UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE **VITAMIN C ANTITRUST LITIGATION**	**1:06-MD-01738 (BMC) (JO)**
THIS DOCUMENT RELATES TO: **ALL CASES**	**CV-05-453**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR CERTIFICATION OF THE COURT'S SEPTEMBER 1, 2011 ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. The Applicable Standard 1

A. Interlocutory Appeals Are Strongly Discouraged 1

B. The Statute Requires More Than a Belief That the Appellate Court Might Reverse 3

C. Satisfying the Statutory Criteria Is Necessary, But Not Sufficient 4

II. The Deference Accorded the Ministry's Statements Is Not a Proper Issue for Interlocutory Review 4

A. There Is No Ground for Substantial Disagreement as to the Law 5

B. The Degree of Deference the Court Afforded the Ministry's Statements Is Not a Pure Question of Law Appropriate for Interlocutory Review 8

III. Whether Defendants' Conduct Was Compelled By A Foreign Sovereign Is Not An Appropriate Issue For Interlocutory Review 10

A. Compulsion Is Not a "Pure" Question of Law 10

B. There Are No Substantial Grounds for A Difference of Opinion As to Whether Defendants' Conduct Was Compelled 11

C. Interlocutory Review of this Issue Would Not Necessarily Advance the Termination of the Litigation 14

IV. Whether the Litigation Should Have Been Dismissed Based Upon Principles of International Comity Is Not Appropriate for Interlocutory Appeal 15

V. Defendants' Motion Is Untimely 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Ackermann v. Levine,
788 F.2d 830 (2d Cir. 1986).....12

Ahrenholz v. Board of Trustees of the University of Illinois,
219 F.3d 674 (7th Cir. 2000) 8

Aspen Ford, Inc. v. Ford Motor Co.,
2008 WL 163695 (E.D.N.Y. Jan. 15, 2008) 3, 4, 10

Baumgarten v. Cnty. of Suffolk,
No. 07–CV–0539, 2010 WL 4177283 (E.D.N.Y. Oct. 15, 2010) 3

Bodner v. Banque Paribas,
114 F.Supp.2d 117 (E.D.N.Y. 2000) 16

Campania Sudamerica de Vapores S.A. v. Sinochem Tianjin,
2007 WL 1002265 (S.D.N.Y. 2007).....18

Casey v. Long Island Railroad Co.,
406 F.3d 142 (2d Cir. 2005).....9

Century Pacific, Inc. v. Hilton Hotels Corp.,
574 F. Supp. 2d 369 (S.D.N.Y. 2008).....19

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978).....2

Curley v. AMR Corp.,
153 F.3d 5 (2d Cir. 1998).....6

Estevez-Yalcin v. Children's Vill.,
2006 WL 3420833 (S.D.N.Y. 2006).....12

F. Hoffmann-La Roche Ltd. v. Empagran S.A.,
542 U.S. 155 (2004).....16, 17

Ferraro v. Sec'y of U.S. Dept. of Health and Human Servs.,
780 F. Supp. 978 (E.D.N.Y. 1992) 19

Filetech S.A. v. France Telecom S.A.,
157 F.3d 922 (2d Cir.1998).....15

Filetech S.A.R.L. v. France Telecom,
978 F. Supp. 464 (S.D.N.Y. 1997) 17

Frontier-Kemper Constructors, Inc. v. American Rock Salt Co.,
2003 WL 22384797 (W.D.N.Y. 2003) 5

Green v. City of New York,
No. 05-CV-0429, 2006 WL 3335051 (E.D.N.Y. Oct. 23, 2006).....18

Hartford Fire Ins. Co. v. Cal.,
509 U.S. 764 (1993).....15

In re 105 E. Second St. Assocs.,
No. M–47 (LLS), 1997 U.S. Dist. LEXIS 8019 (S.D.N.Y. June 7, 1997) 4

In re CINAR Corp. Securities Litigation,
186 F.Supp.2d 279 (E.D.N.Y. 2002) 16

In re Citigroup Pension Plan ERISA Litigation,
2007 WL 1074912 (S.D.N.Y. 2007).....18

In re Enron Corp.,
No. M–47 (SAS), 2006 U.S. Dist. LEXIS 63223(S.D.N.Y. Sept. 5, 2006) 3, 4

In re Flor,
79 F.3d 281 (2d Cir. 1996).....2, 3

In re Maxwell Communication Corp. plc by Homan,
93 F.3d 1036 (2d Cir. 1996).....15

In re World Trade Ctr. Disaster Site Litig.,
469 F.Supp.2d 134 (S.D.N.Y. 2007).....2

Karaha Bodas Co. v. Perushaan Pertambangan Minyak Dan Gas Bumi Negara,
313 F.3d 70 (2d. Cir. 2002).....6

