14-4375-cv(L)

14-4378-cv(XAP)

In the
United States Court of Appeals
for the Second Circuit

IN RE: VITAMIN C ANTITRUST LITIGATION

THE RANIS COMPANY, INC.,

Appellant-Cross-Appellee,

—against—

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

Appellees-Cross-Appellants.

On Appeal From the United States District Court
For the Eastern District of New York

OPENING BRIEF FOR APPELLEES-CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Hebei Welcome Pharmaceutical Co. Ltd. hereby discloses that North China Pharmaceutical Co. Ltd. is its parent company and no other publicly held corporation holds more than 10% of its stock. North China Pharmaceutical Group Corporation hereby discloses that it is a state-owned enterprise under the indirect ownership of the State-Owned Assets Supervision and Administration Commission ("SASAC") of the Hebei Province of the People's Republic of China, that Jizhong Energy Group Co., Ltd. (which is wholly owned by the SASAC) is its direct parent company, and that no publicly held corporation holds more than 10% of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Not content with the disrespect shown to Chinese sovereignty by the judgment in this case, The Ranis Company ("Ranis") sought in the district court to further inflame tensions over this matter by enforcing the judgment against assets in China before this Court has even resolved the judgment's validity.[1] The district court correctly avoided the worst possible intrusions on Chinese sovereignty by acknowledging that North China Pharmaceutical Group Corporation's ("NCPG") status as an "instrumentality" of China renders its assets abroad immune from attachment in U.S. courts under the Foreign Sovereign Immunities Act ("FSIA"). The Court erred, however, in arrogating to itself the power to order the freezing and turnover of Hebei Welcome Pharmaceutical Co.'s ("Hebei") assets with no connection to New York. This Court should therefore affirm the denial of Ranis' judgment enforcement requests as to NCPG and reverse the grant of Ranis' requests as to Hebei.

1. NCPG's status as an "instrumentality" of China and therefore a "foreign state" for FSIA purposes is determined under 28 U.S.C. §

[1] The appeal of the judgment on the merits was argued and submitted to this Court (Cabranes, Wesley, Hall, JJ.) on January 29, 2015. *See In re Vitamin C Antitrust Litig.*, 13-4791 (2d Cir.). These cross-appeals will, of course, be rendered moot by a ruling in NCPG and Hebei's favor in that appeal. *See, e.g.*, *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 227 (2d Cir. 2014) (vacating enforcement orders in light of reversal of underlying monetary judgment).

1603(b). This means that the separate operation of the FSIA's jurisdictional provisions (28 U.S.C. §§ 1604-08) and judgment enforcement provisions (28 U.S.C. §§ 1609-11) has no bearing on the core question at issue here, which is whether NCPG qualifies as a "foreign state" for purposes of this litigation. This Court, following the Supreme Court, has "unequivocally" held that status for purposes of § 1603(b) is determined by the facts existing at the time of filing. *See Abrams v. Société Nationale des Chemins de Fer Francais*, 389 F.3d 61, 64 (2d Cir. 2004) (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003)). Since it is undisputed that, at the time this case was filed, NCPG qualified as an instrumentality of China under the "majority ownership" provision of § 1603(b), the district court's holding as to NCPG's immunity should be affirmed.

Furthermore, even if the Court adopted an unprecedented exception to the time-of-filing rule, it is undisputed in the record that NCPG presently qualifies as an instrumentality of China under the "organ" prong of § 1603(b) given its public purpose as the manager of Chinese government investments in the pharmaceutical sector and its complete ownership by the Chinese state via an intermediate financing vehicle. Chinese law also deems NCPG's assets to be under the ultimate ownership of "the whole people of China" and thus renders those assets FSIA immune regardless of NCPG's status. The Court

should therefore affirm NCPG's FSIA immunity on these alternate grounds regardless of its resolution of the time-of-filing issue.

Finally, recent Supreme Court precedent has established beyond meaningful dispute that the district court had no personal jurisdiction over NCPG given that it has no jurisdictionally meaningful connection to New York or to the United States. The district court declined to engage with this argument on the merits because it believed it would have to vacate the judgment if it accepted the argument, and it has no jurisdiction to do so in light of the pending merits appeal. While the district court's view of its own authority may or may not have been correct, that does not matter for this Court, which has full authority to address the argument. Since Ranis has no meritorious argument in favor of the exercise of personal jurisdiction over NCPG, the denial of its requests for enforcement orders as to NCPG may be affirmed on this alternative ground as well.

2. While the district court correctly denied Ranis' requests for orders in aid of enforcement as to NCPG, it erred in granting Ranis' requests as to Hebei. Its authorization of service of a restraining notice on Hebei via its U.S. counsel violates the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention"), and its refusal to dissolve the restraining notices issued to Hebei's banks cannot survive the New York Court of Appeals' recent holding that bank branches abroad are

separate entities from their New York branches and thus not subject to *in personam* enforcement orders under New York law. Its turnover order as to bank accounts that no longer exist represents an improper advisory opinion and violates the requirement that a turnover order be directed to specified "money or personal property" that is in the "possession or custody" of the party subject to the order. And applying the provisions of New York Civil Practice Law & Rules (C.P.L.R.) Article 52 to regulate disposition of Hebei's foreign assets represents an unconstitutional attempt to regulate foreign commerce under the aegis of state law and to expand New York's legislative authority to control property with which it has no connection. The district court's enforcement orders as to Hebei should therefore be dissolved. These arguments also provide further reasons for affirming denial of Ranis' requests as to NCPG, to the extent further reasons are needed.

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In the end, there is no sound basis for Ranis' enforcement requests as to either NCPG or Hebei. Since both are Chinese companies with little or no connection to the U.S. beyond this lawsuit, Ranis' enforcement efforts will need to be undertaken abroad, consistent with notions of comity and respect for the sovereign authority of any foreign nations where assets may be located. This Court should therefore affirm the denial of Ranis' judgment enforcement requests as to NCPG and reverse the grant of those requests as to Hebei, or alternatively

vacate the order below entirely if the Court reverses or vacates the underlying judgment in appeal 13-4791.

STATEMENT OF JURISDICTION

Hebei and NCPG adopt Ranis' statement of jurisdiction as to appeal 14-4375, adding only that the Court also would have jurisdiction to review the order as an order dissolving injunctions (the restraining notices as to NCPG's assets) and denying requests for additional injunctions (the turnover orders) under 28 U.S.C. § 1292(a)(1).

