UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE **VITAMIN C ANTITRUST LITIGATION** **This Document Relates To:**	MASTER FILE 06-MD-1738 (DGT)(JO)
ANIMAL SCIENCE PRODUCTS, INC. and THE RANIS COMPANY, INC. **Plaintiffs,** **- v. -** **HEBEI WELCOME PHARMACEUTICAL CO. LTD.; et al.,** **Defendants.**	Case No. CV 05-453 (DGT)(JO)

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUR-REPLY OPPOSING SUMMARY JUDGMENT AND DETERMINATION OF FOREIGN LAW

ORRICK, HERRINGTON & SUTCLIFFE LLP
Stephen V. Bomse
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Tel: (415) 773-5700
Fax: (415) 773-5759

Richard S. Goldstein
Steven R. Newmark
666 Fifth Avenue
New York, NY 10103-0001
Tel: (212) 506-5000
Fax: (212) 506-5151

Attorneys for Defendant
Aland (Jiangsu) Nutraceutical Co., Ltd.

GREENBERG TRAURIG, LLP
James I. Serota
Kenneth Lapatine
200 Park Avenue
New York, NY 10036
Tel: (212) 801-2277
Fax: (212) 801-6400

Attorneys for Defendant
Northeast Pharmaceutical Group Co., Ltd.

BAKER & McKENZIE LLP
Charles H. Critchlow
Darrell Prescott
Christopher Chinn
1114 Avenue of the Americas
New York, NY 10036-7703
Tel: (212) 626-4476
Fax: (212) 626-4120

Attorneys for Defendant
Hebei Welcome Pharmaceutical Co., Ltd.

ZELLE HOFFMAN
VOELBEL & MASON LLP
Daniel Mason
Joseph Bell
Jiangxiao Hou
44 Montgomery Street, Suite 3400
San Francisco, CA 94101
Tel: (415) 693-0700
Fax: (415) 693-0770

Attorneys for Defendant
Shijiazhuang Pharma. Weisheng
Pharmaceutical (Shijiazhuang) Co., Ltd.

Plaintiffs' Sur-Reply Opposing Summary Judgment and Determination of Foreign Law [D.E. 416] (the "Sur-Reply") is extraordinary by any measure. Having failed to find a single expert or, even, a scholarly article to cite in support of their counsel's *ipse dixit* regarding China's sovereign regulation of vitamin C, Plaintiffs now attempt to enlist a most improbable ally: the Chinese government itself. Thus, while reiterating in passing an earlier contention that China has misrepresented its own regulatory system through "a series of unsupported assertions" (Sur-Reply at 1), Plaintiffs devote the vast majority of their most recent brief to the startling contention that the Chinese government's August 31, 2009 Statement [D.E. 400] (the "August 2009 Statement") actually "support[s] Plaintiffs' position." (*Id.* at 2.)

This curious assertion, which certainly would come as a surprise to the Chinese government, is refuted by a reading of China's actual submissions to the Court. Plaintiffs' attempts to twist those submissions into support for their position are utterly without merit.

Point One

Plaintiffs begin by citing snippets of paragraph 2 of the August 2009 Statement, then drawing a conclusion that does not follow. This non-sequitur reads: "The self-discipline system was established to 'mitigate exposure to antidumping investigations' and to prevent 'self-destructive competition'. *Thus self-discipline exists to prevent below-cost pricing.*" (Sur-Reply at 2 (emphasis added).) The words "below cost pricing," however, do not appear in the paragraph, or anywhere else in the August 2009 Statement. In fact, nothing in the submission suggests that a policy broadly addressing self-destructive competition was so narrowly focused.

The actual text of the August 2009 Statement shows that the Chinese government, in describing its broad objectives, was simply introducing its multi-paragraph description of its regulatory system by pointing out, as Defendants and the government have explained

previously,[1] that the regulations in force during the relevant time period had two objectives accomplished through multiple measures:

> In order [1] to prevent self-destructive competition through distorted pricing by Chinese exporters...*and* [2] to mitigate potential exposure to antidumping investigations..., the Ministry took active measures by exerting export regulations over certain commodities that might encounter or have encountered such problems. (August 2009 Statement, ¶ 2; emphasis added).

