

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

**IN RE
VITAMIN C ANTITRUST LITIGATION**

This Document Relates To:

*Animal Science Products, Inc., et al. v.
Hebei Welcome Pharmaceutical Co., Ltd., et
al.*, Case No. 1:05-CV-00453(BMC)(JO)
(E.D.N.Y.)

**MASTER FILE 1:06-MDL-1738
(BMC)(JO)**

**NON-SETTLING DEFENDANTS'
NOTICE OF FILING OF AFFIDAVIT
OF QIAO HAILI PURSUANT TO
THE COURT'S ORDER OF JULY 11,
2012 AND STATEMENT THEREON**

Pursuant to the Court's Minute Order dated July 11, 2012, Non-Settling Defendants attach hereto as Exhibits A and B¹ the Affidavit of their proposed trial witness Mr. Qiao Haili, the former Chinese government official responsible for administering and enforcing China's vitamin C export regulations during the relevant period in this litigation. As directed by the Court, Mr. Qiao's Affidavit provides the details of his testimony which Defendants seek to offer at trial.

Defendants further submit this brief statement to provide a summary of Mr. Qiao's Affidavit for the Court's convenience, and to highlight why this crucially important testimony should be permitted at trial.

At the July 10 Status Conference, the Court stated that "there are factual issues surrounding the determination of whether Chinese law actually precluded these defendants from

¹ Exhibit A is an executed copy of Mr. Qiao's Affidavit attaching exhibits in Chinese. Exhibit B is an English translation of the Affidavit attaching translations of exhibits. Defendants reserve the right to challenge and correct the translation of these exhibits at a time appropriate.

doing anything but fixing the price of the Vitamin C. So there are things for the jury to determine, and I'm going to let you present that stuff to the jury.... So you will have relatively free reign in presenting what seems to me is essentially a duress defense to the jury." (Status Conference Hr'g Tr. 7:10-18, July 10, 2012.) Such factual issues, the Court said, include "things that people may or may not have said." (*Id.* at 10:8.)

Mr. Qiao's Affidavit, as summarized below in Section I, reveals that there is simply no witness more qualified to testify on these topics, and explains that Defendants were compelled to engage in the conduct of which Plaintiffs complained. This testimony will go to the heart of Defendants' defense and is the sort of evidence that Defendants should be permitted to present at trial.

Although Mr. Qiao was timely identified in 2006 as witness by all three non-settling Defendants' Rule 26(a) Statements as a knowledgeable individual, he was unavailable to be called as a witness while he was still with the Chamber due to the position of the Chinese government as discussed before Judge Trager in 2007. *See* Transcript of June 5, 2007 Hearing at pp. 91, 119. However, Mr. Qiao has now become available by virtue of his retirement from the Chamber, and as discussed below in Section II there is more than ample time for pre-trial discovery should Plaintiffs so desire, and no basis for precluding him from testifying at trial as Plaintiffs sought to do at the status conference.

I. Summary of Mr. Qiao's Proposed Testimony.

From 1992 until his retirement, Mr. Qiao served as the individual directly responsible for administering and enforcing China's regulations on vitamin C exports. (Affidavit ¶¶ 4, 18). He was the highest level officer at the Chamber of Commerce of Medicines and Health Products Importers and Exporters (the "Chamber") responsible for industry coordination of vitamin C.

(*Id.* at ¶ 3). Mr. Qiao is prepared to testify at trial about the authority delegated to the Chamber and its Vitamin C Subcommittee by China's Ministry of Commerce, their industry coordination responsibilities as mandated by the Ministry, and the actions he personally undertook and directions he issued to vitamin C manufacturers to implement industry coordination measures as mandated by the Chinese government.