Hebei's cross-appeal (14-4378) concerns the same order as Ranis' appeal (14-4375). The district court had ancillary jurisdiction to entertain the judgment enforcement proceedings against Hebei after having exercised jurisdiction over the main proceedings under 28 U.S.C. §§ 1331 & 1337. The district court entered its order on October 23, 2014, and Ranis noticed a timely appeal from that order on November 21, 2014. SPA-1-30; JA-457-59; FED. R. APP. P. 4(a)(1)(A). Hebei noticed a timely cross-appeal on November 24, 2014. JA-460-61; FED. R. APP. P. 4(a)(3). This Court has jurisdiction over the cross-appeal as a final disposition of Ranis' requests for restraining notices and turnover orders against Hebei's assets under 28 U.S.C. § 1291 and as an order refusing to dissolve injunctions (the restraining notices) and granting an injunction (the turnover order) under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Whether the district court properly denied Ranis' request for a turnover order against NCPG and properly dissolved restraining notices as to NCPG's assets since NCPG is entitled to attachment and execution immunity under the FSIA and all of its assets are outside of the U.S.

2. Whether recent Supreme Court precedent completely deprived the district court of personal jurisdiction over NCPG, separately requiring dissolution of the restraining notices as to NCPG and denial of Ranis' request for a turnover order.

3. Whether this Court should vacate the restraining notices and turnover order as to Hebei's assets where (1) the restraining notice to Hebei itself was improperly served, (2) the restraining notices to Hebei's banks are barred by New York's separate entity rule, (3) the turnover order represents an advisory opinion and is inconsistent with New York law, and (4) the application of New York law to regulate the disposition of Hebei's assets held abroad constitutes a *per se* violation of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and an improper expansion of New York's legislative jurisdiction in violation of the Due Process Clause, U.S. Const. amend. XIV, § 1.

4. Whether the arguments in Hebei's cross-appeal provide an alternative basis for affirming denial of Ranis' requests for enforcement orders as to NCPG.

STATEMENT OF THE CASE

A. Procedural History and Decision Presented for Review

On November 26, 2013, the district court entered a final judgment holding Hebei and NCPG jointly and severally liable for a $162.3 million damages award. *See* No. 13-4791, Dkt. 175 at 2-3 & 7. Hebei and NCPG timely appealed that judgment, and that appeal has been briefed, argued, and submitted to a panel of this Court for decision. *See id.* Dkts. 174, 175, 176, & 221. The Chinese government has actively supported that appeal, with both the Chinese Ministry of Commerce and the Chinese Embassy arguing that the district court fundamentally disrespected Chinese sovereignty by subjecting NCPG and Hebei to treble damages based on Hebei's participation in a mandatory Chinese regulatory program. *See id.* Dkts. 105 & 111-3 at 8-9.

On March 26, 2014, Ranis filed motions seeking leave to register the judgment in other districts as well as various orders in aid of enforcement. *See In re Vitamin C Antitrust Litig.*, 1:06-md-1738-BMC-JO, Dkts. 856 & 859. The district court initially denied Ranis' motion for orders in aid of enforcement on procedural grounds, and Ranis refiled the motion on April 25, 2014. *See id.* Dkts. 867 & 874. Ranis' counsel also attempted to serve restraining notices pursuant to C.P.L.R. § 5222(a) on both Hebei and NCPG on April 10 and 15, 2014. *See* J.A.213-22. NCPG and Hebei infer from a list of subpoena recipients

that Ranis also attempted to serve restraining notices pursuant to C.P.L.R. § 5222(a) on NCPG and Hebei's banks. *See* J.A.208-09.

NCPG and Hebei responded to Ranis' motions on May 5 & 9, 2014 and cross-moved the district court to dissolve the restraining notices served on them and their banks as well as to stay enforcement proceedings as to Hebei. *See* 1:06-md-1738-BMC-JO, Dkts. 879 & 885. Various response and reply briefs were filed by the parties in May 2014, and a motion to compel post-judgment discovery raising similar issues to the prior briefing was also briefed in August 2014. *See id.* Dkts. 889, 892, 900, & 909-11. The district court entered a Memorandum Decision and Order on October 23, 2014 resolving all of the pending motions, which *inter alia* denied Ranis' request for a turnover order directing NCPG to turn over a bank account and shares it holds in a partial subsidiary—North China Pharmaceutical Co. Ltd. ("NCPC Limited")—and dissolved the restraining notices as to NCPG and its banks on the grounds that NCPG is entitled to attachment immunity under the FSIA; issued a turnover order directing Hebei to turnover monies in bank accounts that the district court effectively acknowledged do not exist; and refused to dissolve the restraining notice as to Hebei and its banks. *See* SPA-1-19. The order is unreported.

B. Statutory Background

The FSIA. "Claims of foreign states to immunity" are "decided by courts of the United States . . . in conformity with the principles set

forth in" the FSIA, 28 U.S.C. §§ 1602, *et seq*. 28 U.S.C. § 1602. The term "foreign state" for FSIA purposes "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state[.]" *Id*. § 1603(a). In turn, an "agency or instrumentality of a foreign state" is "any entity":

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

Id. § 1603(b)(1)-(3).

Foreign states are broadly immune from lawsuits in U.S. courts, with certain defined exceptions. *Id*. §§ 1604-07. They also have certain additional rights concerning service of process and removal of suits from state to federal court, as well as the right to demand a bench trial under certain circumstances. *Id*. §§ 1330, 1441(d), & 1608. And "the property in the United States of a foreign state" is immune from attachment with limited exceptions. *Id*. §§ 1609-11. The FSIA only authorizes attachment of non-immune property "in the United States," so property of a foreign state held abroad is categorically immune from judgment enforcement proceedings in U.S. courts. *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009).

C.P.L.R. Article 52. As relevant here, C.P.L.R. Article 52 allows a restraining notice requiring the freezing of assets to be "issued" by "the attorney for the judgment creditor as officer of the court" provided it is "served personally in the same manner as a summons or by registered or certified mail[.]" C.P.L.R. § 5222(a). With certain exceptions, "[a] judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest," and a third party served with a restraining notice has similar obligations if "he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served." *Id.* § 5222(b).

Article 52 also permits an order to the judgment debtor to pay or turn over to a sheriff money or personal property "where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest[.]" *Id.* § 5225(a). Additionally, "[t]he court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require,

make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." *Id.* § 5240.

The Hague Convention. The Hague Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Hague Convention Art. 1. The contracting states (which include the U.S. and China) are required to "designate a Central Authority . . . to receive requests for service" and then effect service of documents abroad by having a "judicial officer competent under the law of the State in which the documents [to be served] originate . . . forward to the Central Authority of the State addressed a request" to effect service. *Id.* Arts. 2-3. The Central Authority of the receiving country will then effect service. *Id.* Art. 5. The Convention allows for other methods of service where the signatory nation consents, but a contracting state may object and insist on service through the Central Authority. *Id.* Art. 10. China has lodged such an objection and requires service through its Central Authority, the Ministry of Justice. J.A.210-12.

