UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VITAMIN C ANTITRUST LITIGATION This Document Relates To: ANIMAL SCIENCE PRODUCTS, INC., *et al.*, Plaintiffs, vs. HEBEI WELCOME PHARMACEUTICAL CO., LTD., *et al.*, Defendants.	**MASTER FILE 1:06-MDL-1738 (DGT)(JO)** Case No. 1:05-CV-00453(DGT)(JO)

REPLY MEMORANDUM IN SUPPORT OF CHINA PHARMACEUTICAL GROUP LTD.'S ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

Plaintiffs' Opposition ("Pl. Opp.") presents arguments and assertions identical to those in their opposition to CPG's motion to dismiss for lack of personal jurisdiction, to which CPG has fully responded. *See* D.E. 300. Plaintiffs again contend that CPG directly participated in the alleged conspiracy and seek to hold CPG liable on alter ego and agency theories.

Alternatively, Plaintiffs seek discovery against CPG but fail to show any legal entitlement. Plaintiffs ignore the jurisdictional discovery CPG already voluntarily provided, producing nearly one thousand pages of documents and making a corporate representative available for a Rule 30(b)(6) deposition.[1] Despite the extensive information made available to them, Plaintiffs fail to point to any fact to support their theories of liability against CPG. Plaintiffs' Opposition relies on misstated records, speculation and unsupported legal contentions.

II. PLAINTIFFS' ARGUMENT REGARDING CPG'S ALLEGED PARTICIPATION IN A CONSPIRACY IS UNAVAILING

Plaintiffs do not contend that CPG employees attended any alleged conspiracy meetings. Nor do Plaintiffs contend that CPG authorized any employees to attend meetings of the Vitamin C Subcommittee. Rather, Plaintiffs contend CPG participated in the alleged conspiracy because three of CPG's directors, Messrs. Feng, Liu and Cai attended alleged conspiracy meetings. Pl. Opp. at 12. But the record is undisputed that none attended as CPG officers.

Contemporaneous records establish that Mr. Feng attended Subcommittee meetings as the General Manager of Weisheng, and not on behalf of CPG.[2] CPG's corporate representative confirmed this in his deposition.[3] Mr. Liu is identified as attending only a November 2001

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[1] The deposition lasted one and a half days and covered 49 broad topics. Plaintiffs also have taken full scale discovery against the four manufacturer defendants, including CPG's subsidiary, Shijiazhuang Pharma.Weisheng Pharmaceutical (Shijiazhuang) Co., Ltd. ("Weisheng").

[2] *See e.g.,* Exs. E-G to CPG Motion for Summary Judgment ("MSJ"); Ex. D. to Pl. Opp.

[3] Yue Depo. at 199, Ex. B to CPG MSJ.

Subcommittee meeting. The notes of that meeting identify him as the General Manager of Shijiazhuang Pharmaceutical Group Co. Ltd. ("SJZ China") and not a CPG representative.[4]

The April 13, 2001 meeting which Mr. Cai allegedly attended occurred prior to the commencement of the conspiracy alleged.[5] The record is clear that the meeting was called by the Chinese Government with respect to its export license policy. *Id.* Officials from the China Chamber of Commerce of Importers and Exporters of Medicines and Pharmaceutical Products (the "Chamber") and the Trade Administration Department of China Ministry of Commerce ("MOFCOM," formerly MOFTEC) attended the meeting.[6] Notes of this meeting identify Mr. Cai as a representative of SJZ China and not CPG. *Id.* Mr. Cai attended the meeting only briefly to greet Chinese government officials.[7] The meeting notes indicate that Mr. Cai did not participate in any substantive discussion.[8]

Plaintiffs misstate the record by asserting that Mr. Cai executed a "Memorandum by Chinese Vitamin C Manufacturers on Restricting Export Volume and Protecting Export Price" in November 2001 as "Chairman (General Manager) of Shijiazhuang Pharmaceutical Group Co. Ltd. (including Weisheng Pharmaceutical Co. Ltd.)" Pl. Opp. at p.12. The memorandum referred to by Plaintiffs contains a blank signature block and does not identify the signator.[9]

Plaintiffs ignore settled law in contending that there is a question of fact as to whether Messrs. Feng, Cai and Liu acted as CPG representatives in those meetings. Pl. Opp. at pp. 15-16. In *United States v. Bestfoods,* 524 U.S. 51, 69 (1998) (italics added), the Supreme Court

[4] Ex. C to Pl. Opp.

