13-4791-cv

United States Court of Appeals

for the

Second Circuit

In Re: Vitamin C Antitrust Litigation

ANIMAL SCIENCE PRODUCTS, INC., THE RANIS COMPANY, INC.,
Plaintiffs-Appellees,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., NORTH CHINA PHARMACEUTICAL GROUP CORPORATION,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK (BROOKLYN)

FINAL FORM BRIEF FOR PLAINTIFFS-APPELLEES

WILLIAM A. ISAACSON
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Washington, DC 20015
(202) 237-2727

MICHAEL D. HAUSFELD
BRIAN A. RATNER
MELINDA R. COOLIDGE
HAUSFELD LLP
1700 K Street, NW
Washington, DC 20006
(202) 540-7200

JAMES T. SOUTHWICK
SHAWN L. RAYMOND
KATHERINE KUNZ
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
(713) 651-9366

BRENT W. LANDAU
HAUSFELD LLP
325 Chestnut Street, Suite 900
Philadelphia, Pennsylvania 19106
(215) 985-3273

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Animal Science Products, Inc. hereby discloses that it has no parent corporation and no publicly held corporation holds more than 10% of its stock. The Ranis Company, Inc. hereby discloses that it has no parent corporation and no publicly held corporation holds more than 10% of its stock.

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INTRODUCTION

Appellants and the Ministry of Commerce of China ("Ministry") ask this Court to adopt an unprecedented "whatever the Ministry says, goes" approach to overturn a jury verdict, even though the Ministry's assertions are not supported by the evidence or even Chinese law.

In the nine years since this case was filed, two district court judges appropriately considered the evidence of Appellants' conspiracy to fix prices and limit the supply of vitamin C imported into the U.S. and determined the nature of Chinese law in light of the evidence submitted by the parties and statements by the Ministry (appearing as *Amicus*). The district court then presided over a trial at which the jury—using an unobjected-to set of instructions and verdict form—concluded that the Chinese government did not compel Appellants' cartel as a factual matter.

Appellants' and the Ministry's assertion that the district court's judgment represents a groundbreaking application of the Sherman Act is overblown because foreign corporations are routinely subject to liability under U.S. antitrust law over foreign governments' objections. No Chinese law required Appellants and their co-conspirators to set supra-competitive prices for vitamin C imported to the United States.

Appellants argue that they were required by Chinese law to accept coordination by a vitamin C Subcommittee of a China Chamber of Commerce that was acting to implement the Chinese government's regulatory objectives. Regardless of the proper interpretation of Chinese law, the facts as determined by the jury under unobjected-to instructions showed that the Subcommittee and Chamber *did not as a factual matter act to compel* the conduct at issue here; rather, the jury found Appellants liable for their own voluntary conduct.

With respect to its correct rulings on Chinese law, the district court gave the Ministry's statements appropriate respect and regard, but in multiple rulings disagreed with the Ministry, concluding that the plain language of Chinese law and the overwhelming evidence contradicted the Ministry's position. Having made its Federal Rule of Civil Procedure 44.1 ("Rule 44.1") ruling on issues of foreign law, the district court properly excluded copies of Chinese laws and regulations from the evidence submitted to the jury. As it should be in every trial, the jury reached its verdict based on instructions of law from the Court and not from Appellants' counsel reading and arguing law to the jury.

The district court correctly exercised personal jurisdiction over North China Pharmaceutical Group Corporation ("NCPG") and denied its motion for judgment as a matter of law based on the evidence of NCPG's direct participation in a cartel selling products into the United States. The district court also appropriately

certified the Damages Class, the members of which sought damages for direct purchases from Appellants and their co-conspirators for U.S. vitamin C deliveries. And the jury had a reasonable basis for its award of damages.

STATEMENT OF JURISDICTION

Appellees adopt the Statement of Jurisdiction in Appellants' brief.

ISSUES PRESENTED

1. Whether the jury verdict that the Chinese government did not compel Appellants' illegal conspiracy or cause Plaintiffs' damages should be overturned.

2. Whether international comity, the act of state doctrine, or the political question doctrine mandates that the judgment against Appellants be vacated.

3. Whether Appellants are entitled to a new trial, based on excluded evidence of law, not facts.

4. Whether the district court properly exercised jurisdiction over NCPG when NCPG knowingly took part in the conspiracy that sold substantial quantities of vitamin C in the United States.

5. Whether the jury was presented sufficient evidence to conclude reasonably and fairly that NCPG participated directly in the vitamin C cartel.

6. Whether the district court correctly certified a Damages Class limited to direct purchasers of vitamin C from Appellants or their co-conspirators for delivery in the United States.

7. Whether the jury had a reasonable basis for its damage award.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This appeal arises out of a class action filed on January 26, 2005 in the Eastern District of New York alleging that Appellants and other Chinese companies conspired to fix prices and supply of vitamin C in violation of U.S. antitrust laws. A-144-45.

Plaintiffs-Appellees are the Ranis Company ("Ranis") as class representative of direct purchasers of vitamin C seeking damages ("Damages Class")[1] and Animal Science Products, Inc. ("Animal Science") as class representative of direct and indirect purchasers seeking injunctive relief under Clayton Act § 16 ("Injunction Class").[2]

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[1] The Damages Class is defined as "all person[]s or entities, or assignees of such persons or entities, who directly purchased vitamin C for delivery in the United States, other than pursuant to a contract containing an arbitration clause, from any of Defendants or their coconspirators, other than Northeast Pharmaceutical (Group) Co. Ltd., from December 1, 2001 to June 30, 2006." SPA-276.

[2] The Injunction Class is defined as "all persons or entities, or assignees of such persons or entities, who purchase vitamin C manufactured by Defendants for delivery in the United States, other than pursuant to a contract with a Defendant containing an arbitration clause, from December 1, 2001 to the present, requiring injunctive relief against Defendants to end Defendants antitrust violations." SPA-276.

Defendants-Appellants are Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei"), a Chinese vitamin C manufacturer, and NCPG, a company that touts itself as one of the world's leading pharmaceutical manufacturers. A-2221. NCPG has investments in North China Pharmaceutical Ltd., which in turn is a majority shareholder of Hebei. A-1721-22 at 474:22-475-11.[3] Other Defendants were either dismissed or settled with the certified classes prior to the jury verdict. SPA-276.

The Judicial Panel on Multi-District Litigation coordinated this case for pretrial proceedings before Judge Trager. A-144-45. The Ministry then filed its first *Amicus* brief, but Judge Trager denied Appellants' motion to dismiss asserting defenses of foreign sovereign compulsion, act of state, and international comity. SPA-1-31. Judge Trager found that the early discovery "suggests that the hand of government was not weighing as heavily on defendants as defendants and the Ministry would have this court believe." SPA-21. Judge Trager concluded that the Ministry's *Amicus* brief was "entitled to substantial deference, but will not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." SPA-25.

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[3] "Tr." citations from Appellees' Page-Proof Brief have been replaced with Appendix citations.

In January 2011, following the passing of Judge Trager, the case was reassigned to Judge Cogan, who also rejected Appellants' defenses at the summary judgment and post-trial stages. A-658; SPA-35-106, 178-88, 213-46, 258-61. Judge Cogan certified the proposed classes, admitted Appellees' damages evidence, and found that a fact question existed as to whether NCPG participated in the vitamin C conspiracy. SPA-107-52, 153-77, 189-207, 258-65; A-1030-49.

Trial took place from February 25 to March 14, 2013, ending in a jury verdict holding Appellants liable for violating the Sherman Act and awarding the Damages Class $54.1 million (trebled to $162.3 million). SPA-249-57. In the special verdict (to which there was no objection, A-1885-58 at 1564:22-1567:5), the jury found that Appellees proved by a preponderance of the evidence that Appellants knowingly entered into an agreement to fix prices or limit the supply of vitamin C and that the class paid higher prices due to Appellants' violation of the antitrust laws. SPA-249-57. Further, the jury found that Appellants failed to prove they were compelled to enter into their illegal agreements, or that they faced sanctions for not complying with directives of the Chinese government. *Id.*

Following post-trial motions, including an award of fees and costs and settlement offsets, the operative district court judgment awards the Damages Class $147,831,471.03 plus post-judgment interest. SPA-276-78.

The Court also ordered an injunction barring Appellants "from agreeing, directly or indirectly, to fix the price or limit the supply of vitamin C sold in the United States in violation of Section 1 of the Sherman Act" for 10 years. *Id*.

II. FACTS RELEVANT TO THE APPEAL

A. CHINA DID NOT COMPEL APPELLANTS' PRICE-FIXING AND SUPPLY RESTRICTION AGREEMENTS.

As they have throughout this litigation, Appellants and the Ministry continue to describe the Chinese legal regime in the 1980s and 1990s incorrectly as if it were in effect at the time of the vitamin C cartel in this case. In 2002, China's legal regime fundamentally shifted as it deregulated its market in advance of World Trade Organization ("WTO") admission. This new regime was in effect at the time of the conspiracy.

The Ministry and the Chamber. The Ministry is a governmental agency with authorization to regulate trade between China and other countries. Min.Br.1.[4] At no point during the class period did it have the authority to force Appellants to fix prices. A-1811, lines 1-11; A-1687, lines 13-24; A-1688, lines 11-14.

In 1989 the Ministry established the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber"), a "social organization" concerned with the import and export of medicinal products. Qiao Haili of the

[4] "Min.Br." refers to the Brief for *Amicus Curiae* Ministry of Commerce.

Chamber testified that a "social organization" is "different from a government agency." A-1819, lines 19-24; A-1820, lines 3-5. He testified that the Ministry, a government agency, had legal status and the Chamber did not. A-1798, lines 6-24. Qiao himself had a Ministry ID that was only a pass for Ministry buildings where he did not work. A-1794-95 at 1021:17-1022:6. Even according to Appellants, the Chamber only acted as an instrumentality of the government when it was explicitly authorized to do so. Br.8-9;[5] A-205-07; A-650-57.

