject of contempt must be drawn together from case law and from statutes. The earliest law in this area is decisional and based on the common law. The substantive and procedural rules were then altered by statute. This legislation was not comprehensive, and our subsequent decision seem to take the position that to the extent the common law was not inconsistent with the statutes, its survives and can continue to evolve.

A trial court's power to act in the administration of justice is well established. Courts have "inherent powers not derived from any statute" to control the proceedings before them. *See Griffith v. Griffith*, 1999 UT 78, ¶ 13, 985 P.2d 255 (citing *In re Evans*, 130 P. 217, 224-25 (Utah 1913)). This Court has long held:

[C]ourts of general and superior jurisdiction possess certain inherent powers not derived from any statute. Among these are the power to punish for contempt, to make, modify, and enforce rules for the regulation of the business before the court, to amend its record and proceedings, to recall and control its process, . . . . 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 inherent 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. 217, 224-25 (Utah 1913).<sup>82</sup> A court may use these inherent powers to sanction litigants. In appropriate cases, a court can impose the sanction of dismissal by default.<sup>83</sup>

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<sup>82</sup>Ms. Stewart suggests that the legislature has limited the court's ability to fashion appropriate remedies in its administration of justice. Stewarts' Brief, at 52-53. Where the contumacious conduct goes to the heart of the integrity of the judicial process, the court, as a coordinate branch of government, does have the inherent authority to control the proceedings before it. *See In the interest of J.E.S.*, 817 P.2d 508, 511-13 (Colo. 1991) (legislature may not unduly limit sanctions for contumacious conduct).

<sup>83</sup>*See Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Pope v. Federal Express Corp.*, 974 F.2d 982, 984 (8th Cir. 1992). *Cf. Archibeque v. Atchison, Topeka and Santa*

Ms. Stewart’s characterization of the court’s authority to strike pleadings as a sanction for contempt was incomplete. She improperly labeled the trial court’s action “mere punishment” for contumacious conduct. This is not true. While courts have held that a court may not strike an answer and issue default for contumacious conduct *unrelated* to the merits of the case, *Hovey v. Elliot*, 167 U.S. 409, 413-14 (1897), the opposite is true when the misconduct of a party interferes with the fairness of the proceeding. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51 (1909).<sup>84</sup>

The “striking of pleadings, entering of default, and rendering of judgment against a disobedient party are the most severe of the potential sanctions that can be imposed upon a . . . party.” *Utah Department of Transp. v. Osguthorpe*, 892 P.2d 4, 8 (Utah 1995). Where a party willfully, however, or in bad faith fails to comply with a court order that undermines

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*Fe Ry. Co.*, 70 F.3d 1172 (10th Cir. 1995).

<sup>84</sup>The *Hammond* Court explained:

The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create *a presumption of fact as to the bad faith and untruth* of an answer to be gotten from the suppression or failure to produce the proof ordered, *when such proof concerned the rightful decision of the cause*. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey v. Elliott*, and the power exerted in this, is as follows: *In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.*

212 U.S. at 350-51 (emphasis supplied).

the integrity of the cause, this sanction is appropriate.<sup>85</sup> *Id.* (prejudice to government resulted from party's discovery abuses, justifying the striking of landowner's answer). Such sanction in cases involving destruction or spoliation of evidence is particularly appropriate. Litigants have an "affirmative duty to preserve evidence which might be relevant to the issues in the lawsuit." *In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000).<sup>86</sup>

The sanction of striking pleadings also serves "an important deterrent value." *Id.* at 429. "Imposing a dispositive sanction for this type of conduct punishes the wrongdoer for the severity of its culpable conduct, and serves to put the public on notice that this type of behavior will be punished severely." *Id.* Another court explained:

Permitting this lawsuit to proceed would be an open invitation to abuse the judicial process. Litigants would infer they have everything to gain, and nothing to lose, if manufactured evidence merely is excluded while their lawsuit continues. Litigants must know that the courts are not open to a person who would seek justice by fraudulent means.