[5] Ex. B to Pl. Opp.

[6] The MOFTEC representative lectured vitamin C manufacturers at the meeting: "Enterprises need to obey the industry agreements and industry rules. When enterprises are maximizing their profits, they also need to consider the interest of the sate as a whole." *Id.*

[7] Declaration of Cai Dong Chen in Support of Motion for a Protective Order, ¶10, filed May 12, 2008 (D.E.279-2).

[8] Ex. B to Pl. Opp.

[9] Ex. C to Pl. Opp.

held: "This recognition that the corporate personalities remain distinct [between a parent corporation and its subsidiary] has its corollary in the 'well established principle of corporate law that directors and officers holding positions with a parent and its subsidiary *can and do change hats* to represent two corporations separately, despite their common ownership." "[C]ourts generally presume that the directors are wearing their subsidiary hats and not their parent hats when acting for the subsidiary." *Id.* This is a "time honored common law rule." *Id.* at 70. Plaintiffs erroneously contend that *Bestfoods* is inapposite because it concerns claims arising under a different federal statute. Pl. Opp. at p. 15. However, the Court explicitly stated its holding on dual officers and directors was based on a "well established principle of corporate law." *Id.* at 69.[10]

The cases cited by Plaintiffs' are inapposite because they involved a more substantial factual showing than Plaintiffs have made here. In *Basic Mgmt. v. United States*, 569 F.Supp.2d 1106 (D. Nev. 2008), the court found "involvement by [a parent] beyond the norms of parental supervision" and evidence of "eccentricity" in the control by the parent, which did not exist in the relationship between CPG and Weisheng. *Maine v. Kerramerican, Inc.*, 480 F.Supp.2d 348, 356 (D.Me.2007) does not involve dual directors. There, individuals responsible for planning, managing and directing the mining activities that resulted in the release of hazardous substances were employees of the company which claimed to be an investor only. Those employees "had

[10] Courts have applied this holding in cases where the claims did not arise under the federal statute in *Bestfoods*. *See, e.g., Bavaria Int'l Aircraft leasing GmbH v. Clayton, Dubilier & Rice, Inc.*, 2003 WL 21767739 (S.D.N.Y. Jul. 30, 2002) (dismissing claims against the parent where actions of Chairman of the subsidiary, who was also an officer of the parent, cannot be attributed to the parent because plaintiff failed to justify overcome the *Bestfoods* presumption); In *re Parmalat Securities Litig.*, 501 F.Supp.2d 560 (S.D.N.Y.2007) (granting defendants' motion to dismiss where plaintiffs failed to overcome the *Bestfoods* presumption concerning dual directors for their agency theory); *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001)(granting defendant's motion to dismiss for lack of personal jurisdiction); *ITT Corp. v. Borgwarner Inc.*, 2009 WL 2242904 (W.D.Mich. Jul. 22, 2009) (granting summary judgment for defendants and refusing to pierce the corporate veil); *Thompson v. Buhrs Americas, Inc.*, 2009 WL 537633 (D.Minn. Mar. 3, 2009) (dismissing age discrimination claims against a parent company where its director, who also served as a director of the subsidiary, was involved in the subsidiary's employment decisions).

no hat to wear but" the investor company's. *Id.* at 355-356. In *Jackowski v. Seoco, Inc. Northern*, 2001 WL 709485 (N.D. Ill. Jun. 22, 2001), the defendant's motion for summary judgment was denied because a dual officer who was involved in the alleged sexual harassment admitted that he had not received any income from the defendant in the last five years. *Id.* at *4. That raised questions of fact as to what hat the person was "actually" wearing. *Id.* [11]

Plaintiffs cannot point to any post-*Bestfoods* case challenging the "corollary" corporate principle concerning dual directors and officers. 524 U.S. at 69. Indeed, as the Court had warned, "if the evidence of common corporate personnel acting at management and directorial levels were enough to support a finding of a parent corporations' direct [] liability ..., the possibility of resort to veil piercing to establishing indirect, derivative liability for the subsidiary's violation would be academic." *Id.* at 70.