The Chamber is self-governing: members of the Chamber elect senior officers from candidates nominated by the members or by the Ministry and the Chamber's members elect a governing board. A-3770, Art. 13. Chamber employees are recruited from the member companies and from the public and are hired and paid by the Chamber. A-3770, Art. 8-11; A-3771, Art. 17.

In July 2003, Qiao wrote a memo to the Ministry that showed that the compulsive defense in this case was never true. He wrote that "the legal standing of chambers of commerce is still not clear," his Chamber "need[s] support from relevant government departments," along with "legislation to define the legal status of the chambers of commerce," and he concluded that the Chamber rules "become formality and only 'honest fellows will follow.'" A-2174; *see* A-1920

[5] "Br." refers to the Brief for Defendants-Appellants.

("'gentlemen's agreements' of the Chamber of Commerce"); A-2001 ("an open question as to what extent the consensus made at the meeting will be implemented"); A-2208 ("join the scheme when the timing is ripe"; "cooperation is only temporary"); A-2118 (discussing mediation by the Chamber: "allegiance is vulnerable and will easily succumb to the temptation of profit").

Qiao, the lead defense witness, tried to explain away his July 2003 memo as unrelated to vitamin C and instead as a discussion of a broken industry agreement concerning penicillin. Qiao was shown to have fabricated this trial testimony about his damning memo. The memo and his deposition testimony concerning the memo discussed vitamin C prices and not penicillin. A-1828-30 at 1152:6-1154:4; A-1796-98 at 1028:20-1030:5, A-1831-32 at 1227:13-1228:3; A-3991-92 at 235:16-19, 21; 232:5-235:9. And Qiao was confronted with another memo he later wrote about the penicillin agreement, and was forced to admit that the penicillin agreement took place after July 2003 and *did not exist* at the time of his July 2003 memo. A-1835, lines 4-18.

Qiao was also impeached in front of the jury with his deposition testimony in which he said it was "accurate" that "export prices were fixed by enterprises without government intervention." The jury then heard Qiao admit that he changed his testimony after the deposition in an English language errata (Qiao does not speak English). A-1811, lines 1-11; A-1812, lines 6-11. Qiao was also

paid for his testimony over the years of litigation, including multiple trips to the United States. A-1788-89 at 1014:10-1015:25; A-1805, lines 5-20. And Qiao changed his testimony at trial concerning meeting minutes he sent to Appellants once he realized that Appellants had not produced these documents in discovery. A-1806-07 at 1061:23-1062:16; A-1808, lines 8-23; A-1809-10 at 1064:24-1065:5; A-3995, lines 8-11. The jury was entitled to disregard all of Qiao's testimony given his demonstrably false statements made under oath.

With respect to the cartel agreements, a witness from one of the co-conspirators was asked whether "anybody was going to make the manufacturers go along with the common understanding," and he confirmed, "Nobody's going to force them." A-1707-08 at 360:25-361:3. Qiao admitted at trial that "on the whole, the government did not involve itself in price fixing." A-1811, lines 2-15. He acknowledged that the Ministry never discussed a specific price for vitamin C with him. A-1824, lines 16-23; A-1826, lines 18-20; A-4005, lines 16-20.

The jury even saw documents proving that the companies manufactured the compulsion defense after the lawsuit was filed. A-2208 ("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."). After the lawsuit was filed, the co-conspirators initially stopped keeping records of their meetings, and then

stopped meeting—despite the government's so-called requirement to meet. A-1684-85 at 283:13-284:8; A-1712, lines 2-8.

The Vitamin C Subcommittee. Vitamin C exporters, including Appellants, formed the vitamin C Subcommittee of the Chamber ("Subcommittee") and passed its charter in 1997. SPA-318-21. In 2002, as China sought admission to the WTO, the Subcommittee revised its charter to state that it "is an organization jointly established on a *voluntary* basis" rather than on Ministry approval. A-1954, Art. 3. The 2002 Charter permits members the "[f]reedom to withdraw from the Subcommittee" and omits the provisions from its 1997 Charter stating that the Subcommittee shall "coordinate and administrate market, price, customer, and operation order of vitamin C export" and that members shall "strictly execute export coordinated price." A-1955, Art. 16(8); SPA-318; SPA-320. In the 2002 Charter, the only penalties for violating "industry agreements" are public criticism, warnings, suspension from or revocation of membership in the Subcommittee. A-1956, Art. 19(4); A-1813, lines 3-13. During the class period, the Ministry never attended formal Subcommittee meetings or discussed specific vitamin C prices. A-1684, lines 6-12; A-1686, lines 4-7; A-1824-26 at 1123:16-1125:20; A-4005, lines 16-20.

Verification and chop. The Ministry and General Administration of Customs ("Customs") issued a notice in 2002 that ended review or supervision of

vitamin C export contracts by Customs and listed vitamin C as among the products subject to "verification and chop" by a "chamber." SPA-301-04.

"Verification and chop" meant that a product was not supposed to be exported unless its contract received a "chop" (stamp) after Chamber "verification" that the contract complied with a minimum price of $3.35/kg. *Id.*; A-1816-17 at 1091:13-1092:8. This floor price attempted to address concerns raised by the WTO of potential dumping charges. The evidence showed Appellants fixing prices at much higher than $3.35/kg, *e.g.*, A-2091 (agreement to charge $11.50/kg), and co-conspirator Wang Qi testified that no one outside of his company ever directed them to charge more than $3.35. A-1710, lines 8-17.

Even with respect to the $3.35/kg minimum price, the 2002 Notice stated that the relevant chambers would provide information on "industry-wide negotiated" prices to Customs, but it provided no guidance or requirement as to those "industry-wide negotiated" prices. SPA-302 at Art. 3. There was no requirement to agree on "industry-wide negotiated" prices in the first instance. The Chamber filed a list of "industry-wide negotiated" prices with Customs that left the price for vitamin C blank. A-1934-35.

The evidence also showed that the Chamber's alleged enforcement mechanism of verification and chop and minimum price of $3.35 were voluntarily adopted by the companies. A-1934 ("the agreed prices are the minimum prices");

A-2168 ("[B]ecause 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.").

As it turned out, the Chamber rarely chopped vitamin C contracts; Appellant Hebei possessed no chopped contracts at all. A-3020-3375; *see also* A-2267-2539; A-2565-2970; A-3431-3669. When confronted with piles of vitamin C contracts with no chops, Qiao testified that those contracts were "not reported to customs." A-1814-15 at 1089:11-1090:1. From all the contracts they entered during the class period, Appellants could only offer at trial six contracts with chops. A-3014-19; A-2540-44.

When Appellants charged less than the verification and chop price, they were not punished—the Chamber *never* denied or delayed a chop to punish a company for selling below the minimum price. A-1710-11 at 363:18-364:8; A-1818, lines 15-18. The companies also admitted submitting false contracts to the Chamber to avoid the minimum price of $3.35. A-1749-50 at 662:15-663:5; A-1711, lines 9-17.

The overwhelming evidence also showed that, regardless of the potential enforcement mechanisms, the conspirators breached the cartel agreements whenever they desired—A-1985 ("unilaterally tore up the agreement"); A-2049 ("reneging"); A-2250 ("over threw the June production suspension agreement");

A-2257 ("unilaterally pulled out"); A-2001 ("damage to the agreement caused by Weisheng"); A-1705-06 at 350:16-351:10; SPA-101-02—and sold vitamin C during one period below the so-called minimum $3.35 price. A-1968 ("every manufacturer quoted prices lower than the floor price"); *see* A-2161-65; A-2070-77; A-2971-3013; A-3376-3430; A-2545-64; A-1744, lines 14-22.

B. Appellants Voluntarily Formed a Cartel and Reached Price and Output Agreements.

Appellants formed their cartel in 2001 in *response* to price wars and the anticipated abolishment of government export controls. A-3879-85; A-2012 ("in order to turn the cruel situation of [the] VC market, the 4 main domestic companies reached the common understanding of production limitation and price retention"). Qiao's November 2001 Chamber meeting minutes explain that market power, not the government, led to the agreements (by "hand voting") to limit supply and to increase prices. A-2080-82; A-2036 ("the industry exercised self-restraint").

Appellants agreed to fix prices and stop production based on their own agreements and not on instruction from the Chamber. Qiao admitted that from 2002 forward, no price limitations or agreements on export quantities went forward without the support of the majority of the manufacturers. A-1803, lines 11-15; A-1804, lines 13-14; A-3994, lines 12-16, 21. "If nobody agrees, then we could not have a stoppage. No agreement, no stoppage." A-1802-03 at 1037:21-1038:3. He also admitted it was "perfectly acceptable" for the companies to decide to have *no*

minimum prices. A-1821, lines 3-11; A-1822, lines 20-24. Documents showed that without unanimous agreement, no action was taken on prices or quantity. A-1992-99.

Wang Qi kept detailed records of Subcommittee meetings, none of which stated that the Chamber made decisions about vitamin C pricing. A-1699-1704 at 328:22-333:23; A-1714, lines 16-24; A-1717, lines 9-12; A-1717-18 at 450:24-451:1; A-1718, lines 13-16; A-2000-04 (rejecting Weisheng's proposed reduction in production volume).

Not a single document created before this lawsuit was filed reflects any Chamber instruction that bound Appellants on vitamin C pricing. A-1700-01 at 329:4-330:2; A-1717-18 at 450:24-451:1. But numerous documents show that after 2002 Appellants and their co-conspirators continued to reach voluntary agreements without any compulsion from the government or Chamber. A-2100 (manufacturers "agreed to limit production during the first half of 2004"); A-1974 ("Concerned with price drop in the market, all participating manufacturers agreed to increase stock in the Shanghai warehouse"); A-2105 ("we had an agreement among all the producers, and the production shutdown in June is [] part of this agreement"); A-2161 ("The participants agreed on two measures: first, to raise the price quote unanimously . . . and second, each manufacturer will halt production for 40 days"); A-1967-68 ("We all agreed to set the floor price at 9.20 USD/kg");

A-1979 ("reached an agreement, in which the 6 domestic VC manufacturers will arrange to suspend production"); A-1944 ("All the agreements reached (and signed by representatives of all the companies)").