Klinghoffer v. S.N.C. Achille Lauro,
921 F.2d 21 (2d Cir. 1990).....3, 8

Koehler v. Bank of Bermuda Ltd.,
101 F.3d 863 (2d Cir. 1996).....1, 2

Lidle v. Cirrus Design Corp.,
2010 WL 4345733 (S.D.N.Y. 2010).....19

Linde v. Arab Bank,
PLC, 262 F.R.D. 136 (E.D.N.Y. 2009).....15

Martens v. Smith Barney, Inc.,
238 F. Supp. 2d 596 (S.D.N.Y. 2002).....2

Matsushita Elec. Co. v. Zenith Radio Corp.,
(No. 83-2044), 1985 WL 669667 (June 17, 1985) 7

Morris v. Flaig,
511 F. Supp .2d 282 (E.D.N.Y. 2007) 4, 18

National Asbestos Workers Medical Fund v. Phillip Morris, Inc.,
71 F. Supp. 2d 139 (E.D.N.Y. 1999) 4

Richardson Elec. v. Panache Broadcasting,
202 F.3d 957 (7th Cir. 2000) 18

Santiago v. Pinello,
647 F.Supp.2d 239 (E.D.N.Y. 2009) 11

SEC v. Credit Bancorp, Ltd.,
103 F.Supp.2d 223 (S.D.N.Y. 2000).....3

Shanahan v. Vallat,
2004 WL 2937805 (S.D.N.Y. 2004).....16

Stone v. Patchett,
No. 08-CV-5171 (RPP), 2009 WL 1544650 (S.D.N.Y. June 3, 2009).....3

Switzerland Cheese Ass 'n. v. E. Horne's Mkt., Inc.,
385 U.S. 23 (1966).....2

Timberlane Lumber Co. v. Bank of Am.,
549 F.2d 597 (9th Cir.1976) 15, 17

Trugman-Nash, Inc. v. New Zealand Dairy Board,
954 F. Supp. 733 (S.D.N.Y. 1997) 17

U.S. v. First Nat. Bank of Chicago,
699 F.2d 341 (7th Cir. 1983) 12

Villegas Duran v. Arribada Beaumont,
534 F.3d 142 (2d. Cir. 2008).....6

Weir v. Propst,
915 F.2d 283 (7th Cir. 1990) 18

Whiteface Real Estate Development & Const., LLC. v. Selective Ins. Co. of Am.,
No. 8:08-cv-24 (GLS/DRH), 2010 WL 4024517 (Oct. 13, 2010 N.D.N.Y.).....19

Williston v. Feliz, 410 F. Supp. 2d 274 (S.D.N.Y 2006) 8

Plaintiffs Animal Science Products Inc., The Ranis Co., and Magno-Humphries Laboratories, Inc. (collectively "Plaintiffs") respectfully submit this opposition to Defendants' Motion for Certification of the Court's September 1, 2011 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b).

PRELIMINARY STATEMENT

On September 1, 2011, this Court denied Defendants' motion for summary judgment in a well-reasoned 72 page decision that applied the correct legal standards and, consistent with Rule 44.1, considered all relevant materials in determining that Chinese law did not compel Defendants' anticompetitive conduct. Defendants now seek to certify an interlocutory appeal - which should be granted only "rarely" and in "exceptional circumstances" - to address the weight accorded to the statements provided by the Ministry of Commerce as *amicus curiae* in support of their defenses ("Ministry's Statements"), and whether those statements mandated a judgment in their favor on their foreign sovereign compulsion defense or in the interests of comity. Defendants ask the Court to disrupt the ordinary course of trial-court proceedings, reject the general aversion to piecemeal litigation, and depart from the basic policy of postponing appellate review until after entry of a final judgment. Because Defendants have neither satisfied the statutory prerequisites of 28 U.S.C. §1292(b) for the certification of an interlocutory appeal, nor demonstrated the existence of "exceptional circumstances," the Court should reject Defendants' request.

ARGUMENT

I. The Applicable Standard

A. Interlocutory Appeals Are Strongly Discouraged

"It is a basic tenet of federal law to delay appellate review until a final judgment has been entered." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996). The Supreme

Court has emphasized that § 1292(b) certification is warranted only when "**exceptional circumstances** justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.' " *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).[1] This is because of "the debilitating effect on judicial administration caused by piecemeal appeal[s]," *Id.* at 471, which are likely to "prolong judicial proceedings, add delay and expense to litigants, burden appellate courts, and present issues for decisions on uncertain and incomplete records, tending to weaken the precedential value of judicial opinions." *In re World Trade Ctr. Disaster Site Litig.*, 469 F.Supp.2d 134, 144 (S.D.N.Y. 2007) (citing *Koehler*, 101 F.3d at 865).