The reference to the Chinese sovereign's objective of preventing "self-destructive competition" could not be more plainly at odds with Plaintiffs' position. Yet, that objective is central to the government's explanation of why the acts challenged in this litigation resulted from sovereign compulsion – an explanation directly asserted, over and over again, in the balance of the text of the Statement (as well as in the government's two earlier submissions):

> During the relevant period in the present case, the Ministry required vitamin C exporting companies to coordinate among themselves on export price and production volume...in order to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition. (August 2009 Statement, ¶ 4.)

> Vitamin C exporters were ... subject to the regulation by the Chamber, including compliance with the Chamber's requirements of self-discipline, the very purpose of which was to coordinate each exporter's behavior. No vitamin C exporter could ignore these policies, nor abstain from such coordination with regard to export price and production volume.... (*Id.*, ¶ 5.)

> A system of government-mandated 'coordination' among industry participants served the Ministry's goal of transitioning to a healthy market-based economy: it established mandatory coordinated export price and output levels (thereby forestalling what the government feared could be destructive export competition before the foundation for a healthy industry could be laid) by vitamin C manufacturers.... (*Amicus* Brief at 13.)

---

[1] *See, e.g.*, Memorandum of Law in Support of Defendants' Motion for Summary Judgment or, In the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P. [D.E. 393] ("Def. Mem.") at 19; Reply Memorandum in Support of Defendants' Motion for Summary Judgment, *etc.* [D.E. 398] ("Reply Mem.") at 9-10; Brief of *Amicus Curiae* The Ministry of Commerce of the People's Republic of China In Support of the Defendants' Motion to Dismiss the Complaint [D.E. 30] ("*Amicus* Brief") at 14.

See also Amicus Brief at 6, 13, 18, 21.

Point Two

Having begun by misstating a key purpose of China's mandated regulatory system, Plaintiffs next assert that the system of "self-discipline" described by the government in its most recent statement required nothing more than "consult[ation]" about "coordinated activities" and did not require "any particular outcome or agreement," and that the government did not even hint that "self-discipline permits Defendants to raise prices above competitive levels." (Sur-Reply at 2; *see also id.* at 3, 6.) However, the repeated statements of the Chinese government that self-discipline was compulsory flatly contradict those characterizations.

A few examples drawn from the August 2009 Statement suffice to demonstrate the point. Thus, in paragraph 1, the government explains that it chose to submit the statement "to reiterate here that the alleged conduct by the [defendants] is the result of the defendants' performing their obligations to comply with Chinese laws, rather than conduct on their own initiative." After then explaining the purposes of the regulatory system in paragraph 2 of the August 2009 Statement (as discussed above), the Chinese government notes that its "system of self-discipline" is a "system of regulation" under which the parties subject to regulation "consult with each other *to reach consensus* on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies." (August 2009 Statement, ¶ 3.)[2] In paragraph 4, the government points out – in a portion of the statement that Defendants previously quoted – that "the Ministry *required vitamin C exporting companies to coordinate among themselves on export price and production volume....*" (emphasis added). In short, "self-

[2] We have italicized the words "to reach consensus" because Plaintiffs purport to quote the same portion of this sentence in their Sur-Reply. However, in doing so, they simply (and without explanation) omit those three words about the purpose of coordination being "to reach consensus" regarding price and output. Moreover, Plaintiffs do not even alert the Court to their omission with the standard ellipses. *See* Sur-Reply at 2.

discipline" meant not merely voluntarily sitting down to chat – it meant being compelled to reach agreement about price or volume on a coordinated basis: "No vitamin C exporter could ignore these policies, nor could they abstain from such coordination with regard to export price and production volume when asked to by the Chamber." (August 2009 Statement, ¶ 5).