Appellants also engaged in price fixing discussions by telephone and other "chit chat" outside of their Subcommittee meetings. A-1687, lines 13-24; A-1688, lines 11-14; A-1786, lines 11-13; A-1801, lines 11-17; A-1802, lines 3-5; A-3993, lines 13-17. Faced with this evidence, the district court properly concluded that Appellees' damages stemmed from Appellants' *voluntary* actions, rather than any sovereign acts of the Chinese government. SPA-36, 65-68, 71-77.

C. THE DISTRICT COURT PROPERLY EXCLUDED INADMISSIBLE LEGAL EVIDENCE.

At trial, Appellants sought to admit copies of Chinese statutes and regulations, several of which were not in effect during the class period. A-3747-68 (repealed in December 2001, A-499, Art. 77); A-3821-51 (abolished in March 2002). Appellants neither requested a jury instruction on Chinese law nor objected to the jury instruction defining the Court's responsibility to rule on issues of written Chinese law. A-1050-72; A-1910, lines 7-13; A-1868-85 at 1547:5-1564:21. The district court properly denied admission of these laws and regulations as they were legal issues for the court. SPA-178-88 & 213-41. The district court also rejected Appellants' attempt to admit the Ministry's statements

under FED. R. EVID. 803(8) as a public record because of their lack of presumptive trustworthiness. SPA-180-85.

D. NCPG DIRECTLY PARTICIPATED IN THE VITAMIN C CONSPIRACY.

NCPG not only participated in the conspiracy to fix prices and limit supply of vitamin C sold for delivery to the U.S., A-2206-15, A-2153-58; it chaired the Subcommittee for one year, 2005. A-2063 ("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").

During 2005, Huang was both board chair of Hebei and deputy general manager of NCPG, but he had vacated his Hebei office and worked solely from his NCPG office starting in November 2003. A-1719, lines 18-20; A-1720, lines 22-24; A-1721, lines 7-20; A-1723-24 at 480:20-481:5. His position at NCPG was considered to be his highest title and position and for that reason he was referred to by that title. A-1733, lines 13-18; A-1740, lines 15-18. He attended vitamin C Subcommittee meetings where Appellants and their co-conspirators entered into these anticompetitive agreements, A-1948-52, A-2147-52, but *never* testified that

he only attended these meetings on behalf of Hebei and not NCPG. SPA-263.[6] And for good reason.

Although Appellants deny it, the record shows that NCPG was a vitamin C manufacturer. NCPG's own website states that it is a manufacturer of vitamin C, whose "main businesses" include "vitamins and nutrition products," with NCPG's vitamin C's "output and sales volume . . . ranking in the forefront of the world." A-2221-23, A-2224-27, A-2228-32. NCPG's witness at trial, Yang Jianfu, testified unambiguously that NCPG was a vitamin C manufacturer. A-1855, lines 2-7 ("The Court: . . . Do you see on the exhibit where it says North China Pharmaceutical Group Corp. is a manufacturer? Do you see that? Is that accurate or inaccurate? The Witness: This is accurate."). Also, a trial exhibit from a co-conspirator specifically displays "North China's" vitamin C production capacity. A-3673.

Hebei sent Huang regular, detailed reports about the vitamin C business in his capacity as NCPG's deputy general manager. A-2005-34; A-2042-60; A-2233-48; A-1725, lines 5-12; A-1726, lines 2-6; A-1726-27 at 483:23-484:5; A-1738-39 at 546:12-547:3. These reports were *addressed to* NCPG and included information

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[6] Further, Chamber documents show that NCPG joined a contemporaneous price-fixing agreement for penicillin without joining the Chamber or a penicillin subcommittee. A-2201-05; A-1833-34 at 1229:11-1230:14.

about vitamin C sales, business goals, and *cartel agreements* among the co-conspirators. A-1738-39 at 546:22-547:3; A-2233-48.

The jury was also entitled to disregard Huang's denials of involvement in the conspiracy. Huang repeatedly and incredibly testified that contemporaneous business records were incorrect, false, or inaccurate. A-1734-35 at 515:22-516:8 (A-2005-34, Hebei business record, is "not written correctly"); A-1736, lines 15-17 (A-2035-41, Hebei business record, is "not accurate"); A-1737, lines 19-23 ("I feel that it is false"); A-1738-39 at 546:22-547:5 (A-2233-53, "I feel that it is inaccurate"); A-1741, lines 6-11 (A-2147-52, "This record is totally inaccurate"); A-1743, lines 8-9 (A-2000-04, "I feel it is inaccurate").

The district court found the totality of Appellees' evidence sufficient to sustain the jury verdict against NCPG, particularly in light of "possible questions about defense witness credibility" concerning both the testimony of Huang and Qiao. SPA-261-64.

E. THE DISTRICT COURT CERTIFIED THE CLASSES.

The Graymor Chemical Company ("Graymor") assigned its vitamin C claims to an affiliate, Damages Class representative Ranis. SPA-109. Graymor, like other Damages Class members, purchased vitamin C directly from Appellants. SPA-121. Like other Damages Class members, Graymor sought to purchase vitamin C at market prices, and Ranis sought to recover damages for those

purchases. *Id.* The district court found no conflict of interest and correctly certified the Damages Class. SPA-151.

F. APPELLEES SOUGHT DAMAGES CAUSED BY THE PRICE-FIXING CONSPIRACY.

The jury awarded Appellees damages for overcharges resulting from the price-fixing conspiracy. All purchases of vitamin C directly from Appellants or their co-conspirators for delivery to the United States were included in the damages calculation. A-4010. The district court overruled Appellants' objections to the inclusion of purchases made by purchasers located abroad for delivery in the United States, finding these transactions constituted import trade or commerce, and had a "direct, substantial, and foreseeable effect" on domestic commerce. SPA-189-207.

In support of testimony from damages expert Dr. Douglas Bernheim of Stanford, Appellees introduced evidence that two Chinese vitamin C producers not named as defendants, Shandong Zibo Hualong Co., Ltd. ("Hualong") and Anhui Tiger Biotech Co. ("Tiger"), were co-conspirators with Appellants. A-1939-42; A-1943-47; A-1948-52; A-2147-52; A-2000-04; A-2153-58; A-2159-60; A-1953-66. Appellants never refuted that evidence, nor did they contest the data that Dr. Bernheim used to calculate damages, which included Tiger and Hualong's sales. A-1756-7 at 843:25-844:13.

SUMMARY OF ARGUMENT

1. Regardless of the proper interpretation of Chinese law in this case, the facts as determined by the jury, under instructions not objected to, showed that no entity, governmental or not governmental, *acted to compel* the conduct at issue here; rather, the jury found Appellants liable for their own voluntary conduct.

There was also no error in the district court's evaluation of the factual record or Chinese law under Rule 44.1. Statements by foreign governments do not prevent U.S. courts from adjudicating antitrust claims brought by injured parties in the United States. The district court afforded deference to statements by the Ministry, and properly determined that Appellants did not meet their burden to prove the Chinese government compelled them to violate the Sherman Act as a matter of law. The jury had an ample evidentiary basis to conclude that the Chinese government did not compel Appellants' cartel agreements as a factual matter.

The district court did not abuse its discretion in excluding from evidence copies of Chinese laws (some of which were not in effect during the class period) or Ministry hearsay statements because determining Chinese law is not the province of the jury.

2. NCPG is liable for participating in the price-fixing conspiracy. The district court properly exercised personal jurisdiction over NCPG because NCPG

participated in the vitamin C conspiracy targeting the United States. The "effect" of NCPG's participating in price-fixing meetings in China, which caused buyers in the U.S. to purchase vitamin C at inflated prices, is sufficient to establish minimum contacts with New York. And the district court properly held that Appellees presented sufficient evidence for the jury to conclude that NCPG participated in the cartel.

3. The classes were properly certified. All Damages Class members sought damages from the overcharge resulting from Appellants' anticompetitive conduct. Appellants' argument that the court should consider potential downstream pass-on of damages by direct purchasers was squarely rejected in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

4. The damages award was correctly limited under the Foreign Trade Antitrust Improvements Act ("FTAIA") to purchases for delivery in the United States. The amount of damages need only be proved with reasonable certainty. Appellees' trebled judgment should not be reduced merely because Appellants assert (without evidence) that some purchases from Hualong and Tiger *might* be subject to arbitration clauses.

ARGUMENT

I. STANDARD OF REVIEW

The district court's denial of judgment as a matter of law under Rule 50(b) is reviewed *de novo*. *Zeno v. Pine Plains Cent. School Dist.*, 702 F.3d 655, 664 (2d Cir. 2012). Granting judgment as a matter of law is only appropriate if "a reasonable jury would not have a legally sufficient evidentiary basis" to find for the non-moving party. *Id*. A district court's denial of a motion for judgment as a matter of law can only be reversed if, "drawing all inferences in favor of, and reviewing all evidence in the light most favorable to, the plaintiff, no reasonable juror could have returned a verdict for the plaintiff." *Id*.

The district court's determination of foreign law is a question of law subject to *de novo* review. *Curley v. AMR Corp.,* 153 F.3d 5, 11 (2d Cir. 1998). The district court's decision not to dismiss this case on international comity grounds is reviewed for abuse of discretion. *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998). This court applies a somewhat more rigorous standard of review than abuse of discretion, approaching *de novo* review, when reviewing a district court's refusal to dismiss under the act of state doctrine. *JP Morgan Chase Bank v. Altos Hornos de Mexico,* 412 F.3d 418, 422 (2d Cir. 2005).

The district court's legal conclusions as to the applicability of the FTAIA are reviewed *de novo*, and its factual findings are reviewed for clear error. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

A district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 149 (2d Cir. 2010). In reviewing damages awards, "considerable deference to the factual findings of both judge and jury" must be given. *Zeno*, 702 F.3d at 671.