C. Facts Relevant to this Appeal

Hebei is a Chinese vitamin C producer that has no U.S. assets and has not transacted business with the U.S. since 2010. *See* J.A.154 ¶¶ 2-3, 282-83, 300, & 373 ¶ 4.[2] Hebei is wholly-owned by NCPC Limited,

[2] Appellees made an attempt to argue that Hebei had engaged in commerce with the U.S. through an affiliate, NCPC Victor Co., Ltd., but (continued...)

which in turn is publicly traded on the Shanghai Stock Exchange. *See* J.A.286, 288-89, & 299-300. Two state-owned holding companies, NCPG and Jizhong Energy Co. Ltd. ("Jizhong"), are NCPC Limited's controlling shareholders. *See* J.A.186, 287, & 299. All of the companies are ultimately controlled by a Chinese government office, the State-owned Assets Supervision and Administration Commission of the Hebei Province ("SASAC"), and thus by the government of the People's Republic of China. *See* J.A.299.

NCPG was founded by the Chinese government in 1953 to promote the health and well-being of the Chinese people and build up China's pharmaceuticals industry. *See* J.A.150-51. It has never held assets in the U.S., nor has it had any contacts with the U.S. relevant to this case before or since the filing of this litigation beyond its appearance to defend itself in the district court. J.A.159-61 ¶¶ 11-19 & 169 ¶¶ 3-4.

At the time this suit was filed, the SASAC directly held 100% of NCPG's shares. J.A.174.[3] During the pendency of the litigation, the SASAC restructured its holdings to place them all under the umbrella

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that allegation was never supported by competent evidence and has been refuted. *See* J.A.374 ¶ 5; J.A.377 ¶¶ 2-3.

[3] Shortly after the filing of the suit, the SASAC allocated shares to other investors but retained 84.55% of the shares. J.A.175 & 185.

of a financing vehicle—Jizhong—which included transfer of NCPG's shares from direct ownership by the SASAC to direct ownership by Jizhong. J.A.169 ¶ 2, 178, 277-81, & 299. Jizhong is wholly owned by the SASAC, and the SASAC remains NCPG's "actual controller[.]" J.A.299. *See also* J.A.169 ¶ 2.

NCPG, like Jizhong, is a holding company; it does not manufacture or sell any products, but instead manages various Chinese state investments in the pharmaceutical space. J.A.158-59 ¶¶ 3-8 & 299. The SASAC is entitled to all its profits, selects its senior managers, must approve all of its major decisions, and otherwise exercises broad control over NCPG's operations. *See* J.A.315-16 at 1239:7-11 & 1240:19-1241:6; J.A.319-23 at 12:1-9, 22:23-23:1, & 44:20-45:2; J.A.325 at 75:21-76:3. *See also* J.A.326-31 & 337-41 (press releases showing government control of NCPG).

Chinese law expressly affords this authority to the SASAC even though it manages NCPG through Jizhong. *See, e.g.*, J.A.229-30, Law of the People's Republic of China on the State-Owned Assets of Enterprises Arts. 2, 3, & 13 (2008) (state ownership remains valid despite intermediate body); J.A.355, Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises Art. 17 (2003) (authority to appoint managers). All of NCPG's assets are assets of the Chinese state under Chinese law. J.A.229 Art.3; J.A.259, Const. of the People's Republic of China Art. 7.

As of the end of fiscal year 2013, Hebei had net assets of roughly $44 million. *See* J.A.286. *See also* J.A.304 (giving exchange rate). Hebei has posted losses equivalent to approximately $25 million and $18 million in fiscal years 2012 and 2013, and it continues to operate at a loss. *See* J.A.286, 309 & 374 ¶ 7. This is because a combination of overcapacity and increased input costs has forced all Chinese vitamin C manufacturers to operate at losses. *See id.* *See also* J.A.364-69 (publications documenting industry situation and losses incurred on vitamin C business lines by Chinese manufacturers). It is also relevant that the bank accounts at issue in the turnover order do not exist. *See* J.A.223 ¶ 2.

SUMMARY OF THE ARGUMENT

1. NCPG's status as a "foreign state" for this litigation is determined under 28 U.S.C. § 1603(b), and binding precedent holds that the § 1603(b) determination is made based on the facts existing at the time the litigation was filed. A straightforward application of the time-of-filing rule establishes that NCPG is an "instrumentality" of China for all purposes in this litigation based on the government's majority ownership of NCPG's shares at the time of filing, and thus NCPG qualifies as a "foreign state" under the FSIA.

2. Even if the time-of-filing rule did not apply, NCPG remains FSIA immune as an "organ" of China. NCPG performs the public purpose of managing certain Chinese government investments in the

pharmaceutical industry, and it has sole authority to do so. It is entirely owned by the Chinese government, albeit now through an intermediate financing vehicle, and was formed by the government to promote the health and wellbeing of the Chinese people as well as the economic development of the Chinese pharmaceutical industry. Ranis offered no response to this argument in the district court, nor did it address the issue in its opening brief to this Court, so it has abandoned any arguments it may have had in opposition. NCPG thus is entitled to attachment immunity regardless of whether or not this Court applies the time-of-filing rule to determine its status.

3. Chinese law also establishes that NCPG's assets are owned "by the whole people" of China. This public ownership would further render NCPG's assets immune from attachment even if NCPG institutionally had no FSIA immunity.

4. Recent Supreme Court precedent provides an additional ground for refusing to authorize enforcement orders as to NCPG: the district court had no basis to exercise personal jurisdiction over the company. Ranis has no serious argument that NCPG's connections to the U.S. would make it subject to the jurisdiction of courts here, and the only reason the district court gave for evading this fact was that it lacked jurisdiction to vacate the judgment in light of the pending merits appeal. This Court faces no such obstacle, so in the event it resolves the FSIA issues against NCPG, the Court should affirm denial of Ranis'

requests on the alternate ground that the district court had no basis for personal jurisdiction over NCPG.

5. The restraining notice to Hebei was improperly served, and the district court's order that the notice be served through counsel improperly circumvents the Hague Convention. The restraining notices to Hebei's banks are also invalid under New York's separate entity rule, which was recently reaffirmed by the New York Court of Appeals. The turnover order calls for turnover of assets that do not exist, meaning it violates the jurisdictional bar on advisory opinions as well as New York law. And any application of New York's C.P.L.R. Article 52 remedies to assets held in China constitutes a *per se* violation of the Commerce Clause and a violation of the due process limits on New York's legislative authority, a point Ranis did not contest below and that the district court rejected only by ignoring decades of controlling precedent and relying on state cases where the constitutional issues were not presented. For any number of reasons, therefore, the district court's order as to Hebei should be reversed.

6. While the denial of Ranis' requests for enforcement orders as to NCPG should be affirmed on FSIA or personal jurisdiction grounds, the arguments presented in Hebei's cross appeal would also justify rejection of Ranis' enforcement requests as to NCPG since those requests suffer from the same flaws as the order against Hebei.