III. SUMMARY JUDGMENT IS WARRANTED ON PLAINTIFFS' ALTER EGO THEORY

There is a presumption of separateness afforded to related corporations[12] and courts are "reluctant to disregard the corporate entity."[13] To pierce the corporate veil, a plaintiff must establish by a preponderance of the evidence (1) that the subsidiary is a "mere instrumentality" of the parent; and (2) that the subsidiary is being used by the parent corporation in order to commit or conceal a fraud. *Kashfi v. Phibro-Salomon, Inc.*, 628 F.Supp. 727, 733 (S.D.N.Y. 1986) (granting defendants' motion for summary judgment and refusing to pierce the corporate veil). "The doctrine of piercing the corporate veil ... is the rare exception, applied in the case of

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[11] *In re American Honda Motor Co., Inc. Dealerships Relations Litig.*, 941 F. Supp. 528 (D.Md. 1996) was decided prior to *Bestfoods*. Honda Japan's motion to dismiss was denied because the individuals who were both officers and directors of Honda America and Honda Japan "masterminded" the "widespread" bribery scheme. *Id.* at 552-553. The court allowed the parties to explore these issues through discovery.

[12] *Fidenas A.G. v. Honeywell, Inc.*, 501 F.Supp.1029, 1035-38 (S.D.N.Y.1980), citing *Williams v. McAllister Brothers Inc.*, 534 F.2d 22 (2d Cir. 1976).

[13] *Mouawad National Co. v. Lazare Kaplan Int'l Inc.*, 476 F.Supp.2d 414, 421 (S.D.N.Y. 2007), citing *William Wrigley Jr. Co. v. Waters,* 890 F.2d 594, 600 (2d Cir. 1989).

fraud or certain other exceptional circumstances." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

To establish the first element, plaintiffs must show that the parent exercised "complete control" over the subsidiary with respect to the transaction at issue. *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997). "It is not enough that related corporations have the same officers and directors …, or that the parent corporation owns all of its subsidiary's stock, … or even that a parent and subsidiary hold themselves out as being a single integrated operation, controlled and managed from the parent's offices." *Kashfi*, 628 F.Supp. at 733-734 (internal citations omitted). "In order to pierce the corporate veil, the parent corporation must dominate the finances, policies, and business practices of the subsidiary corporation to such an extent that the subsidiary has no separate existence of its own." *Id.* at 734.

Plaintiffs' assertions are insufficient to support their alter ego theory. Plaintiffs incorrectly contend that there is an absence of corporate formalities because Weisheng has no independent directors and holds few board meetings. Plaintiffs have not pointed to any authorities requiring a private company, such as Weisheng, to have independent directors on its board. Nor do Plaintiffs cite any authority (and none exists) that suggests a private company's lack of independent directors is a factor to be considered for corporate veil piercing. Chinese law does not require Weisheng to have annual board meetings.[14] Moreover, the frequency of

[14] Yue Depo. at 202:2-7, attached hereto as Exhibit A. Additionally, as a wholly foreign owned enterprise ("WFOE"), Weisheng can establish its own internal procedures in its articles of association and is not compelled to convene board meetings regularly. *See* Article 15, Detailed Rules for the Implementation of the Law of the People's Republic of China on Wholly Foreign –Owned Enterprises (last visited November 3, 2009) <http://www.hzbiz.gov.cn/en/0701/1387.htm>; Article 11, The law of the People's Republic of China on Wholly Foreign Owned Enterprises, (last visited November 3, 2009) <http://ge2.mofcom.gov.cn/aarticle/chinalaw/investment/200801/20080105351875.html>. Unlike WFOEs, other types of corporate entities, such as Chinese-foreign equity joint ventures and joint cooperative ventures are expressly required to have a board meeting at least once a year. *See* Article 32, The Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, (last visited November 3, 2009), http://ge2.mofcom.gov.cn/aarticle/chinalaw/investment/200801/20080105351876.html; Article 28, Detailed Rules

Weisheng's board meetings has no bearing on its relationship with CPG. Plaintiffs do not deny that CPG and Weisheng had separate board meetings, financial books and records, payroll and offices.[15]

Plaintiffs' argument that Weisheng is inadequately capitalized is without basis. Plaintiffs mistakenly contend that Weisheng depends financially on CPG and received "numerous loans from its parent." The record shows only one occasion where CPG invested in Weisheng's production expansion project. CPG's investment in Weisheng's vitamin C production expansion project does not suggest that Weisheng was inadequately capitalized or that Weisheng was financially dependent on CPG. In *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988), cited by Plaintiffs, the court held that the fact that a parent supplied its subsidiary with working capital from time to time was insufficient to establish under-capitalization.