II. APPELLANTS ARE NOT IMMUNE FROM ANTITRUST LIABILITY.

Burdens and liabilities are routinely placed on foreign corporations conducting business with the United States notwithstanding submissions from foreign governments that doing so would infringe on their sovereignty.[7] Extraterritorial application of U.S. antitrust law does not unreasonably infringe on the sovereignty of foreign nations where, as here, that application is necessary to

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[7] *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 334 (1990) (reversing Seventh Circuit's opinion in favor of foreign companies despite *amicus* briefs from 15 foreign governments); Brief of United Kingdom as *Amicus Curiae* Supporting Respondents, *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd*., 493 U.S. 331 (1990) (No. 88-1400), 1989 WL 1126918, at *3 (accounting method adopted by California "offended the trading partners of the United States, damaged business relations between the United Kingdom and the United States and finally forced the United Kingdom to enact retaliatory legislation").

protect U.S. commerce. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

A. THE MINISTRY CANNOT DICTATE THE OUTCOME OF THIS LITIGATION.

The Ministry and Appellants ask this Court to find Appellants immune from antitrust liability, despite a trial on the merits, because the Ministry says so. But no matter what level of deference is accorded to the Ministry's statements concerning Chinese law, under Rule 44.1 this Court must determine itself whether that law provides a defense to claims of damages under the Sherman Act. KESSLER & WALLER, INTERNATIONAL TRADE & U.S. ANTITRUST LAW § 11:7 (2d ed. 2013) (even if "a court may be bound by the description of certain facts and their significance under foreign law by such a formal statement submission, a court would still have the ability and the obligation to determine the legal significance of those conclusive government statements under United States law").

The jury found that the antitrust violation and damages here resulted from voluntary, not compelled, conduct. Appellants repeatedly assert that Chinese law mandated the challenged conduct in this case, but Chinese law only required the Chamber and its Subcommittee to "actively coordinate to set vitamin C export prices and quantities." Br.12. The Ministry has made no argument about the specific agreements proven at trial. Instead, the Ministry has represented that Subcommittee members were required to engage in a pre-designated process if

called upon by the Chamber, but not to reach any particular result. A-205-07. Based on the Ministry's own explanation, Appellants' agreements were not based on compulsion from any Chinese law or regulation.

Appellants presented extensive testimony and argued at great length to the jury their position that Qiao and the Chamber required them to agree on prices and supply using verification and chop export requirements. A-1890-1908 at 1652:25-1670:9. They claimed the "hand of the Chinese government in the person of Mr. Qiao was pervasive and everywhere in this case." A-1892, lines 3-4. The district court admitted ample evidence and testimony concerning verification and chop and how Qiao and Appellants believed Qiao was acting pursuant to Chinese regulations. A-1746-47 at 621:2-622:13; A-1769-72 at 924:9-927:4; A-1780, lines 12-24; A-1781-83 at 982:2-984:18. On direct examination, Qiao answered "yes" to virtually any question posed by defense counsel on the issue of government compulsion. A-1784-87 at 988:1-991:10.

Contrary to this testimony, the contemporaneous documentary evidence showed that verification and chop was neither implemented nor enforced, and was instead a hoped-for mechanism to enforce voluntary agreements. The companies' own documents repeatedly showed these were voluntary agreements. *See supra* Statement of the Case, II.B. Qiao himself wrote that Chamber rules were a "formality" that only "'honest fellows will follow.'" A-2174.

The jury was instructed that "You must determine whether there was government compulsion based on all the testimony and evidence in the case as to what the Chinese government directed." A-1909, lines 20-23. The jury found, on the unobjected-to verdict form, that Appellants knowingly entered into collusive agreements, their conduct caused Appellees antitrust injury, and Appellants were not actually compelled by the Government of China to enter into their cartel agreements. A-1912, lines 9-23. The evidence supports that this is a case of voluntary agreements where no outside compulsion from the Chamber happened. Thus, even if the Chamber or its Subcommittee had authority to act for the government and compel price-fixing, the facts here showed (and the jury so found) that this did not happen.

B. THE DISTRICT COURT RULINGS UNDER RULE 44.1 WERE CORRECT.

The Ministry and Appellants assert that the district court showed disrespect for China by denying summary judgment, although the denial of a motion for summary judgment is not appealable. *Ortiz v. Jordan*, 131 S. Ct. 884, 888-89 (2011) (party may not appeal summary judgment denial after district court trial on merits). Both Judge Trager and Judge Cogan subjected the Ministry's statements to the same level of scrutiny as those submitted to U.S. courts by other foreign countries. *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 798-99 (1993) (refusing to dismiss on international comity grounds despite *Amicus* brief from

U.K. government stating that U.S. law and U.K. law conflicted); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 2 (1st Cir. 1997) (reversing dismissal on comity grounds despite *Amicus* brief from Japanese government arguing that allowing matter to proceed was affront to its sovereignty); *Pignoloni v. Gallagher*, No. 12-CV-3305, 2012 WL 5904440, at *45 (E.D.N.Y. Nov. 25, 2012) (letter from Italian Central Authority concerning Italian law given "no weight"); *United States v. Portrait of Wally*, No. 99-CV-9940, 2002 WL 553532, at *7 (S.D.N.Y. April 12, 2002) (position taken by Republic of Austria *Amicus* brief on issue of Austrian law was "without merit"). The district court made clear that it would not permit the jury to judge the conduct of the Chinese government; plaintiffs "can only prevail here if the jury determines that the Chinese government did not act. Period." A-1867, lines 16-19.

The extent of deference sought by the Ministry in this case is breathtaking. The deference is not limited to how a regulation should be read, but seeks to include what factually happened, *i.e.*, whether the Ministry or the Chamber actually exercised any compulsion.

For its current position, the Ministry ignores the contrary positions that the Chinese government has taken with the WTO, namely that in 2002 it gave up "export administration . . . of vitamin C." G/C/W/438 (20 November 2002), at 3, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/65661/

Q/G/C/W438.pdf; A-468-9.[8] None of the laws or regulations Appellants cite from the 1990s appears on the "comprehensive list" of continuing regulations concerning foreign trade submitted to the WTO in March 2000. A-520; A-537-45.

Rule 44.1 provides that a federal court shall determine issues of foreign law as "question[s] of law" and authorizes the court to "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." "Foreign law is to be determined by the court, in light of both evidence admitted and the court's own research and interpretation." *Ackermann v. Levine*, 788 F.2d 830, 838 n.7 (2d Cir. 1986).

Appellants and the Ministry rely on *Pink*, *Abbott*, and *Villegas Duran* to argue that a foreign government's statements regarding the operation of foreign law must be deemed "conclusive." In *Pink*, the question before the Court was not whether a foreign government's interpretation of law was conclusive, but whether the Soviet Union was a legitimate successor government that had rights from its predecessor to assign. 315 U.S. 203, 217-21 (1942). Finding that it was, the Court

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[8] Under Rule 44.1, the court may consider any "relevant material," regardless if it would be admissible at trial. 9A CHARLES ALAN WRIGHT & ARTHUR MILLER, PROOF OF FOREIGN LAW, FEDERAL PRACTICE & PROCEDURE § 2444 (3d ed. 2014).

held that New York state law could not supersede an assignment made by a foreign sovereign (and accepted by the U.S. government). *Id*. at 233.

Rule 44.1 (enacted after *Pink*) imposes an obligation on federal courts to determine the content of foreign law and to consider all relevant sources in doing so. *Riggs Nat. Corp. & Subsidiaries v. Comm'r of I.R.S.*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) (U.S. courts conduct *de novo* review of foreign law when foreign law is raised).

And in *Abbott* (and, consequently, *Villegas Duran*, vacated in light of *Abbott*), the Supreme Court and Second Circuit did *not* accept a foreign official's interpretation as "conclusive"—the courts agreed with the interpretation after conducting their own analyses. *Abbott v. Abbott*, 560 U.S. 1, 10-14 (2010); *Duran v. Beaumont*, 622 F.3d 97, 98-99 (2d Cir. 2010).

Federal courts have developed the practice of granting measured deference to a foreign nation's representations respecting its own laws. *Villegas Duran v. Arribada Beaumont,* 534 F.3d 142, 148 (2d Cir. 2008) ("even if [Chilean Central Authority Statement] is authoritative, the district court was not bound to follow it"); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002); *see also United States v. McNab*, 331 F.3d 1228, 1241-45 (11th Cir. 2003) (declining to defer to Honduran government's interpretation that conflicted with text of Honduran statutes and previous

representations by Honduran officials); *Access Telecom, Inc. v. MCI Telecommc'ns Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) ("courts *may* give deference to foreign governments before the court" (emphasis added)). The district court properly followed that approach by according due consideration to the positions expressed by the Ministry, but declining to accept the Ministry's conclusions when they conflicted with the evidence and Chinese regulations, were contrary to prior governmental representations, or were vague and circular.

Appellants and the Ministry alternatively argue that the Ministry's statements are entitled to the same degree of deference as the pronouncements of federal agencies,[9] citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). But *Chevron* deference has "never [been] applied" to agency positions that "are wholly unsupported by regulations, rulings, or administrative practice."

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[9] The Ministry also argues that its statements were entitled to deference because courts are not permitted to question the good faith of the representatives of foreign nations. Min.Br.21. The district court did not question the Ministry's good faith. A-1775, lines 2-24. Furthermore, the cases cited by the Ministry are plainly inapposite. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding does not apply outside limited context of alien inheritance statutes); *Murarka v. Bachrack Bros.*, 215 F.2d 547, 553 (2d Cir. 1954) (court's presumed validity of Indian vice consul's determination that plaintiffs were Indian citizens inapplicable where validity of Chinese government acts not at issue).

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988); *Rhodes-Bradford v. Keisler*, 507 F.3d 77, 80 (2d Cir. 2007) (according no deference).[10]

It is also established law that agency litigation positions are not entitled to *Chevron* deference. *NRDC v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004); *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (position adopted during litigation "lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference"). The same holds true for informal agency actions—including agency *Amicus* briefs. *Matz v. Household Int'l Tax Reduction Inv. Plan*, 388 F.3d 570, 573 (7th Cir. 2004).

