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:	)	
ANIMAL SCIENCE PRODUCTS, INC., et al.	)	
Plaintiffs,	)	**CV-05-453**
v.	)	
HEBEI WELCOME PHARMACEUTICAL CO. LTD., et al.	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

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Plaintiffs, through undersigned Counsel, respectfully submit this opposition to Defendant North China Pharmaceutical Group Corp.'s ("NCPC") and Hebei Welcome Pharmaceutical Co. Ltd's ("Hebei Welcome") renewed motion for judgment as a matter of law.

PRELIMINARY STATEMENT

Defendants' first argument under Rule 50 requests a ruling as a matter of law that their conduct was compelled and that they are immune from antitrust liability under the doctrines of act of state, foreign sovereign compulsion or international comity. The evidence at trial and the jury verdict demonstrated that the issue of whether the government of China compelled the conduct of Defendants through a regulatory system and through the China Chamber of Commerce for Medicine and Health Products Importers & Exporters (the "Chamber") was theoretical and never real. Whatever was authorized by Chinese law, and regardless of what the Chamber could have done, the evidence showed that the Chamber did not actually compel the conduct of Defendants here. Defendants do not challenge the legal instructions on the compulsion issue and have failed to show that the jury verdict was not supported. Further, the trial showed that the issue of whether the Defendants were actually compelled to engage in the conspiracy depended on credibility issues that were the duty of the jury to resolve.

The evidence showed, and the jury was entitled to conclude, all of the following:

- Mr. Qiao of the Chamber knew and admitted that he and the Chamber lacked authority to compel Defendants' conduct.
- The Government of China did not give directions or instructions to the Chamber or the Defendants to fix prices or limit supply.
- Even if the Government or the Chamber had encouraged price fixing or limits on supply, the only government action was amounted to providing an ineffective enforcement tool for voluntary agreements called verification and chop.

- Regardless of any theoretical power of law or the Chamber, the illegal agreements at issue were voluntary agreements that were not compelled.
- Regardless of any theoretical power granted the Chamber by Chinese law, the Chamber (and Mr. Qiao) did not in fact provide directions or instructions.
- The Chamber is a non-governmental organization without governmental authority.

Each of these points, standing alone, supports the verdict of the jury. Further, resolution of each of these points depends on credibility issues which were for the jury to decide.

NCPC also seeks judgment as a matter of law concerning its participation in the conspiracy. After weighing *all* of the evidence, after judging the credibility of *all* the witnesses, and after considering *all* the same arguments about the documents and testimony that NCPC makes in its renewed motion, the jury found NCPC liable for *directly participating* in the violation of U.S. antitrust laws. The record squarely supports the jury's factual determination. Despite NCPC's protestations to the contrary, the evidence is not "overwhelming" in its favor and certainly is neither "uniform" nor "undisputed."

NCPC participated in the conspiracy directly through, among other means, its executive Huang Pinqi. The evidence showed that Mr. Huang attended conspiracy meetings not only on behalf for a company he seldom visited (Hebei Welcome), but for the company (NCPC) where he worked every day. In its defense, NCPC provided no testimony whatsoever from any executive of NCPC or Hebei Welcome on the central issue of whether Mr. Huang represented NCPC in conspiracy meetings. Even Mr. Huang never denied that he represented NCPC, his "highest" employer, in the conspiracy meetings he attended. Nor did Mr. Huang ever testify that he only represented Hebei Welcome in those meetings. NCPC cannot meet the enormous burden under Rule 50(b) necessary to overturn the jury's reasonable and fair-minded verdict that it

participated in the conspiracy, particularly when the facts were hotly contested and the outcome depended, in large part, on whether or not the jury believed what witnesses had to say

Defendants are also not entitled to a reduction in damages. Plaintiffs met their burden to put forth a reasonable, non-speculative estimate of damages through the testimony of Dr. Bernheim. Far from the overwhelming evidence needed to overturn the jury's verdict on damages, there is **no** evidence to support Defendants' theory that sales of vitamin C by Anhui Tiger Biotech Co., Ltd. ("Tiger") and Shandong Zibo Hualong Co., Ltd. ("Hualong") were subject to arbitration clauses.

ARGUMENT

I. RULE 50(B) IMPOSES A PARTICULARLY HEAVY BURDEN

In ruling on Defendants' renewed motion for judgment as a matter of law under Rule 50(b), the Court must consider the evidence in the light most favorable to Plaintiffs and give Plaintiffs the benefit of all reasonable inferences that the jury might have drawn in their favor from the evidence. *Stratton v. Dep't for the Aging*, 132 F.3d 869, 878 (2d Cir. 1997). In this case there was an enormous amount of direct evidence, but even "where the majority of the evidence is circumstantial, the inferences to be drawn are *properly left to the jury*." *Zavala v. Citicorp Servs., Inc.*, 426 F. Supp. 241, 243 (S.D.N.Y. 1976) (emphasis added).

Contrary to what Defendants' renewed motion actually requests, the Court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury. *Stratton*, 132 F.3d at 878. "It is also insufficient to allege that the jury's verdict involved speculation and conjecture. ***When facts are in dispute*** or the evidence is such that fair-minded men may draw different inferences, ***a measure of speculation and conjecture is required*** on the part of those whose duty it is to settle the dispute by choosing what

seems to them to be the most reasonable inference." *Zavala*, 426 F. Supp. at 243-44 (emphasis added).

The Second Circuit has made clear that:

> A movant's burden in securing Rule 50 relief is ***particularly heavy*** after the jury has deliberated in the case and actually returned its verdict. Under such circumstances, the district court may set aside the verdict only where there is such ***a complete absence of evidence*** supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or . . . there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

Cross v. New York City Transit Auth., 417 F.3d 241, 248 (2d Cir. 2005) (emphasis added) (internal quotation marks and citation omitted). A Rule 50 motion "must be denied unless the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Id.* (internal quotation marks and citations omitted).

II. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER LAW UNDER THE DOCTRINES OF ACT OF STATE, FOREIGN SOVEREIGN COMPULSION OR INTERNATIONAL COMITY

Defendants renew their motion for judgment as a matter of law based on the doctrines of act of state, foreign sovereign compulsion, and international comity. Defendants cannot meet the "particularly heavy burden" imposed by Rule 50(b). Defendants do not argue that the jury charge on government compulsion was erroneous and do not argue that the evidence of compulsion was so overwhelming that a rational jury could only find in their favor, nor could they. Substantial evidence supported the jury's conclusion that Defendants were not compelled by the government of China to enter the price-fixing and production suspension agreements proven at trial. Defendants' Rule 50(b) motion must be denied for this reason alone.

Defendants assert that this Court erroneously excluded evidence and testimony relating to their affirmative defense, but present no argument on the evidentiary issue and do not seek a new trial. The improper exclusion of evidence does not justify granting judgment as a matter of law in their favor, which is the only relief Defendants seek. And no evidence was improperly excluded. This Court's decision to exclude copies of Chinese laws and opinions about what those laws mean was undeniably correct under the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

Rather than attempting to satisfy the requirements of Rule 50(b), Defendants argue that this case should not have been tried at all. Defendants' entire motion thus amounts to a re-argument of their motion for summary judgment or, in the alternative, for determination of foreign law pursuant to Rule 44.1. This Court properly denied that motion and Defendants' renewed motion does not identify any change in the law warranting reconsideration.

The jury was properly instructed by the Court that it must return a verdict in favor of Defendants if Defendants proved, by a preponderance of the evidence, that an authorized member of the offices or agencies of the Government of China compelled them to enter into agreements fixing the price or limiting the supply of vitamin C exported from China. Jury Charge, Day 11 Tr. 1760:3-19.[1] The evidence showed, and after weighing the evidence the jury found, that Defendants were not compelled to set the specific prices they set, were not compelled to reach the production stoppage agreements they reached, and were not compelled to agree on a common warehouse.

The jury's verdict cannot be undone by vague statements from the Ministry or Qiao Haili that Chinese law required "coordination" or "self-discipline." Even if Defendants had been compelled to exercise "self-discipline" and "coordinate" to avoid "malicious competition" – and

[1] The portions of the trial transcript cited herein are attached as Exhibit A.

they were not – there is simply no credible evidence that such compulsion drove the Defendants' decisions to collusively raise prices well above costs, and well above the price for verification and chop.

A. The Jury's Findings Are Supported by the Evidence

The evidence on compulsion supports the verdict of the jury, which was properly instructed on the law. This is true regardless of the regulatory regime that was adopted by the Government of China or the potential authority of the Chamber. As a factual matter, these Defendants were not compelled. Further, resolution of the compulsion issue depends on credibility determinations which were for the jury to decide.

1. The Chamber Did Not Have the Authority to Compel Defendants' Conduct.

As the jury learned, more than two years after the conspiracy began, Qiao Haili – then the head of the Western Medicine Division of the China Commerce of Commerce for Medicine and Health products (the "Chamber") – wrote a July 17, 2003 memorandum to China's Ministry of Commerce (the "Ministry") on "Suggestions For Building a Credibility System." PX 234.[2] That memorandum described the success of the vitamin C cartel at increasing the price of vitamin C exports far above competitive levels. *Id.* The memorandum continued by stating: "the legal standing of chambers of commerce is still not clear." *Id.* As described in the memorandum:

> Regulations and rules formulated by companies in the industry organized by the chambers of commerce lack legal basis and are difficult to gain support from government departments. These rules and regulations become formality and only 'honest fellows will follow'. …
>
> Therefore, first of all, we need legislation to define the legal status of the chambers of commerce. We also need support from relevant government departments to assist chambers of commerce in asserting their authority, so that (*chambers of commerce*) can punish companies.

[2] The trial exhibits cited herein are attached in numerical order and identified by trial exhibit number.

Id. (emphasis added).

Mr. Qiao attempted to explain away his memorandum by testifying, for the first time at trial, that the memorandum referred to an agreement amongst penicillin manufacturers, not vitamin C companies. Mr. Qiao testified that when he wrote the memo he was reporting to the Ministry that he lacked the authority to compel the compliance of a company that had breached the penicillin agreement. Qiao, Day 8 Tr. 1152:6-1154:7, 1227:21-1228:3. On cross-examination, Mr. Qiao admitted that the document (as evident from the document itself) only mentions one product, vitamin C, and that the word "penicillin" does not appear in the memorandum. Qiao, Day 7, Tr. 1027:13-15. The jury also heard Mr. Qiao's deposition testimony, in which he confirmed the statements of the memorandum *without making any claim* that the statements referred to penicillin. Tr. 1028:20-10230:5; Video Ex. 5 (Qiao Dep 235:16-19, 235:21, 232:5-8, 232:10, 233:8-18, 235:3-9).[3]

Finally, when confronted with evidence about the penicillin agreement, PX 252, Mr. Qiao admitted that the penicillin agreement that he claimed the July 17 memorandum referred to was not signed – much less breached – until after September 2003, months after his July 17 memorandum was written. Qiao, Day 8 Tr. 1233:4-18.

> Q. Sir, the penicillin agreement that you testified about happened after September 29, 2003?
>
> A. Yeah, afterwards.