Although 28 U.S.C. § 1292(b) permits a district court to certify an issue for interlocutory appeal on rare occasions, certification requests should be approached "gingerly lest a floodgate be opened that brings into the exception many pretrial orders," *Switzerland Cheese Ass 'n. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966); *see also In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) (the Second Circuit Court of Appeals has "repeatedly cautioned [that] use of this certification procedure should be strictly limited because only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment"); *Koehler*, 101 F.3d at 865 (interlocutory appeal "is a rare exception to the final judgment rule that generally prohibits piecemeal appeals"). Section 1292(b) "was not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation, or to be a vehicle to provide early review of difficult rulings in hard cases." *Martens v. Smith Barney, Inc.*, 238 F. Supp. 2d 596, 600 (S.D.N.Y. 2002).

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[1] Throughout Plaintiffs' Memorandum in Opposition, unless otherwise stated, all emphasis to quotations has been added and all citations and internal quotation marks have been omitted.

B. The Statute Requires More Than a Belief That the Appellate Court Might Reverse

The Second Circuit has repeatedly stated that the power to grant an interlocutory appeal "must be strictly limited to the precise conditions stated in the law." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990). Section 1292(b) sets forth a three-prong test that movants must satisfy: the order at issue must involve (1) "a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *SEC v. Credit Bancorp, Ltd.*, 103 F.Supp.2d 223, 226 (S.D.N.Y. 2000).

That an appellate court might reverse a district court's denial of a defendant's motion for summary judgment does not suffice to permit an interlocutory appeal. Instead, the statute requires a finding that the appeal involves a "controlling question of law." To warrant interlocutory review, the question must be one of "pure" law that "the reviewing court could decide quickly and cleanly without having to study the record." *Aspen Ford, Inc. v. Ford Motor Co.*, 2008 WL 163695, at *2 (E.D.N.Y. Jan. 15, 2008); *see also Stone v. Patchett*, No. 08-CV-5171 (RPP), 2009 WL 1544650, at *2 (S.D.N.Y. June 3, 2009) (finding no "controlling question of law" where the court's decision rested on a "highly fact-specific inquiry").

Further, the mere belief that a district court reached the wrong result is insufficient because a "substantial ground for a difference of opinion must arise out **of a genuine doubt as to the correct legal standard**." *Baumgarten v. Cnty. of Suffolk*, No. 07–CV–0539, 2010 WL 4177283, at * 1 (E.D.N.Y. Oct. 15, 2010). "[I]t is not sufficient that the relevant case law is 'less than clear' or allegedly 'not in accord' or that there is a 'strong disagreement among the parties.'" *In re Enron Corp.*, No. M–47 (SAS), 2006 U.S. Dist. LEXIS 63223, at *19 (S.D.N.Y. Sept. 5, 2006). "The mere presence of a disputed issue that is a question of first impression, without more, is insufficient to satisfy this prerequisite." *Id.* (citing *In re Flor*, 79 F.3d at 284).

As to the third prong under § 1292(b), "[a]n immediate appeal is considered to advance the ultimate termination of the litigation if that appeal promises to advance the time for trial or shorten the time required for trial." *In re Enron Corp.*, 2006 U.S. Dist. LEXIS 63223, at *19. This requirement "is strictly construed to preclude appeals that have **no clear potential to materially advance the litigation's termination**." *In re 105 E. Second St. Assocs.*, No. M–47 (LLS), 1997 U.S. Dist. LEXIS 8019, at *5-6 (S.D.N.Y. June 7, 1997) (*citing Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 88 (2d Cir. 1992)).

C. Satisfying the Statutory Criteria Is Necessary, But Not Sufficient

Merely establishing the three statutory criteria is not sufficient to guarantee an interlocutory appeal. "District court judges have broad discretion to deny certification even where the statutory criteria are met." *Morris v. Flaig*, 511 F. Supp .2d 282, 314 (E.D.N.Y. 2007) The authority to deny certification is "independent" and "unreviewable." *National Asbestos Workers Medical Fund v. Phillip Morris, Inc.*, 71 F. Supp. 2d 139 (E.D.N.Y. 1999); *see also Aspen Ford, Inc.*, 2008 WL 163695, at *2.

II. The Deference Accorded the Ministry's Statements Is Not a Proper Issue for Interlocutory Review

The first issue Defendants pose for interlocutory review is whether the Court erred by not deferring more fully to the Ministry's Statements regarding whether Defendants' behavior was compelled. This is not an appropriate issue for interlocutory review for the following reasons:

1. There is no substantial ground for difference of opinion as to the law concerning the deference a district court should give to a foreign sovereign's statement of its law; and

2. The law permits a wide range of deference depending on the circumstances, which, along with the latitude given judges determining foreign law pursuant to

Rule 44.1, does not present a pure question of law appropriate for interlocutory review.

Defendants' position regarding the level of deference paid to the Ministry's Statements is a matter of degree and weight. Absent a rule that the Ministry's Statements must be given conclusive effect – which the law does not require and Defendants cannot earnestly press – whether the Ministry's Statements were afforded the proper degree of deference is a question of whether the court properly exercised its considerable discretion. Discretionary decisions do not present the type of pure questions of law that are the proper subject of interlocutory review.

