13-4791-cv

IN THE

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,

—against—

HEBEI WELCOME PHARMACEUTICAL CO. LTD., and NORTH CHINA PHARMACEUTICAL GROUP CORPORATION,

Defendants-Appellants.

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

FINAL REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

Appellees' brief confirms that the judgment below cannot be affirmed unless this Court rejects a sovereign government's view of its own laws, establishes federal courts as arbiters of the validity of foreign nations' regulatory decisions, disregards the massive foreign policy concerns raised by that approach, creates multiple circuit splits, and rejects binding precedent. This Court should therefore decline Appellees' invitation to sit in judgment over China's economic development policies.

The dispositive issue is now undisputed: Appellees concede that Chinese law required active coordination by vitamin C manufacturers on vitamin C prices and output. This amounts to a concession that the Chinese government compelled violation of the Sherman Act and that the district court's determination of Chinese law cannot survive *de novo* review.

That should end the case. But Appellees argue that this Court should find that Chinese manufacturers and their corporate affiliates could still face nine-figure penalties because they complied with their own government's legal, regulatory, and policy decisions. Their arguments that U.S. law can prohibit the same conduct a sovereign nation ordered and directed, if accepted, would go far in eradicating the foreign sovereign compulsion, international comity, act of state, and

political question doctrines altogether, contrary to decades of established law.

In addition to seeking a dramatic expansion of federal judicial power into foreign affairs, Appellees' brief advocates that this Court diverge from the Seventh Circuit on the admissibility of public records; ignore the Supreme Court's recent personal jurisdiction jurisprudence; disregard the overwhelming factual record that North China Pharmaceutical Group Corp. ("NCPG") had no role in the alleged conspiracy; create a circuit split with the Eleventh Circuit on how to analyze class conflicts under Federal Rule of Civil Procedure 23(a)(4); and allow the Damages Class to sweep in claims barred by the Foreign Trade Antitrust Improvements Act ("FTAIA") and claims that Appellees failed to prove fell within the class definition. This Court should reject Appellees' arguments and reverse the judgment below.

ARGUMENT

I. THE JUDGMENT BELOW VIOLATES MULTIPLE LEGAL PRINCIPLES BY IMPOSING LIABILITY ON CHINESE CITIZENS FOR COMPLYING WITH THEIR OWN NATION'S LAWS

A. Appellees' Concession That China Required Vitamin C Manufacturers to Reach Agreement on Price and Output Should End the Case

In their brief, Appellees concede that Chinese law "required the Chamber and its Subcommittee to 'actively coordinate to set vitamin C export prices and quantities.'" Appellees-Br.25 (citation omitted). This concession is fatal to their claims, for if Chinese law required vitamin C

producers to coordinate on price and output, it required the complete Sherman Act offense of which Appellees complain.

Under settled law, "conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). "The establishment of the price by joint action is the illegal act and this is so whether the price is or is not unreasonable." *United States v. Chas. Pfizer & Co.*, 217 F. Supp. 199, 201 (S.D.N.Y. 1963) (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927)). *See also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 715 F.2d 30, 32 (2d Cir. 1983). The complete offense is thus the act of agreement, regardless of any impact on pricing.

The concession that Chinese law required coordination on price and output should therefore resolve this appeal, for it amounts to a concession that Chinese law required the claimed antitrust violation. The level of the prices achieved—whether $3.35 per kilogram, some hypothetical competitive price, or a monopoly price—has no bearing on the question of Sherman Act liability, so Appellees' arguments about the vitamin C manufacturers "exceed[ing] the scope" of the government's mandate cannot save their case. Appellees-Br.12, 36.

Appellees further admit, as they must, that verification and chop was implemented as a means to enforce the Vitamin C Sub-Committee agreements. Appellees-Br.34. The fact that verification and chop was a means to enforce compliance shows that reaching and adhering to agreements on price and quantity was not optional.

That there may have been instances of "cheating" does not change the fact that Appellees have conceded Chinese law both mandated and enforced the challenged conduct. The efficacy of the conduct is immaterial to liability. *See Socony-Vacuum*, 310 U.S. at 221-22 & 224 n.59. So if the Chinese government required a jointly agreed starting point for vitamin C pricing, it required the complete violation regardless of whether some individual contracts were lower than the agreed prices. *See Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) ("[A]greed starting point" for pricing sufficient to establish violation); *Ohio Valley Elec. Corp. v. Gen. Elec. Co.*, 244 F. Supp. 914, 930-31 (S.D.N.Y. 1965) (same).[1]

Appellees thus attack a straw man by focusing on whether the Chinese government compelled specific prices. Appellees-Br.9-10, 12-13, 25, 34, & 36. They cannot contest that the conduct that allegedly

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[1] *See also Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 600-01 (7th Cir. 1984); *United States v. Cont'l Grp., Inc.*, 603 F.2d 444, 467 (3d Cir. 1979); *In re Yarn Processing Patent Validity Litig.*, 541 F.2d 1127, 1136-37 (5th Cir. 1976).

violated the Sherman Act—meeting to reach agreement on price and output—was the same conduct called for by Chinese law and supervised by the Chinese government acting through Qiao Haili.

