UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re VITAMIN C ANTITRUST LITIGATION	**1:06-MD-01738 (DGT) (JO)**
THIS DOCUMENT RELATES TO: **ANIMAL SCIENCE PRODUCTS, INC., *et al.*,** **Plaintiffs,** ***v.*** **HEBEI WELCOME PHARMACEUTICAL CO., LTD, *et al.*,** **Defendants.**	**CV-05-453**

Plaintiffs' Sur-Reply Opposing Summary Judgment
and Determination of Foreign Law

Plaintiffs respectfully submit this sur-reply opposing Defendants' motion for summary judgment and determination of foreign law. (Doc. No. 391). This sur-reply addresses the August 31, 2009 statement of amicus, the Ministry of Commerce ("Min. Stmt."), which was not mentioned even once in Defendants' opening brief (Doc. No. 393), but which Defendants reference repeatedly in reply (Doc. No. 398).

The Ministry's statement consists of a series of unsupported assertions and provides no additional record support for Defendants' motion and therefore has been sufficiently addressed by Plaintiffs' opposition (Doc. No. 395). The Ministry's statement nowhere addresses the substantial factual evidence showing that Defendants voluntarily and on their own agreed to fix

prices and limit supply. The Ministry's statement also fails to identify current laws or regulations requiring agreements to fix prices or limit supply.

Plaintiffs submit this sur-reply to point out, however, that the Ministry's careful yet vague affirmative statements and its broad silences support Plaintiffs' position and require denial of Defendants' motion.[1]

The Ministry statement says that:

1. The self-discipline system was established to "mitigate exposure to antidumping investigations" and to prevent "self-destructive competition" (Min. Stmt. ¶ 2). Thus self-discipline exists to prevent below-cost pricing. The Ministry does not even hint that self-discipline permits Defendants to raise prices above competitive levels through concerted wielding of market power.
2. The Chinese "system of self-discipline does not mean complete voluntariness or self-conduct" (Min. Stmt. ¶ 3), thus acknowledging the broad discretion Defendants have within the self-discipline system.
3. Self-discipline only requires that "the parties involved consult with each other on coordinated activities for the purpose of reaching the objectives" of Chinese law. (Min. Stmt. ¶ 3.) The Ministry does not suggest that the Chinese government compels any particular outcome or agreement among the Defendants.
4. "The Ministry required the vitamin c exporting companies to coordinate among themselves on export price and production volume . . . to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destruction." (Min. Stmt. ¶ 4). This statement demonstrates:

[1] The Ministry's Statement was not served according to the procedures for this litigation and instead was emailed to a single individual plaintiff counsel who did not see that email on the day it was received and therefore the Statement was not previously referenced by Plaintiffs' pleadings.

a. That the Defendants set the price and production volume, not the Chinese government;

b. That the Chinese government did not compel any price or output levels other than avoiding below-cost pricing, *i.e.*, avoiding "self-destruction;"

c. "Maintain[ing] orderly export and safeguard[ing] the interests of the country as a whole" are far too vague to support a claim of government compulsion and both can be accomplished without supra-competitive pricing.

5. "Embodied in the Ministry's delegation of authority to the Chamber were industry regulatory functions and powers as well as necessary enforcement measures." (Min. Stmt. ¶ 5). By delegating "enforcement measures" to the Chamber, the Chinese government stepped out of the picture completely. The government neither compelled any price or output decisions, nor did the government enforce the members' decisions. Enforcement was delegated to the members — the Defendants themselves.

6. The Ministry does not say that any Defendant was ever compelled by the Chinese government to charge a particular price for vitamin C.

7. The Ministry does not say that any Defendant was ever compelled by the Chinese government to restrict its production of vitamin C.

8. The Ministry does not say that any Defendant was ever compelled by the Chinese government to sell vitamin C into the United States at above-market prices.

1.

The Chinese Government Did Not Compel Defendants' Actions

The Ministry Statement does not permit this Court to find that Defendants have proven as a matter of law that the compulsion defense (or the similar act of state doctrine defense) applies, or

that they are otherwise absolved from liability for illegally conspiring to fix prices and limit output of Vitamin C exported to the United States. As set forth in Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion for Summary Judgment, the issue of compulsion is one of disputed fact because Defendants' own business records and sworn testimony show that they voluntarily agreed to fix prices and limit supply. Further, as also detailed in that Opposition, the Ministry relies on the same outdated and even repealed laws as Defendants. This Court cannot find that a governmental directive relieves Defendants of liability when that directive has not been produced or even identified by Defendants. The Ministry's vague statement, which does not reference any specific law, regulation, or order, does not fill that evidentiary gap.