*Brady v. United States*, 877 F. Supp. 444, 453 (C.D. Ill. 1994). The court's authority and the appropriateness of the action taken are both beyond question.<sup>87</sup>

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<sup>85</sup>Courts have employed their inherent powers to impose the sanction of default in cases involving behavior of the type in which Ms. Stewart engaged. *Brady v. United States*, 877 F. Supp. 444, 452 (C.D. Ill. 1994) (destruction of evidence); *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991) (falsification of testimony), *Vargas v. Peltz*, 901 F. Supp. 1572, 1581 (S.D. Fla. 1995) (perjury and obstruction of justice).

<sup>86</sup>See L. Solum and S. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1095-96 (Fall 1987) (summarizing cases applying inherent power).

<sup>87</sup>The trial court found Ms. Stewart in both civil and criminal contempt. Striking Ms. Stewart's pleadings was appropriate under either or both contempt findings. In the criminal context the remedy vindicated the court's authority through punishment for violation of Orders, and it was necessary to preserve the integrity of the proceedings and

3. MS. STEWART FAILED TO MARSHAL THE EVIDENCE.

Ms. Stewart failed to marshal the evidence<sup>88</sup> in support of her assertion that the trial court abused its discretion in striking her pleadings as a sanction for her contempt.<sup>89</sup> The properly marshaled evidence, as set forth in the Statement of Facts herein. Ms. Stewart's characterization of facts at pages 54-55 of her Brief are set in the light most favorable to herself and does not fulfill her marshaling obligation. Some material omissions follow: (a)

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protect the administration of justice because the contumacious conduct (obstruction and spoliation) had made the proceedings inherently and irreparably unfair. For civil contempt striking the pleadings could be considered remedial because Ms. Stewart's contumacious activities made it certain that Dr. Chen could not receive the process she was due. Given Ms. Stewart's conduct, there was no way the trial court could otherwise administer justice. Ms. Stewart's obstruction and spoliation could be purged only by the court granting Dr. Chen the relief she sought in her Verified Complaint because Ms. Stewart had successfully hijacked the only vehicle through which Dr. Chen could obtain relief, the judicial process.

<sup>88</sup>Examples of improper marshaling include (a) the assertions that "there was little in the way of actual damage to E. Excel for any purported violation of the Interim Order or the [TRO]. Most of the criticized conduct was easily cured," Stewarts' Brief, at 54, and (b) the list of twelve categories of contumacious acts for which Ms. Stewart minimizes and mischaracterizes the injury to Excel USA: (1) Territorial Owners did not produce written contracts, so it was their own fault Ms. Stewart did not ship them product; (2) no cactus juice was damaged; (3) the rodents were removed within two days and Excel USA had had prior rodent problems; (4) product that was removed was returned; (5) Ms. Stewart was rarely at Excel USA when the violations occurred; (6) the surveillance system incurred no permanent damage; (7) missing reports were recreated at nominal cost; (8) analytical and toxicology reports were easily replaced; (9) Excel USA attorneys were given opportunity to review records in the possession of Ms. Stewart's counsel; (10) Ms. Stewart "made every reasonable effort to return any equipment, inventory, and corporate records removed from" Excel USA; and, (11) Taig Stewart returned more equipment and software than Excel USA claimed was missing; (12) \$1.925 million taken from Excel USA's operating account was repayment of a loan. *Id.* at 54-55.

<sup>89</sup>*See State v. Pena*, 869 P.2d 932, 936-38 (Utah 1994). The Court therefore is entitled to assume that the Contempt Findings are adequately supported by the evidence. *Utah Medical Products, Inc. v. Searcy*, 958 P.2d 228, 233 (Utah 1998).