STANDARD OF REVIEW

This Court reviews the decision to grant or deny orders in aid of enforcement for abuse of discretion. *See Aurelius*, 584 F.3d at 129. A district court abuses its discretion "if it applies legal standards incorrectly, relies on clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law." *Id.* The applicability of the FSIA is subject to *de novo* review. *Id.* This Court reviews the district court's exercise of personal jurisdiction *de novo* as to issues of law and for clear error as to issues of fact. *See D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006). This Court reviews issues of justiciability *de novo*. *See Carver v. City of N.Y.*, 621 F.3d 221, 225 (2d Cir. 2010). All relevant questions of Chinese law are also reviewed *de novo*. *See Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998). Questions of service are reviewed for abuse of discretion. *See Gerena v. Korb*, 617 F.3d 197, 201 (2d Cir. 2010).

ARGUMENT

I. NCPG'S ASSETS ARE IMMUNE FROM EXECUTION UNDER THE FSIA BECAUSE NCPG WAS AND REMAINS A "FOREIGN STATE" FOR FSIA PURPOSES, AND CHINA'S OWNERSHIP INTEREST IN ITS ASSETS MAKES THEM IMMUNE IN ANY EVENT

Ranis' appellate argument as to NCPG relies on a tautology and a *non sequitur*. The tautology is that execution immunity under the FSIA only applies to the property of a foreign state; the *non sequitur* is that execution immunity under 28 U.S.C. §§ 1609-11 and jurisdictional

immunity under 28 U.S.C. §§ 1604-08 operate independently. *See* Ranis Opening Br. at 9-13. Neither point actually determines the immunity issue here.

The principal question for Ranis' appeal is whether NCPG is a "foreign state" for FSIA purposes in this litigation, and Ranis has failed to rebut NCPG's showing on this point. Under the rule required by controlling precedent, NCPG is a "foreign state" because China directly held a majority of its shares at the time this suit was filed. Even if the Court adopted an unprecedented exception to the time-of-filing rule, NCPG qualifies as a "foreign state" based on undisputed facts because it remains an "organ" of China. And under either rule, China's ownership interest in NCPG's assets would render them immune. The FSIA thus bars Ranis' requests under any approach this Court could adopt.

A. NCPG Qualifies as a "Foreign State" for FSIA Purposes Under the "Majority Ownership" Provision of 28 U.S.C. § 1603(b)(2) Because a Majority of Its Shares Were Held Directly By the Chinese Government at the Time This Suit Was Filed

In focusing on the separate operation of the FSIA's jurisdictional and attachment provisions, Ranis completely ignores the fact that the *status* of an entity as a "foreign state" for purposes of the FSIA is determined under 28 U.S.C. § 1603, which precedes both sets of substantive immunity provisions. Under controlling precedent, status as an "agency or instrumentality of a foreign state" under § 1603(b) is determined for the entire litigation based on the facts existing at the

time of filing. *See Dole Food*, 538 U.S. at 480 ("[W]e hold . . . that instrumentality status is determined at the time of the filing of the complaint."); *Abrams*, 389 F.3d at 64.

Undisputed facts establish that NCPG qualifies as a "foreign state" based on its status as an "agency or instrumentality" of China at the time the suit was filed. Ranis does not dispute that NCPG meets the first and third requirements for "agency or instrumentality" status since it is "a separate legal person" from China and is not a U.S. citizen or created under any country's laws other than China's. *See* J.A.174 & 231 Art.17. Ranis also does not contest that the Chinese government directly owned a majority of NCPG's shares at the time this suit was filed. *See* J.A.174 & 185. This means that, under *Dole Food*, NCPG meets the requirements of § 1603(b). *See Dole Food*, 538 U.S. at 480 ("[A] foreign state must itself own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state[.]").

Ranis seeks to evade this fact by characterizing NCPG as a "former foreign state" and arguing for an exception to the time-of-filing rule based on post-filing changes in NCPG's shareholding structure. *See* Ranis Opening Br. at 9-11. But Ranis has no basis for its proposed exception. The sole authority it cites is the *Aurelius* case, but that case does not establish the time for determination of foreign-state status; rather, it establishes the time at which property must be used for

commercial activity in the U.S. to be subject to an exception to immunity. *See Aurelius*, 584 F.3d at 130 (property at issue "must have been 'used for a commercial activity' *at the time* the writ of attachment or execution is issued.").

To the extent Ranis would seek to exploit a potential grammatical ambiguity in the *Aurelius* case, this Court recently made clear the time-of-attachment rule only applies to the applicability of an FSIA exception. *See Exp.-Imp. Bank of the Republic of China v. Grenada*, 768 F.3d 75, 84 (2d Cir. 2014) ("In this case, to find that Ex-Im Bank may attach either set of funds, we must conclude that those funds are: (1) 'property in the United States'; (2) 'of a foreign state,' i.e., that they belong to Grenada; and (3) that they are 'used for a commercial activity in the United States' when the writ of attachment or execution issues.") (quoting *Aurelius*, 584 F.3d at 130). This Court explained the reason for that requirement: to attach property, it must be "discrete property of [the foreign state] held in the United States and arguably designated for a commercial use in the United States." *Id.* at 86. Otherwise, it is "part of the undifferentiated property of the sovereign" and may not be attached. *Id.*

Ranis also attempts to rely on the separate operation of the jurisdictional and attachment provisions of the FSIA. *See* Ranis Opening Br. at 11-12. But that separate operation is simply a rule for waiver of immunity: "'a waiver of immunity from suit does not imply a

waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit.'" *See Walters v. Indus. & Commercial Bank of China Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 456(1)(b) (1987)). All that means is that NCPG's decision not to contest its amenability to suit did not constitute a waiver of its attachment immunity. It does not mean that the FSIA status determination should be made for attachment issues based on a different rule from that applicable to jurisdictional issues.

Two Seventh Circuit cases are instructive. In *Autotech Technologies LP v. Integral Research & Development Corp.*, the court applied the time-of-filing rule to establish the defendant's "foreign state" status for both jurisdiction and judgment enforcement purposes. 499 F.3d 737, 742-43 & 749-51 (7th Cir. 2007). Similarly, in *Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A.*, the court addressed the question of whether an airline that qualified as an instrumentality of Italy at the time the suit was filed should still be treated as an instrumentality for purposes of the ban on jury trials of foreign states in removal cases under 28 U.S.C. § 1441(d). 509 F.3d 347, 348-49 (7th Cir. 2007) (Posner, J.). The court concluded that even though the jury trial bar was non-jurisdictional (and thus separate from the question of

subject-matter jurisdiction), the airline should still be treated as an instrumentality of Italy, reasoning:

> The purpose of foreign sovereign immunity —'to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns,' [ ]—does not fall out of the picture when a foreign-state entity is privatized. If the result of the jury trial in this case is allowed to stand, foreign governments may think twice before privatizing one of its instrumentalities that has been sued in a U.S. court. The timing of foreign governments' decisions on whether and when to privatize their instrumentalities would be affected, creating a complication in these governments' decision-making process that could be an irritant in their relations with the United States.