B. The Primary Issues Raised on Appeal Are Threshold Questions for the Court to Which the Jury Verdict is Irrelevant

The determination of Chinese law under Federal Rule of Civil Procedure 44.1, the propriety of abstention on international comity or act of state grounds, and the justiciability of the case are all threshold issues for the District Judge in the first instance and this Court on appeal, largely subject to *de novo* or nearly *de novo* review. *See* Appellants-Br.22. Nevertheless, Appellees' brief is replete with assertions about "unobjected-to [jury] instructions" and Appellants' alleged failure to request a Chinese law instruction. *See* Appellees-Br.2, 20, 26, & 50. But how the jury was instructed and what it found are not at issue. The question before this Court is whether the case should have been submitted to a jury in the first place.

C. The District Court's Rule 44.1 Determination Should be Reversed on *De Novo* Review

In their opening brief, Appellants noted that four categories of materials support a holding that Chinese law mandated the challenged conduct: the applicable regulations themselves, the authoritative

statements of the Ministry,[2] unrebutted expert testimony, and additional evidence. Appellants-Br.23. Appellees fail to rebut any of these materials.

Text of the Regulations: As described in multiple filings now, the Chinese government maintained a system of mandatory coordination from 1997 to 2002. The Ministry directed the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("Chamber") to establish a Vitamin C Sub-Committee ("Sub-Committee"), and all vitamin C exporters were required to join the Sub-Committee and participate in setting export prices and quotas. SPA-298-300. At the time the alleged conspiracy formed in November and December 2001, this regime remained in place, and Qiao Haili was assigned by the Ministry to administer the program on behalf of the government. JA-684-85 ¶¶1, 3-4; JA-694-98 ¶¶26-37.

The Ministry abolished the 1997 program in 2002 following China's accession to the World Trade Organization ("WTO") and implemented a system that served the dual goals of 1) complying with China's WTO commitments and 2) facilitating the continued orderly development of the vitamin C industry. *See* JA-698-705 ¶¶38-58. Under this new "verification and chop" system, the Vitamin C Sub-

[2] The term "Ministry" continues to refer to the Ministry of Commerce of the People's Republic of China and its predecessor entity, the Ministry of Foreign Trade and Economic Cooperation.

Committee (led by its original four members, including Hebei Welcome Pharmaceutical Co., Ltd. ("Hebei")) was required to reach price and quantity agreements. *See* JA-3880, 3886-92; SPA-301-02. The agreements would be enforced by the General Administration of Customs ("Customs") and the Chamber; the Chamber would review and approve all export contracts, and Customs would prohibit any export that did not meet with the Chamber's approval. SPA-305, 310-11.

This regime plainly required precisely the conduct claimed to be unlawful here: coordination between competitors on price and output and adherence to agreed-upon price and output levels. The Ministry, the Chamber, Customs, and the Sub-Committee (supervised by a Chamber official) operated as government organs implementing Chinese policy regarding vitamin C exports. In particular, the Chamber had a mandate to enforce "industry-wide negotiated prices" and to "coordinate export price and industry self-discipline." SPA-301-02. Directions to the Sub-Committee provided that "industry self-discipline shall be strictly implemented." JA-3880.

Appellants do not claim that the district court's incorrect analysis sprang from mistranslation. Rather, the district court failed to account for the cultural context that no translation can adequately convey surrounding terms like "voluntary" and "self-discipline." Those terms are terms of art in Chinese law connoting systems by which private actors cooperate with a mandatory system to achieve the government's

policy goals while minimizing the need for the government to resort to stronger enforcement methods. *See* JA-324-27 ¶¶69-79; JA-393-94 ¶36. The verification and chop regime thus required industry coordination on price and output, both for avoidance of dumping sanctions and broader regulation of competitive conditions.

Further, the penalties at issue (export prohibitions and exclusion from access to the channels for policy making) were sufficiently severe to meet the compulsion standard. In particular, the regulations provided for deprivation of export rights. SPA-310-11. For Hebei, that would have meant loss of 70-80% of its sales volume. JA-1745. Indeed, a WTO decision, examining the general economic context in China, found that "China requires exporting enterprises to export at set or coordinated export prices or otherwise face penalties, including the possibility of having one's exporting rights revoked." JA-1373. The text of the regulations thus supports a finding that Chinese law compelled the challenged conduct in this case.

