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 BRIEF FOR DEFENDANTS-APPELLANTS

JONATHAN M. JACOBSON
DANIEL P. WEICK
JUSTIN A. COHEN
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1301 Avenue of the Americas,
40th Floor
New York, New York 10019
(212) 999-5800

SCOTT A. SHER
BRADLEY T. TENNIS
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1700 K Street, N.W., 5th Floor
Washington, D.C. 20006
(202) 973-8800

Attorneys for Defendants-Appellants

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

STATUTES & RULES

OTHER AUTHORITIES

INTRODUCTION

This case poses a fundamental question: does the government of China deserve the respect for its regulatory choices and explanation of its own laws traditionally afforded to other nations and even to U.S. states?

The district court imposed nearly $150 million in penalties and a permanent injunction on Appellants for complying with their own nation's laws and regulations in reaching price and output agreements on vitamin C exports. The text of the applicable regulations, authoritative legal interpretations offered by the Chinese government, unrebutted expert testimony on Chinese law, and other evidence that the Chinese government mandated the challenged conduct had no impact on the district court. Rather, the court attacked the credibility of the Chinese government and seized on translated words without due regard for their cultural and linguistic context in order to hold that China's regime of export regulations for vitamin C constituted a purely private "cartel." Proper regard for Chinese sovereignty should have led to dismissal of Appellees' claims under the doctrines of foreign sovereign compulsion, international comity, act of state, or political question. The judgment below represents a massive extension of U.S. federal judicial power into the affairs of a sovereign nation and matters of foreign affairs. This Court should hasten to repudiate it.

In addition to the district court's fundamental disrespect for Chinese sovereignty, it made multiple other reversible errors. These include excluding the most compelling evidence in support of Appellants' principal defense at trial, exercising personal jurisdiction over North China Pharmaceutical Group Corp. ("NCPG") in violation of due process and failing to grant it judgment as a matter of law in light of the complete lack of evidence against it, certifying classes marred by a fundamental conflict between class members who benefited from the alleged conduct and those that did not, and allowing Appellees to claim over $50 million in treble damages for claims that 1) the court lacked jurisdiction to adjudicate and 2) Appellees lacked sufficient evidence to include in the damages award. These additional errors also warrant reversal.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment. Appellees asserted claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26. The district court exercised jurisdiction under 28 U.S.C. §§ 1331 & 1337. The trial in this case concluded with a jury verdict and clerk's judgment on March 14, 2013. Appellants timely renewed their motions for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) on April 11, 2013. The district court denied the Rule 50(b) motions on November 26, 2013 and entered its Amended Judgment and Final Decree on

November 27, 2013. Appellants filed a timely Notice of Appeal on December 23, 2013, which was amended on January 6, 2014 and February 18, 2014 to account for amendments to the final judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred in its determination of Chinese law pursuant to Federal Rule of Civil Procedure 44.1 by failing to construe Chinese law as mandating the challenged conduct.
2. Whether the district court erred in refusing to grant judgment as a matter of law to Defendants where the evidence shows that the Chinese government compelled the conduct at issue.
3. Whether the district court erred in failing to dismiss the case on international comity and/or act of state grounds.
4. Whether the political question doctrine renders the case non-justiciable.
5. Whether the district court erred in excluding nearly all of the relevant evidence necessary for the jury to understand how the Chinese government compelled the challenged conduct.
6. Whether the district court violated due process in exercising personal jurisdiction over NCPG where the company had no contacts with the forum.

7. Whether the district court erred in denying NCPG's motion for judgment as a matter of law given the lack of evidence that NCPG participated in the challenged conduct.
8. Whether the district court erred in certifying the classes where conflicts between class members who wanted higher prices during the class period and those that did not preclude a finding of adequacy of representation under Federal Rule of Civil Procedure 23(a)(4).
9. Whether the district court erred in allowing the Damages Class to recover on foreign purchasers' damages claims over which the court lacked subject-matter jurisdiction.
10. Whether the district court erred in allowing the Damages Class to recover on damages claims for purchases that Appellees failed to show fell within the class definition.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This appeal arises out of a class action originally filed on January 26, 2005, in the Eastern District of New York alleging that Appellants and other Chinese vitamin C manufacturers conspired to fix prices and output volumes on vitamin C in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. JA-144-45.

Appellees, Plaintiffs below, are The Ranis Company ("Ranis") as class representative for a class of direct purchasers of vitamin C seeking

damages under Clayton Act § 4 ("Damages Class")[1] and Animal Science Products, Inc. ("Animal Science") as class representative for a class of direct and indirect purchasers seeking injunctive relief under Clayton Act § 16 ("Injunction Class").[2]

Appellants, Defendants below, are Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei"), a Chinese vitamin C manufacturer, and NCPG, a holding company that owns a minority share of North China Pharmaceutical Ltd., which in turn holds a majority share of Hebei. JA-195 ¶¶5-6.

The case was consolidated with certain state law class actions before Judge David G. Trager by the Judicial Panel on Multi-District Litigation. JA-144-45. In January 2011, the case was reassigned to Judge Brian M. Cogan. JA-658.

Appellants and the other Defendants below asserted as principal defenses the foreign sovereign compulsion, act of state, and

---

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

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

international comity doctrines based on the fact that the government of China organized, directed, supervised, and mandated the challenged conduct. Judge Trager denied the motion to dismiss based on these defenses because he believed further factual development was necessary in an opinion reported at 584 F. Supp. 2d 546 (E.D.N.Y. 2008). After Judge Cogan took over the case, he rejected the defenses at the summary judgment and post-trial stages in opinions available at 810 F. Supp. 2d 522 (E.D.N.Y. 2011) and 2013 WL 6191945 (E.D.N.Y. 2013). He also excluded much of the evidence Appellants proffered to support their compulsion defense at trial in an unpublished order available at 2012 WL 4511308 (E.D.N.Y. 2012) and in a series of orders from the bench.

Appellants also contested class certification and objected to certain categories of damages. NCPG further objected to the district court's assertion of personal jurisdiction and to the sufficiency of the evidence to justify holding it liable. Judge Cogan overruled all of those objections, certified the proposed classes, admitted the contested damages evidence, and held NCPG liable in opinions available at 279 F.R.D. 90 (E.D.N.Y. 2012), 904 F. Supp. 2d 310 (E.D.N.Y. 2012), 2012 U.S. Dist. LEXIS 187063 (E.D.N.Y. 2012), 2013 WL 504257 (E.D.N.Y. 2013), and 2013 WL 6191945 (E.D.N.Y. 2013).