The compulsion defense applies when a sovereign government requires a Defendant to break U.S. law. *See*, *e.g.*, *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997) (concluding that the New Zealand Dairy Board Act of 1961 "mandates Board disapproval of sales price competition among New Zealand dairy producers in respect to export to nations like the United States that restrict import quantities," which creates "an actual and material conflict between American antitrust law and New Zealand law"). In this case, the China's export regulations – by the Ministry's own admission – do not require Defendants to sell vitamin C into the U.S. at supra-competitive prices in violation of U.S. antitrust law:

> During the relevant period in the present case, the Ministry required vitamin C exporting companies to coordinate among themselves on export price and production volume in compliance with China's relevant rules and regulations in order to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition.

2009 Ministry Statement ¶ 4.

At best, the Ministry's Statement only shows that the Ministry requires Defendants to "coordinate" vitamin C export prices. The Ministry does *not* require Defendants to export

vitamin C at supra-competitive prices and does not require Defendants to restrict production to achieve supra-competitive prices. When the Ministry asserts at ¶ 1 that Defendants had to "perform[] their obligation to comply with Chinese laws," that obligation did not, even according to the Ministry, require Defendants to set vitamin C export prices at above-market levels in violation of U.S. antitrust laws.

That Chinese law does not compel Defendants to sell vitamin C into the U.S. at above-market prices is consistent with the Ministry's stated policy goals for regulating China's vitamin C export system. The Ministry admits that it required Defendants to coordinate

> [i]n order to prevent self-destructive competition through distorted pricing by Chinese exporters caught unprepared for the drastic change of China's export policies, and to mitigate potential exposures to antidumping investigations in other countries against Chinese exporters ….

2009 Ministry Statement ¶ 2.

The Ministry's requirement that Defendants coordinate vitamin C export prices prevents Defendants from setting lower-than-market prices for vitamin C exported to the U.S. This ensures China will not be subject to anti-dumping claims brought by the world community and explains why at ¶ 7 the Ministry states "[t]he regulations are implemented in a manner consistent with international law and custom" and are "consistent with the trade policies of importing companies to protect and regulate relevant domestic industries."

The Ministry fails to identify any international law or custom – particularly ones adopted by members of the World Trade Organization (WTO) – that permits privately-owned companies to collusively set above-market prices for exported goods. Given the representations China made to gain admission to the WTO, including representations specific to vitamin C, the Ministry has not claimed in this case that it forced Defendants (or delegated to any other government entity the power to force Defendants) to set above-market vitamin C export prices. The underlying

purpose of Chinese policy – and the Ministry's submissions say nothing to the contrary – is *not* to force Defendants to take actions that violate the Sherman Act.

2.

Defendants Could Have Complied with Chinese Law Without Breaking U.S. Antitrust Law

Regardless of what motivated the Chinese government to establish its self-discipline system, the undeniable and essential fact remains that Defendants could have carried out the Chamber's "system of self-discipline" without violating the Sherman Act. The Ministry acknowledges as much at ¶ 3 when it states that "[s]elf-discipline does not mean *complete* voluntariness or self-conduct." ¶ 3 (emphasis added). Defendants, by the Ministry's own admission, operate under some level of voluntariness, which is why at ¶ 7 the Ministry characterizes this system as involving "limited regulatory policies."

Defendants could have voluntarily agreed to coordinate the export of vitamin C to the U.S. by setting prices at levels that would *not* violate U.S. antitrust law. They could have agreed to use market prices instead of above-market prices. Doing so would neither violate Chinese law nor force Defendants to, as the Ministry suggests at ¶ 5, "ignore" or "abstain from" their coordination activities. To the contrary, agreeing to sell at competitive prices would comply with "China's relevant rules and regulations" that serve to "maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition" caused by Defendants setting below-market vitamin C prices. *Id.* at ¶ 4.

The Ministry gives no indication that Defendants would have been cited for "non-compliance with self-discipline" (¶ 3) if Defendants coordinated prices and output in such a way as not to violate U.S. antitrust law.

Because Defendants could have complied with the Ministry's purported "self-discipline" requirements without setting above-market vitamin C export prices in violation of U.S. law, the Court does not need to challenge or investigate the validity of any Chinese law. No actual or material conflict exists between Chinese Vitamin C export regulations and American antitrust law so as to implicate the act of state doctrine. *See O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F. 2d 449, 451 (2d Cir. 1987) (affirming the trial court's dismissal per the act of state doctrine because "O.N.E.'s antitrust suit represents a direct challenge to Colombia's cargo reservation laws and to the legality of appellees' space chartering agreements under those laws").

By voluntarily agreeing to set vitamin C export prices at above-market levels, Defendants injured U.S. purchasers to the tune of tens of millions of dollars. Defendants were not compelled to do this. Defendants could have complied with both U.S. and Chinese law by agreeing to coordinate using market prices – and nothing in the Ministry's filings suggests that Defendants would have been punished for doing so. But Defendants voluntarily chose not to do that. They chose to break U.S. antitrust laws. Now they need to be held responsible for their actions. Otherwise, every other Chinese company that wants to fix prices for products exported to the U.S. will have the green light to do so.

Conclusion

The Court should deny Defendants' Motion for Summary Judgment or, in the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P.

Dated: January 13, 2010

Respectfully submitted,

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