A. There Is No Ground for Substantial Disagreement as to the Law

There is no substantial ground for disagreement as to the law in this Circuit concerning what type of deference a district court must give a foreign sovereign's statement of what its law requires. Two recent Second Circuit cases clearly establish what deference a court must give to a foreign sovereign's statements of its law; and those decisions, which post-date the adoption of Rule 44.1, are not at odds with other modern authority or with the U.S. Department of Justice's positions. Despite Defendants' protest, there are no grounds for substantial disagreement as to the applicable law, because the Second Circuit has ruled on the issue. *Frontier-Kemper Constructors, Inc. v. American Rock Salt Co.*, 2003 WL 22384797, at *4 (W.D.N.Y. 2003) ("When the circuit court of appeals has already ruled on an issue, there is no substantial ground for difference of opinion").

First, Rule 44.1 gives judges wide latitude in the materials they can consider by requiring that "[i]n determining foreign law the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." The rule provides district courts with great flexibility in determining foreign law and the Second Circuit urges district judges to exercise that flexibility. *Curley v. AMR Corp.*,

153 F.3d 5, 13 (2d Cir. 1998) ("We urge district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations").

Second, precedent in this circuit since the passage of Rule 44.1 in 1966 holds that the statements of a foreign government are not conclusive and do not trump a judge's discretion to consider "any relevant material or source." *Karaha Bodas Co. v. Perushaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d. Cir. 2002) (accepting in part and rejecting in part Indonesian Ministry of Finance's statement of which party was entitled to funds under Indonesian law and stating "[w]e also agree with other Courts of Appeal that have suggested that a foreign sovereign's views regarding its own laws merit -- although they do not command – some degree of deference"); *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148 (2d. Cir. 2008) (refusing to adopt statement of Chilean law from Chilean authority regarding Chilean law in light of other factors).

Third, the two cases Defendants rely on, *U.S. v. Pink* and *Agency of Canadian Car and Foundry Co. v. American Can Co.*, both predate Rule 44.1 and the two controlling Second Circuit cases by decades. Defendants' brief cites no cases since the passage of Rule 44.1 that indicate any disagreement with the Second Circuit's position in *Karaha Brothers* and *Villegas Duran* that a foreign sovereign's statement of its law can be disregarded in whole or in part in light of other factors.

Fourth, Defendants' citations to the U.S. Department of Justice's brief in *Matsushita* and its antitrust enforcement guidelines do not create any substantial ground for disagreement because those sources do not require that substantial deference be given to a foreign sovereign's statement when that statement is unclear, ambiguous, lacks detail, or is at odds with the facts and credible evidence.

In its *amicus* brief in *Matsushita Elec. Co. v. Zenith Radio Corp.*, (No. 83-2044), 1985 WL 669667 (June 17, 1985) ("Matsushita *Amicus* Brief"), the DOJ urged adoption of a statement by the government of Japan regarding the operation of Japanese law. The statement of Japan, however, "unambiguously" informed the court concerning the nature of the governmental compulsion at issue and provided a "detailed" explanation of the relevant foreign laws and regulations. *See* Matsushita *Amicus* Brief at * 9, 23. The DOJ explicitly recognized that a sovereign's statement is only entitled to deference when appropriate given the nature of the statement and the surrounding circumstances:

> [f]or such deference to be appropriate, of course, the statement **must be clear and intelligible**. Plainly **ambiguous or internally inconsistent statements need not be treated as dispositive**. And in extraordinary circumstances, concern for the integrity of the judicial process may obligate a court to inquire into the underlying circumstances if it believes that it has been presented with a statement that is incredible on its face.

Id. at * 23.

The current DOJ Antitrust Guidelines make the same requirement for clarity and detail and defer to a foreign sovereign's statement of compelled acts only where "that representation contains sufficient detail to enable the Agencies to see precisely how the compulsion would be accomplished under local law." Antitrust Enforcement Guidelines for International Operations, §3.32.

In sum, this Circuit's law concerning how a court may defer to a foreign sovereign's statement of its law presents no ground for substantial disagreement. When determining foreign law, a court can consider all relevant materials, including statements of a foreign sovereign, but a sovereign's statement does not trump all other evidence and is only entitled to substantial deference when it is clear and detailed and not at odds with other evidence. Despite Defendants'

desire that the law be otherwise, the state of the law does not provide grounds for an interlocutory review.

B. The Degree of Deference the Court Afforded the Ministry's Statements Is Not a Pure Question of Law Appropriate for Interlocutory Review

The Court's exercise of its discretion in determining foreign law does not present the type of pure issue of controlling law appropriate for interlocutory review.