Ms. Stewart obstructed justice, suborned perjury, and committed perjury; (b) Ms. Stewart refused to ship products to the Territorial Owners pursuant to their confirmed orders in the face of the TRO requiring her to do so, resulting in substantial damage to Territorial Owners and exposure to Excel USA, and she removed Excel USA's contracts with Territorial Owners and then asserted, in court, there were no contracts requiring such shipments; (c) Ms. Stewart used nominees and agents to do her bidding in order to prevent discovery of her involvement in violating the Orders, so her presence or absence at Excel USA's offices was of little consequence; (d) Ms. Warner's dismantling of the surveillance system allowed a number of nefarious events to take place without being preserved on video tape; (e) Ms. Stewart's return of *some* Excel USA property--some damaged and unusable--nearly eight months after she was ordered *immediately* to return the product deprived Excel USA of essential property to operate its business; (f) Ms. Stewart shipped product to Rogue Distributors in violation of the Orders, for which Excel USA never received payment and which the Rogue Distributors used to set up competing distribution systems to undermine the Territorial Owners' markets and good will; (g) Ms. Stewart established a competing enterprise on the broken back of Excel USA and recruited employees and former employees of Excel USA to assist her in establishing her enterprise in violation of the non-competition agreements which she caused to be removed from Excel USA's files and premises; (h) she approved of the placement of rodents in the Excel USA during the First Preliminary Injunction Hearing which threatened Excel USA's standing with the FDA, and the existence of the rodents was falsely reported to the court as the reason behind removal of the product; (i) Ms. Stewart to this day has failed to return significant quantities of documents; (j) there is no evidence in the record of a \$1.925

million loan Ms. Stewart made to Excel USA or of Board approval for repayment of the so-called loan; (k) Ms. Stewart's obstruction of justice, her spoliation of substantial quantities of documentary and electronic evidence, her removal of Excel USA's contracts with Territorial Owners, her removal of non-competition agreements, and her use of multiple nominees to prevent discovery of her flagrant and ongoing violations of the Orders, all demonstrate Ms. Stewart undermined the court's ability to administrate justice and Dr. Chen's right to a fair adjudication of her claims.

**C. MS. STEWART WAS ACCORDED DUE PROCESS.**

**1. MS. STEWART FAILED TO DEMAND A JURY.**

Rule 17, Utah Rules of Criminal Procedure, provides in part:

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court . . . .

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial.  
. . .

Ms. Stewart did not demand a jury in writing or otherwise. The issue was not preserved.

**2. MS. STEWART CANNOT RAISE, FOR THE FIRST TIME ON APPEAL, THE SCOPE OF THE EVIDENCE.**

Ms. Stewart complains, for the first time on appeal, that the scope of the evidence the court considered was broader than alleged in the Contempt Motions, suggesting she was not on proper notice. The Court should decline to consider the claim now.

The Affidavits setting forth Ms. Stewart's conduct and the Contempt Motions are extensive and address her contumacious conduct in violation of the Orders, providing Ms. Stewart proper notice of the allegations of wrongdoing. *See* Addendum E; R. 2074, 2078,

2096, 2135. Moreover, certain of Ms. Stewart's contumacious conduct occurred during the pendency of the OSC Hearings, and as those matters were addressed, Ms. Stewart did not assert that she lacked notice of allegations of her ongoing violations, nor was she deprived the opportunity to respond.

3. MR. HOLMAN'S INVOLVEMENT DID NOT PREJUDICE MS. STEWART.

a. THE STEWARTS' ARGUMENTS CONCERNING THE SPECIAL MASTER ARE IMPROPER.

In its November 2002 Order, this Court dismissed, *sua sponte*, Ms. Stewart's and Taig Stewart's "issues dealing with the appointment of the Special Master." Addendum B. Despite this Order, the Stewarts spend a number of pages asserting the special master had an improper role in the OSC Hearings. Stewart's Brief, at 61-66. These arguments violate the letter and spirit of the Court's November 2002 Order.<sup>90</sup>

b. NO DUE PROCESS CLAIM WAS PRESERVED.