Plaintiffs, again, contend that CPG's ownership of Weisheng and the existence of overlapping directors support piercing the corporate veil. It is settled law that ownership and overlapping directors are insufficient to establish an alter ego relationship. *Kashfi*, 628 F.Supp. at 734. *See also Volkswagnwerk Artiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984) (overlapping directors and officers is a factor intrinsic to the parent-subsidiary relationship and is not determinative of control).[16]

Plaintiffs do not dispute that CPG and Weisheng maintain separate corporate addresses. However, Plaintiffs contend CPG treats its subsidiaries' production facilities as its own because

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on the Implementation of the Law of People's Republic of China on Sino-Foreign Joint Cooperative ventures, (last visited November 3, 2009) <http://www.wxmofcom.gov.cn/english/html/law2.asp>.

[15] Yue Decl. ¶¶ 15, 16, and 19, Ex. A to CPG MSJ.

[16] *See also Mouawad National Co.*, 476 F.Supp.2d at, 421 ("a corporate parent is not automatically liable for the acts of its wholly owned subsidiary, even where the parent and subsidiary have interlocking directorates").

CPG collectively refers to the group of companies it invested in on its website.[17] This argument fails as a matter of law. *See Fidenas*, 501 F.Supp. at 1035-36 (even if a parent and subsidiary hold themselves out as being a single integrated operation, it is insufficient for alter ego relationship).

Plaintiffs incorrectly contend that CPG dominated Weisheng.[18] Plaintiffs refer to certain CPG press releases and website statements, which collectively discuss the performance of its investment portfolio. But as CPG's representative testified, CPG and its public relations agent in certain press releases failed to distinguish CPG from the "Group," a term which CPG routinely used to refer to its investment portfolio companies collectively.[19] Such statements cannot indicate CPG manufactures and sells vitamin C.[20] Even though CPG invested in Weisheng's vitamin C expansion project, there is no evidence that CPG controls or supervises Weisheng's daily manufacturing and sales activities.

The one isolated trip to the U.S. by a former CPG director to recover money owed to Weisheng, which occurred long before the commencement of the alleged conspiracy, is not relevant to the degree of control by CPG over Weisheng. *See In re Parmalat Securities Litig.*, 501 F.Supp. 2d 560 (S.D.N.Y.2007) (allegation that a company requested a representative of its parent to resolve its business dispute with a sister company is insufficient for alleging the control

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[17] Ex. 5 to Pl. Opp.

[18] Pl. Opp. at p.19.

[19] *See* 2006 CPG Annual Report, Ex.23 to Pl. Opp. at p. 16. *See also,* Yue Depo. 47:17-21; 48:7-9, 16-17; 49:24-50:2, 54:23-24; 55:1-2, Exhibit A. At least on one occasion, the confusion of the terms is attributed to inaccurate translation. *See e.g.,* Yue Depo. 56:19-21, Exhibit A.

[20] *See J.L.B. Equities, Inc. v. Ocwen Financial Corp.*, 131 F.Supp.2d 544, 550 (S.D.N.Y. 2001) (a web page that fails to distinguish parent and subsidiary is sufficient to show a parent's pervasive or complete control over the subsidiary); *In re Ski Train Fire*, 230 F.Supp.2d 403, 411 (S.D.N.Y.2002) (webpages of the companies which shared a "unified presentation" is insufficient to show "pervasive" or "complete" control, or that the distinction between the companies is more formal than real.")

relationship necessary to find an agency relationship). The director who traveled to the U.S., Mr. Wang, retired in 2000, well before this action was filed.[21]

Without citing any authorities, Plaintiffs speculate that CPG did not deal with Weisheng at arms length because "CPG pledged all its equity interest in Weisheng as collateral to secure a bank loan."[22] Plaintiffs' assertion is unavailing. CPG's pledging of its equity interest in Weisheng to secure a loan for itself is in accord with its ownership interest. In any event, Plaintiffs do not cite any authority that how CPG uses its ownership interest has any bearing on its relationship with Weisheng, as there is none.[23]