As set forth in greater detail in the attached Affidavit, Mr. Qiao will testify based on his personal experience regarding the implementation of the Chinese government mandated policy that Chinese exporting companies "act in unison" in competing with foreign companies, the creation of various chambers to implement that policy, the delegation of government authority to the Chamber "to regulate the foreign trade ... in order to achieve the Chinese government's economic goals," and his assignment by MOFTEC to that Chamber as the highest level officer responsible for industry coordination of pharmaceutical products. (¶¶ 2 et seq.) He will testify that he conducted that coordination function under regulations with which he had personal day-to-day familiarity and often personally drafted. (*See, e.g.,* ¶¶ 13, 17, 19, 22, 40 and 44).

Mr. Qiao will testify that a number of the Ministry's regulations formalized the Chinese Government's requirement that the Chamber be charged with the responsibilities and authority to administer the mandatory industry coordination of vitamin C exports. In 1996, MOFTEC Ministry issued a report to China's State Council based on a report he submitted to that Ministry, expressing its dissatisfaction with the activities of Chinese vitamin C companies in export and "the dangers that low prices posed to Chinese national economic interests." (¶ 15.) Soon thereafter, Mr. Qiao personally participated in drafting MOFTEC's 1997 regulation that "included mandates to strictly control vitamin C production scale" and to "strengthen the coordination of vitamin C exports." (¶ 17.)

Mr. Qiao will testify that under this regulation, which he administered and which was in effect in November and December 2001 (the time when Plaintiffs allege a conspiracy was formed), “the vitamin C manufacturers were required to strictly implement industry coordination measures under Chamber’s supervision, with penalties imposed for any attempts at circumvention.” (¶ 18.) Further, the government agencies responsible for issuing export licenses were required to issue licenses only to those companies that complied with “government mandated price and volume as coordinated and set by the Chamber.” (*Id.*)

Mr. Qiao will testify that he received a directive from the Ministry approving the establishment of a Sub-Committee to regulate vitamin C (¶ ¶19 *et seq.*) (the “Approval Directive”) and drafted the 1998 Charter of the Chamber’s Vitamin C Sub-Committee, which he designed to set forth the plenary authority of the Chamber over exporter members, requiring that they follow the directives of the Chamber. (¶ 22.)

As part of his responsibilities at the Chamber, and under the authority delegated by the Ministry, Mr. Qiao personally organized and presided over numerous meetings of the Chinese vitamin C manufacturers. (¶ 25.) At these meetings, Mr. Qiao “identified export issues to be addressed by industry coordination and directed, and required exporting manufacturers to discuss and agree upon appropriate measures.” (*Id.*)

Mr. Qiao will testify that he exercised the power delegated to him under the 1997 regulation and the 1998 approval directive to compel the vitamin C manufacturers to adopt export coordination measures at meetings held in November and December 2001 when Plaintiffs allege an unlawful conspiracy was formed. (¶ 36.) He will further testify from his personal experience that although China's accession to the WTO in 2002 led to the adoption of new regulatory mechanisms which he enforced, the mandate that the Sub-Committee exercise self-

discipline under the direction and auspices of the Chamber remained unchanged, the Chamber continued to have power and the duty, delegated by the government, to enforce these agreements, and vitamin C manufacturers still had to attend Sub-Committee meetings which he as a Chamber officer called, and that they had to follow his agendas for discussion and had to reach agreement by consensus at those meetings on self discipline and coordination. (¶ 38.)

Mr. Qiao will testify that a new mechanism known as “verification and chop” was implemented by him to continue the Government’s requirement of industry coordination and self-discipline. (¶¶ 38-43.) Under this system, all vitamin C export contracts were required to be submitted to Mr. Qiao and his staff for review and approval so as to ensure they complied with the industry agreements reached under his supervision and direction. (¶ 41.) After reviewing each export contract to ascertain whether it met the price and quota requirements under the agreements mandated by the Chamber, Mr. Qiao or a member of his staff would, if the contract complied, affix the Chamber’s “chop,” and the shipment could proceed. (*Id.*) If the chop was not on the contract, Chinese Customs would not accept the export application and the vitamin C could not be exported. Mr. Qiao will testify that he used this tool to “review both prices and quantities” and to set quotas. (¶42.)