Qiao, Day 8 Tr. 1233:4-6. At that point, it became clear that Mr. Qiao had fabricated the story that the July 17, 2003 memo was about a breached penicillin agreement because that penicillin agreement did not exist and had not been breached when he wrote the memo. The jury at that

[3] The Video Exhibits cited herein are attached following the trial exhibits in numerical order.

point was also entitled to disregard any testimony of Mr. Qiao given his demonstrably false statements under oath.

The jury's finding that Mr. Qiao did not compel Defendants to fix prices or limit supply with authority from the government of China is supportable based on Mr. Qiao's memorandum – and his fabrications about it – alone. But substantial additional evidence established that the participants in the conspiracy also did not believe at the time that the Chamber had the authority to compel their compliance with price or supply agreements. For example, one of NEPG's internal business memoranda directly echoed Mr. Qiao's concern about 'honest fellows' and recommended that the company shouldn't "rely completely on the 'gentlemen's agreements' of the chamber of commerce." PX 42 at 8.

Jiangshan's business records further confirm that Mr. Qiao and the Chamber lacked the ability to compel them. For example, as documented in a memorandum by Wang Qi, the Vitamin C Subcommittee met on May 19, 2005 and debated an agreement on production suspension. PX 87. General Manager Feng Zhenying of Weisheng stated at the meeting that "he hopes steps will be taken to stabilize the price properly, such as each manufacturer reducing its production volume proportionately?" *Id.* Jiangshan's General Manager Kong Tai indicated "he does not agree the proposal of proportionately decreasing production…Therefore it will not participate in this production reduction." *Id.* Wang Qi then observed: "As for the proposal for production shutdown/limitation, each manufacturer will *as usual* have its own calculation. In addition, due to the damage to the agreement caused by Weisheng last year, it is still an open question as to what extent the consensus made at the meeting will be implemented." *Id.* (emphasis added)

Mr. Wang testified that he did not know whether an agreement reached at the meeting of the vitamin C subcommittee – which Defendants claim they were compelled to enter and comply with – would work. Wang, Day 2 Tr. 360:22-24. As Mr. Wang testified:

> Q. And you didn't write in your observations that anybody was going to make the manufacturers go along with the common understanding?
>
> A. Nobody's going to force them.

Wang, Day 2 Tr. 360:25-361:3.

In another Jiangshan memoranda, Wang Qiang wrote:

> In general, I think our company should carefully consider the suggestion of coordinated production termination and join the scheme when the timing is ripe. Of course, our competition with opponents is eternal and overall while cooperation is only temporary and local. During the process of negotiation, we should not pull down our caution or estimate their credibility.

PX 259 at 5-6 (emphasis added).

A speech by Kong Tai of Jiangshan in 2005 similarly stated:

> These VC enterprises, mediated by [the] Chamber …, took measures last year to limit production to protect price and to ensure a 'soft-landing' of the price plunger, but in the long run, such allegiance is vulnerable and will easily succumb to the temptation of profit and before the test of time.

PX 141 at 9 (emphasis added); *see also* PX 144 at 2 ("It is unwise to have an internal war where none of us can pull each other down").

2. The Government of China Did Not Give Directions or Instructions to the Chamber or the Defendants to Fix Prices or Limit Supply.

Regardless of the theoretical authority of the Chinese government to act directly or through the Chamber, the evidence at trial showed that the government of China had no involvement in the conspiracy that was alleged and proven. Mr. Qiao on cross-examination admitted this. He admitted that when testifying under oath at his deposition, he was asked whether the statement that "export prices were fixed by enterprises without government

intervention" was inaccurate, and that he testified "[i]t is accurate, it is accurate." Qiao, Day 7 Tr. 1075:1-11. Only in subsequent errata in English, a language that Mr. Qiao does not speak, did Defendants seek to change that testimony to "it is inaccurate." Qiao, Day 7 Tr. 1077:6-11.

But even without his changed testimony, Mr. Qiao ultimately admitted at trial: "on the whole, the government did not involve itself in price fixing." Qiao, Day 8 Tr. 1075:2-15. And documents show that the defense that the government of China was responsible for price fixing was manufactured after the lawsuit was filed and that Defendants were responsible for their own actions. Wang Qiang of Jiangshan, who attended conspiracy meetings, thus wrote: "If we won the lawsuit, it would be hard for foreigners to make more trouble. Even if we lost the case, government would take the foremost part of responsibility. After all, we need to do many things in a more hidden and smart way." PX 259 at 5.

After the lawsuit was filed, the conspirators agreed not to keep records of their meetings. PX 142 at 3; Wang Qi, Day 2 Tr. 283:13-284:8. And at some point after the lawsuit was filed, the companies stopped their phone calls where they fixed prices and the Vitamin C Subcommittee stopped meeting, showing that Defendants were making their own decisions. Wang, Day 2 Tr. 381:2-8.

The evidence at trial demonstrated that the government of China did not involve itself in the efforts of the companies to fix prices or limit supply. There was no evidence for the period from November 2001 to June 2006 that the Ministry of Commerce directed Mr. Qiao or the companies to require any of the conspiratorial acts, including a minimum price of $3.35, prices higher than $3.35, export volume limits, production stoppages or a common warehouse.

Rather, Mr. Qiao admitted that the Ministry never discussed specific prices with him. He was asked if the Ministry ever discussed a specific price for vitamin C with him and could only

respond: "I reported back to them." Qiao, Day 8 Tr. 1123:16-23. Mr. Qiao was confronted with his deposition testimony in which he admitted that since 2002, the Ministry had never discussed a specific price for vitamin C for export with him. Video Ex. 6 (Qiao Dep. 59:16-59:20); Qiao, Day 8 Tr. 1125:18-20 He also admitted at trial that with respect to the minimum price of $3.35, "they don't discuss that with me." Qiao, Day 8 Tr. 1124:21-24.

The evidence further showed that the conspiracy included critical price fixing discussions that took place outside of formal vitamin C subcommittee meetings and at prices above the verification and chop minimum price of $3.35. *E.g.* PX 74 at 2 (agreement to follow $3.80). Wang Qi testified that price-fixing conversations took place by telephone and through "chit chat." Wang, Day 2 Tr. 293:13-24. For example, an April 2003 work report prepared by Mr. Wang states "we will maintain the original price level for deliveries in May and June, which is USD 11.50/kg or above . . . we have communicated with Weisheng and Welcome, hoping that they will maintain a similar pricing policy for our common interest." PX 135 at 2. These agreements made on the phone and during 'chit chat' did not involve the government or anyone from the Ministry. Wang, Day 2 Tr. 296:11-14.

The evidence also showed, with respect to the formal vitamin C subcommittee meetings, that, during the class period, the Ministry did not attend the meetings. Wang, Day 2 Tr. 283:9-12, 287:4-7. Wang Qi of Jiangshan, moreover, testified that "there was nobody from the Ministry of Commerce" at those meetings, even though Mr. Qiao of the Chamber attended the meetings, indicating again that the companies understood the difference between the government of China and the Chamber. *Id.*

3. Verification and Chop Did Not Compel Defendants' Conduct.

Defendants argue that "the evidence at trial was overwhelming that defendants could not export vitamin C without complying with the verification and chop regulations." Memorandum

of Law in Support of Defendants Renewed Motion for Judgment as a Matter of Law Based on Act of State, Foreign Sovereign Compulsion and International Comity (Dkt. 691-1) ("Def. Memo") at 10. Defendants' case at trial also relied entirely on the alleged coercive effect of verification and chop. Thus, if verification and chop was not coercive, there was no government compulsion defense that could even be asserted.

At trial, the evidence established that the Chamber could not compel Defendants without verification and chop. Before verification and chop (and Defendants' voluntary agreements), the evidence showed that Defendants and their coconspirators engaged in price wars, i.e. competition, despite the existence of the Chamber and the Vitamin C Subcommittee (and the Ministry). PX 21 at 1; PX 111 at 6; Feng, Day 4 Tr. 610:25-611:4; Huang, Day 4 Tr. 514:18-515:9. Further, after verification and chop ended in 2008, Mr. Qiao testified that he had no power to enforce any agreements. Qiao, Day 8 Tr. 1144:15-1145:15 And Mr. Qiao, in creating his penicillin story, explained that the penicillin agreement was broken and ineffective because there was no verification and chop for penicillin. Qiao, Day 8 Tr. 1154:10-12.

Defendants failed to prove at trial that verification and chop constituted legal compulsion as defined in this Court's unobjected to instructions. Verification and chop was a mechanism to enforce existing agreements and did not compel defendants to enter any agreement in the first instance. PX 52 (verification and chop applies to "industry agreed" export prices); Jury Instruction, Day 11 Tr. 1760:24-1761:2 ("Government enforcement, or government facilitation, of already existing agreements is not sufficient to prove that the parties were compelled to enter into the agreement in the first place"). The evidence even showed that the after-the-fact enforcement mechanism of verification and chop was agreed to by Defendants. PX 173 at 3 ("Because the manufacturers have not agreed on the enforcement mechanisms of the verification

and chop system, it remains a major question whether this price limit can be enforced effectively.")

The purported enforcement mechanism of verification and chop applied to a minimum price of $3.35/kg, and not the much higher prices at issue in this case. Qiao, Day 7 Tr. 1091:13-1092:8. And then, even with respect to the minimum price of $3.35, verification and chop was shown at trial to be ineffective. Mr. Qiao testified that he would chop contracts that complied with the minimum price of $3.35 and "let it be sent to the company by express mail." Qiao, Day 7 Tr. 984:6-8. The records admitted at trial, however, establish that vitamin C contracts were rarely chopped by the Chamber and that Defendant Hebei Welcome possessed no chopped contracts at all. PX 386, PX 425; PX 426; PX 427. When confronted with piles of vitamin C contracts with no chop, Mr. Qiao testified that those contracts were "not reported to customs." Qiao, Day 7 Tr. 1089:11-1090:1. Thus, the evidence showed that the process of verification and chop as enforced by customs was a myth. Defendants also failed to introduce any documentary evidence establishing that the Chamber ever denied or delayed a chop to compel an agreement or to force compliance.

As another mechanism to avoid verification and chop, Mr. Feng testified that his company submitted false contracts to the Chamber rather than complying with the purportedly compelled minimum price. Feng, Day 5 Tr. 662:15-663:5. And Mr. Wang testified that Jiangshan evaded the verification and chop regulations by providing rebates or refunds to customers to bring the price below the minimum verification and chop price. Wang, Day 2 Tr. 364:9-17. Jiangshan was never punished for selling vitamin C at less than the minimum price for verification and chop. Wang, Day 2 Tr. 364:3-8. Mr. Qiao confirmed that no company was ever punished for charging less than the verification and chop price. Qiao Day 7 Tr. 1093:15-18.