Id. at 352 (quoting *Dole Food*, 538 U.S. at 479).

These considerations apply to attachment immunity as well. Foreign countries have a reasonable reliance interest in the fact that the courts have "unequivocally" held that an entity qualifying as a "foreign state" at the time a case is filed remains in that status throughout any given litigation. *See Abrams*, 389 F.3d at 64. Altering that rule for purposes of attachment immunity would have a similar impact to altering the jury trial rule: it would force foreign countries to consider immunity issues in pending litigations when deciding how to organize their agencies and instrumentalities, which plainly "could be an irritant in their relations with the United States." *See Olympia*, 509 F.3d at 352. The same policy concerns identified in *Olympia* thus justify maintaining the application of the time-of-filing rule in the enforcement context.

Altering the time-of-filing rule would also raise the prospect of a federal court losing jurisdiction over judgment enforcement proceedings in cases where federal jurisdiction only lay over the merits by virtue of the defendant's "foreign state" status, such as disputes between foreign citizens which would not ordinarily be removable absent an FSIA hook. *See Trans Chem. Ltd. & China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 276 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998) (jurisdiction predicated on finding that defendant was an instrumentality of China). *See also Universal Licensing Corp. v. Paola del Lungo S.P.A.*, 293 F.3d 579, 581 (2d Cir. 2002) (no diversity jurisdiction where both parties are foreign citizens). If the defendant's foreign-state status was deemed to have shifted when the time came to enforce the judgment, a district court may no longer have jurisdiction over the proceedings. And a foreign government may even have an incentive to take a majority stake in a politically favored company just before a major judgment becomes enforceable against it to cloak it with immunity. These considerations further support retaining the time-of-filing rule for FSIA status determinations in the attachment context.

The Supreme Court has described the value of the time-of-filing rule: "[t]he time-of-filing rule is what it is precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful." *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 580 (2004). Adopting

Ranis' unprecedented proposed exception to the time-of-filing would result in exactly the type of wasteful litigation that the Supreme Court has condemned by potentially forcing the courts and parties to relitigate the FSIA status issue every time there is a change in a judgment debtor's corporate structure. This Court should therefore reject Ranis' proposed rule, affirm the district court's FSIA holding, and affirm the denial of Ranis' enforcement requests as to NCPG.

B. Even If the Court Adopted Ranis' Unprecedented Proposed Exception to the Time-of-Filing Rule, NCPG Still Qualifies as a "Foreign State" for FSIA Purposes Under the "Organ" Provision of 28 U.S.C. § 1603(b)(2)

Ranis claims it is "undisputed" that NCPG no longer qualifies as a "foreign state" for FSIA purposes. Ranis Opening Br. at 2. That is incorrect. NCPG argued to the district court that it still qualifies as an "organ" of China and thus remains an "agency or instrumentality" of China under § 1603(b), and the district court found that "NCPG's complete, albeit indirect, ownership by the Chinese state, combined with the appointment of NCPG's directors by the government; close control and supervision by the government; and treatment as a state-owned entity under Chinese law suggests that [NCPG's] argument that [it] is an 'organ' of the Chinese state has some merit." SPA-7. While the district court did not need to fully adjudicate the issue based on its application of the time-of-filing rule, if this Court accepts Ranis'

arguments against the time-of-filing rule, it should still affirm on the grounds of NCPG's status as an organ of China.

The term "organ" for FSIA purposes is construed "broadly" in light of Congress's intent to provide maximum recognition to the variety of means foreign nations might use to organize their public agencies and instrumentalities. *See Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1098 (9th Cir. 2008). No single factor is decisive of the issue, but courts generally consider "'(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.'" *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 144 (2d Cir. 2014) (quoting *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004)). Unlike the majority ownership provision, § 1603(b)'s organ provision can cover the wholly-owned subsidiary of a state-owned company, and a wide variety of such entities have been deemed organs of foreign states under this provision. *See, e.g.*, *Powerex*, 533 F.3d at 1099-1102 (power company); *USX Corp.*

v. Adriatic Ins. Co., 345 F.3d 190, 211-16 (3d Cir. 2003) (insurance company).[4]

Ranis has never disputed NCPG's organ status. Nor can it. NCPG is wholly owned and controlled by the Chinese government, serves as an investment manager for the government's pharmaceutical investments over which it has exclusive control, promotes the government's health and economic development policy goals, and is treated as a state-owned enterprise under Chinese law. *See* SPA-7; J.A. 299. This Court should therefore affirm the holding that NCPG's assets are immune from attachment under the FSIA on this alternative ground even if it disagrees with the district court's time-of-filing holding.[5]

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[4] *See also RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima (PDVSA)*, 338 F. Supp. 2d 1208, 1215-16 (D. Colo. 2004) (oil company); *Shirobokova v. CSA Czech Airlines, Inc.*, 335 F. Supp. 2d 989, 991 (D. Minn. 2004) (airline).

[5] The district court suggested that it was somehow improper that NCPG first raised its argument as to the "organ" provision on reply in support of its cross-motion and in response to Ranis' call for an unprecedented exception to the time-of-filing rule. *See* SPA-8. But the district court's view hinges on a misapplication of the rule against new arguments in reply *appellate* briefs; where an argument is presented for the first time in a reply brief in the district court, the opposing party's remedy is to object and offer a sur-reply in order to preserve any opposing arguments. *See Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252-53 & nn.3-4 (2d Cir. 2005). Ranis did not do so, and it did not address the organ issue in its opening brief before this Court, so it has permanently waived any claim that NCPG does not qualify as an organ of China under the FSIA. *See United States v. Yousef*, 327 F.3d 56, 115-16 (2d Cir. 2003).

C. China's Ownership Interest in NCPG's Assets Also Renders Them Immune From Execution

Finally, regardless of NCPG's status, China's ownership interest in NCPG's assets would render those assets non-attachable under the FSIA. NCPG is merely "entitled to the possession and use of state-owned assets[.]" J.A.173. The ultimate ownership interest in those assets remains with the Chinese state. *See* J.A.229 Art.3 ("The state-owned assets shall be owned by the state, i.e. owned by the whole people. The State Council shall, on behalf of the state, exercise the ownership of state-owned assets."); J.A.259 Art. 7 ("The state-owned economy, that is, the socialist economy with ownership by the whole people, is the leading force in the national economy."). At least one district court opinion—subsequently adopted on appeal as law of the Fifth Circuit—has construed the predecessors to these provisions to mean that China's government holds the ultimate ownership interest in both the state-owned enterprise and its assets. *See Trans Chem.*, 978 F. Supp. at 278-91, *op. adopted in relevant part by* 161 F.3d. at 319.

