

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)

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

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Defendant China Pharmaceutical Group Ltd. (“CPG”) respectfully submits this memorandum of law in support of its alternative motion for summary judgment in the above captioned action pursuant to Fed. R. Civ. P. 56.¹

INTRODUCTION

Plaintiffs allege in this action that Chinese vitamin C manufacturers conspired to fix the prices and limit the output of vitamin C exported to the United States from China. Plaintiffs assert that this purported conspiracy was facilitated via meetings of the Vitamin C Subcommittee of China Chamber of Commerce for Import and Export of Medicines and Health Products (the “Chamber”). However, Plaintiffs’ Third Amended Complaint (“TAC”) does not allege that CPG manufactures or sells vitamin C and is completely devoid of any specific allegations regarding CPG’s involvement in the alleged conspiracy.²

CPG is an investment holding company based in Hong Kong. It does not manufacture or sell vitamin C. CPG was named a defendant in this lawsuit only because one of its subsidiaries, Defendant Shijiazhuang Pharma. Weisheng Pharmaceutical (Shijiazhuang) Co., Ltd. (“Weisheng”), is a vitamin C manufacturer in China. There is no evidence that CPG was involved in any of the conspiratorial activities alleged by Plaintiffs. With the conclusion of

¹ This motion for summary judgment is filed in compliance with the Court’s scheduling order, which requires all summary judgment motions be filed by August 31, 2009. On June 30, 2006, CPG filed a Motion to Dismiss for Lack of Personal Jurisdiction. That motion is pending. CPG respectfully submits that the Court need to rule on this alternative motion for summary judgment only in the event that it determines it has personal jurisdiction over CPG. As noted on page 2 of this memorandum *infra*, CPG has specifically preserves its personal jurisdictional defense.

CPG also joins and incorporates by reference 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. and also seeks dismissal of the Third Amended Complaint, in its entirety and with prejudice.

² Lacking any allegations sufficient to state a conspiracy claim against CPG, Plaintiffs instead improperly attempt to lump CPG into the general allegations as to all “Defendants.” Such generalized accusations, however, fail to state a claim under the federal pleading standard. *See Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 556 (2007) (“a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do... a bare assertion of conspiracy will not suffice.”); *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1940 (2009) (“threadbare recitals of a cause of action’s elements, supported by mere conclusory statements” are insufficient to “state a claim that is plausible on its face.”)

merits discovery last year, four manufacturer defendants have produced hundreds of thousands of documents including those that purport to be notes and minutes of the Vitamin C Subcommittee meetings. Numerous employees of manufacturer defendants were deposed and examined a wide variety of topics, including among others, the specifics of the Vitamin C Subcommittee meetings and communications among the manufacturer defendants concerning vitamin C export price and output. No reference to CPG is found in the alleged discussions of vitamin C export price and output among vitamin C manufacturer defendants. Because Plaintiffs have failed to uncover any admissible evidence that CPG participated in the alleged conspiracy, summary judgment should be granted in favor of CPG.

CPG previously moved to dismiss this action and three related actions³ for lack of personal jurisdiction. In a good faith effort to try to resolve this matter without the Court's intervention, CPG complied with Plaintiffs' request for jurisdictional discovery and produced nearly one thousand pages of documents⁴ and produced its Executive Director, Mr. Yue Jin, for deposition in Hong Kong. That motion is pending. *See* D.E. 286.

CPG files this motion for summary judgment in the alternative to CPG's prior motion to dismiss. Furthermore, CPG hereby specifically preserves its personal jurisdictional defense and incorporates by reference the papers submitted in connection with its prior motion to dismiss.

FACTUAL SUMMARY

CPG is an investment holding company incorporated under the laws of Hong Kong. China Pharmaceutical Group Ltd.'s Local Rule 56.1 Statement in Support of Alternative Motion for Summary Judgment ("SUF"), ¶1. Its principal place of business is Room 3805, 38th Floor,

³ The other three actions are: *Audette et al. v. Hebei Welcome Pharmaceutical Co., Ltd., et al.*, Case No. 1:06-00988(DGT)(JO); *Philion et al. v. Hebei Welcome Pharmaceutical Co., Ltd., et al.*, Case No. 1:06-00987(DGT)(JO); *Keane et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al.*, Case No. 1:06-00149(DGT)(JO).

⁴ Documents produced in connection with CPG's jurisdictional motion include, e.g., CPG annual reports, CPG audit committee meeting minutes, CPG board meeting minutes and CPG board resolutions, Weisheng's board minutes and CPG payroll lists.

Central Plaza, 18 Harbour Road, Wanchai, Hong Kong. SUF ¶2. CPG does not maintain any other offices or facilities. *Id.*

CPG has never engaged in the production, sale or marketing of Vitamin C. SUF ¶3. Its sole business is to invest in companies that it acquires and holds in its portfolio. *Id.* As an investment holding company, CPG only monitors its subsidiaries' business generally to ensure its investment return. SUF ¶4. It does not control, manage or otherwise involve itself in the business practices, decisions or day-to-day operations of its subsidiaries. SUF ¶5.

As an investment company in Hong Kong, CPG does not have any business communications with the Chinese government. SUF ¶6. None of CPG's employees, agents or representatives attended any of the meetings of the Chamber specifically alleged in Plaintiffs' complaint, or any other meetings with any other defendants in this action during the relevant time period. SUF ¶7. CPG never had any CPG representative or anyone acting on its behalf participate in any meeting with any other defendants in this action to discuss or consider any agreement regarding the production or prices of vitamin C products. SUF ¶8. Nor has anyone attended any meetings of the Vitamin C Subcommittee of the Chamber on its behalf. SUF ¶9. CPG has never authorized any employee to attend meetings of the Vitamin C Subcommittee or has received any reports from anyone who attended meetings of the Vitamin C subcommittee. SUF ¶10.