Mr. Qiao will also testify that the new Sub-Committee Charter, which he drafted in 2002, continued the fundamental principle that the Sub-Committee had to accept guidance and supervision from the Chamber, and was to coordinate and guide export activities, promote self-discipline, and protect the interests of the State. (¶44.) He will testify that this was all done by him in compliance with an Approval Directive issued by MOFCOM in 1998. (¶45.)

Mr. Qiao will testify from his personal experience and familiarity with the Chamber's structure that even after China joined the WTO, “as a practical matter, no manufacturer could

abandon participation in the Sub-Committee or the meetings that the Chamber called.” (*Id.*) “This is because those meetings, under the Chamber’s guidance and direction, were to establish the prices and volumes which would meet with our approval and chop.” (¶ 46.) The manufacturers could not disregard the verification and chop system. (¶¶ 47, 48, 50.) Rather, Mr. Qiao continued to call meetings and “warned the manufacturers” that the Chamber would not approve their exports until they complied with price and export agreements. (¶¶ 51-57.) Indeed, “[t]he verification and chop system provided the Chamber with an effective tool to enforce industry self-discipline and coordination.” (¶49.)

Mr. Qiao will testify to a number of instances of direct coordination compelled by him, acting under the authority delegated to the Chamber by the Chinese government. (*See* ¶¶ 51, *et seq.*) For example, he will testify that in late 2003, he held a meeting to address industry coordination where “at my direction the manufacturers agreed to limit production during the first half of 2004.” (¶54.) Similarly, in December 2005, Mr. Qiao will testify he presided over a meeting where he “required vitamin C manufacturers to implement the industry coordination measures of suspending production in April and May of 2006.” (¶ 57.) He further “warned manufacturers that if any company quoted a lower price than the minimum export price or did not stop production as mandated, the Chamber would not issue export verification approvals to that company until it became compliant.” (*Id.*) He will testify that in June 2006, he “reminded” NEPG of its “obligation to follow industry coordination” and threatened to “impose a series of sanctions on NEPG” to force NEPG’s compliance. (¶ 58.)

Mr. Qiao will testify that the administration of Chamber’s mandated industry coordination measures was not perfect. (¶ 59.) “[T]here was no guarantee that circumvention would not be attempted.” (¶ 60.) “[T]here were basic changes in market dynamics, such as the

withdrawal of vitamin C producers in the other countries, the SARS outbreak in late 2002 through the middle of 2003, and a second epidemic in late 2003-2004, where prices rose significantly on their own.” (¶ 61.) Nevertheless, he will testify that while sometimes self discipline was effective and sometimes it was not, whether the industry coordination measures adopted under the regulatory mandate issued by the Chinese government were effective or not, the Chinese vitamin C manufacturers were required at all times to participate in industry coordination discussions, following the agenda the Chamber set. (¶ 67.)

II. There is No Basis to Exclude Mr. Qiao’s Testimony at Trial.

Clearly, Mr. Qiao’s testimony is relevant, indeed critical to the defense of these proceedings. However, Plaintiffs stated at the July 10th hearing that they wished to exclude it. There is no basis to do so.

Mr. Qiao was identified early on as a knowledgeable person with information relevant to this case.² He was only unavailable as a witness because he was employed by the Chamber, and due to the position of the Chinese Government which would not permit him to give any testimony in these proceedings as a matter of policy -- a circumstance wholly beyond the control of Defendants and, indeed, recognized by the Court as discussed above.³ Mr. Qiao’s availability now is due only to his retirement — again a circumstance wholly beyond the control of Defendants.

There is no prejudice to Plaintiffs as regards his proposed testimony. The substance of Mr. Qiao’s testimony has repeatedly been set forth in various papers submitted by Defendants and the Ministry during the course of proceedings in this case. It is set forth in exacting detail in

² Defendants Hebei, NEPG and Weisheng disclosed Mr. Qiao as a witness in their Rule 26 initial disclosures served on Plaintiffs in August of 2006.