The "overwhelming evidence" establishes that, despite the potential enforcement mechanism of verification and chop, all of the conspirators breached the cartel agreements when it suited them to do so. PX 119 at 8 (Weisheng reneging on production suspension agreement); PX 320 at 4 ("Weisheng unilaterally pulled out of the commitment originally made by the big four producers, in which 'each producer put 200 tons into its warehouse in Feb., 250 tons into its warehouse in March and in April put a quantity no less than the March quantity into the warehouse'"); PX 78 at 2 ("every manufacturer quoted prices lower than the floor price"); PX 165 at 1 (even though the Chamber had adopted verification and chop with $3.35 as a minimum price, "each company is still selling actively at 2.8-2.9 USD"); PX 133 at 1 (the real export price was lower than the verification and chop minimum price of $3.35/kg); Huang Day 4 Tr. 555:14-23 (confirming that Hebei Welcome sold vitamin C for less than the verification and chop price of $3.35/kg); PX 426A (Hebei Welcome contracts to sell vitamin C for less than $3.35/kg); PX 427A (NEPG sales contracts for less than $3.35/kg); PX 425A (Jiangshan sales contracts for less than $3.35/kg.); PX 386A (Weisheng sales contracts for less than $3.35/kg).

4. Defendants Voluntarily Formed A Cartel and Reached Agreements Without Any Directions From The Chamber or Mr. Qiao.

As minutes drafted by Mr. Qiao made clear for the jury, the cartel was formed in response to the anticipated abolishment of government export controls, not in compliance with them. DTX 28 ("there would be relatively significant changes in the regulatory manner concerning vitamin C exports in 2002. In order to adapt to those changes, the Chamber held a meeting on November 16, 2001, with the heads of the major vitamin C manufacturers, during which they agreed" to form a cartel). Minutes of the November 2001 meeting, also drafted by Mr. Qiao, state that the reason the participants were able to reach agreement was market power, not compulsion from the Chamber or the government:

> The participants of the meeting through enthusiastic discussions have reached an agreement aimed at enhancing the self-discipline of the industry. They have concluded that Chinese Vitamin C manufacturers are absolutely capable of realizing the self-discipline of the industry. . . . the production of vitamin C in China is highly centralized in four manufacturers and thus it is relatively easy to reach unison within the industry…
>
> The meeting, by way of hand voting, has unanimously passed the resolution on restricting the export volume and protecting the price.

PX 134 at 3. As reflected in the minutes, the participants entered a written memorandum agreement to limit supply to increase prices:

> Through friendly consultation, the four Chinese Vitamin C manufacturers… have entered into the following memorandum on restricting the export volume and protecting the export price.

Id at 5. Mr. Qiao confirmed that the manufacturers reached an agreement at the November 2001 meeting, but claimed they did so only in response to his "forceful urging." Qiao, Day 8 Tr. 1132:4-1133:3. Mr. Qiao admitted that his memorandum made no mention of any "forceful urging" and that his testimony about the November 2001 meeting was "different" from what he wrote at the time. Qiao, Day 8 Tr. 1133:4-1133:25.

A Hebei Welcome report confirms that the Defendants reached a "common understanding" when the government stopped imposing quotas in November 2001 in order to raise prices, not because they were compelled by the Chamber or the government:

> in order to turn the cruel situation of VC market, the 4 main domestic companies reached the common understanding of production limitation and price retention under the coordination of [the Chamber]; meanwhile the former state active quota restraint was changed to industrial self-discipline management. This brought the VC market to a standardized course of development and significant changes took place in the VC market, for example, the upturn of VC price.

PX 111 at 7. Huang Pinqi of Hebei Welcome and NCPC testified that he addressed the Hebei Welcome report to NCPC. Huang, Day 4 Tr. 513:3-6. Other reports also confirmed the initial

cartel agreement. PX 118 at 2 ("Price fall was caused by internal reasons, the industry exercised self-restraint and each export enterprise determined its export amount").

After the cartel was formed, Defendants continued to reach voluntary agreements without any compulsion from the government or the Chamber. The evidence establishing the existence of these agreements is too extensive to describe in detail, but examples include: PX 137 at 2 (the four major vitamin C manufacturers "agreed to limit production during the first half of 2004"); PX 81 at 2 ("Concerned with price drop in the market, all participating manufacturers agreed to increase stock in the Shanghai warehouse"); PX 139 at 2 ("we had an agreement among all the producers, and the production shutdown in June is part of this agreement"); PX 165 at 1 ("the participants agreed on two measures: first to raise the price quote unanimously … and, second, each manufacturer will halt production for 20 days during April and May"); PX 78 at 1-2 ("We all agreed to set the floor price at 9.20 USD/kg"); PX 83 at 2 (defendants "reached an agreement, in which the 6 domestic VC manufacturers will arrange to suspend production"); PX 57 at 2 (referring to "all the agreements reached (and signed by representatives of all the companies)" during the VC coordination meeting at the end of December 2003).

Defendants do not deny that they reached agreements but instead argue that "[n]early all references to 'agreements' among the defendants state that they were reached under the auspices of the Chamber or at a meeting convened by the Chamber, and thus by the Chinese government." Def. Memo at 15. The jury was entitled to conclude that the documents meant what they said: the Defendants reached agreements and were not following orders. The jury was also entitled to conclude that the "auspices" of the Chamber or its convening of a meeting did not prove that there were orders to fix prices or limit supply. Defendants also ignore the evidence that they reached agreements outside, as well as inside, meetings of the Chamber.

Further, the evidence showed that the Vitamin C Subcommittee itself was a voluntary organization. This issue was argued to the jury at trial. Defendants extensively cited, and continue to extensively cite, testimony about the 1997 Charter of the Vitamin C Subcommittee, but ignore the 2002 Charter which expressly stated that the Subcommittee is a "trade organization jointly established on a voluntary basis by members of the Chamber…." PX 73 Art. 3.

5. The Evidence Showed that Mr. Qiao Gave No Instructions.

The defense of compulsion collapsed at several points, but that collapse included the admissions of Mr. Qiao. Mr. Qiao on cross-examination admitted that an agreement of the companies was required for action to be taken on prices or supply. "If nobody agrees, then we cannot have a stoppage. No agreement, no stoppage." Qiao, Day 7 Tr. 1037:21-1038:3. Mr. Qiao similarly testified that no price limitations went forward without the support of the majority of the manufacturers. Qiao, Day 7 Tr. 1038:11-15. Finally, he confirmed that at his deposition he truthfully testified that from 2002 forward, no agreements on export quotas or quantities went forward without the support of a majority of the vitamin C manufacturers. Qiao, Day 7 Tr. 1039:13-14, Video Ex. 5 (Qiao Dep. 280:12-16, 21).

Compounding these admissions, Mr. Qiao admitted it was "perfectly acceptable" for the companies to decide to have *no minimum prices.* Qiao, Day 7 Tr. 1100:3-11; 1101:20-24. *"If it was cancelled because of circumstances, it was cancelled." Id.*

Kong Tai, a co-conspirator, corroborated Mr. Qiao's admissions and testified that no decision was made by the vitamin C subcommittee without a consensus of those in attendance. Video Ex. 1, (Kong Dep. 38:4-21, 49:12-16, 18, 68:16-24, 69:1-6).

Despite the significant evidence of price agreements over $3.35, Mr. Wang similarly told the jury that no one outside of his company ever directed his company to charge more than $3.35 per kilogram. Wang, Day 2 Tr. 363:8-17.

Further, as set forth above, Defendants discussed prices outside of meetings either on the phone or during "chit chat." Mr. Qiao testified that he "asked" defendants to share information about market conditions between meetings but that he did not give any directions about pricing between meetings and never used verification and chop to compel price discussions between meetings. Qiao, Day 7 Tr. 990:11-13, 1034:11-23, 1037:3-5; Video Ex. 5 (Qiao Dep. 300:13-17).

Although Defendants argue—and Mr. Qiao asserted—that he gave orders to the companies, the documents showed him asking questions and not giving orders. PX 53. Instead, it was the top officials of the companies who gave the orders and the instructions. *Id.* (GM Kong cancels an export price agreement). Mr. Qiao even admitted that he did not know enough about the vitamin C market to make decisions on price by himself. Qiao, Day 7 Tr. 1037:11-13.

While witnesses repeatedly testified to purported instructions or directions from the Chamber, those instructions were never recorded and are not reflected in any contemporaneous documents created before the lawsuit was filed and the jury was entitled not to believe these unsupported assertions. Wang Qi kept extensive records of Chamber meetings, in which he recorded all of the important or key items, none of which stated that the Chamber was making decisions. Wang, Day 2 Tr. 329:5-7, 329:24-333:2; Wang, Day 3 Tr. 414:19-20, 450:9-12, 450:24-451:1, 451:15-16. Feng Zhenying of Weisheng testified that he does not remember whether he ever saw a single document from his company stating that they were required to abide by an agreement on price or volume. Feng, Day 5 Tr. 658:9-13. Mr. Feng also testified

that "there's no such record" showing that the Chamber ever required Defendants to enter an agreement on price or supply. Feng, Day 5, Tr. 657:14-22.

6. The Chamber Is Not a Government Agency.

Defendants argue that the Chamber and the Vitamin C Subcommittee were part of the Chinese government and that a jury could not reasonably conclude otherwise. Defendants ignore all of the above evidence demonstrating that neither Mr. Qiao nor any of the participants in the conspiracy thought that the Chamber acted with governmental authority. Rather, Mr. Qiao asked the government for clear legal status that he and the Chamber did not have, indicating he understood that he and the Chamber were not the government. He admitted this on cross-examination:

> Q. And that there was no question about the legal status of the Ministry of Commerce in July of 2003, was there?
>
> A. The Ministry of Commerce?
>
> Q. It had clear legal status, right?
>
> A. Yes.
>
> Q. It wasn't like the Chamber?
>
> A. Right.

Qiao, Day 7 Tr. 1030:6-24.

During the trial, Defendants implored the witnesses to say that the Chamber was the government or was a government agency, but the witnesses would not go that far. Wang Qi, for example, called the Chamber "one of the subordinate organizations." Qi, Day 3 Tr. 408:14. Mr. Qiao called the Chamber a "direct subordinate unit." Qiao, Day 8 Tr. 1147:5-11. And when asked point blank whether the Chamber is a government agency, Mr. Qiao responded: "It is a government organization." Qiao, Day 8 Tr. 1149:5-8. (Mr. Qiao also testified falsely in direct

testimony that the Ministry of Commerce determines the salary level of the people who work for the Chamber, but admitted on cross that the Ministry only approved a total personnel budget. Qiao, Day 6 Tr. 919:20-22, Day 7 Tr. 1087:24-1088:2).

Defendants, by necessity, cherry pick from the record. Defendants cite Mr. Qiao's testimony that the Chamber is a government organization, but ignore Mr. Qiao's testimony that the Chamber is a "social organization" and that a "social organization" is "different from a government agency." Qiao, Day 7 Tr. 1097:19-20; 1097:22; 1098:3-5.

Defendants likewise cite Mr. Qiao's testimony about instructions from Wu Ying, the Vice Premier of China, but ignore his testimony on cross-examination that those instructions consisted of a 1994 speech given to a large audience that happened to include Mr. Qiao. Qiao, Day 7 Tr. 1059:23-1060:5. Defendants do not (and could not) attempt to show that a 1994 speech compelled price agreements between 2001 and 2006.