That state ownership interest provides a further basis for applying the FSIA to prevent attachment of NCPG's assets. In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak*, this Court held that the Indonesian government's ultimate ownership interest in certain assets held in the U.S. rendered them beyond attachment, for although the defendant (a state-owned enterprise) held them, the defendant "possesses the . . . funds but has no ownership interest in them." 313

F.3d 70, 92 (2d Cir. 2002). Just so here, NCPG manages its assets for the benefit and under the direction of the Chinese government, and therefore its assets should be treated as immune even if NCPG institutionally is deemed to be not immune.[6]

II. THE DISTRICT COURT'S LACK OF PERSONAL JURISDICTION OVER NCPG ALSO PRECLUDES RANIS' REQUESTED JUDGMENT ENFORCEMENT ORDERS

Personal jurisdiction is the "linchpin of authority" under C.P.L.R. §§ 5222 and 5225; a restraining notice or turnover order may not issue as to an entity over which the New York courts lack such jurisdiction. *See Tire Eng'g & Distrib. L.L.C. v. Bank of China*, 740 F.3d 108, 110 (2d Cir. 2014) (quoting *Commonwealth of the N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 64 (2013) ("*NMI*")). But it is now beyond dispute that the district court never had personal jurisdiction over NCPG, for the company has no relevant contacts with New York or the U.S., let alone sufficient contacts to satisfy the Supreme Court's mandate that personal jurisdiction may not be exercised absent some connection between the defendant and the forum other than the plaintiff. *See Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) ("[T]he plaintiff cannot be the only link between the defendant and the forum."). *See also* J.A.159-61 ¶¶ 11-19 & 169 ¶¶ 3-4.

[6] Once again, despite the fact that NCPG raised this issue in the district court, Ranis did not respond to the argument there or contest it in its opening brief to this Court. *See* 1:06-md-1738-BMC-JO, Dkt. 900 at 4-5. It has therefore waived any opposition to this argument.

The district court did not seriously address this argument because it believed it had no jurisdiction to consider the issue in light of the pending merits appeal. *See* SPA-10. That is likely incorrect, for the district court has broad discretion to withhold Article 52 remedies. *See* C.P.L.R. § 5240; *Cruz v. TD Bank, N.A.*, 711 F.3d 261, 265 (2d Cir. 2013); *JPMorgan Chase Bank, N.A. v. Motorola, Inc.*, 47 A.D.3d 293, 307-08 (1st Dep't 2007). It would certainly be a provident exercise of discretion to refrain from judgment enforcement in order to avoid perpetuating an ongoing violation of Due Process.

But even assuming the district court's assessment of its jurisdiction was correct, this Court's jurisdiction is not so limited. Because this Court has plenary authority to entertain NCPG's personal jurisdiction objections, and Ranis has no serious argument in favor of personal jurisdiction over NCPG, this Court should affirm the denial of Article 52 remedies as to NCPG on the alternative ground that the district court lacks personal jurisdiction over NCPG.

III. THE DISTRICT COURT ERRED IN PERMITTING SERVICE OF A C.P.L.R. § 5222 RESTRAINING NOTICE ON HEBEI THROUGH ITS U.S. COUNSEL WITHOUT FIRST ATTEMPTING HAGUE CONVENTION SERVICE

A restraining notice under C.P.L.R. § 5222(a) operates as an injunction against the recipient. *See Cruz v. TD Bank, NA*, 22 N.Y.3d 61, 76 (2013). The statute accordingly requires substantial procedural

protections, including that the restraining notice be "served personally in the same manner as a summons[.]" C.P.L.R. § 5222(a).

Ranis violated this requirement by attempting to serve a restraining notice directed to Hebei on Hebei's counsel and by mail to Hebei's offices. J.A.213-18. The district court correctly found that service deficient and held that C.P.L.R. § 5222(a)'s service requirement means an attorney serving a restraining notice on a judgment debtor in a federal case must effect service of the notice in compliance with Federal Rule of Civil Procedure 4. *See* SPA-12-13. *See also Schneider v. Nat'l R.R. Passenger Corp.*, 72 F.3d 17, 19-20 (2d Cir. 1995). But the district court erred in attempting to overcome this requirement by authorizing service of a new restraining notice on Hebei's counsel under Rule 4(f)(3). *See* SPA-13-15.

Since Hebei is in China, and China has objected to any manner of service under the Hague Convention that allows for service without a request to the Chinese government, the ordinary method of service would be through compliance with Hague Convention procedures. *See* FED. R. CIV. P. 4(f)(1). *See also* J.A. 211-12 (noting that China requires service by request to the Chinese government and objects to alternate methods). Indeed, "compliance with the Convention is mandatory in all cases to which it applies[.]" *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988); *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). *Accord Burda Media, Inc. v. Viertel*, 417 F.3d 292,

299-300 (2d Cir. 2005) ("[B]oth the United States and France are signatories to the Hague Convention, and thus service of process on a defendant in France is governed by the Hague Convention.").

Since the restraining notice was required to be served "personally" under the C.P.L.R., it needed to be transmitted abroad and, accordingly, needed to be served in compliance with the Hague Convention. *See* Hague Convention Art. 1. Nothing in the Hague Convention authorizes personal service to be accomplished by service on counsel, meaning the district court's grant of alternate service violated the Convention.

For legal authority, the district court relied on a handful of district court cases misconstruing a Ninth Circuit decision. *See* SPA-14. Those cases read *Rio Properties, Inc. v. Rio International Interlink* as authorizing service by alternate means in all cases, regardless of whether the Hague Convention applies, but that case expressly noted that "[a] federal court would be prohibited from issuing a Rule 4(f)(3) order in contravention of an international agreement, including the Hague Convention referenced in Rule 4(f)(1)." 284 F.3d 1007, 1015 n.4 (9th Cir. 2002). The relevant appellate authority thus rejects the district court's approach here.

Because China is a signatory to the Hague Convention and only permits service on its nationals via requests to its Central Authority, the district court's order of alternative service contradicts the Hague Convention and violates Rule 4(f). *See* J.A.211-12. Resorting to

alternate service in this case is particularly inappropriate given that the Chinese government, in its sovereign control over acts occurring in its own territory, requires that foreign judicial documents be served by Chinese courts pursuant to a request to the government and has retained for itself the authority to restrain assets located in China. *See* J.A. 453-54, Civil Procedure Law of the People's Republic of China Arts. 276-78 (2012) (requiring service through requests to the government). *See also* J.A. 438 & 443-44, Arts. 224, 242, & 244 (execution, including restraint of assets, performed by "the people's court where the property subject to execution is located."). At a minimum, Ranis should have been required to at least attempt Hague Convention service in deference to China's sovereign interests in regulating the restraint of assets located in its own territory. The order should therefore be reversed and the restraining notice to Hebei dissolved based on its improper service.