³ See Transcript of June 5, 2007 Hearing at pp. 91, 119.

the Affidavit submitted herewith. Plaintiffs will be able to depose Mr. Qiao in the United States before the November 5 trial date (still three months away). Defendants are willing to accommodate any reasonable scheduling requests by Plaintiffs.⁴

As the Second Circuit has held, a court's refusal to allow a party's witness to testify at trial on grounds that the witness was not previously disclosed or made available for discovery constitutes "an extreme sanction in any case." *Outley v. City of New York*, 837 F.2d 587, 590 (2d Cir. 1988). But this "extreme sanction" further has an "excessively harsh effect" when, as here, "the testimony is extremely important to [the proponent's] case." *Id.* Therefore, the Second Circuit has instructed that, when the evidence of the witness is important, "only extreme misconduct on the part of the [proponent] or extreme prejudice suffered by the [opposing party] would justify the extraordinary sanction of preclusion." *Id.* at 591.

In *Outley*, the court reversed the judgment of the district court and remanded the matter for a new trial because the trial court "abused its discretion" in precluding two witnesses from testifying on the plaintiff's behalf. *Id.* at 588; accord *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904-05 (3d Cir. 1977)⁵ (holding exclusion of important evidence is an "extreme" sanction, "not normally to be imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent.")

In accordance with these directives, courts in this district and beyond have refused to preclude testimony that is important to the proponent's case—even when the opposing party could not obtain prior discovery from the witness. See *Disability Advocates, Inc. v. Paterson*, 03-CV-3209 NGG MDG, 2009 WL 1312112, *7 (E.D.N.Y. May 8, 2009) ("the subject of the

⁴ As defense counsel explained at the Status Conference, Mr. Qiao is neither controlled nor represented by defense counsel, but Defendants have been advised that he will make himself available for a deposition in the United States. (Status Conference Hr'g Tr. 7:10-18)

⁵ *Overruled on other grounds by Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985)

testimony from the HRA witness is sufficiently important that it declines to exclude this witness. At trial, the court will allow Plaintiff broad latitude during cross-examination of this witness, given that Plaintiff cannot depose her prior to trial.”); *Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 49 F. Supp. 2d 456, 462 (D. Md. 1999) (denying motion to exclude where witness testimony was “of central importance to the plaintiffs’ case” and went “to an issue of unquestionable importance to the litigation.”); *Meyers*, 559 F.2d at 904-05 (holding district court erred by excluding witness given “how important such testimony might have been and how critical is its absence”). Here, not only is Mr. Qiao’s testimony highly relevant to the defenses asserted by Defendants⁶, he is the only witness from the Chamber available to give such testimony.

In addition to the importance of testimony, courts have identified three other factors to be considered when determining whether to preclude a witness not previously disclosed or available: (1) the explanation for the failure to name or provide the witness previously; (2) the need for time to prepare to meet the testimony; and (3) the possibility of a continuance. *Outley*, 837 F.2d at 590. As discussed above, none of these factors support Plaintiffs’ request for exclusion here: Mr. Qiao was previously unavailable for reasons beyond Defendants’ control and there is more than ample time for Plaintiffs to take his deposition. The time needed for Plaintiffs to prepare should not be an issue, nor is a continuance of the trial date necessary. *See Tucker*, 49 F. Supp. 2d at 462 (declining to exclude witness where four months remained before trial and proponent thus “did not wait until the eve of trial.”)

⁶ Indeed, the Court specifically referred to statements made by Mr. Qiao in its order denying Defendants’ summary judgment motion. *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 538, 539, 562-63, 566-67, n. 13, n. 21 (E.D.N.Y. 2011).

WHEREFORE, for the reasons stated above Defendants respectfully request that Mr. Qiao be permitted to testify at trial.

Dated: August 8, 2012

Respectfully Submitted,

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