Defendants cite Mr. Qiao's testimony about a "work certificate" offered into evidence, but ignore his testimony on cross-examination that the "work certificate" was a building pass Mr. Qiao used to enter Ministry buildings where he did not have an office. Day 7 Tr. 1021:17-1022:6

Once the entire record is considered, as Rule 50 requires, it is beyond dispute that a jury could conclude that the Chamber was not part of the government but rather, in the words of Mr. Qiao, that "the legal status of the chambers is still not clear." Moreover, the jury's finding that Defendants were not compelled is not dependent on the legal status of the Chamber. As set forth above, overwhelming evidence established that Defendants were not acting pursuant to any coercion from the Chamber.

B. Overturning the Jury Verdict Requires Credibility Determinations Which are the Province of the Jury

Despite all of this evidence, Defendants argue, relying solely on testimony, that "overwhelming" evidence supports their defenses but each of the witnesses gave the jury ample reason to doubt his veracity.

Mr. Huang, for example, repeatedly and incredibly testified that the contemporaneous business records were incorrect, false, or inaccurate. Huang, Day 4 Tr. 516:2-8 (PX 111, a Hebei Welcome business record, "is not written correctly"); Huang, Day 4 Tr. 529:15-17 (PX 118, a Hebei Welcome business record, is "not accurate"); Huang, Day 4 Tr. 531:19-22 ("I felt that it is false"); Huang, Day 4 Tr. 546:22-547:5 (PX 306, "I feel that it is inaccurate"); Huang, Day 4 Tr. 551:6-11 (PX 142, "this record is totally inaccurate"); Huang, Day 4 Tr. 553:8-9 (PX 87, "I feel it is inaccurate"); 493:24-494:1 (PX 300, "personally, I think it is incorrect"); Huang, Day 4 Tr. 494:23-25 (PX 301, "Statement is incorrect"); Huang, Day 4 Tr. 495:10-13 (PX 302,"Incorrect").

Mr. Feng testified that it was "literally impossible" for the conspirators to reach an agreement on price or supply without instruction from the Chamber. Feng, Day 5 Tr. 645:15-23. Thus, the countless business records referring to such agreements were somehow inaccurate. Feng, Day 5 Tr. 646:5-8 (PX 56 is incorrect); *see also* Feng, Day 5 Tr. 653:15-20 (PX 66 is incorrect).

Defendants rest most of their arguments on the testimony of Mr. Qiao. But Mr. Qiao admitted that Defendants paid him for the substantial time he spent preparing his testimony, paid all of his expenses for multiple extended trips to the United States, and met with him repeatedly and at length to prepare his testimony and assist in their defense. Qiao, Day 7 Tr. 1014:10-1015:25; 1052:5-22. Despite his extensive preparation, Mr. Qiao repeatedly changed and

contradicted his own sworn testimony. In addition to the many examples already described, Mr. Qiao also testified on the first day of his deposition to a specific recollection of routinely sending minutes of Subcommittee meetings—incriminating documents that no company produced in discovery—by mail to the import and export divisions of the participating companies and then calling them on the telephone to confirm receipt. Qiao, Day 7 Tr. 1061:23-1062:16; 1063:8-23. The following day of his deposition, Mr. Qiao volunteered that his memory of sending the minutes was "hazy" and then he reversed again and stated that he was certain that he had never sent minutes of the meetings to the participants. Qiao, Day 7 Tr. 1064:24-1065:5.

In the morning of the first day of his deposition, Mr. Qiao testified that the only means he had to control vitamin C companies between March 2003 and June 2006 was verification and chop for price, but after lunch he came back and volunteered that he also had power to stop production. Qiao, Day 7 Tr. 1066:9-19. He made that addition to his testimony at the request of defense counsel. Qiao, Day 7 Tr. 1067:5-7. He also tried to change testimony in an English language errata sheet prepared and submitted by counsel. Qiao, Day 7 Tr. 1075:24-1078:7.

Much of the testimony Defendants cite in their renewed motion was given by Mr. Qiao on direct examination. But on direct, Mr. Qiao answered "yes" to virtually any question posed by defense counsel. The following exchange is just one of many examples of the resulting absurdity:

> Q. Did you <u>always</u> at the conclusion of a vitamin C subcommittee make a decision or give a direction?
>
> A. Yes.
>
> Q. Did you <u>sometime not</u> give a direction at the end of a meeting?
>
> A. Yeah, that happened too.

Qiao, Day 7 Tr. 989:14-19.

The witnesses whose testimony Defendants rely upon as proof of compulsion could not agree on basic facts about how that compulsion operated. Mr. Huang testified that the participants *never* expressed any opinions or agreed to anything at Chamber meetings, despite the overwhelming documentary evidence to the contrary. Huang, Day 4 Tr. 509:13, 510:3. But Kong Tai testified that *all* decisions of the vitamin C subcommittee required consensus of everybody in attendance. Video Ex. 1 (Kong Dep. 49:15-18, 67:22-69:6, 95:11-20).

Mr. Feng testified that the Chamber directly controlled export volume through verification and chop from March 2002 through June 2006 and Defendants were compelled to comply by the threat of a reduction to their quota. Feng, Day 5 Tr. 722:3-723:11. But Mr. Qiao testified that he did not control volume at all during that period and there were no set quotas to reduce. Qiao, Day 7 Tr. 1032:25-1034:9.

While the witnesses could not tell a coherent story about compulsion, the contemporaneous records consistently show the conspirators proposing, discussing, and reaching agreements – or not reaching agreements – in their own interests and without any compulsion from the Chamber or the government of China. The jury's verdict is amply supported by those contemporaneous records.

C. This Court Properly Excluded Evidence of Chinese Laws

Defendants argue that the submission of the case to the jury was "fatally flawed" by the exclusion of the Ministry's statements to this Court, copies of Chinese laws, and testimony from witnesses as to their opinions about the meaning and content of foreign laws. The Federal Rules of Civil Procedure and the Federal Rules of Evidence required the exclusion of this evidence. Fed. R. Evid. 801, 802 (out of court statements offered for the truth of the matter asserted are inadmissible hearsay); Fed. R. Civ. P. 44.1 (a court's determination of foreign law "shall be treated as a ruling on a question of law"); Fed. R. Civ. P. 44.1 advisory committee note to 1966

adoption ("[i]t has long been thought ... that the jury is not the appropriate body to determine [such] issues"); Fed. R. Evid. 701 (if a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness).[4] Defendants do not argue otherwise and do not seek a new trial on the grounds that any evidence was improperly excluded. Judgment as a matter of law, the only relief sought by Defendants, is only appropriate if there was no legally sufficient evidence supporting the jury's verdict; it is not a remedy for evidentiary errors.

D. Defendants Are Not Entitled to Judgment as a Matter of Law On Their Affirmative Defenses

Defendants' renewed motion presents the same arguments on the act of state, foreign sovereign compulsion and international comity doctrines that Judge Trager rejected in denying Defendants' motion to dismiss. This Court fully considered those arguments yet again in denying Defendants' motion for summary judgment or, in the alternative, determination of foreign law pursuant to Rule 44.1. Defendants do not identify any change in the law that would justify a reconsideration of those previous exhaustive decisions.

Further, Defendants motion now faces the issue that, as a factual matter, the jury found there was no compulsion under this Court's instructions, which were given without objection. Defendants argue that the "official acts of the Chinese government were being placed directly at issue" at trial because "its system of regulation" was at issue. Def. Memo at 4-5. But the evidence showed that no actual acts of the Chinese government, and no regulatory system, were challenged and instead voluntary conduct was at issue. Thus, even accepting that there was a regulatory system in place, that regulatory system was not put on trial and liability was based on

[4] These issues were fully briefed by Plaintiffs in their Opposition to Non-Settling Defendants' memorandum Regarding the Admissibility at Trial of Certain Statements of the Ministry (Dkt. 514), Plaintiffs Motion in Limine to Exclude Chinese Laws and Regulations and Opinion Testimony (Dkt. 574). Plaintiffs hereby incorporate those briefs in their entirety.

voluntary corporate conduct. As this Court stated in denying Defendants motion for judgment as a matter of law before the verdict:

> this is clearly not a case where anyone will be judging whether the Chinese government acted in an illegal fashion. Plaintiffs can only prevail here if the jury determines that the Chinese government did not act. Period.

Day 9 Tr. 1544:16-19.

This Court further recognized that the compulsion defense involved credibility determinations for the jury to resolve. *Id.* 1544:23-1545:8. The jury resolved those credibility determinations in favor of Plaintiffs and the resulting verdict conclusively establishes that Defendants were not in fact compelled to reach any agreement on price or supply during the relevant period and were not required to abide by the agreements they reached.

Plaintiffs will not waste this Court's time by explaining, again, that the texts of the regulations cited by Defendants cannot support Defendants' interpretation of them. Those regulations are well-known to the Court and the plain terms of the regulations speak for themselves. Plaintiffs refer the Court to their opposition to Defendants' Motion for Summary Judgment (Dkt. 395), and this Court's order denying summary judgment (Dkt. 440), and will also not set forth, again, how Defendants fail to satisfy their burdens under the doctrines they invoke or why the Ministry's statements to this Court were never entitled to conclusive weight.

Plaintiffs do note that whatever weight the Ministry's statements were entitled to prior to the decision on summary judgment, they are entitled to even less weight now. The statements predate this Court's decision denying summary judgment and the evidence at trial. The statements thus do not identify any error in this Court's specific rulings. The statements also make no effort to address or explain the evidence submitted to the jury showing voluntary agreements.

Defendants make several false statements in their renewed motion that do require a response. First, Defendants argue that "while it is impermissible for a court in this country to inquire into the motivations of a foreign sovereign's actions, or to pass judgment upon their validity, it is far more extreme for a U.S. Court to conclude that such a regulation did not exist when the foreign government presents certified and consularized copies of the actual regulations and explains how the conduct complained of was done pursuant to, and in compliance of, such mandatory regulations." Def. Memo at 5 (emphasis added). But this Court never *denied the existence* of any regulation submitted by the Ministry. To the contrary, this Court closely read each regulation and explained at length why the regulations failed to support Defendants' affirmative defenses.

In addition, the Ministry *never* explained how the conduct complained of was done pursuant to and in compliance with such mandatory regulations. The Ministry never explained how the verification and chop regulations, which on their face are limited to the enforcement of existing price agreements, required Defendants to enter any agreements on price or required Defendants to enter into or abide by agreements on non-price issues such as volume limits and production suspensions. And the jury has now concluded that Defendants were not in fact compelled to reach any agreements on price or supply.

Second, Defendants assert that "against this unequivocal evidence and regulations stating their terms in black and white plaintiffs did not present any evidence whatsoever of Chinese law and engaged no Chinese law expert." Def. Memo at 12. This rhetoric obscures the truth: Defendants failed to present *any* unequivocal evidence. The Ministry and Professor Shen continually relied on repealed and abolished regulations and outdated charters and failed to address the plain language of the regulations themselves. *See* Plaintiffs' Opposition to Summary

Judgment pp. 27-28, 31-38; Order Denying Summary Judgment. Plaintiffs, who did not have the burden of establishing the content of foreign law, had no need to engage a Chinese law expert because the texts of the applicable Chinese regulations plainly contradicted the Ministry and Professor Shen. And Plaintiffs *did* provide this Court with substantial evidence, including copies of the Chinese laws that repealed the regulations relied upon by Defendants as well as business records and deposition testimony establishing that Defendants were acting voluntarily.