Until filing her Notice of Appeal, R. 8777, the Stewarts raised no concerns that Mr. Holman's involvement in the Preliminary Injunction Hearing on Excel USA's and Ms. Stewart's cross Motions, which were considered simultaneously with the OSC Hearings, tainted the OSC Hearings. The Court should decline to consider the claim now.

c. EVIDENCE DEVELOPED INDEPENDENT OF MR. HOLMAN'S INVOLVEMENT SUPPORTS THE ORDERS.

In its January 24, 2003 Order denying the Motion to Vacate, the trial court clarified:

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<sup>90</sup>The basis of the special master's appointment and the actions he took after his appointment go hand in hand and are briefed in the Special Master Appeal. Addendum L.



“This Court concludes that the outcome of the hearings would not have been any different if the errors alleged by Madam Chen, particularly regarding the Special Master, had never occurred.” R. 12760. The undisputed record evidence of Ms. Stewart’s contumacious conduct, independent of Mr. Holman’s involvement, bears this out.

Under both translations, which the trial court found were not materially different, Ms. Stewart obstructed justice. Her perjurious testimony of February 8, 2001, carried out her plan, as did Mr. Hu’s testimony of February 13, 2001. Ms. Stewart’s Third and Fourth Affirmations, by her own admission, acknowledged her attempt to mislead the Utah court. And, Addendum J, the translation her expert prepared, reveals the conspiracy. Her testimony given during the OSC Hearings (prior to the court’s combining those Hearings with hearings on the cross Motions for Preliminary Injunction), while a further attempt to mislead the court, also confirmed her obstruction of justice and perjury. *See* Addendum N.

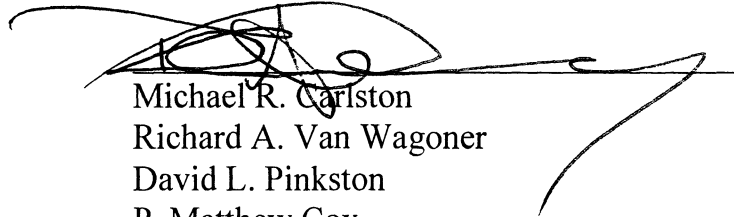
Ms. Stewart’s violation of the TRO and Interim Order by failing to fill confirmed orders, shipping products to Rogue Distributors, her acts of sabotage, conversion of Excel USA property and establishment of a competing enterprise are not subject to realistic dispute. The evidence in support thereof is overwhelming without the involvement of Mr. Holman.

## **X. CONCLUSION**

The Contempt Orders should be affirmed. The integrity of the judiciary cannot be open to siege through recalcitrance. The actions taken by the trial court were necessary and proper.

DATED this 16 day of June, 2004.

SNOW, CHRISTENSEN & MARTINEAU

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

Michael R. Carlston

Richard A. Van Wagoner

David L. Pinkston

P. Matthew Cox

Attorneys for Plaintiffs/Appellees

## **XI. ADDENDUM**

Bound separately

## **XII. CERTIFICATE OF SERVICE**

Snow, Christensen & Martineau, attorneys for defendants herein, certifies that the attached **APPELLEE'S BRIEF IN RESPONSE TO BRIEF OF JAU-HWA AND TAIG STEWART** and separately bound **ADDENDUM** (Utah Supreme Court 20020927-SC) was served upon the parties listed below by placing two copies thereof in an envelope addressed to:

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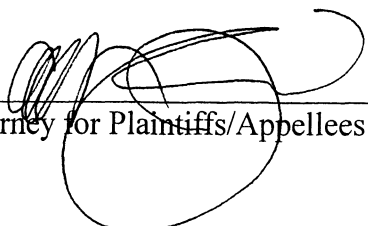
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\_\_\_\_\_  
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