Plaintiffs' descriptions entirely contradict the text of the August 2009 Statement. In fact, we believe that there is a fair question as to how Plaintiffs, in good conscience, can assert that the Chinese government does not say that it was regulating price and output. This is especially so in the face of statements from the Chinese government's earlier submissions, such as:

> Chinese law promulgated by the Ministry and administered through the Chamber, compelled defendants…to coordinate export prices and maximum export volumes and to abide by those requirements. (*Amicus* Brief at 17.)

> While the Government did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination*. That, of course, is all that is alleged in the complaints here and that is conduct that was compelled by the Chinese government in the interests of insuring "order in market competition." (*Id.* at 18 (emphasis in original).)

> In this case, the Ministry specifically charged the [Chamber] with the authority and responsibility, subject to Ministry oversight, for regulating, through consultation, the price of vitamin C manufactured for export from China so as to maintain an orderly export. (June 9, 2008 Letter from the Chinese Ministry of Commerce [D.E. 306] ("June 9, 2008 Letter") at 2.)

To be sure, neither the government nor Defendants ever have claimed that the process of regulation under "self-discipline" had the government set particular prices. As the government stated without equivocation long before its most recent statement: "[T]he system of regulation the Ministry imposed on China's vitamin C export industry centered around a process not a price." (June 9, 2008 Letter at 2.) But that is no different than numerous regulatory systems – here and elsewhere – that have been held immune from antitrust challenge, including those

involved in *Southern Motor Carriers* and *Trugman-Nash*.[3] The essential point – whether for purposes of sovereign compulsion or under the Act of State doctrine – is that Defendants acted pursuant to requirements of foreign law and, *as to that central and controlling issue,* the government's Statement (like those before it) could not be more clear, or any more at odds with Plaintiffs' assertions in their Sur-Reply.

Point Three

In a related point, Plaintiffs also contend that the regulatory system described by the government nowhere prevents sales at "market" prices. Thus, they say: "At best, the Ministry's Statement only shows that the Ministry requires Defendants to 'coordinate' vitamin C export prices." (Sur-Reply at 4; *see also id.* at 6 (arguing that Defendants could have voluntarily agreed to coordinate export prices by agreeing to sell at "competitive prices").)

This argument not only is unsupported by anything contained in the government's actual statements, but confounds both the English language and settled principles of antitrust law. While the prices charged may actually equate to those which would have pertained in the absence of the government-imposed process described by the Chinese government, "market prices" are prices that are determined as the result of competition among sellers, as opposed to "coordination" or "agreement" among competing sellers. Thus, referring to a "market price" that is set by coordinated agreement is both a linguistic and a conceptual oxymoron. It makes as much sense as referring to liquid ice.

[3] *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733 (S.D.N.Y. 1997). The same is true of the situation in the Japanese Electronics Products Cases (*Matsushita*), in which the United States asserted that the case should have been dismissed as a matter of law under the foreign sovereign compulsion doctrine, based on submissions from the Japanese government that were far less detailed than those here. *See* Brief for United States as *Amicus Curiae* in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (No. 83-2004), 1985 WL 669667 (June 17, 1985).

To say that the process of "agreeing to sell at competitive prices would comply with 'China's relevant rules and regulations'" and *mandating* coordination in order to achieve its policy objectives (Sur-Reply at 6) is insupportable for reasons that the Chinese government itself has explained at great length. It assumes that Plaintiffs, rather than the government of China, should determine how China's economic and regulatory systems ought to operate.

Point Four

Plaintiffs' also attempt to re-run their argument that the Chamber is a private organization, stating that "[b]y delegating 'enforcement measures' to the Chamber, the Chinese government stepped out of the picture completely." (Sur-Reply at 3.) But, that argument ignores what the Chinese government has said, over and over again, about the nature of the Chamber and its relationship to the government for purposes of enforcing Chinese policy with respect to vitamin C export prices and production.[4] The official status and responsibilities of the Chamber are repeated in paragraphs 3 and 5 of the August 2009 Statement. In the face of that record, how Plaintiffs nonetheless could argue that the Statement "supports Plaintiffs' position" on this point is, once again, both puzzling and without basis.