The trial in this case was held from February 25, 2013 to March 14, 2013, ending in a jury verdict holding Appellants liable for violating

the Sherman Act and awarding the Damages Class $54.1 million in damages (automatically trebled to $162.3 million). SPA-249-57. All other Defendants had settled with the classes or otherwise been dismissed from the case prior to submission to the jury. SPA-276. Following post trial-motion practice, including an award of attorneys' fees and costs and offsets for settlement monies received by Appellees, the currently operative district court judgment 1) awards the Damages Class monetary relief (inclusive of attorneys' fees and costs) of $147,831,471.03 plus post-judgment interest accruing as of March 14, 2013 and 2) awards the Injunction Class a permanent injunction barring Defendants "from agreeing, directly or indirectly, to fix the price or limit the supply of vitamin C sold in the United States in violation of Section 1 of the Sherman Act" for 10 years. SPA-277-78

II. FACTS RELEVANT TO THE APPEAL

A. China Exercised Its Sovereign Prerogative to Regulate Vitamin C

1. The Chamber of Commerce and Vitamin C Sub-Committee Were Chinese Government Organs Charged with Implementing Chinese Government Policy

In 1978, China began to transition from a centralized command economy to a socialist market economy, and the Ministry[3] charged with

[3] This brief uses the term "Ministry" to refer both to the Ministry of Commerce ("MOFCOM") and its predecessor, the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC").

managing the transition instituted export controls on a number of industries, including vitamin C. *See* JA-3795-820.[4] Since 1989, the Ministry has chosen to regulate the import and export of medicinal products through the Chamber of Commerce of Medicines and Health Products Importers & Exporters (the "Chamber"), a "social organization" with delegated regulatory power that acts as an organ of the Ministry for these purposes. *See* JA-3716 Art. 14 ("Social organizations established with coordination and industry regulation functions as authorized by [the Ministry] *must* implement the administrative rules and regulations relating to foreign trade and economy.") (emphasis added).

The Ministry exercises full control over the Chamber: it selects or otherwise approves the senior officials of the Chamber, who are often drawn from the Ministry's own staff; approves the number of its personnel; approves its salary structure, accounting systems and budget; and requires that the Chamber submit its annual work plan and all important meetings and activities to the Ministry for review. *See* JA-3716 Arts. 15-16; JA-3769-71 Annexes II-V. The Chamber described its own role over the relevant time period as "coordinat[ing] import and export business in Chinese and Western medicines" by

[4] Appellants respectfully refer the Court to the Affidavit of Qiao Haili and exhibits attached thereto for a comprehensive overview of the Ministry's regulation of Chinese vitamin C exports. *See* JA-683-985.

"implement[ing] [China's] policies and regulations governing foreign trade" under the "guidance and supervision of the responsible departments under the States Council." JA-412.

In 1997, the Ministry created a new regulatory scheme for vitamin C exports through publication of a Notice Relating to Strengthening the Administration of Vitamin C Production and Export by Ministry of Foreign Trade and Economic Cooperation and State Drug Administration (Nov. 27, 1997) ("1997 Notice"). SPA-298-300. The 1997 Notice, among other things, required the Chamber to set minimum export prices on vitamin C by restricting the amount of vitamin C that each manufacturer could export. SPA-298-99. The 1997 Notice also directed the Chamber to establish the Vitamin C Sub-Committee ("Sub-Committee") and to implement the Ministry's policy. SPA-299. The Sub-Committee was established pursuant to Ministry order. SPA-322.

The Sub-Committee operated under the Chamber's and the Ministry's active and direct supervision, and was responsible for "coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce [*sic*] in the world market and promote the healthy development of Vitamin C export of China." *Id.* Qiao Haili, who was transferred from the Ministry to the Chamber in May 1992 and became head of the Western Medicine Department of the Chamber in 1998, was the

Secretary General of the Sub-Committee. JA-684-85 ¶¶1, 3-4; JA-1758-61. Mr. Qiao's duties included supervising the Sub-Committee and exercising final decision-making authority on setting the minimum export price. JA-694-95 ¶¶26, 28; JA-697 ¶36. After the verification and chop system (described below) was implemented in 2002, Mr. Qiao continued to have final decision-making authority on setting minimum export prices and export volume quotas. JA-1761-63, 1767-68.

The Sub-Committee adopted a charter in October 1997 in accordance with the Chamber's charter and the 1997 Notice. SPA-318-21. The 1997 Charter stated that the Sub-Committee "bridges and ties the enterprises and the government" and provided that the Sub-Committee's activities were to include the supervision and implementation of export licenses, advising the Ministry on export quotas and coordinating and administrating the market, price, customer, and operational order of vitamin C exports. SPA-318.

In 2002, the Ministry abolished the 1997 Notice and issued a notice establishing a new export regulatory system referred to as "verification and chop." JA-3886-92; SPA-301-02. Under this regulatory regime, the General Administration of Customs ("Customs") would only permit an export of vitamin C if the relevant contract received a "chop" from the Chamber indicating that it had reviewed the contract and verified that the contract complied with the regulatory regime for vitamin C exports. SPA-301-02.

The new system was intended to facilitate China's entry into the World Trade Organization ("WTO") and avoid antidumping sanctions imposed by foreign governments while maintaining the Ministry's policy of ensuring the orderly development of key export industries, such as vitamin C. *See* SPA-301. The Ministry explained that the new system would be "convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline." SPA-302.

On June 7, 2002, to implement the new regulatory system for vitamin C, the Sub-Committee enacted a revised charter. The Sub-Committee remained obligated to "coordinate[] and guide[] vitamin C import and export activities, promote[] self-discipline in the industry, maintain[] the regular order of vitamin C import and export operations, and protect[] the interests of the state, the industry and [its] members." *See* SPA-325. The Chamber subsequently revised its charter as well. As under its original charter, the Chamber's responsibilities continued to be to "coordinate and guide the import and export of medicines and health products[,] . . . maintain the order of foreign trade, defend fair competition, secure interests of the state and the trade[, and] safeguard lawful rights and interests of member organizations[.]" *See* SPA-312.

2. Binding Ministry Rules Required the Sub-Committee and Its Members to Actively Coordinate to Set Vitamin C Export Prices and Quantities

In the 1997 Notice, the Ministry directed the Chamber, through the Sub-Committee, to establish and administer a mandatory minimum export price for vitamin C. SPA-299. The Sub-Committee was required to hold regular meetings to "coordinat[e] the Vitamin C export market, price and customers of China[.]" SPA-322; SPA-299.

While the 1997 Notice was in effect, export quantities were directly regulated by the Ministry, which set an overall export quantity and assigned fractions of that quantity to each qualified exporter in conjunction with other agencies. SPA-298-99. The 1997 Notice established reporting responsibilities to ensure that exporters complied with the regulations: exporters were required to report their export levels and prices to the Chamber, and the Chamber was tasked with tracking exporters' compliance with export quotas and minimum prices and making reports back to the Ministry. *See* SPA-299.