Unable to find case law supporting their position, Appellants and the Ministry rely on a brief filed thirty years ago by the United States as *Amicus Curiae* in *Matsushita Elec. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986) (No. 83-2044), 1985 WL 669667, in which the government argued that a sovereign's statements concerning its own laws are conclusive with the notable caveat that, and this is the part Appellants and the Ministry leave out, "[f]or such deference to be

[10] On appeal, Appellants suggest that "vagaries of translation" impacted the district court's decision. Br.25. In 2006, the Ministry provided the district court a certified translation of each cited law, regulation, and charter, and in 2007 filed revised certified translations of the verification and chop regulations. Appellants never objected to the Ministry's translations, and no trial exhibits were admitted over translation objections.

appropriate, of course, the statement *must be clear and intelligible*. Plainly ambiguous or internally inconsistent statements need not be treated as dispositive." *Id.* at *23 (emphasis added); *see also* U.S. DOJ & FTC ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.32 (1995) ("INTERNATIONAL GUIDELINES") (to establish compulsion, foreign government representation must contain "sufficient detail to enable the Agencies to see precisely how the compulsion would be accomplished under local law").

More recent pronouncements of the U.S. government argue for substantially less deference. Brief of United States as *Amicus Curiae* in *Gucci Am. Inc. v. Bank of China*, 2014 WL 2290273, at *24-25 (2d Cir.) (while district court should not have "summarily dismissed" Chinese regulators' official statement regarding Chinese law, it was not abuse of discretion requiring reversal).

C. CHINESE LAWS AND REGULATIONS DID NOT COMPEL APPELLANTS' AGREEMENTS.

As the jury was instructed, Appellants' sovereign compulsion defense requires actual compulsion and does not extend to conduct that is sanctioned or even facilitated by a foreign government. A-1909-10 at 1760:3-1761:13; *accord Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275 (1927). "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (quoting RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 415, cmt. j) (internal marks omitted).

"Of course, the [sovereign compulsion] defense is not available for private conduct going beyond what the foreign sovereign government compelled." WALLER, ANTITRUST & AMERICAN BUSINESS ABROAD § 8:23 n.6 (3d ed. 2013); *see also Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *In re Potash Antitrust Litig.*, 686 F. Supp. 2d 816, 825 (N.D. Ill. 2010). Without objection from Appellants, the court instructed the jury consistent with these legal principles. A-1910, lines 7-13; A-1868-85 at 1547:5-1564:22.

While Appellants and the Ministry argue that the district court's interpretation of Chinese law was incorrect, they provide no substantive rebuttal to

the district court's comprehensive analysis under Rule 44.1 that (1) verification and chop governed the export of vitamin C during the relevant time period, (2) verification and chop regulations did *not* require Appellants to reach any agreements in the first instance, (3) participation in the Subcommittee was not required during the class period, and (4) any conceivable compulsion was limited to avoiding below-cost pricing, and did not cover Appellants' above-market price-fixing conspiracy.

1. Verification and Chop Governed the Export of Vitamin C During the Class Period.

In its 2006 *Amicus* brief, the Ministry argued that Appellants' alleged conduct was compelled by a 1997 Notice and a 1997 Subcommittee Charter. A-167. As the district court concluded, the 1997 regime was abolished in 2002 and inapplicable during the relevant time period. SPA-82, 88, 103; A-3886-93. The 1997 regime's impending repeal (along with price competition) motivated Appellants to reach their voluntary cartel agreement in late 2001. A-3879-85.

2. Verification and Chop Did Not Compel Agreements.

The district court correctly concluded that the regulations governing verification and chop did not direct Appellants to reach any anticompetitive agreements in the first instance. SPA-101-03. The Ministry also has described verification and chop as a means to *enforce* compliance with industry agreements, not to compel such agreements. A-164; Min.Br.5.

The Notices governing verification and chop provided *no* guidance as to the "industry-wide negotiated" prices that should be submitted to Customs and provided *no* procedure to follow or penalty to be applied if the members of an industry failed to agree on a price or if an agreed price was not filed with Customs. SPA-298-304. The evidence showed that Appellants frequently failed to reach agreements without penalty and when agreements were reached, the industry ignored and evaded verification and chop. *See supra* Statement of the Case, II.A.

3. Appellants Were Not Required to Participate in the Subcommittee During the Class Period.

Because membership was no longer mandatory under the applicable regulations, SPA-311, Art. F, the 2002 Subcommittee Charter stated that the Subcommittee "is an organization *jointly established on a voluntary basis*." A-1954, Art. 3 (emphasis added). The 2002 Subcommittee Charter members also had the right to freely "withdraw from the Subcommittee." A-1955, Art. 16(8). Under the new charter, it was noted that a "company, without being a member of the VC Chapter, can export VC." A-2216. On appeal, Appellants *admit* that "membership and participation in the Sub-Committee were no longer conditions for a company to be able to export vitamin C" during the conspiracy period. Br.33.

Because membership was not required to export vitamin C, suspension of membership cannot possibly be "a penal or severe sanction" giving rise to a compulsion defense. INTERNATIONAL GUIDELINES § 3.32 ("the foreign government

must have compelled the anticompetitive conduct under circumstances in which a refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441 (1987); *see also* SPA-46.

4. Appellants Exceeded the Scope of Any Theoretical Compulsion.

The district court correctly found that, even if Appellants were required to "coordinate" on a minimum price, the verification and chop minimum price was $3.35 and Appellants exceeded the scope of any compulsion by agreeing to fix prices well above $3.35 and by agreeing to restrict production. SPA-55-56. "Yes, when [the price is] over [$3.35], they [the Chamber] don't care." A-1709-10 at 362:25-363:7. As the Ministry's notices and procedures explain, the primary purpose of verification by the Chamber was to avoid dumping sanctions for below-cost pricing—it was not to affirm agreed-upon supra-competitive profit for exporters. SPA-310, Art. A.

Appellants also exceeded the scope of any compulsion by agreeing to restrict production. Qiao admitted that there was no direct authorization for the Chamber to use verification and chop to control export volumes. A-1799-1800 at 1032:24-1033:22. The chop form Qiao relied on did not even have a field to report volume agreements. A-1934-38.

5. Appellants and the Ministry Attack Strawmen.

Appellants and the Ministry fail to address the substantive findings of the district court and instead attack fictitious ones.

a. Appellants Misrepresent the District Court's Analysis of "Self-Discipline."

In its 2009 submission, the Ministry argued that a "'system of self-discipline'" compelled Appellants' conduct.[11] A-651 ¶ 3. As the district court found, the descriptions of "self-discipline" provided by the Ministry and Professor Shen are vague and circular to the point of meaninglessness. SPA-79-80 & n.39. On appeal, the Ministry argues that the district court erred by indicating that the Ministry should have provided positive law sources establishing the scope of "self-discipline." Min.Br.25. But it was the Ministry, not the district court, that defined "self-discipline" in terms of unidentified "rules and regulations." The trial evidence showed that *specific* conduct in this case was not compelled.

And the district court *did* criticize the Ministry's 2009 submission for failing to provide any explanation or detail supporting broad assertions of compulsion.

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[11] "Self-discipline" is also translated as "self-regulation." A-324 ¶ 70 n.69. As Professor Shen explained, *all* trade associations and chambers of commerce in China have the obligation of "self-discipline" and "coordination." A-326 ¶¶ 77-78. If self-discipline requires price fixing for all trade associations and chambers in China, this breathtaking contention would conflict with China's representations to the WTO that "[e]xport prices are fixed by enterprises without government intervention." A-533.

For example, the Ministry and Professor Shen "conclusorily asserted that persons engaged in self-discipline are 'well aware that they are subject to penalties' for 'noncompliance with self-discipline,' including 'forfeiting their export right.'" SPA-89. But "the Ministry never explains: (1) why such persons are 'well aware' of this fact; (2) what 'forfeiting their export right means in the context of the 2002 regime; (3) how a forfeiture of export rights would be accomplished under the 2002 regime; or (4) what the other potential penalties are." *Id.* On appeal, these questions remain unanswered.

b. The District Court Properly Interpreted the Regulations.

Appellants and the Ministry wrongly argue that it was improper for the district court to interpret the texts of regulations according to their plain meaning. Courts are permitted to interpret the statutory text according to its plain meaning and frequently do so. *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998). The cases cited by the Ministry and Appellants do not suggest otherwise. *Bader v. Kramer*, 484 F.3d 666, 670 (4th Cir. 2007) (federal courts are ill-suited to make *policy-oriented* decisions about application of foreign law to determine whether child custody was being "exercised" under Hague Convention); *Whallon v. Lynn*, 230 F.3d 450, 457 (1st Cir. 2000) (interpreting Mexican statutes in accordance with their plain meaning and decision of Mexican court).

The district court here did not base its decision "on the literal English meaning of word-for-word translations" of regulations, Br.26, but considered the regulations in light of an extensive factual record, the Ministry's statements, and Professor Shen's opinion. The district court concluded that "it must consider the plain language of the governmental directives" when neither the Ministry nor Professor Shen had addressed the language because it "cannot ignore such plain language without some explanation as to why it should be disregarded." SPA-65.

On appeal, neither the Ministry nor Appellants have provided any explanation for why the plain language of the verification and chop regulations should be ignored. The Ministry also complains that the district court failed to identify any principle of Chinese law justifying its interpretation of the "suspension provision" of the verification and chop regulations. Min.Br.30. However, the district court interpreted the plain language of the provision as further evidence of voluntary conduct. SPA-83-84. The suspension provision is not "pivotal" because even without an explicit suspension provision, Appellants "had the power to effectively suspend verification and chop simply by not reaching any agreements in the first instance." *Id*.

The Ministry also argues that the district court should have applied unidentified Chinese legal principles in its review of evidence, including a document (not a law) posted to the Chamber's website. A-2078-90. That

document was simply another document showing that "the Chamber was able to reach, and implement, an agreement without the government's intervention." SPA-100.

c. There Is No Conflict Between the Judgment Below and USTR's Position or WTO Dispute Resolution Panel Findings.