Government Statements: Appellees' arguments for rejecting the Ministry's statements are unavailing. They claim a contradiction between the Ministry's statements and China's WTO statements, but there is no contradiction between China representing that it gave up "restrictions on exports through non-automatic licensing or other means justified by specific product" and its maintenance of mandatory price and output coordination programs to avoid anti-dumping actions and

facilitate economic development. *See* G/C/W/438 (20 November 2002), at 2-3, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/65661/Q/G/C/W438.pdf.[3] Appellees are simply grasping for "contrary positions" that do not exist. *See* Appellees-Br.28.

The "no deference" standard that Appellees advocate has no case law support. In the compulsion and act of state contexts, the Supreme Court and this Court have held that deference to a competent foreign government's construction of its own laws should be absolute. *See United States v. Pink*, 315 U.S. 203, 218-21 (1942); *Banco de Espana v. Fed. Reserve Bank*, 114 F.2d 438, 443 (2d Cir. 1940); *Agency of Canadian Car & Foundry Co. v. Am. Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919). In other contexts, courts of appeals (including this Court) have endorsed a substantial deference standard at least on par with that afforded U.S. agencies' formal interpretations of their statutes and regulations. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002); *In re Oil*

[3] Appellees also note that certain provisions from the Ministry's regulations do not appear on a particular list of regulations compiled by the WTO in 2000, but that list does not appear to have sector-specific notices like the notice establishing the 1997-2002 program listed for any industry, thus suggesting that the list does not cover the full range of government regulations in effect.

Spill by Amoco Cadiz, 954 F.2d 1279, 1312 (7th Cir. 1992).[4] Insisting on an appropriate level of deference does not mean Appellants and the Ministry seek deference as to factual issues; rather, deference should be paid to the Ministry's authoritative construction of its own regulatory regime. Appellees cite no compulsion, comity, or act of state case where a foreign government's statements about its own law were given anything less than substantial deference.

There is no support for Appellees' claim that the Ministry's statements "conflicted with the evidence and Chinese regulations, were contrary to prior governmental representations, or were vague and circular." Appellees-Br.30. Rather, as the Ministry explains in its *amicus* brief to this Court, the three statements offered below, taken together, provide a clear and coherent explication of the vitamin C regulatory regime. *See* Ministry-Br.4-6, 25-29.

Moreover, the district court did not engage in a straightforward application of unambiguous texts. *See* Appellees-Br.38-39. It admitted that it had to draw inferences and make judgment calls concerning precisely the sort of ambiguities that should have led it to defer to the

[4] Invocation of the *Chevron* standard indicates a degree of deference, not the need for every formality of the Administrative Procedures Act. *Cf.* Appellees-Br.30-31. Moreover, Appellees are wrong: agencies do receive deference with respect to their interpretations of their own regulations made in *amicus* briefs. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997). And the *In re Oil Spill* case itself involved statements by France made in the context of litigation.

Ministry. *See* SPA-65, 82-84, 100. Indeed, the court noted that it had questions, but it failed to hold a hearing or even offer Appellants and the Ministry an opportunity to address those questions or the materials that the court found during its own research. *See* SPA-65 n.24. *Cf.* FED. R. CIV. P. 44.1 advisory committee's note ("Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely."). The district court thus compounded its error by failing to take advantage of the assistance the Ministry (as well as Appellants' experts) could have offered at a hearing.

Finally, the U.S. government's position in *Gucci America v. Bank of China* is entirely consistent with its view in *Matsushita*; in fact, the government found that the district court orders at issue were erroneous to the extent they failed to defer to the Chinese regulators' articulations of their own law and policy. *See* Br. for the U.S. as *Amicus Curiae*, 2014 WL 2290273, at *25 (2d Cir. May 21, 2014). Appellees thus cannot offer any basis for denying the Ministry deference in its interpretation of its own regulatory regime.

Expert Testimony: Appellees' criticisms of Appellants' expert reports do nothing to undermine the analyses offered by Professors Shen and Speta. Professor Shen placed the regulations in historical

context to show the fundamental consistency of the Chinese regulatory regime even as it evolved to fit new economic models; the fact that he would rely on the historical practice of the government to do so makes his report more compelling, not less. *Cf.* Appellees-Br.41-42. Professor Speta likewise offered expertise in the characteristics of regulated industries based on years of study, and the fact that he did not claim to be an "antitrust expert" just means he was not usurping the role of the Court. *Cf. id.* at 43 n.12. By contrast, Dr. Stern offered no relevant expertise, and her generalized commentary on Chinese government statements was thoroughly impeached at her deposition and rejected by the Chinese government. *See* JA-441-60, 652-53 ¶7. Her report thus in no way undermines the validity of Appellants' experts, who actually offered on-point expertise.

The fact remains that Appellees could not find a single Chinese law expert willing to endorse their position on a full record despite the fact that they used a Chinese law expert, Professor James Feinerman, at the motion to dismiss stage. Indeed, nobody other than Appellees' counsel has come forward to endorse the district court's approach in this case, strongly suggesting that it is unsupportable.