When the new verification and chop system was introduced in 2002, the Chamber's and Sub-Committee's basic responsibilities for determining the minimum price of vitamin C exports remained the same, and the Chamber took direct control of setting export volumes with the Sub-Committee's advisement. *See* JA-3880. The Chamber was required to verify the export prices and quantities "based on the industry agreements[.]" SPA-310-11. The Chamber was directed to

issue its "chop" to export contracts "at the blocks where the prices and quantities are specified," ensuring that both the export price and export quantity complied with the levels determined by the Sub-Committee and the Chamber. SPA-310.

Under the new regulatory regime, the Sub-Committee and its members continued to be required to reach industry-wide agreements on appropriate minimum export prices, as well as on maximum export quantities and production output levels to support the minimum export prices. *See, e.g.*, JA-3880 (Sub-Committee informed in early 2002 that "[t]he committed export volume as part of the industry self-discipline shall be strictly implemented."). The original four member companies of the Sub-Committee continued as the sole industry members of the Sub-Committee Council, which performed executive functions of the Sub-Committee, including proposing and implementing coordination plans. *See* SPA-328.

All vitamin C exporters—whether members or non-members of the Sub-Committee—were subject to the verification and chop system, were required to comply with Sub-Committee export quantity restrictions, and were given the same treatment by the Chamber and the Ministry. *See* SPA-305, 310-11. The Chamber would only issue its chop after reviewing the export contract to ensure that both the export price and export quantity were in conformance with the decisions reached by the Sub-Committee and the Chamber. SPA-310-11.

3. The Ministry Adopted and Enforced the Export Controls Recommended by the Sub-Committee as Binding Government Policy

a. Under the 1997 Notice, the Ministry Would Not Approve Export Licenses unless Firms Complied with the Export Price Restrictions Agreed to by the Sub-Committee and the Export Quotas Established by the Ministry

The Ministry directly enforced the 1997 Notice's directives to coordinate price and export quantities for vitamin C through the Export Licensing System. In order to receive an export license, a manufacturer was required to limit its export to the quantity determined by the Ministry in conjunction with other agencies. *See* SPA-298-99. The 1997 Notice required any authority issuing export licenses for vitamin C to "strictly verify the qualification of Vitamin C export and operation of the enterprises, and verify their export contracts and issue export license according to the Vitamin C coordinated price and volume quotas." SPA-299. The Ministry itself decided the total aggregate export quota and individual firm quotas for vitamin C exports, but looked to the Chamber and the Sub-Committee to analyze the market situation and determine the appropriate minimum export price. *Id.* Compliance with both the quota and the minimum price levels was legally necessary in order for a firm to receive an export license. *Id.*

b. Under the Verification and Chop Regime Instituted in 2002, Customs Prohibited Export Unless Compliance with Sub-Committee Agreements was Certified with a Chop

When the Ministry moved to the verification and chop system in 2002, the Ministry continued to look to the Chamber and the Sub-Committee to analyze the market and reach whatever industry agreements were necessary to give effect to the Ministry's export policy, including with respect to appropriate minimum export prices and volume restrictions necessary to support those export prices. *See* SPA-310-11; SPA-302; SPA-312. The Chamber was directed to review each export contract, and to place its "chop" on the contract only if it complied with the industry agreements coming from the Sub-Committee. JA-3886-92; SPA-301-02. The agreed price and quantity levels were equally applied to members and non-member exporters. *See* SPA-325-26. If a contract did not have a chop, Customs would not accept it and the goods could not be exported. SPA-310-11.

B. NCPG Was Not Involved In Vitamin C Pricing

NCPG received reports on Hebei's activities as part of its portfolio management, but it observed all corporate formalities and remained a separate entity from Hebei. JA-1836, 1845. While one employee, Huang Pinqui, held positions with both Hebei and NCPG, he assiduously maintained his separate hats, and the evidence is uncontroverted that NCPG did not manufacture vitamin C during the

relevant period and was not eligible to be a member of the Sub-Committee. JA-195-96 ¶¶7, 9; JA-198 ¶20. Moreover, NCPG never transacted business in any U.S. state or otherwise developed meaningful contacts with the U.S. during the relevant period. JA-196-98 ¶¶11-19.

C. The Classes Appellees Sought to Represent Had Conflicting Interests

Ranis did not directly purchase vitamin C during the class period. SPA-109. Rather, it received an assignment from The Graymor Chemical Company ("Graymor") of Graymor's potential damages claims in this action. *Id.* Graymor was a wholesaler with a substantial interest in ensuring vitamin C prices remained as high as possible. *See* JA-188-93. Thus, the evidence shows that at least one direct purchaser, and likely others, benefited from the price regulation scheme implemented by the Chinese government.

D. The Chinese Government Repeatedly Explained Its Vitamin C Regulatory Program to the District Court

The Ministry submitted three statements to the district court explaining applicable Chinese law, placing the regulatory regime in historical context, and informing the court that the Chinese government compelled the challenged conduct. JA-147-75, 205-07, 650-57. The Ministry explained that the conduct at issue was part of "a regulatory pricing regime mandated by the government of China" and was instituted to ensure orderly markets during China's transition to a

market-driven economy. JA-156. It noted that "industry participants in this multilateral process, thus, acted pursuant to government compulsion; when establishing price controls, they were exercising governmental regulatory power; and the price controls developed through this multilateral process were legally binding and governmentally-enforced." JA-162. It later explained "the Ministry specifically charged the [Chamber] with the authority and responsibility, subject to Ministry oversight, for regulating, through consultation, the price of vitamin C manufactured for export from China so as to maintain an orderly export." JA-205-07.

E. Appellees Pursued Damages for Non-U.S. Purchases and Purchases Not Demonstrated to be Within the Damages Class Definition

The conduct challenged in this case took place entirely within China and with an eye to raising prices for global exports, not just exports to the U.S. But rather than ensure their claims were limited to claims of U.S.-based purchasers, Appellees included in their damages calculations claims by foreign entities for their overseas purchases that were simply shipped to U.S. sites after purchase. JA-4018. The district court overruled Defendants' objections to this inclusion. SPA-189-207.

Similarly, the Damages Class definition expressly excluded purchases made pursuant to contracts with arbitration clauses. SPA-108. Appellees never obtained contracts associated with two Chinese vitamin C producers who were not named as defendants, Shandong Zibo

Hualong Co., Ltd. ("Hualong") and Anhui Tiger Biotech Co. ("Tiger"). JA-997-98. There is thus nothing in the record to establish whether sales by those entities fall within the class definition, but Appellees claimed damages associated with these sales. JA-1857-63.

F. The District Court Excluded Critical Evidence Concerning the Principal Defense at Trial

Despite their disagreement that the case presented any jury-triable issues, Appellants proffered substantial evidence for the jury to consider in assessing whether the Chinese government compelled the conduct at issue. In particular, Appellants proposed to enter the Ministry's statements from this case into evidence and to have a former Ministry official, Qiao Haili, offer a detailed description of the Chinese regulatory regime in which the businesses operated (supported by copies of the regulations) and explain how the Ministry compelled the conduct at issue. JA-683-989, 999-1029. Mr. Qiao proposed to testify to the creation of the Chamber and Sub-Committee, the history of Chinese vitamin C regulation, how the Sub-Committee and Chamber operated under the guidance of the Ministry to effect Chinese regulatory and policy goals, and how the system of "self-discipline" implemented after China's accession to the WTO did not alter the mandatory nature of the Chinese regulatory regime. JA-685-708 ¶¶5-67. The district court, however, excluded much of this evidence, leaving only an inadequate shell of Mr. Qiao's proposed testimony. SPA-178-88, 213-41.