Appellants argue that the judgment conflicts with findings by the United States Trade Representative ("USTR") and a panel of the World Trade Organization ("WTO") that China maintained "a system that prevents exportation unless the seller meets or exceeds the minimum export price." Min.Br.28. However, as China itself contended, vitamin C was not one of the materials subject to that system. G/C/W/438 (20 November 2002) at 3; *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/65661/Q/G/C/W438.pdf. And the minimum export price here was the (unenforced) price of $3.35; only voluntary agreements caused higher, above-market prices.

Neither the USTR nor the WTO Panel made any statements about minimum prices or export quotas *for vitamin C*. The WTO Panel also declined to address the price verification and chop regulations relevant to vitamin C. A-1369 ¶ 7.1062. The USTR never discussed the accuracy of the Ministry's statements in this case; it merely acknowledged that they had been made. First Written Submission of the United States of America, China—Measures Related to the Exportation of Various

Raw Materials, WT/DS394, WT/DS395, WT/DS398 (1 June 2010), ¶ 229, *available at* http://www.ustr.gov/webfm_send/1948.

There also is no 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 against voluntary cartel conduct that is facilitated by a foreign government.

d. The District Court Properly Rejected Professor Shen's Conclusions and Opinions.

Professor Shen's report reiterated arguments made in the Ministry's *Amicus* brief and suffered from the same deficiencies, including reliance on irrelevant documents concerning an abolished licensing and quota system not in effect during the class period. A-509 at 51:9-18; A-310 ¶ 29, A-315 ¶ 43, A-317-18 ¶¶ 47-49, A-322-23 ¶ 65. Professor Shen admitted that he did not research whether regulations he relied upon remained effective, testified that he could not remember whether regulations he cited had been abolished, and repeatedly stated falsely that membership and participation in the Subcommittee was required to export vitamin C. A-512 at 85:14-86:16; A-517 at 177:13-16. Professor Shen often relied on repealed and abolished laws, including 1991 regulations, 1992 Interim Measures, and a 1997 MOFTEC & SDA Notice. A-515 at 132:19-135:13; A-316-17 ¶ 46, A-

319 ¶¶ 52-54, A-324-25 ¶ 71; A-562-98, Ministry of Commerce Announcement (No. 12, 6 March 2008) (listing all currently valid and effective regulations).

It is well-established that "a court may reject even uncontradicted expert testimony and reach its own decisions on the basis of independent examination of foreign legal authorities." *Faggionato v. Lerner*, 500 F. Supp. 2d 237, 244 (S.D.N.Y. 2007). Where, as here, interpretations of foreign law provided by an expert are unsupported, and even rely on repealed laws, those interpretations lack persuasiveness and may be disregarded. *In re Ishihara Chem. Co.,* 251 F.3d 120, 126 n.3 (2d Cir. 2001) (expert declaration that relies on weak or speculative assertions is "not persuasive"), *abrogated on other grounds by Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

Appellants repeatedly refer to Professors Shen and Speta's opinions as unrebutted, but Appellees disqualified their opinions by, among other things, putting before the District Court the laws and charters repealing, abolishing, or superseding those they cited.[12] The expert report of Paula Stern, former U.S. International Trade Commission chair, also shows that Professor Shen's and the

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[12] Professor Speta gave a general opinion that Chinese vitamin C was part of a "regulated industry," and admitted that he had no expertise in vitamins, chemicals, pharmaceuticals, antitrust, Chinese law, or the history of Chinese regulatory policy. A-638-39 at 21:24-22:6; A-641 at 30:10-25; A-642 at 34:3-17; A-645 at 47:18-25. His opinion was not germane to foreign sovereign compulsion.

Ministry's positions were contradicted by China's statements to the WTO and the U.S. government. A-461-87. Regardless, expert testimony is plainly not required by Rule 44.1. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 631 (7th Cir. 2010) (Posner, J., concurring) (in determining foreign law, "the court doesn't *have to* rely on testimony; and in only a few cases, I believe, is it justified in doing so").

D. THE ACT OF STATE DOCTRINE IS INAPPLICABLE BECAUSE THE JUDGMENT DID NOT TURN ON THE LEGALITY OF ANY OFFICIAL ACTION OF THE CHINESE GOVERNMENT.

The predicate for application of the act of state doctrine only exists when the suit "requires the Court to declare invalid . . . the official act of a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990) (citation and internal marks omitted). This Court need not declare invalid any official act of the Chinese government because (as the district court and the jury found) there was no official act of the Chinese government compelling Appellants' actions. As the district court explained: "Chinese laws themselves were not placed on trial. Rather, the jury was only required to determine whether the Chinese government acted, not the propriety of its actions." SPA-261; *see also Kirkpatrick*, 493 U.S. at 406 ("The issue in this litigation is not whether acts are valid, but whether they occurred.") (citation omitted).

Appellants repeatedly confuse the findings that the Appellants' alleged conduct was not an act of state with findings, not made here, that acts of state are

illegal or invalid. Br.41-44. "The act of state doctrine does not preclude an initial inquiry as to whether a challenged act is in fact an act of state [or] whether scrutiny of the act is necessary to a litigant's claim or defense." *Galu v. Swissair: Swiss Air Transp. Co.,* 873 F.2d 650, 654 n.4 (2d Cir. 1989) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 443 cmt. i (1986)).

E. DISMISSAL IS NOT REQUIRED AS A MATTER OF COMITY.

To trigger the discretionary comity doctrine, a "true conflict" must exist between U.S. and foreign law such that compliance with the laws of both countries is impossible. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993). Consistent with *Hartford Fire*, foreign law did not require Appellants "to act in some fashion prohibited by the law of the United States." *Id.* at 799. Appellants argue that a "true conflict" is not required to trigger the comity doctrine under *Hartford Fire*, but cite only two post-*Hartford Fire* cases, neither of which supports their argument. *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997) (true conflict existed); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996) (no true conflict existed).

Here, compliance with both the Sherman Act and Chinese law was not only possible, it happened: Chinese vitamin C manufacturers did not engage in price fixing prior to the end of 2001; they engaged in price wars until the cartel was formed. A-2005-34; A-176 ("Between May 2000 and late December 2001,

vitamin C in [China] experienced the second 'price war' since 1995"). The companies and the Chamber also stopped meeting after 2008. A-1827, lines 2-9.

Appellants wrongly claim the district court held that *Hartford Fire* overruled *O.N.E. Shipping, Hunt, Timberlane, and Mannington Mills*. Br.40-41. All the district court did was note that whether a court must consider the *Timberlane* factors in a comity analysis absent a true conflict is "unclear" after *Hartford Fire*.[13] SPA-66. The court then expressly considered the *Timberlane* factors, and concluded that they do not support abstention unless the government of China actually compelled the alleged conduct. SPA-67-68.

F. APPELLANTS ARE NOT IMMUNE FROM LIABILITY UNDER THE *PARKER* DOCTRINE.

Appellants next argue that the district court afforded less respect to the sovereignty of China than it would a U.S. state. Br.46-47. The *Parker* doctrine is limited to actions authorized and directly supervised by U.S. states. *Parker v. Brown*, 317 U.S. 341, 350–52 (1943). It "has never before been applied to actions authorized and supervised by foreign governments." *In re Transpacific Passenger*

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[13] Appellants cite *United States v. Javino*, 960 F.2d 1137, 1143 (2d Cir. 1992), which pre-dates *Hartford Fire*, to argue that this Court has embraced the approach to comity of the Restatement (Third) of Foreign Relations Law. In *Javino*, this Court questioned whether Congress could lawfully subject foreign manufacturers to the Firearms Act "unless the firearm is imported into the United States." *Id.* There is no question that the Sherman Act lawfully applies to import commerce.

Air Transp. Antitrust Litig., No. 07-05634, 2011 WL 1753738, at *16 (N.D. Cal. May 9, 2011).

Even under *Parker*, a state cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. "In its simplest form, this means that a state cannot shield private parties from the federal antitrust laws by enacting a statute saying . . . that competitors may agree to fix prices." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 58 (2d Cir. 2010) (citation and internal marks omitted).

In addition, "*Parker* bans states from exempting private parties from the restrictions of the Sherman Act solely to benefit those parties." *Freedom Holdings, Inc. v. Spitzer*, 363 F.3d 149, 156 (2d Cir. 2004). There must be "a plausible nexus" between the purported state action and a legitimate policy goal *other than* the profit of the private parties. *Id.* The Ministry's stated goal of ensuring Appellants' profitability is not immune under *Parker*.

G. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR THIS SUIT.

Appellants argue for the first time on appeal that the political question doctrine bars Appellees' claims. "In general, the Judiciary has a responsibility to decide cases properly before it, even those which it would gladly avoid." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (internal marks and citation omitted). The political question doctrine is a narrow exception to this rule. *Id.*

The Supreme Court has summarized the exception as including controversies that the Constitution has textually and demonstrably committed to a coordinate political department, or where the law lacks judicially discoverable and manageable standards for resolving the issue. *Id.*

The political question doctrine is inapplicable here because Appellees invoke a statutorily created private cause of action to hold private parties liable for their own conduct. *Id.* The court is not "being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy towards [China] should be." *Id.* To the contrary, Congress has specifically tasked the judiciary with adjudicating claims arising under the Sherman Act against foreign companies engaged in import commerce. 15 U.S.C. § 6a.

Interpreting and applying federal statutes are quintessential powers and duties of the federal courts. *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). Analyzing whether Appellants' unlawful acts are attributable to the Chinese government does not raise political questions. The predicate question to "the act of state doctrine—whether conduct can be attributed to a government—cannot sensibly be labeled non-justiciable." *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 535 (S.D.N.Y. 2013).

The *Amicus* argument about hurting international relations with China—which has been made for the last eight years in this case without any incident—fares no better. *Kirkpatrick*, 847 F.2d at 1061 (defendants must "come forward with proof that adjudication of [] plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government").

III. THE DISTRICT COURT PROPERLY EXCLUDED FROM THE JURY WRITTEN CHINESE LAWS AND REGULATIONS AND THE MINISTRY'S *AMICUS* STATEMENTS.

Appellants request a new trial claiming that the district court committed reversible error by failing to allow Qiao to "illuminate his testimony" on his supposed authority to compel the co-conspirators' agreements through the admission of written laws, regulations, and the Ministry's statements to the district court. Br.47.