Plaintiffs also speculate that CPG does not treat Weisheng as an "independent profit center" because CPG and Weisheng file consolidated financials and CPG discusses vitamin C as merely a "series" of its product. CPG is required by the law of Hong Kong, where it is incorporated, and Hong Kong Accounting Standards to "present consolidated financial statements in which it consolidates its investment in subsidiaries."[24] Because consolidated financial reporting is typical of the parent-subsidiary relationship, it cannot be a basis to find control beyond a normal parent-subsidiary relationship.[25] Similarly, CPG's reference to vitamin

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[21] *See* CPG 2000 Annual Report, at CPG 0000009, attached hereto as Exhibit B.

[22] Plaintiffs also contend, without citing to any authority, that CPG's pledging of its equity interest in Weisheng to secure a bank loan "cuts against the corporate separateness of [C]PG and Weisheng." Pl. Opp. at p.19.

[23] Without citation, Plaintiffs also allege CPG did not deal with Weisheng at arms length because Weisheng did not conduct board meetings annually. As explained above, Chinese law does not require Weisheng to have annual board meetings and that has no bearing on its relationship with CPG.

[24] Hong Kong Accounting Standard 27, para. 10 (last visited November 3, 2009) <http://www.hkicpa.org.hk/ebook/HKSA_Members_Handbook_Master/volumeII/hkas27.pdf>; Hong Kong Companies Ordinance §124(1) (last visited November 3, 2009) <http://www.legislation.gov.hk/blis_ind.nsf/d2769881999f47b3482564840019d2f9/e5704d176728030bc825648000432663?OpenDocument>.

[25] *J.L.B. Equities*, 131 F. Supp. 2d at 551(noting U.S. generally accepted Accounting principles also require consolidated financial reporting where the parent owns more than 50% of the subsidiary's stock).

C as one of the series of products its subsidiaries manufacture is not telling on the relationship between CPG and Weisheng.[26]

Plaintiffs incorrectly rely on *Baker's Aid v. Hussman FoodService Co.*, 730 F. Supp. 1209, 1220 (E.D.N.Y.1990) for the proposition that the degree of the domination over a subsidiary is normally a question for the jury to decide. "Although the question of domination is generally one of fact, courts have granted motions to dismiss as well as motions for summary judgment in favor of defendant parent companies where there has been a lack of sufficient evidence to place the alter ego issue in dispute." *Flectcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995). "[A] court is not precluded from granting summary judgment by the existence of frivolous or immaterial factual issues." *Fidenas*, 501 F.Supp. at 1035-38 (citations omitted) (granting defendants' motion for summary judgment where plaintiffs failed to establish an alter ego liability against defendants). *See also Kashfi*, 628 F. Supp. at 735 ("Summary judgment is appropriate… where the evidence discloses no real questions of fact.").[27] Here, Plaintiffs have not created any genuine issue of significant fact regarding the requisite degree of control for veil piercing.

Even if Plaintiffs were able to establish that CPG reports Weisheng's sales and profit in its own financial report, approves Weisheng's expenditures over a certain level, procures loans for Weisheng, holds itself and its subsidiaries out as a "single integrated world-wide operation," and approves Weisheng's long term plans, such facts would only "represent fairly common relationships between parent corporations and subsidiaries rather than the 'alter ego' or 'mere instrumentality' relationship required for piercing the corporate veil." *Fidenas*, 501 F.Supp. at

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[26] *See J.L.B. Equities,* 131 F. Supp. 2d at 550; *In re Ski Train Fire*, 230 F. Supp. 2d at 411.

[27] *See also Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152, 163 (App.Div.1980) (mere allegation of wholly-owned subsidiary status resulting in summary judgment for parent).

1037. Plaintiffs fail to cite any cases where assertions similar to theirs have been held to create a material fact issue on an alter ego theory, and they cannot.

More importantly, Plaintiffs have not even alleged that Weisheng was used by CPG as a sham to commit a fraud or wrong that caused Plaintiffs' loss. *American Protein*, 844 F.2d 56, 60 (2d Cir. 1988) (cited by Plaintiffs); *WM. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) (cited by Plaintiffs).[28] Plaintiffs have simply ignored this requisite element.