Point Five

Plaintiffs resort finally to argument by adjective. Not once, but twice, Plaintiffs contend that the Chinese government does not really mean what it says about compulsion because it states in paragraph 3 of the August 2009 Statement that its system of self-discipline does not "mean *complete* voluntariness or self-conduct." (Sur-Reply at 6 (emphasis added by Plaintiffs); *see also id.* at 2.) In other words, as Plaintiffs would have it, by adding the adjective "complete"

---

[4] *See Amicus* Brief at, *e.g.*, 5-9; June 9, 2008 Statement at 2. The role of the Chambers also is discussed at length in Defendants' briefs on the present motion, which further cite to various scholarly articles that make the same points about the role of the Chambers. *See* Def. Mem. at, *e.g.*, 10-14, 45-46; Reply Mem. at 23, 27-30.

at one point in their most recent statement, the Chinese government intended to disavow everything that it has said elsewhere -- not only in its August 2009 Statement, but in its two prior filings, as well.

The point is meritless. First, read in context, the quoted language merely introduces the government's description of the Chinese system of self-discipline, which then follows in the balance of paragraph 3 and in the three succeeding paragraphs. Taken together, that text constitutes the Chinese government's detailed statement of how the self-discipline system operates both in general and as applied to vitamin C. Second, based on the government's careful explanation of its regulatory system, the use of the word "complete" is entirely accurate and appropriate: self-discipline is a regulatory system that is designed to utilize private discussions as an effective way of fulfilling the goals of government policy, which are mandatory. Although that point is most fully understood in the context of the August 2009 Statement as a whole, any suggestion that the word "complete" means that Defendants were free not to agree upon prices or output under the aegis of the Chamber is conclusively dispelled by the following sentence: "No vitamin C exporter could ignore [the government's] policies, nor could they abstain from…coordination with regard to export price and production volume when asked to by the Chamber." (August 2009 Statement, ¶ 5).

CONCLUSION

For the reasons set forth above, and in all prior submissions by Defendants and the Chinese government, this Court should grant Defendants' motion for summary judgment or determination of foreign law.

Dated: New York, New York
February 5, 2010

Respectfully Submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: ______________________
Stephen V. Bomse (*pro hac vice*)
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Tel: (415) 773-5700
Fax: (415) 773-5759
Email: sbomse@orrick.com

Richard S. Goldstein (RG 9560)
Steven Newmark (SN 9079)
666 Fifth Avenue
New York, NY 10103
Tel: (212) 506-5325
Fax: (212) 506-5151
Email: rgoldstein@orrick.com

Attorneys for Defendant
Aland (Jiangsu) Nutraceutical Co., Ltd.

GREENBERG TRAURIG, LLP
James I. Serota
Kenneth Lapatine
200 Park Avenue
New York, NY 10036
Tel: (212) 801-2277
Fax: (212) 801-6400

Attorneys for Defendant
Northeast Pharmaceutical Group Co., Ltd.

ZELLE HOFFMAN
VOELBEL & MASON LLP
Daniel Mason
Joseph Bell
Jiangxiao Hou
44 Montgomery Street, Suite 3400
San Francisco, CA 94101
Tel: (415) 693-0700
Fax: (415) 693-0770

Attorneys for Defendant
Shijiazhuang Pharma. Weisheng Pharmaceutical (Shijiazhuang) Co., Ltd.

BAKER & McKENZIE LLP
Charles H. Critchlow
Darrell Prescott
Christopher Chinn
1114 Avenue of the Americas
New York, NY 10036-7703
Tel: (212) 626-4476
Fax: (212) 626-4120

Attorneys for Defendant
Hebei Welcome Pharmaceutical Co., Ltd.