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING WRITTEN COPIES OF CHINESE LAWS AND REGULATIONS.

The jury does not decide pure questions of law and does not interpret statutes. *Stissi v. Interstate & Ocean Transp. Co. of Philadelphia*, 765 F.2d 370, 374 (2d Cir. 1985). The principle applies equally to foreign law determinations. *Itar–Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998).

Evidence and testimony related to foreign law should be "given to the judge, outside of the presence of the jury, and is meant to assist the judge in determining the appropriate instructions." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997); *see also Weiss v. La Suisse, Société D'Assurances Sur la Vie*, 293 F. Supp. 2d 397, 402 (S.D.N.Y. 2003) ("The jury in this case will be charged regarding the applicable Swiss contract principles. It is the Court's role to decide what those principles are").

The district court admitted ample evidence and testimony concerning verification and chop, the Chamber and Subcommittee, and the contention that the conduct here was the result of government compulsion. But Appellants also sought to admit copies of nearly a dozen different written Chinese statutes and regulations. Much of what the Appellants sought to admit was not in effect during the relevant time period. A-3747-54 (repealed in December 2001, A-499, Art. 77);

A-3821-51 (abolished in March 2002). Submitting this stack of foreign regulations to the jury would have been unworkable and contrary to the Federal Rules and judicial authority. And Appellants failed to request *any* instruction on Chinese law, nor did they object to the jury instruction defining as the Court's responsibility any ruling on issues of written Chinese law. A-1868-85 at 1547:5-1564:21; A-1910, lines 7-13.

Appellants' cited case law is irrelevant here. In *Litton Systems, Inc. v. AT&T Co.*, 700 F.2d 785, 819 (2d Cir. 1983), AT&T appealed a jury verdict imposing liability for "filing [an] interface tariff in bad faith." *Jack Faucett Assocs., Inc. v. AT&T Co.*, 744 F.2d 118, 128 (D.C. Cir. 1984). AT&T challenged the *admission* of FCC rulings concerning the unreasonableness of its interface tariff along with the *exclusion* of a 1969 New York State Public Service Commission ("NYSPSC") decision upholding the interface. On appeal, this Court held that exclusion of NYSPSC's factual findings was erroneous *in light of the admission of the FCC's factual findings.* 700 F.2d at 819. The district court here did not admit one-sided evidence, and even if Appellants had been permitted to introduce written regulations, as in *Litton*, it would have been error not to also admit the dozens of written laws and regulations superseding, abolishing, or contradicting those written laws or regulations.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE MINISTRY'S LITIGATION STATEMENTS.

Appellants also sought to admit select statements from the Ministry's district court *Amicus* brief and 2008 and 2009 letters to the district court. Because Appellants sought to admit these out-of-court statements for their truth, they are inadmissible hearsay.

Appellants rely on the public record exception from the hearsay rule for records that set out the office's activities. A public record is only admissible under this rule if "neither the source of information nor other circumstances indicate a lack of trustworthiness." FED. R. EVID. 803(8)(B). As this Court has repeatedly held, "Rule 803(8)(A)-(B), which defines public records, *excludes documents prepared in anticipation of litigation.*" *United States v. James*, 712 F.3d 79, 89 (2d Cir. 2013) (emphasis added). It is undisputed that the "records" at issue here were prepared for this litigation for the purpose of aiding Appellants.

Moreover, as Appellants themselves argued to the district court, the Ministry is not an impartial party and instead has acted in "close coordination" with the co-conspirators. A-672. Shortly after this lawsuit was filed, defendant NEPG shared the analysis of its legal experts with the Ministry, expressly seeking its active assistance, participation, and litigation support. A-673. The Ministry admits it has "shared a common interest" with Appellants "from the time this lawsuit was filed in seeking its prompt dismissal." A-294. The Ministry and Appellants entered a

common interest agreement "within the first several weeks after the first complaint . . . was filed." *Id.*; *see also* A-679. After that, the Ministry was "actively involved in coordinating and approving [Appellants'] legal strategy." A-210.

Finally, the Ministry's litigation statements, crafted in consultation with Appellants, concern the meaning of Chinese law. Determining the content of foreign law is a matter for the court, not the jury, and it was not an abuse of discretion to exclude this evidence.

The advocacy statements in this case bear no resemblance to the expense reports admitted into evidence in *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1307-08 (7th Cir. 1992). Moreover, as the district court noted, *In re Oil Spill* "merely means that an appellate court found that a district court did not abuse its discretion in admitting hearsay evidence, not that a contrary ruling to exclude the evidence would have been an abuse of discretion." SPA-182.

IV. NCPG IS LIABLE FOR PARTICIPATING IN THE PRICE-FIXING CONSPIRACY AIMED AT THE UNITED STATES.

A. THE DISTRICT COURT HAD PERSONAL JURISDICTION OVER NCPG.

The district court properly exercised personal jurisdiction over NCPG because NCPG knowingly took part in the vitamin C conspiracy, which targeted the United States. SPA-166. The Supreme Court has held that personal

jurisdiction exists when the "effects" caused by a defendant's intentional actions (*i.e.*, the injury to the plaintiff) connect that defendant's conduct to the *forum state*. *Calder v. Jones*, 465 U.S. 783, 789 (1984). It is irrelevant whether the price-fixing meetings NCPG attended occurred solely in China. *Calder*'s "effects test" permits the exercise of jurisdiction over a foreign defendant whose tortious actions were directed toward the forum state of New York. *Id*. Otherwise, there would be no jurisdiction under the federal antitrust laws against any foreign cartel selling products into New York or anywhere in the United States.

Defendants that engage in antitrust conspiracies that affect a forum state have established the requisite "minimum contacts" for purposes of due process. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir. 2003) (foreign executive's presence at meeting in foreign country in which price-fixing activities were "purposefully directed at the United States" could satisfy *Calder* "effects test"); *In re Sumitomo Copper Litig.*, 120 F. Supp. 2d 328, 342 (S.D.N.Y. 2000) (citing *Calder* to hold that defendants who schemed to fix "New York-based copper market" had sufficient minimum contacts).

Appellants claim that *Walden v. Fiore*, 134 S. Ct. 1115 (2014), somehow insulates NCPG (and all international cartels) from being subject to personal jurisdiction in the United States. But the holding in *Walden*, which involved a DEA agent seizing cash at a Georgia airport from passengers who happened to be

Nevada residents, has no relevance here. *Walden* reaffirms that "intentional and allegedly tortious acts expressly aimed at the forum state" are sufficient to support a finding of personal jurisdiction: "the relationship must arise out of contacts that the 'defendant himself' [as opposed to the plaintiff] creates with the forum State." *Id*. at 1122.

NCPG's reference to Justice Breyer's concurrence in *McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) does not change the analysis. There is a material difference between this case and a foreign manufacturer that never sent goods to the U.S. but instead used a U.S. distributor to make an isolated sale to New Jersey, as in *Nicastro*.

B. THE EVIDENCE SUPPORTS THE VERDICT THAT NCPG VIOLATED THE SHERMAN ACT.

The district court properly held that Appellees presented sufficient evidence for the jury to conclude that NCPG participated directly in the vitamin C cartel, particularly when all reasonable inferences must be drawn in favor of Appellees and all credibility determinations must be left to the jury, which found the contemporaneous documents more credible than NCPG's witnesses' self-serving testimony. *Cash v. City of Erie*, 654 F.3d 324, 333 (2d Cir. 2011); *Zellner v. Summerlin*, 494 F.3d 344, 370 (2d Cir. 2007).

Appellants wrongly suggest that Appellees are trying to pierce the corporate veil to impute Hebei's actions to NCPG. Appellees advanced no such theory

before the jury; the instructions and verdict form also say nothing about corporate veil piercing. The jury was asked to determine—and did determine—that NCPG was a direct participant in the illegal price-fixing scheme.

Bestfoods—which turned on statutory interpretation principles—does not apply here. But even if it did, *Bestfoods* requires inquiry into whether "an act is taken on behalf of the corporation for whom the officer claims to act." 524 U.S. at 70 n.13; *see also Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2209-10 (2010) (in antitrust cases courts are "moved by the identity of the persons who act, rather than the label of their hats"); *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1499 (3d Cir. 1985) (dual officers can "wear[] two hats simultaneously"), *vacated,* 475 U.S. 1105 (1986), *analysis readopted*, 823 F.2d 49, 50 n.2 (3d Cir. 1987).

Appellants presented substantial evidence of NCPG's direct participation in the cartel. An officer of NCPG and Hebei, Mr. Huang worked from his NCPG office, rarely visited Hebei, and participated in cartel meetings for NCPG. A-1721, lines 7-20; A-1723-24 at 480:20-481:5; A-2062-63. Appellants tried to get Huang to explain away the Subcommittee's reference as a NCPG executive as merely an honorific. A-1740, lines 15-18. But as the district court noted, Huang "never denied attending Subcommittee meetings on behalf of NCPG[], and he never testified that he only attended these meetings on behalf of Hebei." SPA-263. He

never gave any explanation as to his appointment as chairman of the Subcommittee. And Qiao had no response for why Chamber documents show NCPG participated in an agreement to fix prices of another product, penicillin, without being a member of the Chamber or Penicillin Subcommittee. A-1832-34 at 1228:7-1230:14; A-2201-05.

As the district court observed, the persuasiveness of these witnesses' testimony "obviously depends on the credibility of Mr. Huang and Mr. Qiao and, given the fact that these witnesses repeatedly questioned the accuracy of certain contemporaneously created documents, there were ample grounds for the jury to question their credibility." SPA-262-63.

Contrary to Appellants' argument that "NCPG did not ever produce, manufacture, sell, or set pricing on vitamin C during the relevant period," Br.53, NCPG's Yang Jianfu testified at trial that NCPG manufactures vitamin C. A-1855, lines 2-7. NCPG's own website touted the company's involvement in vitamin C manufacturing, and its internal documents reported on vitamin C export quantities, production stoppages, and proposed pricing. A-2224-27; A-2005-34; A-2233-48. An internal memorandum from a co-conspirator specifically named NCPG as part of the conspiracy. A-2206-15.