Third, Defendants' renewed motion suggests that it was improper for the jury to weigh the credibility of Mr. Qiao Haili's testimony. Defendants cite no authority for the proposition that a Court must defer to the testimony of a former government official paid to appear on behalf of a party. Moreover, Defendants' recent assertion that the Chamber is part of the government and that Mr. Qiao is thus a former government official is not supported by the Ministry, which has never claimed Mr. Qiao as an employee. The Ministry has never stated to this Court that it directly employed the Chamber's leadership. Ministry *Amicus* Brief (Def. Memo Ex. B) at p 9 ("candidates for senior positions with the Chamber are *recommended* by the [Ministry] or recommended by over 1/3 of the Chamber's members and approved by the [Ministry]"); *see* Qiao, Day 7 Tr. 903:20 ("I was assigned to work at the Chamber from the [Ministry]").

As the Ministry explained to this Court during oral argument on Defendants' Motion to Dismiss, the relevant Chinese regulations do "not say every [c]hamber is an instrumentality that is acting in the nature of a regulatory body. It is only in those instances where the Ministry later imbues them through regulation with the power to regulate that they become so." Hearing Transcript of June 5, 2007 (attached hereto as Exhibit B) at 100:21-25.[5] Thus, even accepting

[5] As Counsel for the Ministry explained, "[t]here **are certainly parts, products and parts of the Chamber, where it is not acting as a government instrumentality**." *Id.* 105:21-25. In a subsequent written submission to this Court, the Ministry confirmed the statements of its counsel and stated that it "was careful to direct its U.S. counsel to explain to the Court that specific chambers of commerce, ***when authorized by the Ministry to***

the Ministry's statements, Mr. Qiao was not a government official but acted with governmental authority in some circumstances and not others.

In particular, the Ministry's submissions to the Court make no mention at all of any governmental authority imbued upon Mr. Qiao to restrict export volumes or limit production. The Ministry does not even agree that the verification and chop regulations provided Mr. Qiao with the authority to deny or delay chops to force companies to reach agreement or to enforce agreements on matters other than price. Ministry *Amicus* Brief (Def. Memo Ex. B) at 14 (The basis of the verification and chop system was a process of "industry-wide negotiated prices." Under verification and chop "[i]f the price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed … a 'chop,' on the contract and returned it to the manufacturer").

Fourth, Defendants argue that this Court's judgment conflicts with findings by the United States Trade Representative ("USTR") and a panel of the World Trade Organization ("WTO") that China "continued to control minimum prices, export quotas, and production of vitamin C." Def. Memo at 14. Defendants cite a string of documents, which were not previously part of the record in this case, to support that argument. None of those documents contain **any** findings about minimum prices for vitamin C, export quotas applied to vitamin C, or the production of vitamin C.

The documents cited by Defendants concern Chinese export restrictions on "raw materials," not vitamin C. Those "raw materials" were subject to "export administration" by the Chinese government while vitamin C was not. In November 2002, the head of China's trade

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regulate, act in the name, with the authority and under the active supervision, of the Ministry." June 9, 2008, Statement of the Ministry (Def. Memo Ex. C) at 2 (emphasis in original). The Ministry continued: "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."** *Id.* (emphasis added).

delegation, which included Ministry officials, submitted a statement to the WTO regarding China's implementation of its WTO commitments. Statement by the Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade in Goods, November 22, 2002 (G/C/W/441) (attached hereto as Ex. C). On behalf of the government of China, the Ministry official stated:

> China maintains export administration of a small number of products…which are in conformity to GATT 1994. From 1 January 2002, China gave up export administration of…vitamin C….

China's trade delegation continued: "There are now still 54 products subject to export administration including…fluorspar…coke" and the other raw materials at issue in the trade dispute. *Id.* at 3. China justified its continued restrictions on the exports of raw materials on the grounds that those products, unlike vitamin C, were exhaustible natural resources. *Id.*

Over the next several years, USTR addressed China's continued restrictions on the exports of raw materials, including coke and fluorspar, in its annual report to Congress on China's WTO compliance. Def. Memo Ex. N at 29 ("China has continued to impose restrictions .. on exports of a few raw materials," including fluorspar, and defended those restrictions as necessary for the conservation of exhaustible natural resources); Def. Memo Ex. O at 32 (same); Def. Memo Ex. P at 35 (same). Eventually, the USTR brought a WTO complaint against China related to those restrictions, which included a licensing requirement and government quotas. The panel found that the license and quota requirements applicable to those raw materials violated China's trade agreements. Def. Memo Ex. M ("WTO Report") ¶¶ 8.16, 8.17, 8.18, 8.19.

According to Defendants' own evidence, vitamin C was not subject to any export licensing requirements or government quotas from January 1, 2002 through June 30, 2006. Qiao, Day 7 Tr. 980:24-981:6. The WTO Panel expressly declined to address the price verification

and chop regulations, which are the only export regulations relevant to vitamin C during the conspiracy. WTO Report ¶ 7.1062.

In addition, neither the WTO Panel nor the USTR purported to address the issue of antitrust immunity under the doctrine of foreign compulsion, which had no relevance to the trade dispute. Instead, the WTO Panel found that the China Chamber of Commerce of Metals & Minerals ("CCCMC"), which is subject to the same Ministry oversight as the Chamber, is a non-governmental body. WTO Report ¶ 7.1001. The WTO Report further found that certain conduct of the CCCMC was "attributable" to China for the purpose of the trade dispute. *Id.* ¶ 7.1006. As the WTO Panel made clear, "private actions" may be subject to challenge in a WTO proceeding where there is merely "some governmental connection to or endorsement of those actions." *Id.* ¶ 7.1004. In contrast, as the jury was instructed, private agreements are **not** immunized from antitrust liability by the act of state doctrine or the defense of government compulsion if a foreign government merely approves, facilitates or enforces illegal cartel agreements. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927).

There is thus no inherent conflict between the USTR pursuing a trade dispute against a government that facilitates and encourages anticompetitive conduct by private companies and a U.S. court finding that those same private companies are liable under the antitrust laws. Rather than conflicting enforcement regimes, antitrust laws and WTO proceedings may act together to counter voluntary cartel conduct that is facilitated or endorsed by a foreign government.[6]

Finally, Defendants continue their eight-year campaign of scare-mongering by asserting, once again, that holding them liable for their unlawful conduct will anger China and cause

[6] Moreover, the USTR and WTO did not hear witnesses, review business records, or resolve any of the factual disputes at issue in this case, which concerns an unrelated product. The jury did resolve those factual disputes and unanimously found that Defendants' conduct was not compelled by the government of China.

"problems for the international community" that will "eventually harm the United States." Def. Memo at 14. This threat is now made by U.S. counsel for Chinese companies. It was first raised by the Ministry in its *Amicus* brief, which claimed that denying Defendants motion to dismiss would be an "insult" to China and would "harm international relations." Ministry *Amicus* Brief at 22. This Court denied the motion to dismiss and the motion for summary judgment years ago without international incident.

III. NCPC IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

With respect to its liability, NCPC asks for reconsideration of the *same* arguments the Court has consistently rejected at the motion to dismiss (Dkt. 496), the motion for summary judgment (Dkt. 635), and the directed verdict stages. Each time, the Court determined that whether NCPC participated in the vitamin C price-fixing conspiracy at issue was a factual question for the jury to decide. NCPC cannot show a "complete lack of evidence" supporting the jury's findings against it, nor can NCPC prove that the jury acted unreasonably or unfairly in reaching its verdict. This is fatal to NCPC's renewed motion.

In a footnote, NCPC states that its renewed motion is "emphatically not" requesting that the court weigh the credibility of the witnesses, but rather is asking the Court merely to enforce the "prohibition against 'sheer surmise and conjecture.'" Dkt. 689-1 at 4 n.3. NCPC's statement is disingenuous on two levels.

First, its renewed motion relies heavily on references to trial testimony that tries (albeit unsuccessfully) to explain away documents showing NCPC's participation in the conspiracy, including the following:

- "Qiao Haili, the chief Chamber officer who organized the meetings and drafted the subcommittee Charter, testified that NCPC was never a member of either the Chamber the vitamin C subcommittee, and that under the subcommittee By-Laws was not even eligible to be a member of the vitamin C subcommittee. (Tr. 1017:25-1018:15)."

- "Yang Jianfu, chief legal officer of NCPC testified that because NCPC neither produced nor manufactured vitamin C it was impossible for it to be a member of the Chamber. (Tr. 1260:2-20)."

- "Mr. Qiao Haili, who drafted the statement, testified that when Mr. Huang attended vitamin C subcommittee meetings he always attended solely as a representative of Hebei Welcome. (Tr. 1018:16-1019:3)."

- "Mr. Huang testified that he maintained a separation between his duties as Deputy General Manager of NCPGC and his duties as General Manager, and later, Chairman, of Hebei Welcome. . . . (Tr. 481:10-483:22)."

Dkt. 689-1 at 8, 11-12. Reliance on any of this testimony does, in fact, turn on the credibility of the witnesses, which Rule 50 prohibits NCPC from asking the Court to do. The credibility of each of these witnesses was challenged repeatedly during the trial and the jury was clearly entitled to disregard their testimony.

Moreover, the jury was entitled to disregard Mr. Qiao's assertion that Mr. Huang attended conspiracy meetings on behalf of Hebei Welcome because Mr. Huang himself never testified to such a thing or corroborated it. Nor did any other witness for Hebei Welcome or NCPC corroborate or support Mr. Qiao's assertion. Mr. Qiao also provided no explanation to the jury as to why he would know that Mr. Huang, an executive for NCPC, did not attend conspiracy meetings for NCPC.

Further, the jury was shown the immateriality of Mr. Qiao and Mr. Yang's testimony that NCPC was not a member of the Chamber. The jury was shown that NCPC participated in an agreement to fix prices of another product, penicillin, without being a member of the Chamber or the Penicillin Subcommittee. PX 252; Qiao, Day 8 Tr. 1230:3-9.

Second, it is not "surmise and conjecture" for this jury to have reached its conclusion as to NCPC's liability based on documents presented at trial that are contrary to the testimony from defense witnesses the jury did not find credible. *See United States v. Landau*, 155 F.3d 93, 103

(2d Cir. 1998) (reversing district court grant of motion for judgment as a matter of law because, *inter alia*, district court made "impermissible assessment of the credibility of a witness" by discrediting documentary evidence in favor of testimonial evidence jury was entitled to reject).