Additional Evidence: The remaining record further supports a finding that Chinese law mandated the challenged conduct. Mr. Qiao's complete testimony, as documented in his proffer, is consistent and uncontested; nearly every point of "impeachment" asserted by Appellees

is vastly overstated and has no bearing on the ultimate issue of whether Chinese law compelled the conduct in question. Further, Appellees do not contest that all of the agreements at issue were reached under the auspices of the Chamber, and they identify no agreements reached separately from these official processes.

Significantly, the U.S. Trade Representative ("USTR") used the Chinese government's statements in this case to bolster a WTO case claiming China continued to engage in compulsory export controls, and Appellees' sole response to that fact is to allege, illogically and without support, that the USTR did not actually credit the statements but sought to benefit from them anyway. *See* Appellees-Br.40-41. Moreover, Appellees' statement that the WTO did not address vitamin C specifically ignores the fact that the WTO found an identical regime to the vitamin C regime to constitute a mandatory export price regulation attributable to the exercise of authority by the Ministry. *See* JA-1356-70.

All relevant materials thus support a finding that Chinese law required the challenged conduct in this case. Because the district court's Rule 44.1 determination cannot survive *de novo* review, the judgment below should be reversed.

D. Comity Requires Deference to the Chinese Government's Policy Choices, and Thus Reversal of the Judgment Below

Even if the record did not establish compulsion as a matter of law, the international comity doctrine would require dismissal. This Court has authoritatively endorsed application of the balancing test for comity articulated by the Third and Ninth Circuits and reflected in the Restatement (Third) of Foreign Relations Law. *See O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana*, 830 F.2d 449, 451 (2d Cir. 1987) (affirming decision to apply "the balancing tests of *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979)"); *United States v. Javino,* 960 F.2d 1137, 1142-43 (2d Cir. 1992).

Appellees argue for a myopic focus on the issue of "conflict" between Chinese law and U.S. law. *See* Appellees-Br.44-45. They cite no case holding that *Hartford Fire* displaced the other relevant comity factors; in fact, post-*Hartford Fire* precedent still treats all of the traditional comity factors as relevant. *See Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 737 (S.D.N.Y. 1997).

But even accepting Appellees' approach, there is plainly a "true conflict" between Chinese law and policy—which established, directed, and promoted the challenged conduct—and the Sherman Act, which would deem it *per se* illegal. *See Geier v. Am. Honda Motor Co.*, 529

U.S. 861, 874-86 (2000) (conflict existed even though manufacturers could theoretically comply with both federal regulations and state tort law); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000). Naturally, U.S. federal law cannot "preempt" foreign law the way it preempts conflicting state laws, so the necessary solution to the conflict here is to abstain on the basis of comity, not to impose penalties on companies that comply with their own nation's laws.

Moreover, Appellees offer no meaningful argument as to the other applicable factors, which plainly weigh in favor of comity abstention due to the availability of diplomatic channels and WTO remedies for vindicating any interests of U.S. citizens, the important economic development and trade policies the Chinese regulatory regime served, and the potential harm to U.S.-China relations raised by this case.

Here, where all agree that Chinese law mandated at least some price-fixing, and where the only dispute is to how much price-fixing was required, considerations of comity should be at their apex. The disregard for those considerations below and the concomitant disrespect paid to a foreign sovereign's construction of its own laws and regulations represent clear abuses of discretion, warranting reversal.

E. The Act of State Doctrine Renders the Judgment Below Unsustainable Because It Hinges on an Invalidation of the Acts of the Chinese Government Within Its Own Territory

Appellees' brief repeatedly passes judgment on the validity of Chinese government actions and the credibility of Chinese officials. *See* Appellees-Br.7-14, 25-26, 51-52. Many of these issues are misstated. For example, Appellees draw completely unsupportable inferences from PTX-234, which clearly states that the Chamber and its sub-organs had regulatory authority and simply calls for improved enforcement mechanisms in areas like smuggling, tax evasion, and medicinal safety. JA-2173-79. And most of their attacks on Mr. Qiao's translated testimony have no apparent bearing on the core issues in the case.

But even if every statement Appellees made were correct, that would be irrelevant: the act of state doctrine bars the very inquiry into the validity of a foreign state's policy choices and foreign officials' credibility that the jury was asked to make. *See O.N.E. Shipping*, 830 F.2d at 453. Even where the plaintiff does not directly sue the foreign sovereign, a requirement to pass judgment upon the sovereign's activities means the act of state doctrine bars the claim. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir. 1977). And rendering judgment based on the Chinese government's decisions on whether or how to take enforcement actions is improper, for prosecutorial discretion is as much a matter of sovereign prerogative as the authority

to establish a law or regulation in the first place. *See West v. Multibanco Comermex*, 807 F.2d 820, 828 (9th Cir. 1987).