G. The District Court's Judgment Harms U.S.-China Relations

As could be predicted, the Chinese government has taken umbrage at the district court judgment. Chinese officials have noted the judgment will "cause problems for the international community" and "eventually harm the interests of the United States[.]" JA-1666. *See also* JA-1667-72, 1678. Leading commentators have observed that the case "has potentially expansive implications for how the U.S. antitrust laws do and should interact with executive branch and foreign interests on international trade," "is at least in tension with the executive branch's position [in the WTO]," and "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).

SUMMARY OF ARGUMENT

1. The district court's disrespect for Chinese sovereignty requires reversal of the judgment. By misinterpreting the text of the applicable Chinese regulations, rejecting the Chinese government's explanations of its own laws, failing to grapple meaningfully with unrebutted expert testimony on Chinese law, dismissing the overwhelming evidence that all the agreements at issue were reached under the supervision of the

Chinese government, and ignoring Customs' prohibition of exports based on contracts that did not include the Chamber's chop, the district court erred in its Rule 44.1 determination of Chinese law.

Under a proper interpretation, it is clear that Chinese law compelled the challenged conduct. And even if that were not so, the heavy involvement of the Chinese government requires dismissal as a matter of international comity, or under the act of state and political question doctrines. The district court's contrary holdings required it not only to misconstrue Chinese law, but also reject leading appellate precedents, including binding precedent of this Court. Moreover, if there was a jury-triable issue at all (and Appellants maintain there was not), the district court seriously abused its discretion in excluding critical evidence of sovereign compulsion, requiring a new trial as a minimum remedy.

2. Even if the district court properly adjudicated Hebei's liability, the inclusion of NCPG as a Defendant cannot stand. It had no contacts with the U.S. at all, let alone sufficient contacts with the forum to allow the district court to exercise personal jurisdiction over it without violating due process. Moreover, the evidence was legally insufficient to justify holding NCPG liable for the actions of an affiliate in which it holds a minority stake.

3. The class certification order should be reversed as well. The evidence demonstrated conclusively that at least one wholesaler (and

likely more) benefited from the conduct at issue. This precludes maintenance of a class action under Rule 23(a)(4) because such a fundamental conflict means the classes cannot be adequately represented.

4. The damages award is also infirm. The district court allowed Appellees to claim damages for purchases made by foreign entities who suffered their entire alleged financial injury outside of the U.S., exceeding the jurisdictional limitations imposed on extraterritorial application of the antitrust laws. Further, the district court improperly required Appellants to prove that sales for which no contracts are available in the record did not fall within Appellees' Damages Class definition. These errors resulted in $54.3 million in legally erroneous damages post-trebling.

ARGUMENT

I. STANDARD OF REVIEW

The district court's denial of Appellants' renewed motions for judgment as a matter of law under Rule 50(b) is reviewed *de novo*. *Wolf v. Yamin*, 295 F.3d 303, 308 (2d Cir. 2002). Judgment as a matter of law is appropriate where "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [persons] could not arrive at a verdict

against [it]." *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998).

The district court's determination of foreign law pursuant to Rule 44.1 is reviewed *de novo*. *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998); *Carlisle Ventures v. Banco Espanol de Credito*, 176 F.3d 601, 604 (2d Cir. 1999).

The district court's refusal to dismiss the action on international comity grounds is reviewed for abuse of discretion. *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 422 (2d Cir. 2005). Its refusal to dismiss under the act of state doctrine is subject to "a 'somewhat more rigorous' standard of review than abuse of discretion that approaches *de novo* review." *Id.* (citation omitted).

This Court reviews questions of justiciability *de novo*. *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 594 (2d Cir. 1993). The standard of review for the district court's exercise of subject matter jurisdiction is "clear error for factual findings and *de novo* for legal conclusions." *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 930 (2d Cir. 1998).

The district court's evidentiary rulings are reviewed for abuse of discretion. *Nimely v. City of N.Y.*, 414 F.3d 381, 393 (2d Cir. 2005). The district court's decision to certify the classes under Rule 23 is also reviewed for abuse of discretion. *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 31-32 (2d Cir. 2006) ("*IPO*").

II. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE CASE ON FOREIGN SOVEREIGN COMPULSION, INTERNATIONAL COMITY, AND/OR ACT OF STATE GROUNDS, AND THE CASE PRESENTS A NON-JUSTICIABLE POLITICAL QUESTION

A. CHINESE LAW AND REGULATIONS MANDATED THE CHALLENGED CONDUCT

1. The District Court's Rule 44.1 Determination was Erroneous

The district court's erroneous Rule 44.1 determination of Chinese vitamin C regulations infected all of its core legal rulings. The district court dismissed China's detailed regulatory regime for vitamin C exports, bending over backwards to avoid the plain fact that China's government extensively regulated vitamin C in the exercise of its sovereign authority. SPA-35-106. In its Rule 44.1 decision, it rejected or misconstrued 1) the text of the regulations themselves; 2) the authoritative legal interpretations offered by the Chinese government; 3) the cogent and essentially unrebutted analyses of Chinese law offered by Appellants' experts; and 4) other evidence that China compelled the challenged conduct.

Text of the Regulations. A review of the applicable regulations makes perfectly clear that China legally required the challenged conduct. Under the 1997 Notice, the Sub-Committee was "to coordinate with respect to Vitamin C export market, price and customers, and to organize the enterprises in contacting foreign entities." SPA-299. All businesses exporting vitamin C from China were required to

"participate" in the price coordination and "subject themselves to the coordination of the [Sub-Committee]." *Id.* The Sub-Committee was directed "to conduct studies on marketing strategies, timely formulate and adjust export coordination price, which the Vitamin C export enterprises must strictly implement in accordance with." *Id.* This was enforceable through penalties like a reduction in export quotas and revocation of export licenses. SPA-300.

In 2002, the regulatory scheme was modified to adopt the verification and chop enforcement approach. SPA-301-02. Although this new regime eliminated export licenses, the Chinese government's regulatory objectives, and the responsibilities of the Chamber, remained largely the same. Under this regime, the Chamber was required to review exporting contracts to ensure compliance with "industry-wide negotiated prices" in order to ensure an environment "conducive for the chambers to coordinate export price and industry self-discipline." *Id.* ¶¶1-4. Customs would not approve any export application associated with a non-compliant contract. SPA-305.