A. NCPC Misconstrues Plaintiffs' Theory of Liability

NCPC wrongly contends that Plaintiffs are somehow seeking to pierce the corporate veil, citing to *United States v. Bestfoods*, 524 U.S. 51 (1998) and *Bavaria Int'l Aircraft Leasing GmbH v. Clayton, Dubilier & Rice, Inc.*, No. 03 CIV. 0377 (NRB), 2003 WL 21767739 (S.D.N.Y. July 30, 2003). Those cases involve plaintiffs seeking to implicate the parent corporations through agency or corporate veil-piercing vis-à-vis a subsidiary corporation, or simply by the mere fact that one person held a board position with both the parent and the subsidiary. *See Bestfoods*, 524 U.S. at 69; *Bavaria Int'l Aircraft Leasing GmbH*, 2003 WL 21767739, at *7.

In this case, however, Plaintiffs have made no such argument and the jury was not instructed on a veil piercing theory. On the contrary, Plaintiffs argued based on evidence (and unobjected to instructions) that NCPC acted for itself, not for its subsidiary, in its participation in the vitamin C cartel. But even if *Bestfoods* did apply, Plaintiffs have provided sufficient evidence to overcome the presumption that NCPC was acting with its "subsidiary hat" in its dealings with the cartel:

> [T]he presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent.

Bestfoods, 524 U.S. at 71 & n.13; *see also Greene v. Long Island R. Co.*, 280 F.3d 224, 236, 239 (2d Cir. 2002) (finding parent directly involved in subsidiary business where parent performed

more than "management and operation" of subsidiary but was instead "directly and integrally involved in essential business aspects" of subsidiary's business).

NCPC goes on to suggest that Plaintiffs were required to *prove* that NCPC was a member of the Chamber or the vitamin C subcommittee. Not so. As the agreed-upon verdict form stated, Plaintiffs only needed to "prove, by a preponderance of the evidence, that [NCPC] knowingly entered into an agreement or conspiracy with the purpose of or predictable effect of fixing the price or limiting the supply of Vitamin C." Further, Plaintiffs demonstrated that NCPC joined a price fixing agreement for penicillin – described in a Chamber document – without joining the Chamber or a penicillin subcommittee. PX 252; Qiao, Day 8 Tr. 1230:3-14. Based on the evidence Plaintiffs presented, the jury had a reasonable basis to conclude that NCPC was directly involved in the conspiracy regardless of whether it was a member of the Subcommittee.

B. The Jury Had a Reasonable Basis to Conclude That Huang Pinqi Attended – and Led – Vitamin C Subcommittee Meetings On Behalf of NCPC

Huang attended and led vitamin C conspiracy meetings during the period that he was deputy general manager of NCPC. PX 58, PX 87, 124, 142.[7] NCPC does not contest that there was more than sufficient evidence to show that Mr. Huang participated in the conspiracy.

NCPC also does not dispute that the Court properly instructed the jury on the law relating to whether Huang Pinqi acted as an agent of NCPC when he attended conspiracy meetings:

- "As I pointed out before, both defendants in this case are corporations. A corporation can act only through its agents. A corporation's agents include its directors, officers, employees, or others acting on its behalf." Jury Charge, Day 11 Tr. 1753:17-20.

[7] While he generally attended vitamin C subcommittee meetings while he was at NCPC, the record reflects many meetings during this period for which minutes do not exist. PX 81 ("On February 17th [2004] all vitamin manufacturers participated in a coordination meeting"); PX 83 ("On June 15th [2004], the VC regulation meeting was held in Shanghai"); PX 85 (May 24 2004 talks in Nanjing); PX 138 (December 26 2003 Beijing VC meeting); PX 318 ("On May 12 [2004] a VC coordination meeting was held in Beijing"); PX 320 ("VC coordination meeting held by CCCMHPIE on March 19 [2004]". As a result, the evidence also supported the conclusion that Mr. Huang participated in conspiracy meetings for which there were no minutes to record the participants.

- "A corporation is legally bound by the acts and the statements of its agents or employees done or made within the scope of the agent's employment or apparent authority. Acts done within the scope of employment are acts performed on behalf of a corporation and directly related to the performance of the duties the agent has the general authority to perform." *Id.*, Tr. 1754:1-7.

- "Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact or issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence." *Id.*, Tr. 1754:24-1755:5.

The evidence supported a verdict based on the proper instructions the Court gave. Mr. Huang was an employee of NCPC and attended conspiracy meetings during the period he was deputy general manager of NCPC. Mr. Huang's actual and apparent authority with NCPC included responsibilities for vitamin C and therefore included participation in the conspiracy.

Specifically, Mr. Huang was General Manager of Hebei Welcome from 1999 to early 2005. Huang, Day 4 Tr. 472:18-20. In 2005, he became Board Chair of Hebei Welcome. *Id.*, Tr. 475:22-24. In November 2003 – while still serving as General Manager of Hebei Welcome – Mr. Huang also became deputy general manager of NCPC. *Id.*, Tr. 474:7-10. He remained in his position at NCPC until January 2010. *Id.*, Tr. 474:17-20.

Once Mr. Huang became deputy general manager of NCPC, Mr. Huang admitted that his executive position at NCPC was considered to be his highest title and position. *Id.*, Tr. 550:15-18. Counsel for NCPC told the jury in opening statement that it was his highest title and that the Chamber referred to him with that title for that reason. *Id.*, Tr. 233:21-25. Mr. Huang likewise testified that in China that it was customary to address executives by their "higher title," *id.*, Tr. 511:18-20, and reports on vitamin C production were typically addressed to NCPC because it was the "higher entity." *Id.*, Tr. 512:13-18.

After he joined NCPC, Mr. Huang even admitted that he virtually no longer worked for Hebei Welcome. Mr. Huang testified that in November 2003 he vacated Hebei Welcome's premises and maintained his working office at NCPC. *Id.*, Tr. 480:23-481:5. He had "basically" no physical presence at Hebei Welcome during his working days after that point. *Id.* His office was at NCPC by that point and he "seldom" showed up at Hebei Welcome. *Id.* These two companies are not even physically near each other in China; they are a twenty-minute bus ride apart. *Id.*, Tr. 481:6-8.

These facts are important because after Mr. Huang moved his office to NCPC, he participated in vitamin C conspiracy meetings, and the evidence, considered in the light most favorable to Plaintiffs, shows he did so on behalf of NCPC. But NCPC's defense at that point became the incredible argument that Mr. Huang attended these conspiracy meetings for Hebei Welcome, a company where he seldom showed up, and did not represent the company where he maintained his daily working life.

On November 23, 2004, the Chamber recorded that "it was decided that Huang Pinqi, deputy general manager of North China Pharmaceutical Group, would be the rotating chair of the Council of the subcommittee for the year 2005." PX 124. The Chamber referred to Mr. Huang in his capacity as deputy general manager of NCPC, and Mr. Huang admitted that he, in fact, chaired the vitamin C subcommittee in 2005. Huang, Day 4 Tr. 550:8-551:5.

Mr. Huang attended a vitamin C subcommittee meeting on April 19, 2005 while he was chair of the council. PX 142; Huang, Day 4 Tr. 550:22-551:5. And notes from a meeting held on May 19, 2005 show that Mr. Huang made a report about the export quantities for March and

offered two proposals: one regarding Vitamin C pricing, and one suggesting a production stoppage in July and August. PX 87.[8]

In his trial testimony – and this included NCPC's counsel's direct questioning of him – ***Mr. Huang never denied attending vitamin C subcommittee meetings behalf of NCPC, and he never said he attended these meeting only on behalf of Hebei Welcome***. In his examination by NCPC counsel, Mr. Huang only denied that Zhang Yingren of Hebei Welcome had a relationship with NCPC. Huang, Day 4 Tr. 563:2-8. Counsel for NCPC and Hebei Welcome entirely refrained from asking Mr. Huang for which entity he was attending vitamin C subcommittee meetings. *Id.* Tr. 562:1-563:8. The jury was entitled to weigh what Mr. Huang did not say along with what the exhibits admitted into evidence did say.[9]

In its Order denying NCPC's motion to dismiss, the Court considered many of these issues (although not Mr. Huang's failure at trial to testify as to who he represented at meetings) and found that they were ripe for a jury to decide:

> NCP Group Corp's economic interests are aligned with those of Welcome and the other vitamin C manufacturers who conspired to fix the price and limit the supply of vitamin C exports….***it would make perfect sense for Mr. Huang to have been speaking for both NCP Group Corp and Welcome at these meetings***. Moreover . . ., ***this record includes facts that strongly suggest that Mr. Huang was acting on behalf of both NCP Group Corp and Welcome when he attended these meetings***. For example, when the Chamber publicly announced that Mr. Huang was elected as president of the vitamin C subcommittee for the year 2005, the Chamber referred to him as "the Deputy General Manager of North China Pharmaceutical Group." During that year, Mr. Huang attended a meeting with other vitamin C manufacturers where he proposed specific floor prices and suggested that the manufacturers "stop fermentation for about 20 days so as to reduce the production volume appropriately and ultimately relieve the situation that supply surpasses demand."

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[8] Again, Mr. Huang was not credible because despite, the documentary evidence, he told the jury that the companies "didn't express our opinions" at their meetings. Huang, Day 4 Tr. 510:3.

[9] NCPC also points to testimony from Qiao Haili in which he tries to explain away PX 124 as "legally insufficient." Dkt. 689-1, at 10-11. But again the jurors were entitled to believe what is written in the document, and not Mr. Qiao's testimony – which was successfully and repeatedly impeached during cross examination.

Dkt. 496 at 10-11 (emphasis added). In denying NCPC's motion for summary judgment, the Court again found evidence "a reasonable jury could conclude that NCPGC was involved in vitamin C manufacturing," which is exactly what the jury found. Dkt. 635 at 13-15.

In response to the weight of this evidence, NCPC claims merely that there is nothing to indicate that the language in PX 124 amounts to "anything more than an identification of Mr. Huang by a position that he held." Dkt. 689-1, at 11. That, of course, simply highlights the factual question the jury decided. In his testimony, Mr. Huang gave no explanation as to his appointment to the council as described by PX 124. At trial, Plaintiffs pointed not to PX 124 alone, but also Mr. Huang's participation in other meetings, and evidence of NCPC's involvement in vitamin C manufacturing. The jury considered this evidence. And then it heard the testimony on these points from Mr. Huang, Mr. Qiao, and Mr. Yang. The jury was free to discredit their testimony as unreliable or untrustworthy – and they did.[10]

NCPC goes on to argue that Mr. Huang could not have been representing NCPC at these meetings because the Vitamin C Subcommittee By-Laws "require[] that all members of the subcommittee be members of the Chamber," and that each president "could only be elected from the representatives of the member organizations." Dkt. 689-1, Ex. W (DTX-32B). NCPC characterizes this as "uncontradicted evidence." This is flat wrong. NCPC overlooks the Chamber's own records reflecting that the "deputy general manager" was appointed chair of the council of the vitamin C subcommittee. PX 124. NCPC also ignores the evidence that Mr. Huang's highest title in the eyes of all was with NCPC. And NCPC again overlooks the evidence Plaintiffs presented to the jury about the September 29, 2003 price-fixing agreement on

[10] The jury had good reason to question Mr. Huang's credibility given his penchant for repeatedly taking issue with the accuracy of contemporaneous conspiracy documents and with his company's own documents. *See* supra pp. 20-21.