IV. SUMMARY JUDGMENT IS WARRANTED ON PLAINTIFFS' AGENCY THEORY

Plaintiffs fail to proffer any evidence in support of their agency theory. Nothing in the record indicates that CPG directed Weisheng to attend meetings with other defendants or that Weisheng attended those meetings in compliance with CPG's request. Recognizing this glaring deficiency, Plaintiffs ask this Court "infer" the three requisite elements of an agency relationship: (1) CPG agreed that Weisheng would act for it in attending cartel meetings with other defendants, (2) that Weisheng agreed to do so, and (3) that there was an understanding the CPG was in control.[29] Pl. Opp., at p.21. In support of their contention, Plaintiffs assert: (1) CPG owns 100% of Weisheng and there was interlocking directorship; (2) three directors "wearing dual hats" attended cartel meetings; (3) Weisheng had no independent directors and held almost

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[28] *See also, Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir.1979)("Because New York courts disregard corporate form reluctantly, they do so only when the form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation ..., and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego."); *Kirno Hill Corp. v. Holt*, 618 F.2d 982, 985 (2d Cir.1980) ("The prerequisites for piercing a corporate veil are ... clear ...: [the defendant] must have used [the corporation] to perpetrate a fraud or have so dominated and disregarded [the corporation's] corporate form that [the corporation] primarily transacted [the defendant's] personal business rather than its own corporate business.")

[29] It has been held that the standard required to establish an agency relationship between related companies is the same as that for piercing the corporate veil – abuse of control. *See, e.g., Kashfi*, 628 F.Supp. at 735. Some courts offer an alternative test for the agency relationship – whether the subsidiary has authority, actual or apparent, to act on behalf of the parent. The Second Circuit has not reached this issue yet. *Intel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 909 F.2d 698, 702 (2d Cir. 1990).

no board meetings; and (4) CPG reviewed and approved Weisheng's vitamin C production expansion plans.[30]

Plaintiffs' contention is without merit. The parent-subsidiary relationship between CPG and Weisheng does not support an inference of an agency relationship.[31] Nor do Plaintiffs offer any authority suggesting Weisheng's lack of independent directors and infrequent board meetings have any relevance on the three requisite elements of an agency relationship. It is settled law that overlapping directorship is insufficient for establishing an agency relationship. *In re Parmalat Securities Litig.*, 501 F.Supp.2d at 588, citing *Bestfoods*, 524 U.S. at 69. An assertion of common officers and directors between a parent and a subsidiary does not overcome this presumption. *Id.* For the same reason, certain directors' attendance at Subcommittee meetings does not support an inference of an agency relationship.[32]

As an investment holding company, CPG acted within the normal relationship between a parent and a subsidiary when it reviewed Weisheng's production expansion plan.[33] The relationship between CPG and Weisheng reflects nothing more than the normal operations of a large public holding company with its subsidiary and does not demonstrate that Weisheng was, at any time, acting as an agent for CPG. This is particularly true when the parent and the subsidiary are engaging in different lines of business: CPG is an investment holding company and Weisheng is a manufacturer of vitamin C products. *See J.L.B. Equities,* 131 F. Supp.2d at

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[30] Plaintiffs misstate the record. CPG reviewed Weisheng's 2003 vitamin C production expansion plans and not "production plans" as a prospective investor. *See* Ex.24 to Pl. Opp. at CPG00000952.

[31] *Degraziano v. Verizon Comm., Inc.*, 325 F.Supp.2d 238, 246 (E.D.N.Y. 2004) (agency relationship not found between a parent and its wholly owned subsidiary); *Int'l Controls and Measurements Corp. v. Watsco, Inc.*, 853 F.Supp. 585, 589 (N.D.N.Y. 1994) (agency relationship not found between a parent and its 80% owned subsidiary); *Maung Ng.We & Massive Atl. Ltd. v. Merrill Lynch & Co., Inc.*, 2000 WL 1159835, *4 (S.D.N.Y. Aug. 15, 2000).

[32] *See also, RSM Production Corp. v. Fridman*, 2009 WL 424520, *20 (S.D.N.Y. Feb.19, 2009) ("An agency relationship does not necessarily follow from… directorship.")