Even allowing for the vagaries of translation, the only reasonable reading of these regulatory materials is that the Chinese government 1) established the Chamber (and thus the Sub-Committee) as a regulatory agency, 2) required the Sub-Committee members to agree on export prices and output limitations, and 3) required exporters to comply with the agreed export prices and output limitations. That alone should end

the case as Chinese law—regardless of the vigor of any enforcement activities—mandated all of the activity alleged to be illegal in this case.

Authoritative Government Statements. The Ministry offered three separate statements in the proceedings below explaining to the district court that the Chinese government compelled the conduct at issue and that the conduct was legally required. JA-147-75, 205-07, 650-57. As the competent agency of the Chinese government, the Ministry's explanation of its own laws and regulations should ordinarily be dispositive. *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). This view was adopted by the U.S. Solicitor General even after promulgation of Rule 44.1. Br. of the U.S. as *Amicus Curiae* in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 83-2004, 1985 WL 669667, at *17 (U.S. June 17, 1985).

The district court should have given at least substantial deference to the Ministry's explanation of its own regulatory regime. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) ("[A] foreign sovereign's views regarding its own laws merit—although they do not command—some

degree of deference.").[5] In fact, U.S. courts afford substantial deference to the statutory interpretations of administrative agencies. *See Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). It is incongruous at best to fail to afford at least as much deference to foreign governments' interpretations of their own laws. *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction [a foreign sovereign] places on its domestic law. . . . Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable.").

The district court did not apply these principles. It relied on the literal English meaning of word-for-word translations of complex Chinese regulatory concepts like "industry self-discipline" despite the Ministry's explanation that the translations failed to accurately impart the terms' full meanings under Chinese law. The court acknowledged the possibility that "an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law," but declined to defer to the Ministry's explanation. SPA-65.

Multiple courts have noted the high risk of error in construing foreign laws under a "plain and ordinary meaning" approach given the

[5] In *Karaha*, the Indonesian government was a party to the litigation, so arguably its interpretations merited less deference than the dispositive weight called for by *Pink*.

risk of imposing a meaning that does not accord with how legal terms are used in the relevant country. *See Bader v. Kramer*, 484 F.3d 666, 670 (4th Cir. 2007); *Whallon v. Lynn*, 230 F.3d 450, 456 (1st Cir. 2000). The risk of misunderstanding by U.S. regulators and courts of what they believe to be the "plain language" of Chinese law—and thus the need for appropriate deference—is particularly acute in this case because the terms of art employed in Ministry rules arise from an economic and cultural context wholly unlike that of the U.S. Despite recognizing these critical differences, the district court completely discounted the Ministry's explanation of the actual meaning of the "plain language" of its rules and regulations. *See* SPA-77-78, 85-86, 95-96, 103.

Had the district court taken as dispositive, or at least given substantial deference to, the Ministry's explanations of Chinese law, the conduct that is the subject of this lawsuit would properly have been found to be legally mandated. Under either approach, the Chinese government's statements establish that the government viewed its laws as requiring the course of conduct pursued by Appellants and others between 2001 and 2006.

The district court's dismissal of the government's views was both disrespectful and unfounded. The WTO filings and reports on which the district court relied to claim the Chinese government had taken contrary positions before that body (essentially accusing a sovereign

government of lying) do not stand for the proposition that China imposed no legal obligation on vitamin C producers to coordinate on export pricing and output. *See* SPA-80. Rather, they only state that China had abandoned "restrictions on exports through non-automatic licensing or other means justified by specific product under the WTO Agreement or the Protocol," "[n]on-automatic export licensing requirements under WTO agreement and accession," and "export quotas and licenses[.]" G/C/W/438 (20 November 2002), heading 5(a), p. 2-3, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/65661/Q/G/C/W438.pdf; G/C/W/441 (29 November 2002), heading 2, p. 3, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/53664/Q/G/C/W441.pdf; WT/TPR/S/161 (28 February 2006), p. 104, para. 141, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?Id=68101&filename=Q/WT/TPR/S161-3.pdf. None of them said that China had abandoned management of pricing in vitamin C exports, let alone that the Chinese regulatory regime had become non-compulsory. The Chinese government's representations in both forums were perfectly consistent.

As explained by the Chinese government, the concepts seized on by the district court and Appellees like "industry self-discipline" refer to the means chosen by the Chinese government to have industry

participants develop efficient means to achieve the government's policy goals. JA-160-65, 651-52, 1764-66. They in no way undermine the mandatory nature of the regulatory regime. The district court's entire approach to the statements provided by the Chinese government was thus erroneous, leading to an equally erroneous Rule 44.1 determination.

Expert Reports. Appellants submitted expert reports from Professor Shen Sibao, Dean and Professor of Law at the University of International Business & Economics in Beijing and Dean of the Shanghai University Law School, and Professor James B. Speta, Professor of Law at Northwestern University, to aid the district court in interpreting Chinese law. JA-302-406. Professor Shen placed the regulatory framework for vitamin C in historical context, and showed how the transition from direct export price controls to the system of "self-discipline" under the Chamber's supervision in no way resulted in a "voluntary" pricing regime as Americans would understand the term. *See* JA-304-06 ¶¶8-14. Professor Speta discussed how the Chinese regulatory regime made vitamin C a "regulated industry" despite the use of the Chamber system. JA-372 ¶7. This testimony was not subject to meaningful rebuttal. SPA-38 n.5 (noting "Plaintiffs do not have a Chinese law expert[.]"). But the district court dismissed Professor Shen's testimony and did not even cite Professor Speta's, further compounding its errors.

Other Evidence. Additional exhibits only confirm the Chinese government's interpretation. The "agreements" among the manufacturers on price and output were reached through the Chamber. JA-1967-72, 1939-42, 2099-2104, 1973-77, 1943-47, 1689-1703. Similarly, multiple witnesses testified that Defendants believed they were acting pursuant to Chinese law and under the direction of the Chinese government. JA-1715-16, 1751-54, 1768, 1773-74, 1777-79. Finally, the U.S. Trade Representative and the WTO have found that the Chinese government continued to regulate export pricing on a variety of products subject to the same basic regulatory regime as vitamin C during the relevant time period, and that failure to comply was "subject to investigation leading to potential criminal and administrative penalties." JA-1294; First Written Submission of the United States of America, *China – Measures Related to the Exportation of Various Raw Materials*, ¶¶207-08, 216, 229, 352, WT/DS394, WT/DS395, WT/DS398 (June 1, 2010), *available at* http://www.ustr.gov/webfm_send/1948; JA-1417, 1495, 1588-89. This evidence further illustrates that the district court's construction of Chinese law was erroneous.

Reversal Required. Since the district court's determination that there was no sovereign compulsion during the 2001-2006 time period was rooted in an erroneous understanding of Chinese law, that determination cannot stand. Moreover, since that determination was

the basis for its decision to send the case to the jury (and to reaffirm that decision in denying the Rule 50(b) motion), reversal on this point requires reversal of the entire judgment.