IV. THE DISTRICT COURT ERRED IN REFUSING TO DISSOLVE THE C.P.L.R. § 5222 RESTRAINING NOTICES AGAINST HEBEI'S BANKS WHERE NEW YORK'S SEPARATE ENTITY RULE BARS THE RESTRAINING NOTICES

The district court also declined to dissolve the restraining notices as to Hebei's banks. *See* SPA-15 n.5. But that refusal is simply untenable given that the New York Court of Appeals has now held that "even when a bank garnishee with a New York branch is subject to personal jurisdiction, its other branches are to be treated as separate

entities" for judgment enforcement purposes, meaning that "a judgment creditor's service of a restraining notice on a garnishee bank's New York branch is ineffective under the separate entity rule to freeze assets held in the bank's foreign branches." *See Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 163 (2014). The Court should therefore reverse this aspect of the district court's order as well.

V. THE DISTRICT COURT ERRED IN ISSUING A C.P.L.R. § 5225(A) TURNOVER ORDER AGAINST HEBEI WHERE IT IS UNDISPUTED THAT THE ASSETS SUBJECT TO THE ORDER NO LONGER EXISTED AND WOULD NOT HAVE BEEN IN HEBEI'S "POSSESSION OR CUSTODY"

The district court's turnover order is likewise unsustainable. In the first place, it is an advisory opinion: there is no dispute in the record that the bank accounts at issue do not exist (and have not existed for years), so there is nothing to be turned over. Article III bars such hypothetical injunctions. And even if it did not, the fact that the order does not identify existing personal property in the "possession or custody" of Hebei means it fails to meet the statutory requirements for a turnover order. The turnover order should therefore be overturned.

A. The Turnover Order Violates Article III

The district court issued a turnover order directing Hebei to turn over the contents of bank accounts that undisputed evidence established do not exist. *Compare* SPA-18 *with* J.A.223 ¶ 2. This hypothetical turnover order—directing Hebei to turn over the bank account funds if, contrary to sworn testimony, they in fact exist—

violates the constitutional ban on advisory opinions. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.") (citations omitted). *Accord Exp.-Imp. Bank*, 768 F.3d at 86-87 (attachment proceedings moot where property to be attached "no longer exists") (quoting *Fidelity Partners, Inc. v. First Trust Co. of N.Y.*, 142 F.3d 560, 564–66 (2d Cir. 1998)). Because the turnover order by its terms is purely hypothetical, it violates the constitutional limitations on federal court jurisdiction and should therefore be reversed.

B. The Turnover Order Violates C.P.L.R. § 5225(a)'s Requirements

Even if the order were consistent with Article III, it violates New York's rule that a turnover order may only issue as to "personal property" of the judgment debtor that is in the "possession or custody" of the party subject to the order. *See* C.P.L.R. § 5225(a). The order does not identify existing personal property of Hebei, only bank accounts that do not exist, so it fails this requirement on its face.

Moreover, any bank account funds would be in the possession or custody of its banks and merely in Hebei's control. *See NMI*, 21 N.Y.3d at 63 (holding that "'possession or custody,' by its omission of the term 'control,' refers to actual possession."). The district court attempted to

evade the holding of the *NMI* case by pointing to dicta where the Court of Appeals approved certain lower courts' holdings that a judgment debtor could be ordered to turn over assets in the debtor's "possession or custody." *See* SPA-16-17. But the Court of Appeals did not decide that the specific types of property at issue in those cases were in fact in the "possession or custody" of the judgment debtors, merely that, once the lower courts held that the property was in the "possession or custody" of the judgment debtors, the courts were correct to issue the turnover orders. *See NMI*, 21 N.Y.3d at 64.

The term "actual possession" means "[p]hysical occupancy or control over property." BLACK'S LAW DICTIONARY 1201 (8th ed. 2004). *Accord United States v. Newman*, 755 F.3d 543, 545 (7th Cir.) (Easterbrook, J.) ("Actual possession means physical control, and constructive possession means the *authority* to exercise control."), *cert. denied*, 135 S.Ct. 423 (2014). A bank account holder plainly lacks "physical . . . control" of the funds in a bank account, and accordingly does not have "possession or custody" of a bank account as defined by *NMI* even if he controls it. 21 N.Y.3d at 63-64. Hebei thus lacks "possession or custody" of any bank account funds, so any turnover order regarding bank account funds would need to be directed to a bank within New York's jurisdiction, not to Hebei. The turnover order should therefore be reversed for this additional reason.

VI. THE DISTRICT COURT ERRED IN ALLOWING ANY C.P.L.R. ARTICLE 52 REMEDIES SINCE APPLICATION OF C.P.L.R. ARTICLE 52 TO HEBEI VIOLATES THE COMMERCE CLAUSE AND DUE PROCESS LIMITATIONS ON NEW YORK'S LEGISLATIVE AUTHORITY

In addition to its other arguments, Hebei noted significant constitutional flaws in Ranis' requested enforcement devices. Ranis never responded to these arguments, thus implicitly conceding them. *See* 1:06-md-1738-BMC-JO, Dkts. 892 & 896 (no response to constitutional arguments). Rather than accept Ranis' concession, however, the district court attempted to manufacture arguments on Ranis' behalf. *See* SPA-17-18. Since none of those arguments hold up to scrutiny, and there is no other basis in the record for rejecting Hebei's constitutional arguments, this Court should reverse the enforcement orders as to Hebei on this ground as well and hold that C.P.L.R. Article 52 cannot apply to regulate the disposition of Hebei's assets.

A. Federal Rule of Civil Procedure 69(a) Does Not Authorize Turnover Orders or Restraining Notices

Federal Rule of Civil Procedure 69(a) governs monetary judgment enforcement in federal courts, directing that "[a] money judgment is enforced by a writ of execution, unless the court directs otherwise." FED. R. CIV. P. 69(a). "Execution" is the seizure and sale of a judgment debtor's property within the court's jurisdiction by an authorized officer. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 262 n.13 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (2013); C.P.L.R. § 5230. Rule

69(a) "does not authorize enforcement of a civil money judgment by methods other than a writ of execution, except where 'well established principles [so] warrant.'" *Aetna Cas. & Sur. Co. v. Markarian*, 114 F.3d 346, 349 (1st Cir. 1997) (citation omitted). In particular, "the size of the award and the difficulties in enforcing the judgment due to the location of the assets and the uncooperativeness of the judgment debtor are not the types of extraordinary circumstances which warrant departure from the general rule that money judgments are enforced by means of writs of execution rather than by resort to the contempt power of the courts." *Id.* at 349 n.4 (citing *Hilao v. Estate of Marcos*, 95 F.3d 848, 855 (9th Cir. 1996)).