A legal issue is controlling "if reversal of the district court's order would terminate the action." *Klinghoffer*, 921 F.2d at 24. But not all points that are properly characterized as legal issues, even controlling legal issues, are appropriate for interlocutory review. "Courts interpreting this standard have maintained that "the 'question of law' must refer to a 'pure' question of law that the reviewing court 'could decide quickly and clearly without having to study the record.'" *Williston v. Feliz,* 410 F. Supp. 2d 274, 276 (S.D.N.Y 2006) (*quoting Ahrenholz v. Board of Trustees of the University of Illinois,* 219 F.3d 674, 676-77 (7th Cir. 2000)). As Judge Posner explained, the purpose of 1292(b) review was to permit review of a "'pure' question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case." *Ahrenholz*, 219 F.3d at 677.

The issue Defendants present for review is neither a pure legal question that can be resolved without studying the record, nor is it necessarily a controlling issue. It is not a pure legal issue because, as the Court's lengthy review of the record in its September 1, 2011 Order demonstrates, the Court had to conduct a thorough review of the summary judgment evidence before deciding how much deference to afford the Ministry's Statements. On appeal, the

reviewing court would necessarily have to review the same evidentiary record in assessing whether the extent of deference the Court afforded the Ministry's Statements was appropriate.

Even though the determination of foreign law is termed an issue of law, it is not a "pure" issue of law because Rule 44.1 places the district court in the role of collecting information concerning foreign law from different sources, weighing that information, and then determining the content of foreign law. This inquiry is necessarily driven by the record and requires the court to exercise its discretion and judgment as to how much weight to give each piece of material (including statements of foreign sovereigns) in determining the foreign law. This review takes the court's Rule 44.1 ruling quite far afield from the type of pure issue of law that is readily reviewable on an interlocutory appeal. *Cf. Casey v. Long Island Railroad Co.*, 406 F.3d 142, 147 (2d Cir. 2005) ("in sum, the correctness *vel non* of an order finding that a monetary verdict is not supported by the evidence but rather is so high as to shock the judicial conscience, and requiring a new trial unless the claimant accepts a remittitur, is not a question of law as to which an immediate interlocutory appeal is appropriate under § 1292(b)").

Moreover, immediate appellate review may not materially advance the ultimate termination of the litigation. Because Rule 44.1 provides the district judge with considerable discretion in what evidence to consider and how to weigh the evidence relevant to the foreign law, including discretion in the amount of deference to grant a foreign sovereign's statements, it is not necessarily a controlling issue of law. While it is conceivable that an appellate court might completely disagree and end the case, it is also possible that the court could disagree with the **amount** of deference afforded the Ministry's Statements but still not think the statements must be given conclusive weight. In the latter situation, the appeal would not necessarily end the case, or even materially advance the case.

III. Whether Defendants' Conduct Was Compelled By A Foreign Sovereign Is Not An Appropriate Issue For Interlocutory Review

Defendants request certification of the question of whether China's regulatory system compelled Defendants' anticompetitive conduct and whether there was sufficient deference to the Ministry's Statements on this issue. These issues do not meet any of the three requirements of Section 1292(b). Accordingly, the Court's Order does not raise issues that are appropriate for interlocutory review.

A. Compulsion Is Not a "Pure" Question of Law

Defendants begin their argument by asserting that, because the Court resolved this issue pursuant to Rule 44.1, its determination presents solely an issue of law subject to *de novo* appellate review. But Defendants again misconstrue the applicable standard. The fact that a question may be phrased as an issue of law does not suffice. Rather, the question must be one of "pure" law that is capable of resolution "quickly and cleanly without having to study the record." *Aspen Ford, Inc.*, 2008 WL 163695 at *2. Whether Defendants' conduct was compelled by the government of China is not such a question.

First, a review of the record is necessary to determine what the Defendants actually *did.* As this Court held, and Defendants do not dispute, the compulsion defense is not available for conduct going beyond what the foreign sovereign compelled. Order at 35. Here, Defendants engaged in a range of anticompetitive conduct over a period of years. Even if the appellate court could "quickly and cleanly" determine that Chinese law compelled some anticompetitive conduct, a study of the record would be necessary to determine whether Defendants' conduct in fact exceeded the scope of any such compulsion.

Second, it is appropriate - even necessary - to review the factual record to determine what, if anything, the government of China directed the Defendants to do. Defendants and the

Ministry maintain that governmental compulsion is accomplished, in part, through oral directives. As this Court observed, the "oral directives by officials of the Ministry and the Chamber appear to be an essential part of the Chinese law governing vitamin C." Order at 44 n. 36. Thus, resolving the disputed issue of whether any governmental directives compelled Defendants' conduct requires a full review of the record.

Third, as this Court correctly concluded, it is appropriate to review the factual record to interpret the relevant laws and regulations in this case because Defendants have repeatedly argued that written regulations should be interpreted contrary to the plain meaning of their terms. While Defendants ask this Court to ignore both the text of the legal instruments and the factual record, and to accept the representations of the Ministry, Defendants do not dispute this Court's finding that the Ministry failed to offer any interpretation or explanation of numerous post-2001 regulations and instruments. *See* Order at 45-46, 54-55.[2] In such circumstances, a review of the record is necessary to understand how the regulations were interpreted and applied.