In order to sustain the judgment below, this Court would have to deem China's vitamin C regulatory structure invalid based on its public-private cooperation aspects and instances of allegedly insufficient enforcement. Appellees' assertion that "[t]his Court need not declare invalid any official act of the Chinese government" (Appellees-Br.43) is thus not credible: their entire case hinges on deeming the verification and chop regime and associated regulatory structures invalid due to an alleged lack of enforcement vigor and on deeming China's regulatory approach illegal because it relied too heavily on the required cooperation of market participants. The act of state doctrine bars that *inquiry*, let alone that judgment.

F. The Case Presents a Non-Justiciable Political Controversy Given the Serious Foreign Relations Issues It Implicates

As in *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, resolution of the merits of this case necessarily "reflect[s] a value judgment on [China's] decisions and actions—a diplomatic determination textually committed to the political branches" and "essentially ask[s] [the courts] to make a pronouncement on the resource-exploitation decisions of" China. *See* 632 F.3d 938, 951 & 953 (5th Cir. 2011). Appellees neither cite nor distinguish *Spectrum Stores*, nor do they offer any reason to reject its holding that private company participation in price-fixing

organized by foreign governments implicates political and foreign policy considerations commended to the Executive Branch, not the Courts.

At bottom, the issues raised by this litigation properly belong in diplomatic meetings and/or in dispute resolution forums to which China and the U.S. have mutually agreed, such as the WTO. Appellees' desire to dismantle Chinese trade regulations is a quintessential foreign relations issue, and nothing in the antitrust laws provides authority to the federal courts and class action plaintiffs to pursue such an undertaking, let alone manageable standards to guide it. *See id.* at 952 ("The Sherman and Clayton Acts are decidedly inadequate to provide judicially manageable standards for resolving such momentous foreign policy questions.").

This case stands in marked contrast to *Zivotofsky v. Clinton*, where a statute prescribed an essentially ministerial task of noting a specific place of birth on a passport and the judiciary was simply called upon to require the Secretary of State to perform the assigned task. *See* 132 S. Ct. 1421, 1425 (2012). *Japan Whaling Association v. American Cetacean Society* similarly involved an order to the Secretary of State to perform the assigned task of certifying that Japan had exceeded a defined quota of whales killed. *See* 478 U.S. 221, 230 (1986). In neither case were the courts called upon to engage in the wholesale invalidation of a foreign regulatory regime or impose nine-figure penalties on foreign citizens for complying with their own nation's laws and policies.

Appellees' claim that this litigation has not harmed U.S.-China relations is demonstrably false: China has made its diplomatic umbrage known multiple times. *Compare* Appellees-Br.48 *with* Embassy Diplomatic Note, App. Dkt. 111-3. And harm to foreign relations does not require immediate trade sanctions or armed conflict: the mere threat of creating or exacerbating tensions suffices. *See Spectrum Stores*, 632 F.3d at 952 (dismissal where ruling "has the *potential* to interfere" with foreign relations interests (emphasis added)). The judgment below, if not reversed, plainly has the "potential" to harm both trade relations between the U.S. and China and the relationship between the two countries more broadly. The political question doctrine thus also bars Appellees' claims.

G. Failure to Reverse Would Require Deeming China's Sovereignty Less Substantial Than That of the U.S. and Would Seriously Harm U.S. Interests

Regardless of the specific doctrinal lens adopted, the judgment below clearly "rais[es] the question of whether our antitrust laws ought to be interpreted as giving greater deference to the sovereignty of individual U.S. states than to the sovereignty of foreign governments." Michael N. Sohn & Jesse Solomon, *Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict*, 28 ANTITRUST 78, 78 (2013). Appellees' attempts at technical distinctions of specific cases fail to rebut the point. *Cf.* Appellees-Br.46.

Moreover, the same can be said about *federal* programs. The federal raisin price regulation program, which is largely driven by agreements among private producers enforced by the U.S. government, provides a useful comparison. *See Horne v. USDA*, 750 F.3d 1128 (9th Cir. 2014) (upholding the program). If the reasoning of the district court here were accepted, there is no reason why a foreign country that imports U.S. raisins could not impose antitrust penalties on U.S. raisin producers on the theory that, if the producers wished, they could all just refuse to cooperate with the government. But the U.S. would expect foreign nations to recognize that the public-private interaction surrounding its raisin policies does not create an "optional" regulatory regime or "private" cartel in any meaningful sense. Other nations should be entitled to equal deference.

The district court's judgment disrespects China's sovereignty in a way that will inevitably harm U.S. interests, for it establishes that foreign citizens can be held liable for participating in their home nations' regulatory programs if a U.S. judge deems the programs insufficiently compulsory. These considerations further support reversal of the judgment below.