The jury also considered evidence showing that while Huang worked in NCPG's offices as deputy general manager, Hebei sent him and NCPG regular,

detailed reports about Hebei's vitamin C business. A-1725, lines 5-12; A-1725-27 at 482:22-484:5; A-1738-39 at 546:12-547:3; A-2042-60; A-2233-48. These reports, specifically addressed *to NCPG*, included information about *production suspension agreements* among the co-conspirators. A-2049; A-2236.

V. CLASS MEMBERS HAVE NO CONFLICT THAT WOULD RENDER CLASS CERTIFICATION INAPPROPRIATE.

There is no conflict between members of the Damages Class, all of whom sought to recover monetary damages for the overcharges caused by Appellants' conspiracy. The district court properly rejected Appellants' attempt to overturn the long-settled principle of *Hanover Shoe* that all direct purchasers are entitled to damages for Sherman Act violations. 392 U.S. at 490-94 (antitrust damages consist of overcharges to direct purchasers, irrespective of any pass-on).

As numerous courts have held in rejecting the analysis of pass-on in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181 (11th Cir. 2003), when (as here) *all* Damages Class members seek damages from an overcharge, there is no class conflict. SPA-122; *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 223 (3d Cir. 2012) (rejecting *Valley Drug* as contrary to the Supreme Court's decision in *Hanover Shoe*), *judgment vacated on other grounds, class certification reinstated at* 2013 WL 5180857 (3d Cir. Sept. 9, 2013); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293 (D.D.C. 2007); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 292 F.R.D. 544 (E.D. Tenn. 2013) (listing cases rejecting *Valley*

Drug); *In re Wellbutrin SR Direct Purchaser Antitrust Litig.,* No. 04-5525, 2008 WL 1946848, at *6 (E.D. Pa. May 2, 2008). Unlike *Pickett v. Iowa Beef Processors,* 209 F.3d 1276, 1280-81 (11th Cir. 2000), in which certain class members would receive an ongoing benefit from the contracts they were suing over, no such current conflict exists here, where all Damages Class members seek repayment of overcharges from a past cartel. The Damages Class certification should be affirmed.

VI. THE DISTRICT COURT CORRECTLY HELD THAT THE FTAIA DOES NOT BAR CLAIMS OF CLASS MEMBERS WITH DIRECT PURCHASES FOR DELIVERY IN THE UNITED STATES.

The Direct Purchaser Damages Class includes all direct purchases of vitamin C from Appellants *for delivery into the United States*. This Court recently rejected Appellants' argument that the FTAIA bars jurisdiction over foreign purchasers in *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, No. 13-2280, 2014 WL 2487188, at *8 (2d Cir. June 4, 2014) ("the requirements of the FTAIA go to the merits of an antitrust claim rather than to subject matter jurisdiction").

Appellants' argument fares no better on the merits. The FTAIA "'excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury.'" SPA-191-92 (quoting *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004)). It does not apply to (1) import trade or import

commerce (*i.e.*, purchases *for delivery in the United States*), or (2) conduct with a direct, substantial, and reasonably foreseeable effect on import trade or import commerce, when such effect gives rise to an antitrust claim. 15 U.S.C. § 6a. Decades of criminal and civil antitrust enforcement against foreign cartels selling products into the United States rest on these principles.

A. THE FTAIA DOES NOT APPLY TO DIRECT PURCHASES FOR DELIVERY IN THE UNITED STATES.

It is undisputed that the "foreign purchases" to which Appellants object all involve orders placed by a direct purchaser of vitamin C for delivery in the United States. If the commerce at issue is import commerce, the inquiry ends because the FTAIA does not apply. *Lotes*, 2014 WL 2487188, at *14.

Appellants argue that their illegal conduct did not involve "import trade or import commerce" because they did not specifically *limit* their cartel to U.S. imports. Br.56-59. Conduct *involving* import trade does not mean conduct *limited to* import trade. Otherwise, foreign cartels would be immune from the antitrust laws based on the breadth of their price fixing conduct. For the same reason, Appellants' argument that U.S. courts have no jurisdiction because they did not subjectively *intend* to impact import commerce fails; Appellants knew they were shipping vitamin C directly into the United States. *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469-71 (3d Cir. 2011).

Foreign purchasers are commonly included in claims alleging international cartels under the Sherman Act for the portion of the purchases that involve import commerce. *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 256 (D.D.C. 2002) (class of all persons or entities who directly purchased certain vitamins for delivery *in* the United States); *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2008 WL 5958061, at *25-27 (E.D.N.Y. Sept. 26, 2008) (applying import exception when plaintiffs were foreign freight forwarders who arranged shipments from foreign countries to United States on foreign airlines), *report and recommendation adopted in pertinent part*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2009 WL 3443405 (E.D.N.Y. Aug. 21, 2009).

Unlike the indirect and tenuous issue of whether an import followed illegal conduct addressed in both *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002) and *Turicentro S.A. v. Am. Airlines*, 303 F.3d 293, 302 (3d Cir. 2002), Appellants here conspired on the price of vitamin C that they knowingly sold for import into the United States. And unlike in *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363 (3d Cir. 2005), there is no intermediary purchaser separating Appellants from Appellees. The sales here are "directed at an import market" and exempt from the FTAIA. SPA-196-98; *Animal Science Prods.*, 654 F.3d at 470.

B. THE FTAIA DOES NOT APPLY TO CONDUCT WITH A DIRECT, SUBSTANTIAL, AND REASONABLY FORESEEABLE EFFECT ON IMPORT TRADE.

The FTAIA does not exclude from the Sherman Act conduct that "has a direct, substantial, and reasonably foreseeable effect . . . on import trade or import commerce" if such effect gives rise to an antitrust claim. 15 U.S.C. § 6a. As the district court recognized, "Super-competitive prices for vitamin C in the United States were the 'direct, substantial, and foreseeable effect' of defendants' conduct, and defendants do not argue otherwise." SPA-199.

The Supreme Court's concerns in *Empagran* (and other cases cited by Appellants) are not present here: class members do not include foreign purchasers claiming U.S. jurisdiction on the basis that some *other* purchaser has a claim under U.S. law. *Empagran*, 542 U.S. at 159, 166 (involving foreign vitamin distributors located in Ukraine, Australia, Ecuador, and other countries for delivery outside the United States); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014) (plaintiff's foreign subsidiaries purchased price-fixed LCD screens from foreign defendants for delivery outside the United States); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 989 (9th Cir. 2008) (foreign plaintiff purchased DRAM for delivery outside of the United States); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 537 (8th Cir. 2007) (plaintiff-foreign corporations did "not assert that they purchased or attempted to

purchase MSG or nucleotides in the United States market"); *In re Hydrogen Peroxide Antitrust Litig.*, 702 F. Supp. 2d 548 (E.D.N.Y. 2010) (dismissing claims for chemicals delivered in Europe).

VII. APPELLANTS ARE NOT ENTITLED TO A REDUCTION IN DAMAGES.

Appellees' damages calculation included purchases from Hualong and Tiger, because evidence showed that these non-parties participated in Appellants' conspiracy. A-2153-58; A-2159-60; A-1948-52; A-1943-47; A-1939-42; A-2147-52; A-2000-04; A-1953-66. Appellants are jointly and severally liable under the antitrust laws for sales of their co-conspirators in a price-fixing conspiracy. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981).

Appellants argue that these purchases should have been excluded from the damages calculation because they may have been subject to arbitration clauses. However, Appellants failed to question Appellees' expert, Dr. Bernheim, about the inclusion of these purchases in the model at trial. Appellants' expert admitted he had no evidence that any of Tiger or Hualong's sales contracts were subject to arbitration, and agreed he "would be speculating to assume that there's an arbitration clause" associated with any of those sales. A-1864-65 at 1415:23-1416:7. As the district court noted:

> Defendants have seized on the possibility of an arbitration clause in these contracts, but whatever the basis for excluding them from the

> calculation of damages, it was defendants' burden, not plaintiffs', to show the jury what that basis was. . . . They failed to do so.

SPA-264.

The district court got it right. The law does *not* require that class plaintiffs prove the amount of their damages with mathematical precision, but only with as much definiteness and accuracy as circumstances permit. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). As the district court found, the "evidence satisfied the Class's prima facie burden." SPA-265.

Any argument that Dr. Bernheim included incorrect data in his analysis was a credibility issue, 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"; "trial judge must be careful not to mistake credibility questions for admissibility questions").

CONCLUSION

The judgment of the district court should be affirmed.

Dated: August 11, 2014

s/ William A. Isaacson

WILLIAM A. ISAACSON
BOIES, SCHILLER & FLEXNER, LLP
5301 Wisconsin Avenue, N.W., Suite 800
Washington, DC 20015

Telephone: (202) 237-2727
E-mail: wisaacson@bsfllp.com

JAMES T. SOUTHWICK
SHAWN L. RAYMOND
KATHERINE KUNZ
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002-5096
Telephone: (713) 651-9366
Email: jsouthwick@susmangodfrey.com
E-mail: sraymond@susmangodfrey.com
E-mail: kkunz@susmangodfrey.com

MICHAEL D. HAUSFELD
BRIAN A. RATNER
MELINDA COOLIDGE
HAUSFELD LLP
1700 K Street NW
Washington, DC 20006
Telephone: (202) 540-7200
E-mail: mhausfeld@hausfeldllp.com
E-mail: bratner@hausfeldllp.com
E-mail: mcoolidge@hausfeldllp.com

BRENT W. LANDAU
HAUSFELD LLP
325 Chestnust Street, Suite 900
Philadelphia, Pennsylvania 19106
Telephone: (215) 985-3273
Email: blandau@hausfeld.com

Attorneys for Plaintiffs-Appellees Animal Science Products, Inc. and The Ranis Company, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing brief is in 14-Point Times New Roman proportional font and contains 13,955 words and thus is in compliance with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B).

Dated: Washington, D.C.
August 11, 2014

Respectfully submitted,

s/ William A. Isaacson
William A. Isaacson