B. There Are No Substantial Grounds for A Difference of Opinion As to Whether Defendants' Conduct Was Compelled

Defendants fail to satisfy the second prong of Section 1292(b) because they do not dispute that this Court applied the correct legal standard in evaluating the foreign sovereign compulsion defense. *Santiago v. Pinello*, 647 F.Supp.2d 239, 243 (E.D.N.Y. 2009) ("The

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[2] Defendants argue that the 2009 Ministry Statement answered "all" questions about the post-2001 regulation of Vitamin C. But as this Court found, that submission fails to cite any sources to support its broad and ambiguous statements. Order at 46. Rather than answering all questions about the post-2001 regulatory regime, the 2009 Ministry Statement asserts only that Defendants were obligated to abide by unspecified laws and regulations.

In their argument, Defendants assert that Plaintiffs failed to "even mention" the 2009 Ministry Statement in their opposition to summary judgment. (Def. Br. at 14). This is technically correct, but for the sole reason that Plaintiffs were not aware that the document, which was not cited in Defendants' moving papers, existed when the opposition was filed. Plaintiffs, with Defendants' consent, filed a sur-reply that addressed the 2009 Ministry Statement. (Doc. Nos. 413, 416).

second prong of § 1292(b), that there be 'substantial ground for difference of opinion' on the issue, requires a genuine doubt as to whether the district court applied the correct legal standard in its order"). Where a defendant fails to claim that the Court employed the wrong legal standard in deciding its motion, but rather contends that the court erred in its application of a particular standard, substantial ground for a difference of opinion cannot be established. *See Estevez-Yalcin v. Children's Vill.*, 2006 WL 3420833, at *4 (S.D.N.Y. 2006).

Here, the only legal standard that Defendants claim was erroneously applied concerns the degree of deference accorded to the Ministry's Statements. Defendants' argument thus consists almost entirely of rehashing the Ministry's Statements and asserting that those statements demonstrate a substantial ground for a difference of opinion on the issue of compulsion. As Plaintiffs have shown, the degree of deference accorded to the Ministry's Statements is not an appropriate issue for interlocutory review.

Defendants also imply, but do not explicitly argue, that it was improper for this Court to consider either the factual record or the text of the relevant regulations in determining whether Chinese law compelled the conduct at issue. But Rule 44.1 gives the Court broad discretion to consider *any* relevant material, including testimony, to determine the content of foreign law. *See, e.g. Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986) ("foreign law is to be determined by the court, in light of both evidence admitted and the court's own research and interpretation"); *U.S. v. First Nat. Bank of Chicago*, 699 F.2d 341, 344 (7th Cir. 1983) ("there can be no doubt that the district court was entitled to consider the letters, affidavits" and other evidence to determine what foreign law requires). Defendants point to no case limiting the ability of the Court to consider any materials or record evidence under Rule 44.1.

Defendants attempt to manufacture grounds for a difference of opinion by citing scholarly articles that purportedly support their compulsion defense. None of the articles cited, however, address the issue that was before this Court: whether these Defendants were compelled, during the relevant time period, to collusively limit the supply of vitamin C exports and to fix prices at supra-competitive levels.

The only article cited by Defendants that refers to *any* compulsory price-fixing in the years after China joined the WTO relies solely and uncritically upon the Ministry's Statements in this litigation. *See* Eleanor Fox & Dennis Davis, *Industrial Policy and Competition - Developing Countries as Victims and Users in 2006 Fordham Corp. L. Inst. International Law & Policy,* Ch. 8 at 156 (Barry Hawk, ed.) (Chan Decl., Ex. 52, Doc. No. 394-8) (citing the Ministry's Statements). The remaining articles do not reference compulsory price-fixing of exports during the relevant time period. *See* Bruce M. Owen, et al*, China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond,* 75 Antitrust L.J. 231, 251 (Chan Decl. Ex. 12, Doc. No. 394-2) (discussing a regulation enacted in 1998 and repealed in 1999 that related to the domestic prices of 20 specific products); Wang Xiaoye, *The Prospect of Antimonopoly Legislation In China*, 1 Wash. U. Global Stud. L. Rev. 201, 209 (2002) (same); Scott Kennedy, *The Price of Competition: Pricing Policies and the Struggle to Define China's Economic System*, The China Journal, No. 49 (Jan. 2003) (Milici Decl., Ex. SS, Doc. No. 397-17) (same); Yong Huang, *Pursuing the Second Best: the History, Momentum, and Remaining Issues of China's Antimonopoly Law*, 75 Antitrust L.J. 117, 129 (Chan Decl. Ex. 7, Doc. No. 394-2) (the Chinese government believes that trade associations "ought to promote" coordination to avoid below cost pricing); Howell, et al, *China's New Anti-Monopoly Law: A Perspective From the United States*,

18 Pac. Rim L. & Pol'y 53, 87 (Newmark Decl. Ex. 12, Doc. No. 399-12) (trade associations, "encouraged" by the Chinese government, have played a role in price-stabilization measures).