II. THE DISTRICT COURT'S EVIDENTIARY ERRORS RENDER THE JURY VERDICT UNSUSTAINABLE

Appellees fail to justify the district court's exclusion of the vast bulk of Qiao Haili's proffered testimony and supporting exhibits. *See*

Appellees-Br.49-50. While the evidence proffered certainly bore on the question of what Chinese law required, it also illustrated the fact of compulsion that the jury was called upon to evaluate. *See* JA-683-985, 999-1029. The jury was specifically asked to find whether the conduct at issue was compelled, and it was told that Appellants bore the burden of proof. SPA-252. The excluded evidence bore directly on what the jury was asked to find.

No case cited by Appellees holds that materials relevant to both legal and factual determinations should be categorically excluded; indeed, this Court's precedent holds it is error to exclude such materials. *See Litton Sys., Inc. v. AT&T*, 700 F.2d 785, 819 (2d Cir. 1983). *Accord Wolfe v. McNeil-PPC, Inc.*, 881 F. Supp. 2d 650, 658-59 (E.D. Pa. 2012) (admitting testimony on relevant regulatory context). Any concern that the jury would improperly rely on the proffered evidence to draw legal conclusions could have been resolved through an appropriate jury instruction. Depriving the jury of this evidence altogether functionally deprived Appellants of their main defense at trial and constitutes reversible error.

The Ministry statements were also highly relevant; in them, the Ministry directly advised that it had required the conduct at issue. While technically hearsay, the statements plainly fall into the Rule 803(8) exception for public records since they explain the activities of

the Ministry and can only be deemed "untrustworthy" if one assumes China sought to deceive the district court.

This Court has never held that official statements explaining a public office's activities do not qualify for admission in a civil case under FRE 803(8)(A)(i) simply because they were prepared in the context of litigation. Appellees rely on *United States v. James* (Appellees-Br.51), but that case only considered whether autopsy reports constituted "testimonial" evidence for purposes of the rights of a criminal defendant under the Confrontation Clause of the Sixth Amendment. *See* 712 F.3d 79, 89 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2660 (2014). The only on-point authority cited by either party, *In re Oil Spill*, held that documents comprising "public records" should be admitted even if they were prepared in a litigation context. *See* 954 F.2d at 1308.

There is also no reason to deem the Chinese government's statements, which were contrary to its WTO interests, to be untrustworthy. *Cf.* Appellees-Br.51-52. China naturally had an interest in seeing the claims here defeated because of the affront to its sovereignty that Appellees' case represented, but that does not constitute an "affirmative showing of untrustworthiness" as required by this Court's precedent. *See Bradford Trust Co. v. Merrill Lynch*, 805 F.2d 49, 54 (2d Cir. 1986) (internal marks and citation omitted)). Any possible undue prejudice to Appellees from admission of the statements would have been eliminated by the district court's instructions

concerning the role of the jury and the lack of discovery from the Ministry.

The Ministry statements thus should have been admitted at trial, and excluding them deprived the jury of the crucial information that the Chinese government itself has stated on multiple occasions that it compelled the conduct at issue. Because that information may well have altered the outcome of the trial, this error justifies reversal as well.

III. THE DISTRICT COURT ERRED IN FAILING TO DISMISS NCPG FROM THE CASE

A. *WALDEN V. FIORE* PRECLUDES THE EXERCISE OF PERSONAL JURISDICTION OVER NCPG

Appellees concede that the only possible basis for personal jurisdiction over NCPG is the so-called "effects" test from *Calder v. Jones*. Appellees-Br.52-54. *Calder* involved a libel claim where nearly every aspect of the conduct and the harm it caused pertained to California. *See* 465 U.S. 783, 788-89 (1984). Prior to the Supreme Court's recent *Walden v. Fiore* decision, every circuit other than the Ninth Circuit to decide the issue adopted the "focal point" construction of *Calder*: "effects" were sufficient only if persons in the forum bore the "brunt" of the injury and the conduct so involved the forum that the forum could be said to be the "focal point" of the activity. *See Tamburo v. Dworkin*, 601 F.3d 693, 704 (7th Cir. 2010) (noting circuit split).

Walden resolved the division in favor of the majority rule, adopting the "focal point" standard. *See* 134 S. Ct. 1115, 1122-24 (2014). "[A]fter *Walden* there can be no doubt that 'the plaintiff cannot be the only link between the defendant and the forum.' . . . Any decision that implies otherwise can no longer be considered authoritative." *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) (Wood, C.J.) (quoting *Walden*, 134 S. Ct. at 1122).

Appellees do not even try to satisfy the "focal point" standard. They make cursory assertions that the conspiracy was "directed toward . . . New York," but they identify no evidence supporting that claim. Appellees-Br.53. While sales of vitamin C into New York may have been "foreseeable," this Court held even pre-*Walden* that "[m]ere foreseeability of harm in the forum state is insufficient." *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008), *abrogated in part on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010). Appellees cannot meet *Walden*'s "focal point" test, so they cannot rely on alleged "effects" felt in New York from the challenged conduct to sustain jurisdiction over NCPG.