2. The Record Establishes Compulsion as a Matter of Law

The foreign sovereign compulsion doctrine "shields from antitrust liability the acts of parties carried out in obedience to the mandate of a foreign government." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana*, 830 F.2d 449, 453 (2d Cir. 1987). Where the actions of private parties are compelled by a foreign government, courts have recognized that those actions "become effectively acts of the sovereign," and, as such, have refused to impose antitrust liability. *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970) (opining that "sovereignty includes the right to regulate commerce within the nation."); *see also Mannington Mills*, 595 F.2d at 1293; *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 606 (9th Cir. 1976).

As Judge Trager recognized earlier in these proceedings, this refusal derives in part from the recognition that private parties "trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's." SPA-9. The foreign

sovereign compulsion doctrine requires that: 1) the foreign law coerced the defendant into violating American antitrust law; 2) "the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct" (*Mannington Mills*, 595 F.2d at 1293); and 3) the conduct compelled by the foreign government could "be accomplished entirely within [the foreign government's] own territory." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.32 (1995).

Under the 1997 Notice, the Chamber and the Sub-Committee—both organs of the Chinese government—were directed by the Ministry to set and administer a mandatory minimum export price, to hold regular meetings to coordinate minimum export prices, and to ensure compliance with the Ministry's export quota allocations. The 1997 Notice made membership in the Sub-Committee mandatory: all qualified vitamin C exporters were required to join and to actively participate in the work of the Sub-Committee, and only Sub-Committee members were permitted to export vitamin C. *See* SPA-299; SPA-319. The Chamber and the Sub-Committee were required to review all applications for export licenses—which had to specify both a price and export quantity—to ensure that they complied with the export price and volume restrictions adopted by the Sub-Committee and with the export

quota allocations set by the Ministry. Only applicants complying with those restrictions were granted export licenses. *See* SPA-298-99.

The introduction of the verification and chop system in 2002 did not alter the essential mandated activities of the Sub-Committee and its members. *See* SPA-325. The Sub-Committee remained obligated to "coordinate[] and guide[] vitamin C import and export activities, promotes self-discipline in the industry, maintains the order of vitamin C import and export operations, and protect the interests of the state, the industry and its members." *See id.* The Sub-Committee and its members continued to be tasked with reaching agreement on minimum export prices, as well as coordinating other necessary industry agreements such as volume limits intended to ensure the effectiveness of the minimum export prices. Although membership and participation in the Sub-Committee were no longer conditions for a company to be able to export vitamin C, membership did not in fact change and all companies—Sub-Committee members and non-members alike—were required to abide by the industry-agreements reached by the Sub-Committee. *See* SPA-46-47. All vitamin C exporters had to submit their contracts for review by the Chamber in order to receive the Chamber's chop, which was legally required for Customs to permit export of their vitamin C. The Chamber, in turn, before it was permitted to issue its chop had to verify that the contract complied with

the permissible export price and quantity levels set by the Sub-Committee. *See* SPA-310-11.

The Sub-Committee was supervised at all relevant times by a Ministry official, Qiao Haili. Mr. Qiao testified in court and through his proffer that he communicated the Chinese government's directives to the Sub-Committee members and ensured that the Sub-Committee meetings resulted in agreements that achieved Chinese policy goals.

It was therefore the Chinese government, not the members of the Sub-Committee, that controlled the price and quantity of vitamin C exports. The Sub-Committee, with the direct participation of the Government's legal representative at virtually every meeting, was obligated and compelled to meet and coordinate industry activity by reaching price and volume agreements that were subsequently adopted and enforced by the Ministry and other organs of the Chinese government. These mandates were "basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." *See Mannington Mills*, 595 F.2d at 1293. And critically, all of this conduct occurred entirely within China. Whether the price and quantity limitations were initially decided by the members of the Sub-Committee pursuant to the Ministry's order or by a government official directly is irrelevant, and does not change the fact

that the Chinese government would not permit vitamin C exports that did not comply with the government's export policy.[6]

The district court placed considerable weight on its assertion that the only criterion for receiving a chop was pricing above the industry-agreed minimum export price. SPA-84-86. However, the Ministry's regulations made it clear that receiving a chop required that the export contract specify both a price and a quantity. *See* SPA-310. In addition, the Ministry instructed the Chamber to verify that the contracts were "*based on the industry agreements* and in accordance with the relevant regulations promulgated by the Ministry of Commerce . . . and the General Administration of Customs[.]" SPA-310-11 (emphasis added). These requirements worked together to create an export quantity enforcement mechanism where the Chamber was expected to monitor each manufacturer's total export levels through previously submitted contracts and withhold its chop if agreed upon output levels were violated.

---

[6] *See* Letter Opinion from U.S. Attorney General W.F. Smith to Ambassador Y. Okawara of Japan (May 7, 1981), 1981-1 Trade Cas. (CCH) ¶63,998, *available at* 1981 WL 712555 (stating that Japan's automobile export regime would be properly viewed as compelled by the Japanese Government acting within its sovereign powers where relevant ministry issued directives to each automobile producer specifying the allowable export volume and undertook to require formal export licenses only if a company threatened to exceed this limit).

Even if the agreements on output restrictions were not subject to sufficient compulsion to be immunized by the foreign sovereign compulsion defense, the district court still erred by failing to find that the agreements by the Sub-Committee members on minimum export prices, and the actions of Chinese vitamin C exporters to follow those minimum export prices, were immunized by the foreign sovereign compulsion defense. The district court found as a matter of law that in order to receive a chop, an export contract was required to comply with the industry-agreed minimum price. SPA-84. That conclusion should have been sufficient to find that the foreign sovereign compulsion defense was applicable *at least to the agreements by defendants on minimum export prices*. Failure to apply the doctrine at least to that extent constituted reversible error.

B. COMITY REQUIRES DISMISSAL OF THE CASE

International comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1046 (2d Cir. 1996) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). This Court has identified a significant interest in "avoid[ing] judicial inquiry into the acts and conduct of the officials of [a] foreign state, its affairs and its policies and the underlying reasons

and motivations for the actions[.]" *O.N.E. Shipping*, 830 F.2d at 452 (citing *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977)). In finding that Appellants' activities as part of the Sub-Committee violated the Sherman Act, the district court intruded into China's regulatory system and decided that U.S. antitrust law should supersede the Chinese government's own decision on how best to regulate its economy.