Finally, Defendants suggest that this Court failed to understand the nature of the Chinese regulatory system. In support, Defendants assert that the record demonstrates that virtually all of the meetings at which the Defendants communicated about price and supply agreements were organized by and presided over by the Chamber. However, the mere presence of Chamber personnel at meetings is plainly not proof that Defendants were compelled to fix prices, or that they were even required to attend the meetings. And, in any event, Defendants' assertion is factually incorrect. The record is replete with evidence showing the *Defendants* initiating communications with each other about price and supply limitations, both within and outside of Chamber meetings and Defendants organizing meetings of the sub-committee. *See,* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Doc. No. 395) at 10, 13-14, 18, and 23 and the evidence and testimony cited therein. The record is also replete with evidence demonstrating that Defendants' conduct at meetings at which Chamber personnel was present was voluntary and not compelled. *See* Order at 19-26. Once again, a review of the factual record would be necessary to resolve the issue raised by Defendants thus making it inappropriate for interlocutory review.

C. Interlocutory Review of this Issue Would Not Necessarily Advance the Termination of the Litigation

As this Court correctly concluded, even assuming that the regulatory regime required Defendants to agree on and abide by a minimum price, any compulsion was limited to the actions necessary to avoid anti-dumping suits and below-cost pricing. Order at 60. The record, however, demonstrates that Defendants' conduct far exceeded the scope of that hypothetical compulsion. Thus, "even if Chinese law did involve some compulsion, summary judgment

would still be denied because Chinese law assuredly did not compel all of defendants' illegal conduct." Order at 50. Accordingly, even if this Court granted certification of the foreign sovereign compulsion issue, and even if the Second Circuit found that Defendants were compelled to engage in "self-discipline," this litigation would not terminate.

IV. Whether the Litigation Should Have Been Dismissed Based Upon Principles of International Comity Is Not Appropriate for Interlocutory Appeal

Defendants argue that certification is warranted because there is a substantial ground for disagreement about whether a case ought to be dismissed on comity grounds where the policies of a foreign government encourage or promote, but do not compel, conduct that violates U.S. antitrust laws. Defendants rely on this Court's statement that the nature of the comity inquiry is "unclear" after *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993). Order at 32. But the Court was referring to a lack of clarity regarding whether a court must consider the remaining factors set forth in *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 606 (9th Cir.1976), in the absence of a "true conflict" with foreign law. *Id.* This is irrelevant to the issue Defendants propose for appeal, however, because, after noting the lack of clarity, *this Court considered the Timberlane factors*. Order at 33-34.

Courts within the Second Circuit have consistently affirmed that a 'true conflict' between U.S. law and foreign law, such that compliance with both is impossible, is necessary to trigger comity concerns. *See Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.1998) ("What is required to establish a true conflict is an allegation that compliance with the regulatory laws of both countries would be impossible"); *In re Maxwell Communication Corp. plc by Homan*, 93 F.3d 1036, 1049 (2d Cir. 1996) ("International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction"); *Linde v. Arab Bank, PLC*, 262 F.R.D. 136, 148 (E.D.N.Y. 2009) (a foreign law that provides a privilege

against disclosure of information sought in U.S. discovery, but does not outright prohibit the disclosure, does "not present a true conflict with United States law such that a comity analysis is necessary"); *Shanahan v. Vallat*, 2004 WL 2937805, * 9 (S.D.N.Y. 2004) (holding that "[t]he principle of international comity will permit a court to decline to hear a case only when there is a 'true conflict' between the laws of the countries involved"); *In re CINAR Corp. Securities Litigation*, 186 F.Supp.2d 279, 292 (E.D.N.Y. 2002) ("courts in the Second Circuit have been consistent in affirming a 'true conflict' threshold"); *Bodner v. Banque Paribas* 114 F.Supp.2d 117, 129 (E.D.N.Y. 2000) ("In this Circuit, the threshold inquiry in determining whether principles of international comity merit dismissal is the existence of a true conflict between American law and that of a foreign jurisdiction").

Defendants do not cite *any* post-*Hartford Fire* case dismissing an antitrust claim on the basis of a governmental policy that stops short of compulsion, or any case in which a court considered a foreign government's litigation position in conducting a comity analysis. The handful of materials and decisions referenced by Defendants do not suggest a substantial ground for disagreement on this issue. Defendants cite, for example, an article that purportedly supports the proposition that the majority's approach in *Hartford Fire* was rejected by the Supreme Court's later decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). Def. Br. at 20. But *Empagran* concerned the application of U.S. antitrust laws to conduct causing harm to *foreign* plaintiffs. The *Empagran* Court reaffirmed the uncontroversial premise that the Sherman Act applies to foreign cartels that cause injury to U.S. plaintiffs despite any interference with a foreign nation's ability to regulate commerce:

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence

> consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.