Appellees rely on two pre-*Walden* cases. The decision in *In re Magnetic Audiotape Antitrust Litigation* did not actually construe the *Calder* test but simply suggested that it might apply on remand. *See* 334 F.3d 204, 208 (2d Cir. 2003). And *In re Sumitomo Copper*

Litigation involved a conspiracy to manipulate a New York-based exchange utilizing agreements and accounts in New York. *See* 120 F. Supp. 2d 328, 331-34 (S.D.N.Y. 2000). Because these cases are not on-point, this Court need not decide whether they survive *Walden*.[5]

Appellees raise the policy concern that denying personal jurisdiction over NCPG would preclude personal jurisdiction over all international cartelists. Appellees-Br.53. That overstatement is belied by this very case: no Defendant below that made sales of allegedly price-fixed goods into the U.S. was dismissed for want of jurisdiction. Indeed, most (like Hebei) did not contest the issue.

NCPG has no jurisdictionally relevant, self-created contacts at all with New York or the U.S. It thus is not subject to personal jurisdiction, and the district court violated Due Process by adjudicating NCPG's liability.

B. NCPG Cannot be Held Liable for the Alleged Conspiracy

Appellees identify no evidence in the record from which a reasonable juror could infer that NCPG participated in the alleged conspiracy. Each category of evidence they cite fails as a matter of law

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[5] Appellees also allege that there is a "material difference" between this case and *Nicastro*, but they do not specify the difference. Appellees-Br.54. Here, NCPG has even fewer contacts than the defendant in that case since NCPG made no sales of vitamin C at all, let alone sales into the U.S.

to meet their burden of proving knowing participation by NCPG in vitamin C price fixing:

- ***Mr. Huang***: The evidentiary record is overwhelming that Huang Pinqi, the chairman of Hebei's board of directors during the relevant period, participated in Vitamin C Sub-Committee meetings as a representative of Hebei, and all agreements generated are signed by Hebei, not NCPG. *See* JA-1724-26, 1742, 1791-93, 1845-48, 1850, 2216-20, 3976-78, 2078-90. Appellees concede that "[Mr. Huang's] position at NCPG was considered to be his highest title and position and for that reason he was referred to by that title." Appellees-Br.17. They thus fail to offer any basis for a rational juror to conclude that Mr. Huang attended Vitamin C Sub-Committee meetings on behalf of NCPG or that NCPG participated in the alleged conspiracy through Mr. Huang.
- ***Corporate Websites***: Appellees rely heavily on corporate websites for the entire North China Pharmaceutical Group family of companies. Appellees-Br.18 & 56. The websites Appellees reference aggregated the products sold by all of NCPG's subsidiaries and affiliates; NCPG executive Yang Jianfu clearly testified that NCPG did not manufacture vitamin C and that all references on the website to vitamin

C referred to Hebei (as borne out by the complete site from the relevant period, where a click on the vitamin C link redirected to Hebei's website). JA-1838-45, 3979-90. Appellees falsely claim that Mr. Yang testified "that NCPG was a vitamin C manufacturer," but all he stated was that a website describing NCPG (through its subsidiaries) as "a leading pharmaceutical manufacturer in China" was "accurate." JA-1853-55. This "evidence" thus has no bearing on whether NCPG knowingly participated in vitamin C price-fixing. *See Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) (refusing to attribute statements on group website that "talk generically about Sprint as a collective entity" to any specific affiliate).

- ***Assertions About "North China" Production***: Appellees repeatedly attempt to attribute Hebei's vitamin C capacity and production to NCPG, belying their assertion that they do not seek to pierce the corporate veil. *See* Appellees-Br.17-18 & 56-57. Appellees do not identify a single sale of vitamin C by NCPG. They point to a document from a different Defendant describing Hebei's vitamin C capacity as "North China's," but no reasonable juror could accept that as establishing NCPG was the specific corporate entity referred to. *Id.* at 18. *See also* JA-1851-52. Appellees expressly

concede that all reports concerning the vitamin C business were sent to Mr. Huang *by Hebei* and identify no such reports internal to NCPG. Appellees-Br.18 & 56-57. In short, they fail to identify *any* production or sales of vitamin C separate from Hebei's.

The evidence was thus insufficient as a matter of law to hold NCPG liable for the alleged conspiracy. The judgment should be reversed as to NCPG for this reason as well.