In *United States v. Javino,* 960 F.2d 1137 (2d Cir. 1992), this Court endorsed the approach to comity analysis summarized in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402-03 (1987) ("RESTATEMENT"). 960 F.2d at 1142–43. This approach in turn reflects the factors originally announced by the Ninth Circuit in *Timberlane* and then amplified by the Third Circuit in *Mannington Mills*. *See* RESTATEMENT § 403 Reporters' Notes ¶6; *Timberlane*, 549 F.2d at 614-15; *Mannington Mills*, 595 F.2d at 1297-98. *Mannington Mills* articulated the comity factors as: 1) Degree of conflict with foreign law or policy; 2) Nationality of the parties; 3) Relative importance of the alleged violation of conduct here compared to that abroad; 4) Availability of a remedy abroad and the pendency of litigation there; 5) Existence of intent to harm or affect American commerce and its foreseeability; 6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both

countries; 8) Whether the court can make its order effective; 9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; 10) Whether a treaty with the affected nations has addressed the issue. *Id.* *Accord Nat'l Bank of Can. v. Interbank Card Ass'n,* 507 F. Supp. 1113, 1119–21 (S.D.N.Y. 1980) (applying functionally identical *Timberlane* factors), *aff'd*, 666 F.2d 6 (2d Cir. 1981)).

These factors support dismissal here. As discussed above, there is a true conflict between Chinese law and U.S. law in these circumstances. All Defendants were Chinese and the conduct took place entirely in China. Complaints about Chinese export policies could properly be addressed through diplomatic channels and/or the WTO's processes. The purpose was not to harm Americans but to ease the transition of China's vitamin C industry from central planning to a more market-oriented program and to prevent the harm to China's trade relations that would result from dumping charges. The exercise of jurisdiction by the district court has already inflicted harm on U.S.-China relations. The court's decision creates the prospect of Chinese firms being under conflicting conduct requirements. The U.S. and China are both members of the WTO and are subject to its rules on export restrictions. Simply put, every relevant substantial consideration favors comity abstention.

The district court's refusal to dismiss this case on comity grounds was based on an incorrect reading of the Supreme Court's decision in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). In *Hartford Fire*, the Supreme Court evaluated an argument that the district court should have declined to exercise jurisdiction based upon the principle of international comity. *Id.* at 797. The Court noted that the "only substantial question in this litigation is whether 'there is in fact a true conflict between domestic and foreign law.'" *Id.* at 798 (citation omitted). Upon finding no conflict with British law, the Court concluded it had "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 799.

The Supreme Court did not at any point overrule *Timberlane* or even suggest that the factors articulated in *Timberlane* and *Mannington Mills* are now inapplicable. In fact, the Court clearly acknowledged that "other considerations . . . might inform" a comity analysis; these considerations were simply not applicable under the facts of the case immediately before the Court. *Id.*

Indeed, since *Hartford Fire* many lower courts have continued to apply the mode of analysis originated by *Timberlane*. For example, in *Metro Industries, Inc. v. Sammi Corp.*, the Ninth Circuit analyzed whether jurisdiction was properly exercised using both the *Hartford Fire* direct conflict factor and *Timberlane*'s approach. 82 F.3d 839, 845-

47 (9th Cir. 1996). Similarly, in *Trugman-Nash, Inc. v. New Zealand Dairy Board*, the district court was presented with the question of whether the approach originated by *Timberlane* remained applicable post-*Hartford Fire*. 954 F. Supp. 733, 737 (S.D.N.Y. 1997). The court found this mode of analysis remained binding in light of *Javino*, reasoning that in *Hartford Fire*, "the [Supreme] Court did not have before it, and accordingly expressed no view upon, the validity of the other *Timberlane* factors," aside from the conflict factor. *Id.*

The Ministry has explained that the activities of the Sub-Committee and its members in coordinating export prices and quantities, as well as output volumes, constituted compelled conduct that should have been immunized under the foreign sovereign compulsion defense. However, even if the Chinese regulatory regime did not meet the "true conflict" test, the court should still have evaluated the conduct based on all of the *Timberlane* and *Mannington Mills* factors. A proper application of this analysis should have led the court to dismiss this case on comity grounds, particularly where all of the conduct of concern occurred in China, by Chinese companies, and pursuant to Chinese government policy.

At a minimum, the district court's holding that *Hartford Fire* overruled the *O.N.E. Shipping*, *Hunt*, *Timberlane*, and *Mannington Mills* cases has no support in that decision and constitutes an error of law as well as a flagrant disregard of vertical stare decisis principles.

See Jones v. Coughlin, 45 F.3d 677, 679 (2d Cir. 1995) (*per curiam*) ("A decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court."); *In re United States*, 834 F.2d 283, 284-85 (2d Cir. 1987). The case should thus be dismissed on international comity grounds.

C. THE ACT OF STATE DOCTRINE BARS PLAINTIFFS' CLAIMS

The Supreme Court in *Underhill v. Hernandez* laid the foundation for the act of state doctrine, holding, "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." 168 U.S. 250, 252 (1897). The doctrine "requires that, in the process of deciding [a case or controversy], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 146 (2d Cir. 2012) (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409 (1990)), *cert. denied*, 133 S. Ct. 2837 (2013).

The district court's decision to allow a jury to determine the lawfulness of the Sub-Committee meetings (which was necessary for the jury to find a Sherman Act violation) necessarily required the court and the jury to sit in judgment on the acts of the Chinese government, rendering the decision erroneous. *See Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 954 (5th Cir. 2011); *Clayco Petroleum*

Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406-08 (9th Cir. 1983); *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358-61 (9th Cir. 1981); *Hunt*, 550 F.2d at 77. *See generally Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (counterclaims barred where they depended on lawfulness of Cuban property expropriation).

In finding that the Chinese government had not compelled the actions of Defendants, the district court asserted that the verification and chop system introduced by the Ministry and Chinese Customs in 2002 was not valid and effective, essentially deeming the verification and chop regulation invalid. SPA-77. If the court had properly found that Chinese Customs' refusal to permit exports of vitamin C for any contracts not bearing the Chamber's chop was valid, then there could not have been any causal connection between Appellants' conduct and any injury suffered by Appellees. Instead, the district court substituted its own judgment for that of the Chinese government in determining that the Chinese government would not have compelled the challenged conduct. SPA-104. By holding that the verification and chop system did not really require companies to abide by the Chamber's price and quantity restrictions, the district court effectively decided the case based on its incorrect view that the Chinese regulatory system was not really a valid one.

Moreover, the district court incorrectly determined that the Ministry's directives to the Chamber and the Sub-Committee to reach

agreement on appropriate export prices and export quantities were invalid. For example, rather than accepting, as a matter of law, that the Sub-Committee was directed to reach industry agreements on output levels, the court instead focused on a single case where a company, for a short period of time, did not implement output reductions that had been agreed to pursuant to the Sub-Committee's mandate. SPA-77. But the act of state doctrine holds that courts "may not examine the actual operations of the regulatory system to the extent that such inquiry would directly implicate the failure (whether willful or negligent) of officers of the foreign state to enforce their own laws[.]" *West v. Multibanco Comermex*, 807 F.2d 820, 828 (9th Cir. 1987).