[33] CPG's review of Weisheng's expansion plan is particularly reasonable because Weisheng requested CPG to invest in the project.

549 (Plaintiffs failed to show that the subsidiary was an agent of the parent where the parent company was a holding company whose business is the management and investment of the excess cash of its subsidiaries and the subsidiary was a savings and loan institution, engaged in the specialty financial services business and the servicing of residential and commercial mortgages.)[34]

V. PLAINTIFFS FAIL TO SATISFY THE REQUIREMENTS OF RULE 56(F) AND ARE NOT ENTITLED TO DISCOVERY

Failing to point to any material disputes of fact and to refute evidence CPG introduced in support of its defense, Plaintiffs request they be permitted to take discovery against CPG and to submit a supplemental brief in response to CPG's summary judgment motion. However, Plaintiffs fail to satisfy Rule 56(f), which requires them to demonstrate how the discovery they seek is reasonably expected to created a genuine issue of material facts. *Siegel v. United State*s, 2003 WL 21696218 (E.D.N.Y. Jul. 21, 2003) (Trager J.) (denying request for discovery).

Plaintiffs seek "full merits discovery" from CPG, including witness depositions, document requests and interrogatories, in particularly concerning CPG's derivative liability.[35] Plaintiffs allege in conclusory fashion that they expect to see evidence of CPG's direct involvement in defendants' price fixing conspiracy and evidence in support of CPG's liability under alter ego and/or agency principles, which Plaintiffs claim is in CPG's possession.[36]

Plaintiffs' statement fails to comply with Rule 56(f). Rule 56(f) requires an affidavit seeking discovery state: (1) what facts are sought and how they are to be obtained, (2) how those

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[34] *See also, Porter v. LSB Indus., Inc.*, 600 N.Y.S.2d 867 (App.Div. 1993) ("LSB is a holding company whose business is investment, which differs from the business of Summit, which is distribution of machine tools. The business of the parent is carried out entirely at the parent level, and Summit cannot be deemed to be conducting the parent's business as its agent.")

[35] Declaration of Suyash Agrawal in Support of Plaintiffs' Opposition to CPG's Motion for Summary Judgment, ¶20.

[36] *Id.*

facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts. *Siegel*, 2003 WL 21696218 at *5, citing *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir.1999). "A 'bare assertion' that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." *Contemporary Mission v. United States Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981) (denying discovery request and granting summary judgment where a plaintiff presented "immaterial factual inconsistencies" and by reiterating "conclusory allegations of conspiracy"). *See also Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 251 (2d Cir. 1985) (dismissing an antitrust claim where the plaintiff failed to produce any facts in support of a conspiracy allegation). "Rule 56(f) cannot be relied upon to defeat a summary judgment motion where the result of a continuance to obtain further information would be wholly speculative." *Id.* [37] For these reasons, courts have granted summary judgment even where no discovery has been conducted. *See, e.g., Connecticut Int'l Bank v. Trans World Airlines, Inc.*, 762 F.Supp.76, 79 (S.D.N.Y. 1991); *Netsource LLC v. GFI Group, Inc.*, 332 F.Supp.2d 626, 637-638 (S.D.N.Y.2004) ("the absence of discovery alone does not necessarily bar summary judgment.")

Plaintiffs do not deny that they have taken full-scale merits discovery against all manufacturer defendants. Hundreds of thousands of documents were produced, including those purport to be meeting minutes, which routinely identify attendees of such meetings and the subject of the meetings. Plaintiffs have identified no meeting minutes that mention CPG or identify an attendee as a CPG representative. Nor have Plaintiffs identified any document that shows CPG directed Weisheng's participation in such activities. Plaintiffs have not stated which

[37] *See also, Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994) ("Rule 56(f) is not a shield against all summary judgment motions. Litigants seeking relief under the rule must show that the material sought is germane to the defense, and that it is neither cumulative nor speculative.")

Dated: November 20, 2009

Respectfully Submitted,

By: /s/ Jiangxiao Hou

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of **DEFENDANT CHINA PHARMACEUTICAL GROUP LTD.'S REPLY MEMORANDUM IN SUPPORT OF ALTERNATIVE MOTION FOR SUMMARY JUDGEMENT** to be served via the Court's ECF system and/or electronic email on this 20th day of November, 2009, on each of the persons on the attached service list.

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