IV. FUNDAMENTAL CONFLICTS AMONG CLASS MEMBERS PRECLUDE CLASS CERTIFICATION

Appellees concede that class certification in this case may only be affirmed if this Court rejects *Valley Drug*. *See* Appellees-Br.57-58. They rely on *Hanover Shoe* to claim that class conflicts do not exist if all class members "seek damages from an overcharge[.]" *Id.* at 57. But as the Eleventh Circuit explained, *Hanover Shoe* only limits the range of defenses available to any individual claim; it does not impact the standards for adequacy of representation under Rule 23(a). *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1192 (11th Cir. 2003).

Appellees largely rely on district court cases resisting the *Valley Drug* holding, and their sole appellate authority is the Third Circuit's *In re K-Dur* decision. Appellees-Br.57-58. Since the *In re K-Dur* decision was vacated by the Supreme Court and class certification was only reinstated by an unpublished order, it has no binding effect in the Third

Circuit, so there is no longer any binding circuit-level authority rejecting *Valley Drug*. *See O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975). This Court should decline to create a circuit split and should instead follow *Valley Drug* and reverse the class certification order below given the evidence that The Graymor Chemical Company (and likely others) benefited from the challenged conduct.

V. THE FOREIGN PURCHASER CLAIMS MUST BE REMITTED FROM THE JUDGMENT BECAUSE THE CONDUCT AT ISSUE DID NOT INVOLVE IMPORT COMMERCE AND ANY DOMESTIC EFFECTS IN THE U.S. DID NOT "GIVE RISE TO" THE FOREIGN PURCHASER CLAIMS

The FTAIA Applies. Appellees make no compelling distinction of the controlling precedent holding that a price-fixing conspiracy to set prices for all sales regardless of their ultimate destination is not conduct "involving" import commerce for purposes of the FTAIA. Appellees-Br.60. Under *Kruman*, mere sales into the U.S. charging the price agreed upon do not transform conduct directed at the entire world into conduct "involving" import commerce. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398-99 (2d Cir. 2002), *abrogated on other grounds by F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). The alleged conspiracy here was not directed specifically at U.S. imports; in fact, it was motivated more by European anti-dumping concerns than any issues specific to the U.S. *See* JA-696-97 ¶¶31-35. The FTAIA thus applies to the foreign purchaser claims, for all material

elements of the alleged conduct with respect to those claims occurred abroad.

The recent *United States v. Hsiung* ruling in the Ninth Circuit is not to the contrary; it only held that sales made to U.S.-based companies allowed the government to pursue a criminal price-fixing prosecution. *See* --- F.3d ----, 2014 WL 3361084, at *14 (9th Cir. 2014). The court did not hold that transactions between foreign companies constituted U.S. "import commerce" for purposes of a private lawsuit. Further, the court quoted legislative history stating that "[a] transaction between two foreign firms, even if American-owned, . . . should, for the purposes of [the FTAIA], be treated in the same manner as export transactions—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor." *Id.* (quoting H.R. Rep. No. 97–686, at 9–10 (1982)). Thus, the *Hsiung* decision supports rejection of the foreign purchaser claims.

The "Domestic Effects" Exception Does Not Apply. Appellees fail to address whether the domestic effects of the alleged price-fixing "give rise to" the foreign purchaser claims. *See* Appellees-Br.61-62. A straightforward application of this Court's recent decision in *Lotes Co. v. Hon Hai Precision Industry Co.* should lead the Court to hold that the foreign purchasers' alleged injuries derive entirely from paying for vitamin C abroad, a matter to which the ultimate "ship to" address is

irrelevant. *See* --- F.3d ----, 2014 WL 2487188, at *17 (2d Cir. 2014) (domestic effects did not "give rise to" claim where claimed "injury flowed directly from the defendant's exclusionary foreign conduct"). Any injury to the foreign purchasers "flowed directly from" the claimed price-fixing conspiracy itself, not from any intervening effect in the United States.

Because the FTAIA bars the foreign purchaser claims, this Court should order damages reduced by $31.8 million to eliminate all damages associated with those claims.

VI. SALES NOT PROVEN TO BE WITHIN THE DAMAGES CLASS DEFINITION SHOULD HAVE BEEN EXCLUDED FROM THE DAMAGES CLAIMS

To defend the inclusion of sales by Shandong Zibo Hualong Co., Ltd. ("Hualong") and Anhui Tiger Biotech Co. ("Tiger") in their damages calculations, Appellees assert that they were not required to "prove the amount of their damages with mathematical precision[.]" Appellees-Br.63. But Appellants do not demand "mathematical precision"; they simply ask the Court to hold Appellees to their burden of proving damages without "speculation or guesswork." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

Appellees assumed the burden of proof in establishing that each sale for which they claim damages was not made under a contract containing an arbitration clause when they excluded such sales from their class definition. *See* Appellants-Br.61-63. Because Appellees

presented no evidence on this point for Hualong and Tiger sales, they failed to carry their burden as a matter of law. The damages award should thus be reduced by $22.5 million.

CONCLUSION

The judgment of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,958 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Century Schoolbook font.

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