There is no "well established" federal right to turnover orders or blanket restraining notices,[7] meaning they do not inhere in the district court's Rule 69 authority. Indeed, the Supreme Court has recently noted that "[federal] courts generally lack authority in the first place to execute against property in other countries[.]" *Republic of Argentina v.*

[7] The district court suggested that it would independently issue a restraining order if the restraining notice failed. *See* SPA-13. But it never conducted the analysis that the Supreme Court requires for all federal injunctive relief. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Given that such an order would inflict serious harm on Hebei without meaningfully aiding Ranis and that Ranis cannot execute on assets held in China, it is doubtful that Ranis could satisfy the *eBay* test. *See* J.A.455-56, Civil Procedure Law of the People's Republic of China Art. 282 (2012) (Chinese courts cannot enforce judgments contrary to Chinese sovereignty or public interests).

NML Capital, Ltd., 134 S. Ct. 2250, 2257 (2014). But the New York Court of Appeals has held that New York's judgment enforcement devices apply worldwide as a statutory matter. *See Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 539-41 (2009). As shown below, however, New York's approach violates the constitutional limits on state legislative authority.

B. Applying C.P.L.R. Article 52 to Hebei Violates the Commerce Clause

The Commerce Clause reserves to Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. While states have some leeway to implement regulations impacting interstate commerce, their authority over foreign commerce is much more limited. *See Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 445-51 (1979). This is necessary because, as observed by the concurrence in *Gibbons v. Ogden*, "[t]he States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them[.]" 22 U.S. 1, 228-29 (1824) (Johnson, J., concurring).

It is black-letter law that "a statute will be invalid *per se* [under the Commerce Clause] if it has the practical effect of 'extraterritorial'

control of commerce occurring entirely outside the boundaries of the state in question." *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004) (citing *Healy v. The Beer Inst.*, 491 U.S. 324, 336 (1989)). *See also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009); *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 35 (1st Cir. 2005). Applying C.P.L.R. §§ 5222 and 5225 to regulate the disposition of business assets located in China plainly has the "practical effect" of regulating commerce occurring in China, meaning the statutes violate the Commerce Clause when applied to this case.

Ranis offered no response to this argument below, and the district court's response—the claim that regulating the disposition of business assets held in China did not constitute regulation of "commerce" (SPA-17-18)—runs contrary to more than a century of settled law defining commerce broadly to include "commercial intercourse in all its branches[.]" *See Second Emp'rs' Liab. Cases*, 223 U.S. 1, 46 (1912). *See also Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *Philadelphia v. N.J.*, 437 U.S. 617, 622-23 (1978). Since the district court's reasoning cannot pass muster, and Ranis has waived any other argument for how New York's approach to judgment enforcement could satisfy the Commerce Clause, this Court should hold that the Commerce Clause bars application of C.P.L.R. Article 52 to Hebei.

C. Applying C.P.L.R. Article 52 to Hebei Violates Due Process

The Due Process Clause bars states from regulating a company's conduct where the company lacks sufficient "minimum contacts" with the state. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). *See also MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008); *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1234-38 (11th Cir. 2001); *Red Earth LLC v. United States*, 728 F. Supp. 2d 238, 250-52 (W.D.N.Y. 2010), *aff'd*, 657 F.3d 138 (2d Cir. 2011). Under recent Supreme Court precedent, this test is only satisfied for general purposes if the defendant is "at home" in the state; otherwise, the state's authority only extends to regulating activities based on the contacts the "defendant *himself*" creates with the state. *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014); *Walden*, 134 S. Ct. at 1122. *Accord Quill Corp. v. North Dakota*, 504 U.S. 298, 307-08 (1992) (personal jurisdiction jurisprudence informs legislative jurisdiction inquiry).

New York plainly has no legislative jurisdiction to regulate the disposition of Hebei's Chinese assets. Hebei has not done any business with the U.S. (including New York) since 2010, and nothing in the record even suggests that Hebei was ever "at home" in New York so as to allow the state to exercise plenary authority over the disposition of Hebei's assets. Application of C.P.L.R. Article 52 to Hebei's assets accordingly violates due process.

Once again, Ranis never responded to this argument, and the district court's reasoning on this point fails. The district court claimed that the argument was simply a repetition of the argument that it lacked personal jurisdiction (SPA-18), but it failed to note (1) that Hebei would have been subject to personal jurisdiction in this federal question case based on its cumulative contacts with the U.S. under Federal Rule of Civil Procedure 4(k)(2), so personal jurisdiction as to Hebei was not an issue and (2) that recent Supreme Court precedent has completely vitiated any basis the district court may have had to claim Hebei's contacts with New York specifically satisfy the "minimum contacts" test merely by shipping to consignment sellers and wholesalers throughout the U.S. (including New York) with no specific direction of activity to New York separate from Hebei's service of the U.S. market as a whole. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality opinion). Since there is no other non-waived argument against Hebei's legislative jurisdiction objection, this Court should also hold that application of C.P.L.R. Article 52 to Hebei violates due process.

VII. THE ARGUMENTS IN HEBEI'S CROSS-APPEAL PROVIDE AN ALTERNATE BASIS FOR AFFIRMING DENIAL OF RANIS' REQUESTS FOR JUDGMENT ENFORCEMENT ORDERS AS TO NCPG

It bears noting that the arguments in Hebei's cross-appeal would independently justify affirming the denial of Ranis' requests as to NCPG. The restraining notices as to NCPG and its banks suffer the

same defects of improper service (as to NCPG) and lack of jurisdiction under the separate entity rule (as to its banks). Ranis' turnover order requests would be equally meritless as to NCPG: the identified bank account does not exist (J.A.226 ¶ 2), and NCPG's shares in NCPC Limited are not held in certificates (*id.* ¶ 3), so Ranis would have to pursue NCPC Limited or the Shanghai Stock Exchange as garnishee. *See* C.P.L.R. § 5201(c)(1) & (4); *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 308-09 (2010). China's bar on foreign ownership of NCPC Limited's shares (given its status as a participant in a restricted industry) would further preclude turnover of the shares as well. J.A.200-01 & 205-06 Art. 6. NCPG's bank accounts and stock holdings also are not in its "possession or custody" for purposes of C.P.L.R. § 5225(a), since they would be in the "actual possession" of the banks or exchanges. And application of C.P.L.R. Article 52 to NCPG's Chinese assets would suffer from the constitutional infirmities described above. The arguments on Hebei's cross-appeal thus constitute alternative bases for affirming the denial of Ranis' enforcement requests as to NCPG. *See Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014) ("It is well settled that this Court 'may affirm on any basis for which there is sufficient support in the record, including grounds not relied on by the district court.'") (quoting *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 205 (2d Cir. 2006)).

CONCLUSION

The district court's denial of Ranis' requests for enforcement orders as to NCPG should be affirmed. The district court's grant of enforcement orders against Hebei should be reversed and the restraining notices and turnover order at issue should be vacated. Alternatively, the order below should be vacated in its entirety to the extent the disposition of appeal 13-4791 moots the enforcement issues.

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Respectfully submitted,

s/ Daniel P. Weick

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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 12,139 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.

s/ Daniel P. Weick
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