"self-discipline" in the penicillin industry that NCPC signed without being a member of the Chamber or the penicillin subcommittee. PX 252; Qiao, Day 8 Tr. 1230:3-14.

The sum of this testimony and evidence created a factual dispute regarding whether Mr. Huang was attending these vitamin C subcommittee meeting on behalf of NCPC or Hebei Welcome, and the jury was entitled to assess the credibility of the defense witnesses in light of the documents and what Mr. Huang did not deny.

C. The Jury Had A Reasonable Basis to Conclude NCPC Had An Interest In Vitamin C Based On Its Website Pages and Its Signed Strategic Agreements Regarding Vitamin C

The jury was entitled to conclude from ample evidence that Mr. Huang represented NCPC when he dealt directly with vitamin C competitors, including at vitamin C subcommittee meetings. The jury was further entitled to conclude from this evidence that Mr. Huang's actual and apparent authority extended to vitamin C and negotiations with vitamin C competitors. For example, at trial Plaintiffs produced documents from NCPC's own website stating clearly that it is a manufacturer of vitamin C: "North China Pharmaceutical Group Corp. (NCPC) is a leading *pharmaceutical manufacturer* in China." PX 300 (emphasis added). Yang Jianfu, NCPC's chief legal counsel, testified that this language was "accurate." Yang, Day 8 Tr. 1274:2-7.[11] Mr. Yang went on acknowledge that "North China Pharmaceutical Group Corp is a very influential pharmaceutical group company." *Id.*, Tr. 1268:24-1269:1.

[11] Mr. Yang's testimony on the accuracy of PX 300 was 180 degrees different than what Mr. Huang said, which further clouded the trustworthiness of Mr. Huang's entire testimony:

> Q: North China Pharmaceutical Group Corporation is a leading pharmaceutical manufacturer in China.
>
> A: Personally, I think this is incorrect.

Huang, Day 4 Tr. 493:24-494:1.

NCPC's website further states that "NCPC's *main businesses* covers: over 590 varieties, ranging from antibiotic bulks and formulations, *vitamins* and nutrition products, biotech products, immunosuppressant, and pesticide to veterinary drugs" and that "[t]he output and sales volume of . . . *Vitamin C* and vitamin B12 *are ranking in the forefront of the world*." PX 301 (emphases added). In its list of "Products," NCPC's website lists two forms of vitamin C ("Vitamin C (Ascorbic Acid)" and "Vitamin C Granules"). PX 302. The website goes on to note that in August 2012 *NCPC*'s annual sales volume for vitamins is 23,000 tons. PX 301.[12]

NCPC contends that website pages from 2012 offer no basis for finding NCPC liable as a member of the vitamin C conspiracy. But this was a factual issue for the jury regarding how NCPC presents itself to the world (and whether to believe NCPC's witnesses who said the company has never had anything to do with making vitamin C). Dkt. 689-1 at 16.

This contemporary evidence buttressed what documents shown to the jury during the conspiracy period revealed about NCPC's involvement in vitamin C. Contrary to Mr. Huang and Mr. Yang's claims that NCPC had nothing to do with vitamin C, Huang Day 4 Tr. 484:20-485:10, 495:7-13; Yang Day 8 Tr. 1240:3-9, 1247:2-20, Plaintiffs presented the jury with a report to NCPC for the period January to June 2004, which stated that "North China Pharmaceutical Group's competitiveness in VC field has been elevated a great deal." PX 119 at 5. That report about NCPC's competitiveness in the vitamin C market went on to (a) discuss the conspiracy by describing the status of a "production suspension agreement reached at the beginning of the year;" (b) note that "we believe the market will be very severe and competition extremely fierce;" and (c) recording that "manufacturers were hoping that the suspension of production will buy up the price." *Id.* at 8.

[12] Mr. Huang testified that what was written in PX 301 and 302 was "incorrect." Huang, Day 4 Tr. 493:24-494:1; 495:10-13.

Other documents written during the conspiracy period confirmed NCPC's involvement in Vitamin C manufacturing. PX 111 is a March 11, 2003 report from Hebei Welcome to NCPC, which in addition to describing the conspiracy to limit supply and fix prices of vitamin C, states: "Many customers only choose the North China trademark, which is a great assurance for our future sales." Mr. Huang affirmed during cross-examination that "[t]he North China brand name, the North China that's referred to, is your group corporation." Huang, Day 4 Tr. 520:19-21. Hebei also noted that a competitive advantage it maintained was support from NCPC. *Id.*, Tr. 513:24-514:6.

Although Mr. Huang claimed that NCPC had no involvement in the vitamin C business, he admitted that NCPC, not Hebei Welcome, was engaged in strategic negotiations with the Dutch vitamin manufacturer DSM concerning a vitamin C joint venture. *Id.*, Tr. 488:2-489:9. Mr. Huang personally participated in these talks about vitamin C with another vitamin C manufacturer on behalf of NCPC. *Id.* These talks took place over the course of "many years." *Id.*, Tr. 489:10-14.

These talks resulted in signed agreements between NCPC (not Hebei Welcome) and DSM in 2005 – during the conspiracy period at issue in this case and during the year that Mr. Huang was a chair of the council for the vitamin C subcommittee. *Id.*, Tr. 491:22-24, 492:6-15; PX 42 at 2. NCPC's cooperation with DSM, a competitor, over vitamin C was important to the conspiracy. PX 42 at 3 (NEPG reports that following DSM/NCPC joint venture "DSM certainly won't use a 'price strategy'"). It also factored into the credibility of NCPC's witnesses, who claimed that NCPC had nothing to do with vitamin C. Huang, Day 4 Tr. 484:20-485:10, 495:7-13; Yang, Day 8 Tr. 1240:3-9, 1247:2-20.

NCPC nonetheless tries to paint its involvement as nominal and its websites as the product of corporate branding. NCPC goes so far as to claim that the "North China Pharmaceutical" name conflates multiple entities, including Hebei Welcome, into a single company. But the three inapposite cases on which NCPC relies for this concept each concerned websites that used abbreviated corporate names. *See, e.g.*, *Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) ("the common trade name 'Sprint,'"); *Montalbano v. HSN, Inc.*, No. 11-cv-96, 2011 WL 3921398, at *3-*4 (N.D. Ill. Sept. 6, 2011) (the abbreviation "Cornerstone Brands"); *R&K Lombard Pharm. Corp. v. Med. Shoppe Int'l, Inc.*, No. 07-cv-288, at *4-*5 (E.D. Miss. Mar. 5, 2008) (abbreviation "Cardinal Health" on business cards).

Here, by contrast, NCPC used its *full corporate name* on the web pages in question – not a common trade name. PX 300 ("North China Pharmaceutical Group Corp. (NCPC) is a leading pharmaceutical manufacturer in China."). This provided further evidence for the jury that NCPC itself was involved in manufacturing Vitamin C.

Accordingly, the jury was entitled to conclude that when Mr. Huang attended conspiracy meetings, he did so for NCPC, both on the basis of actual and apparent authority.

D. The Jury's Findings are Supported By Evidence of NCPC's Active and Direct Involvement In The Cartel and Vitamin C Production

The jury was presented with evidence which revealed that NCPC's Huang Pinqi attended and led vitamin C conspiracy meetings during the period that he was deputy general manager of NCPC. PX 58, PX 87, 124, 142. Further, before he assumed his position with NCPC, Huang Pinqi made reports to NCPC which directly reported on the existence of the conspiracy. PX 111 ("the 4 main domestic companies reached the common understanding of production limitation and price retention"). And after he was appointed Deputy General Manager of NCPC, Hebei

Welcome made reports to him describing conspiracy acts. PX 119 ("reneging on the production suspension agreement reached at the beginning of the year").

Documents also undisputedly show NCPC (a) touting its involvement and competitiveness in Vitamin C manufacturing, (b) reporting on export quantities, production stoppages, and proposed Vitamin C pricing, (c) receiving reports from Hebei Welcome about Vitamin C, and (d) named by another co-conspirator as part of the conspiracy. PX 111, 119, 144, 259, 306, DTX 68. At trial, NCPC's witnesses claimed that these documents did not really mean what was written. The jury disagreed for good reason.

E. The Jury Had a Reasonable Basis to Conclude NCPC Was Involved In The Vitamin C Conspiracy Based On Detailed Reports It Received From Hebei Welcome.

Plaintiffs also presented evidence that while Mr. Huang worked in NCPC's offices as deputy general manager, Hebei Welcome sent him regular, detailed reports about Hebei Welcome's vitamin C business. PX 119; PX 306; Huang, Day 4 Tr. 482:8-9; 483:2-6; 23-25; 484:3-5; 546:12-547:3. For example, in 2005 and 2006, Hebei Welcome provided Mr. Huang reports at his offices at NCPC about the business operations of Hebei (which were exclusively devoted to vitamin C) on an as needed basis. Huang, Day 4 Tr. 483:2-9; 484:3-5. Mr. Huang testified that if these reports were about daily events at Hebei Welcome and he decided they were insignificant, he would throw them away. Huang, Day 4 Tr. 484:12-14. Again, this evidence showed that Mr. Huang's actual and apparent authority extended to vitamin C and that when he attended vitamin C subcommittee meetings he was acting for NCPC.

These reports, specifically addressed to NCPC, include information about vitamin C production and sales targets, short- and long-term business goals, marketing strategies, product research and development, management overview, and production suspension agreements among the co-conspirators. *Id*; Huang, Day 4 Tr. 546:22-547:3.

In response to this evidence, NCPC tries to advance the point that "the sending of monthly statements or reports does not suffice to pierce the corporate veil." (Dkt. 689-1, at 19) This, of course, is not the basis alleged for NCPC's liability. The jury was entitled to conclude that Mr. Huang, the deputy general manager of NCPC, based on his actual and apparent authority attended conspiracy meetings on behalf of NCPC, and not Hebei Welcome alone.

F. The Jury Had a Reasonable Basis To Conclude NCPC Was Involved In The Vitamin C Conspiracy Based On Memos From Co-Conspirators Referencing NCPC's Participation.

In deciding whether NCPC participated in the conspiracy, the jury was entitled to consider a 2005 internal memorandum from settling defendant Jiangshan (Aland) that states:

> At this conference, the chamber of commerce once again put forward the suggestion of ***coordinated termination of production***. Several manufacturing companies, such as Northeast Pharmaceutical, Shijiazhuang Pharmaceutical and ***North China Pharmaceutical*** have ***shown their support to this suggestion*** while our company still hasn't given a definite attitude. According to my analysis, this suggestion is reasonable.
>
> In terms of the supply and demand relations
>
> From the current situation, the situation of supply exceeding demand will exist in the market for a long time. In terms of ***possibility of production reductions***:
>
> 1. ***There is no possibility that*** any of Northeast Pharmaceutical, Shijiazhuang Pharmaceutical, ***North China Pharmaceutical,*** Jiangshan Pharmaceutical and DSM ***will withdraw from the market.***

PX 259 (emphases added). This memorandum names NCPC and directly links the company to the conspiracy. Another set of Jiangshan meeting minutes identifies NCPC, rather than Hebei Welcome, as attending a conspiracy meeting. PX 144.