One of CPG's subsidiaries is Weisheng, a vitamin C manufacturer defendant in this case. Organized under the laws of the People's Republic of China, Weisheng operates as a separate legal and business entity. SUF ¶¶ 11-13. Weisheng's operations with respect to manufacturing, marketing, and sale of Vitamin C are conducted and executed without the participation or

involvement of CPG. SUF ¶15. Weisheng's General Manger, Mr. Feng Zhenying, is "fully responsible for Weisheng's production and daily operations."⁵ SUF ¶16.

Mr. Feng has been a director of CPG since 2003. SUF ¶17. CPG directors "are responsible for investment [of CPG] and not for the operation and the results of the operations of subsidiary companies." SUF ¶19. While Mr. Feng attended Vitamin C Subcommittee meetings with other Chinese manufacturers, he did so only as a representative of Weisheng. SUF ¶20. Not one document produced by defendants or deposition testimony by defendants' employees concerning meetings of the Vitamin C Subcommittee indicates that Mr. Feng had ever done so in his capacity as a director of CPG. SUF ¶20. Rather, documents purport to be minutes of such meetings identify Mr. Feng as a representative of Weisheng. SUF ¶21.

ARGUMENT

I. THE LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is warranted if "there is no genuine issue as to any material fact and that the moving party is entitled to ... judgment as a matter of law." *Scholastic, Inc. v. Harris*, 259 F.3d 73, 81 (2d Cir. 2001). When the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *see also Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 273 (2d Cir. 2001); *Brady v. Town of Colchester*, 863 F.2d 205, 210-211 (2d Cir. 1988).

Moreover, "[t]he party against whom summary judgment is sought, however, 'must do more than simply show that there is some metaphysical doubt as to the material facts [T]he

⁵ Mr. Feng was deposed by Plaintiffs on June 12, 2008. In addition, two other Weisheng employees, International Sales Supervisor Guo Jiping and Marketing Department Manager Jia Yancang, were deposed on July 30, 2008 and October 10, 2008 respectively.

nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial.*” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87(1986) (italics in original). “Where the record *taken as a whole* could not lead a rational trier of fact to find for the non-moving party, there is ‘no genuine issue of trial.’” *Matsushita*, 475 U.S. at 587, citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)(italics added).

In this case, discovery against all Chinese vitamin C manufacturer defendant has been completed. Yet, there is no admissible evidence indicating that CPG, an investment holding company in Hong Kong which does not manufacture or sell vitamin C, played any role in determining the export price or production quantity of vitamin C manufactured in China. As such, CPG is entitled to summary judgment as a matter of law.

II. NO EVIDENCE LINKS CPG TO THE ALLEGED CONSPIRACY

There is simply no evidence that can link CPG to the alleged conspiracy. CPG is an investment company that does not manufacture or sell vitamin C. SUF ¶3. For that reason, it has no contact with Chinese government concerning vitamin C export and production, including the Chamber. SUF ¶6. It is not a member of the Vitamin C Subcommittee. *Id.* Mr. Yue testified that none of CPG employees or anyone acting on its behalf participated in any discussion of vitamin C export price and output with representatives of any Chinese vitamin C manufacturers. SUF ¶9. The record confirms that testimony. SUF ¶21. Not one note, memorandum, minute, internal report, or even news report produced by the four manufacturer defendants concerning the discussion of vitamin C exports and volume contains any reference to CPG.

CPG anticipates that Plaintiffs will contend that Mr. Feng Zhenying, a director of CPG since 2003 (SUF ¶17), attended Vitamin C Subcommittee meetings and that Mr. Feng was not acting on behalf of Weisheng, where he serves as the General Manager, but on behalf of CPG or on behalf of both companies. Plaintiffs would be wrong. There is nothing in the record to

evidence produced in support of Plaintiffs' contentions since the fully briefed Motion to Dismiss was submitted.


In this case, there is already extensive information available to Plaintiffs via the fully completed merits discovery by the manufacturer defendants and CPG's own production of documents and a Rule 30(b)(6) deposition covering 40 broad topics. Yet, there is a complete absence of any evidence that connects CPG to the alleged conspiracy. In this case with respect to CPG, "the record taken as a whole," could not lead a rational trier of fact to find for Plaintiffs and therefore, there is "no genuine issue of trial." *Matsushita*, 475 U.S. at 587.

CONCLUSION

For the reasons set forth above, Plaintiffs cannot meet their burden of proof in this case against CPG and CPG respectfully requests that the Court grant its motion for summary judgment and dismiss Plaintiffs' claims with prejudice.

Dated: August 31, 2009

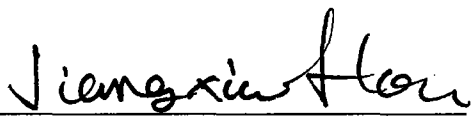
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the **DEFENDANT CHINA PHARMACEUTICAL GROUP LTD.'S MEMORANDUM OF LAW IN SUPPORT OF ALTERNATIVE MOTION FOR SUMMARY JUDGMENT** to be served via electronic and/or U.S. Mail, on this 31st day of August, 2009, on each of the persons on the attached service list.


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