Empagran S.A., 542 U.S. at 165 (emphasis in original).

Defendants also cite a treatise which, according to Defendants, "notes the existence of post-*Hartford* decisions dismissing antitrust cases on comity grounds." *See* Def. Br. at 20 (citing Spencer Weber Waller, Antitrust & American Bus. Abroad § 6:21 (3d ed.)) But that treatise notes the existence of only *two* district court cases, one of which was reversed on appeal. *See id.* (citing *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464 (S.D.N.Y. 1997), *rev'd* 157 F.3d 922 (2d Cir. 1998), and *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 954 F. Supp. 733 (S.D.N.Y. 1997)). In *Trugman-Nash*, the only post-*Hartford* case identified by Defendants that has *not* been overturned, the Court found that foreign law mandated the conduct at issue and that defendants were therefore entitled "to invoke the doctrines of **act of state, foreign sovereign compulsion**, and international comity." *Trugman-Nash*, 954 F. Supp. at 736. Moreover, the treatise explains that, post-*Hartford Fire*, litigants making comity arguments "may not rely upon the conflict between national policies, unless the conflict rises to the level of outright compulsion." Waller, Antitrust & American Bus. Abroad § 6:21.

The Justice Department's Antitrust Enforcement Guidelines also fail to support Defendants' arguments. As this Court noted in its Order, "[t]he unsurprising fact that the Justice Department still considers these factors [other than a "true conflict"] in exercising its prosecutorial discretion does not indicate that courts may, in direct contradiction to *Hartford Fire*, consider a foreign government's encouragement of conduct in a comity analysis." Order at 33 n.28.

Defendants' failure to cite any case supporting their position is fatal to their request for certification. A party seeking certification must come forward with support for its allegation that

a substantial ground for a difference of opinion exists. *See Morris*, 511 F. Supp. 2d at 317-18 (plaintiff's failure to set forth any case law in contradiction to the court's holding insufficient to establish difference of opinion); *Campania Sudamerica de Vapores S.A. v. Sinochem Tianjin*, 2007 WL 1002265, at *5 (S.D.N.Y. 2007) ("defendant's argument that a substantial ground for difference of opinion exists is belied by the fact that only one district court opinion...supports its position"); *In re Citigroup Pension Plan ERISA Litigation*, 2007 WL 1074912 at *3 (S.D.N.Y. 2007) ("Defendants do not cite a single case suggesting that any difference of opinion exists-let alone a substantial one").

V. Defendants' Motion Is Untimely

Neither Section 1292(b) nor Federal Rule of Civil Procedure 5(a), which governs petitions for permission to appeal, specify a time in which a party must move for the order to be certified for interlocutory appeal. However, courts have consistently held that any delay in seeking certification "must be reasonable." *Green v. City of New York*, No. 05-CV-0429, 2006 WL 3335051, at *2 (E.D.N.Y. Oct. 23, 2006).

Defendants first raised the issue of certification to this Court at the status hearing on November 3, 2011, over two months after the Court's September 1st Order. Defendants have offered no justification or excuse for the lengthy delay in seeking certification, even though Plaintiffs' counsel raised the issue of timeliness at the hearing. This unjustified delay is alone a sufficient reason to deny Defendants' motion. *See Green*, 2006 WL 3335051, at *2 (finding that § 1292(b) certification motion made two months after order was untimely); *see also Richardson Elec. v. Panache Broadcasting*, 202 F.3d 957, 958 (7th Cir. 2000) ("[A] district judge should not grant an inexcusably dilatory [1292(b) certification] request [relating to a two month delay]"); *Weir v. Propst*, 915 F.2d 283, 287 (7th Cir. 1990) (finding district court abused its discretion in granting § 1292(b) certification requested three months after the order appealed from with no

justification for the delay); *Ferraro v. Sec'y of U.S. Dept. of Health and Human Servs.*, 780 F. Supp. 978, 979 (E.D.N.Y. 1992) (denying § 1292(b) certification where "there was no justification for plaintiff's [two-and-a-half-month] delay in requesting certification").

Here, at the very least, the unexcused delay weighs heavily against granting certification. *Lidle v. Cirrus Design Corp.*, 2010 WL 4345733, at *2 (S.D.N.Y. 2010) (treating a two month delay as a factor weighing against certification); *Whiteface Real Estate Development & Const., LLC. v. Selective Ins. Co. of Am.*, No. 8:08-cv-24 (GLS/DRH), 2010 WL 4024517, at *1 (Oct. 13, 2010 N.D.N.Y.) (a one month delay weighed against certification); *Century Pacific, Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 371 (S.D.N.Y. 2008) (a delay of several months weighed against granting certification).

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion for Certification of the Court's September 1, 2011 for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b).

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Respectfully submitted,

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