In response, NCPC contends that "internally contradictory memoranda authored by Wang Qiang of Jiangsu Jiangshan" do not support the jury's finding that NCPC participated in the vitamin C conspiracy. But at the very least, PX 259 and PX 144 created a fact issue about

whether NCPC participated, which must be viewed in the light most favorable to Plaintiffs. Another co-conspirator, CPG, also listed in a PowerPoint that North China's vitamin C production capacity was 15,000 tonnes. PX 442 at 4. The jury was permitted to reject the testimony by NCPC's fact witnesses, who testified that these exhibits did not mean what Jiangshan and CPG wrote.

IV. DEFENDANTS ARE NOT ENTITLED TO A REDUCTION IN DAMAGES

As the jury was properly instructed, "[t]he law does not require that plaintiffs prove the amount of their damages with mathematical precision, but only with as much definiteness and accuracy as circumstances permit." Jury Charge, Day 11 Tr. 1762:24-1763:2; *see Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (antitrust damages may be approximated based on relevant data).

A jury is entitled to award damages in an antitrust case based on expert testimony. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 532-33 (6th Cir. 2008) ("if the jury credited [the plaintiffs' expert's] conclusion – in whole or in part – it reasonably could have reached the conclusions that it did") (citing *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 572 (1990) ("expert testimony . . . provided a sufficient basis for an acceptable estimate of the amount of damages")). As to the expert testimony, the jury was properly instructed (and defendants do not dispute):

> In weighing the testimony, you should consider the factors that generally bear upon credibility of a witness, as well as the expert witness' education, training and experience, the soundness, the reasons given for the opinion, and all the other evidence in the case. You should consider the expert opinions which were received in evidence in the case and give them as much or as little weight as you think they deserve. If you should decide that the opinion of an expert was not based on sufficient education, experience or sufficient data, or if you should conclude that the trustworthiness or credibility of the expert is questionable for any reason, then you might disregard the opinion of that expert. Furthermore, if the opinion of an expert was outweighed in your judgment by other evidence in the case, then you might disregard that expert, entirely disregard the opinion of that expert entirely or in part.

Jury Charge, Day 11 Tr. 1743:8-24.

Defendants also take no issue with the damages charges given to the jury, which instructed jurors that "[c]ompensatory damages cannot be based on speculation or sympathy. Rather, they must be based on the evidence presented at trial, and only on that evidence." Jury Charge, Day 11 Tr. 1762:20-22. The jury was instructed that the amount of damages must "be based on reasonable, non-speculative assumptions and estimates," and that "[i]f you find that plaintiffs has failed to carry their burden of providing a reasonable basis for determining damages, then your verdict must be for defendants." *Id.* Tr.1763:12-18. After hearing these instructions and the evidence presented, the jury rendered a $54.1 million verdict for the Plaintiffs.

Far from the overwhelming evidence needed to overturn the jury's verdict on damages, there is no evidence to support Defendants' theory that sales of vitamin C by Tiger and Hualong were subject to arbitration clauses. In rejecting Defendants' pretrial motion to strike evidence of Tiger and Hualong sales as a matter of law, the Court held that:

> Whether these purchases fall outside the class definition… remains a fact issue for the jury to determine. The Court is unwilling to dismiss claims for purchases that may very well be proper based solely on defendants' speculation…. The Court perceives no error in retaining purchases that are not known to be improper.

Dkt. 604 at 18.

In denying Defendants' motion for reconsideration, the Court emphasized that "obviously the defendants can cross-examine Dr. Bernheim" on his decision to include Tiger and Hualong's sales in his damages estimate. Day 6 Tr. 768:8-17. Defendants passed up this opportunity at trial and did not put a single question to Dr. Bernheim concerning his inclusion of Tiger and Hualong sales in his damages calculation.

Rather, at trial, Plaintiffs put forward – and Defendants did not refute – evidence that Tiger and Hualong participated in the same conspiratorial meetings as other Defendants and thus were in fact co-conspirators. PX 53 (July 26, 2003 meeting attended by Hualong); PX 57 (March 19, 2004 meeting attended by Hualong and Tiger); PX 58 (same); PX 142 (April 19, 2005 meeting attended by Hualong); PX 87 (May 19, 2005 meeting attended by Hualong); PX 144 (November 16, 2005 meeting attended by Hualong and Tiger); PX 151 (June 23, 2006 meeting attended by Hualong and Tiger); PX 73 (listing members of the vitamin C subcommittee, including Hualong and Tiger (Anhui)); Wu, Day 9 Tr. 1413:24-1415:15 (testifying that he was aware that Tiger and Hualong were present at the conspiracy and cartel meetings).

In addition to the evidence that Hualong and Tiger attended vitamin C subcommittee meetings and Chamber meetings, it was Defendants' evidence that Mr. Qiao and the Chamber had the power to require such companies to obey orders or submit documentation. In any event, the evidence showed that Mr. Qiao and the Chamber were actively involved in the defense of this case after the lawsuit was filed. Qiao, Day 7 Tr. 1056:10-25, 1057:17-22. As a result, there was every reason to expect that if documents with additional arbitration clauses existed, they would have appeared in the case. Further, Defendants, to the extent that they thought there was relevant evidence available, could have sought formal discovery to obtain the documents during the many years of this litigation.

Nor did Defendants contest the data that Dr. Bernheim used to calculate damages. Dr. Bernheim testified that he used U.S. International Trade Commission (ITC) sales data and Defendant documents to estimate damages caused the defendants and their co-conspirators. Bernheim, Day 6 Tr. 843:5-844:9. He testified that this was the type of data that an economist would typically rely on for a study such as he did. *Id.*, Tr. 843:19-24. He testified that Hualong

and Tiger accounted for less than 14% of Chinese vitamin C imports into the U.S. *Id.*, 844:3-9. He also testified with respect to his model that he had confidence in the analysis, that it was rock solid, and that it met the standards for publication by an economic journal. *Id.*, Tr. 847:13-21, 848:2-16. As a result, Dr. Bernheim's testimony, including his model and the decisions he made as to what data to rely on, met the standards for admissibility under *Daubert* and the jury was entitled to rely on his testimony. The argument that Dr. Bernheim included incorrect data in his analysis was a credibility issue, and not an issue of law that could be taken from the jury. *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 807, 809 (3d Cir. 1997) (reversing exclusion of expert based on "insufficient factual foundation" and cautioning that the "trial judge must be careful not to mistake credibility questions for admissibility questions"); *Katt v. City of New York*, 151 F. Supp. 2d 313, 359 (S.D.N.Y. 2001) ("whether the limitations of his data undermined the credibility of his testimony was for the jury to decide").

On cross-examination, Dr. Wu admitted that "[i]t was reasonable" for Dr. Bernheim to rely on ITC data in estimating damages. Wu, Day 9 Tr. 1415:2-15 ("It was reasonable to use [ITC data] and I accepted that"). Defendants presented no evidence that sales from Hualong and Tiger included arbitration clauses. Dr. Wu admitted he had no evidence that any of Tiger or Hualong's sales contracts contained arbitration clauses and no other evidence was offered by the Defendants on the point. Indeed, rather than prove that Hualong and Tiger sales included arbitration clauses, Defendants own expert testified that it would be pure speculation to assume those sales included arbitration clauses. Wu, Day 9 Tr. 1415:23-1416:7 (testifying that he "would be speculating to assume there's an arbitration clause" in Tiger or Hualong vitamin C sales contracts).

While Dr. Wu initially testified that he believed these sales should be excluded from damages, he later admitted that he "didn't exercise any judgment" in determining that the sales should be excluded; instead, he "had been instructed by Counsel to not consider these sales." Wu, Day 9 Tr. 1332:12-1334:11, 1411:16-1413:20. Thus, the jury heard that Dr. Wu disagreed with Dr. Bernheim not based on independent judgment, but based on the instructions of counsel. The jury also heard extensive argument from counsel as to Plaintiffs' damages estimate and whether Dr. Bernheim's inclusion of Tiger and Hualong's sales was reasonable and proper. Critchlow Summation, Day 11 Tr. 1687:22-1689:22; Isaacson Rebuttal Summation, Day 11 Tr. 1726:17-1727:4.

Plaintiffs thus met their burden to put forth a reasonable, non-speculative estimate of damages through the testimony of Dr. Bernheim. As the Court noted in denying Defendants' motion for judgment as a matter of law before the verdict:

> If there was some kind of presumption that these contracts have an arbitration clause, then I could understand defendant's point. But as we know, there is no such presumption possible. We don't know that there is an arbitration clause. We don't know that there isn't. I think when the plaintiff, which clearly has the burden of proof on all elements of its damage claim, puts the contracts of sale into -- it quantifies them for purposes of claiming damages on them, it has met its burden of going forward on that issue.
>
> It then becomes incumbent on the defendants, it seems to me, to come back and say wait a minute, that's wrong, those contracts should not be included. They are contracts. They are prima facie evidence of sales and unless there's some reason the defendants want to offer to show that they ought to be excluded, then I think they should not be. So, I am rejecting that point.

Day 10 Tr. 1543:23-1544:13.

Because there was not "a complete absence of evidence supporting the verdict," the Court must deny Defendants' motion for judgment as a matter of law. *See Cross v. New York City Transit Auth.*, 417 F.3d 241, 248 (2d Cir. 2005). Further, Defendants did not disprove the reasonableness of Plaintiffs' damages estimate, nor did they prove that Plaintiffs' damages

estimate was speculative. Instead, Defendants presented no evidence at all to demonstrate that the sales of Tiger and Hualong included arbitration clauses, and thus there was certainly not "such an overwhelming amount of evidence in favor of the [defendants] that reasonable and fair minded men could not arrive at a verdict against [them]." *See New York City Transit Auth.*, 417 F.3d at 248.

CONCLUSION

Considering the evidence in the light most favorable to Plaintiffs and giving all inferences to Plaintiffs, the Court should uphold the jury's verdict and deny Defendants' renewed motion for judgment as a matter of law.

Dated: May 10, 2013

Respectfully submitted,

/s/ Michael D. Hausfeld
Michael D. Hausfeld
Brian A. Ratner
Brent W. Landau
Melinda R. Coolidge
HAUSFELD LLP
1700 K Street, NW Suite 650
Washington, DC 20006
Tel: (202) 540-7200
Fax: (202) 540-7201

/s/ William A. Isaacson
William A. Isaacson
Tanya Chutkan
Jennifer Milici
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW, Suite 800
Washington, DC 20015
Tel.: (202) 237-2727
Fax: (202) 237-6131

/s/ James T. Southwick
James T. Southwick
Shawn L. Raymond
Katherine Kunz
SUSMAN GODFREY L.L.P.
1000 Louisiana, Suite 5100
Houston, TX 77002
Tel.: (713) 651-9366
Fax: (713) 654-6666

Alanna Rutherford (AR-0497)
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
Tel: (212) 446-2300
Fax: (212) 446-2350

Co-Lead Counsel for the Certified Direct Purchaser Damages Class and Injunction Class