W.S. Kirkpatrick is not to the contrary. In this case, Appellees essentially sought to impose legal liability on Appellants for the acts of the Chinese government, through Mr. Qiao and others, to direct Chinese export policy. The Supreme Court made clear in *Kirkpatrick* that "the act within its own boundaries of one sovereign State . . . becomes . . . a rule of decision for the courts of this country," and courts should decline jurisdiction "when the outcome of the case turns upon – the effect of official action by a foreign sovereign." 493 U.S. at 406, 409. Thus, rather than simply "imputing to foreign officials an unlawful motivation," as was the case in *Kirkpatrick*, Appellees' case required the jury to decide that the agreements reached under the Chinese government's direction were unlawful, thus "invalidating" acts of the

government. *Cf. id.* at 401. *Kirkpatrick* certainly did not overrule *Hunt* and the other precedents relied on by Appellants to justify application of the act of state doctrine, and the district court compounded its errors by so holding.

D. The Political Question Doctrine Bars Plaintiffs' Claims

"At its core, the political question doctrine 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" *Spectrum Stores*, 632 F.3d at 949 (citation omitted). *See generally Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing categories of non-justiciable political questions); *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (plurality opinion). *Accord Haig v. Agee*, 453 U.S. 280, 292 (1981) ("[M]atters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

The Fifth Circuit recently applied the political question doctrine in *Spectrum Stores* to dismiss antitrust claims against companies that cooperated in the price-setting activities of the Organization of Petroleum Exporting Countries (OPEC). 632 F.3d at 953. The Fifth Circuit found that the claims at issue would require the court to "review

the considered foreign policy of the political branches," and that "[a] pronouncement either way on the legality of other sovereigns' actions falls within the realm of delicate foreign policy questions committed to the political branches." *Id.* at 951. Accordingly, the court found the claims non-justiciable. *Id.* at 953.

This case raises precisely the same set of concerns about the inappropriateness of the judicial branch treading on delicate foreign policy questions. The Chinese government chose to regulate its domestic vitamin C export industry in what it believed was the most effective manner within its system. Insofar as China's sovereign policy decisions about how best to manage its economy conflict with the policies embodied in U.S. antitrust laws, that conflict should be addressed "through diplomatic channels," and not through the "unnecessary irritant of a private antitrust action." *O.N.E. Shipping*, 830 F.2d at 454. For China's economic regulations and enforcement practices "to be reexamined and perhaps condemned by [U.S.] courts . . . would very certainly imperil the amicable relations between [the U.S. and Chinese] governments and vex the peace of nations." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918) (internal marks omitted).

Indeed, the U.S. and Chinese governments are currently engaged in ongoing discussions on issues involving Chinese regulation of its exports, and the U.S. has availed itself of WTO dispute settlement procedures against China based on the WTO's rules on export

restrictions. *See, e.g.*, WTO Dispute DS431, *available at* http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes-1. The U.S.'s active engagement in these avenues for resolving disputes between sovereign governments demonstrates that disputes involving China's regulation of its own exports are foreign relations issues properly committed to the Executive Branch. The U.S. judiciary should be loath to insert itself into such discussions.[7]

E. The District Court Afforded Less Respect to China's Sovereignty Than is Afforded to U.S. States

No matter the doctrinal lens through which it is viewed, the district court's judgment plainly constitutes an affront to Chinese sovereignty. In *Parker v. Brown*, the Supreme Court deemed a nearly identical regulatory regime to that at issue here implemented by the State of California to be "state action" for antitrust immunity purposes. *See* 317 U.S. 341, 347–52 (1943) (program regulating the handling, disposition, and prices of raisins produced in California immune from antitrust scrutiny).

---

[7] While this issue was not raised below, justiciability doctrines derive from Article III's limitations on federal judicial power and are not subject to waiver. *See Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)); *Cooper v. United States Postal Serv.*, 577 F.3d 479, 489 (2d Cir. 2009).

The former General Counsel of the Federal Trade Commission and a co-author trenchantly note that the district court's judgment raises the question of "why California's regulatory regime in *Parker v. Brown* was sufficiently mandatory to qualify as state action, whereas the district court found China's similar regulatory regime in the Vitamin C litigation not to be sufficiently mandatory to apply international comity principles." Sohn & Solomon, 28 ANTITRUST at 83. The proper answer is that China's sovereignty should be entitled to just as much respect as California's, which should lead this Court to reverse the judgment below.

III. THE DISTRICT COURT ERRED IN BARRING THE JURY FROM RECEIVING CRUCIAL EVIDENCE THAT THE CHINESE GOVERNMENT COMPELLED THE CONDUCT AT ISSUE

Even assuming the compulsion issue was properly put to the jury, the district court abused its discretion by gutting Defendants' proffered evidence on the issue. Qiao Haili, the coordinator of the Sub-Committee on behalf of the Chinese government, proposed to testify to how the government, through him, compelled the challenged conduct, relying on various regulations and directives to illuminate his testimony. *See* JA-683-985, 999-1029.[8] The district judge largely excluded this evidence in a pre-trial ruling from the bench and reaffirmed its exclusion multiple

[8] *See also* JA-3691-768, 3795-878, 3886-925, 3961-75; SA-1-12.

times, leaving Appellants unable to present the vast bulk of the testimony and evidence they had proposed to submit to the jury through Mr. Qiao. *See, e.g.*, SPA-213-41. The exclusion of this evidence deprived the jury of the full picture of the regulatory environment in which Appellants operated, and rendered Appellants unable to pursue their principle defense.

This Court in *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), held it error to exclude evidence of state regulatory decisions where those decisions bore on factual issues in the case. *Id.* at 819. Notably, moreover, the D.C. Circuit agreed that the exclusion in *Litton* was erroneous, relying on that error among other reasons to refuse to give the *Litton* judgment preclusive effect. *See Jack Faucett Assocs. v. AT&T*, 744 F.2d 118, 127 (D.C. Cir. 1984). By similar reasoning, it was plainly error to exclude the regulatory materials that show how the Chinese government compelled the challenged conduct.

Additionally, the district court excluded express statements by the Ministry advising that it had compelled the conduct at issue. SPA-178-88; *see also* JA-147-75, 205-07, 650-57. The statements plainly constitute "statement[s] of a public office" that set out "the office's activities," bringing them within the hearsay exception codified in Federal Rule of Evidence 803(8)(A). *See F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983); *United States v. Vidacak*, 553 F.3d 344, 351 (4th Cir. 2009); *In re Oil Spill*, 954 F.2d at 1308; *United States v. Mena*, 863 F.2d

1522, 1530-31 (11th Cir. 1989). That they were prepared for this litigation is irrelevant. *In re Oil Spill*, 954 F.2d at 1308 (admitting documents from French municipalities "prepared especially for use in this litigation[.]").

To reach a contrary conclusion, the district court had to 1) reject the *In re Oil Spill* holding and 2) decide that the statements were "not trustworthy." SPA-182-83. Accepting the first proposition would create an unnecessary circuit split, and the second proposition is patently (and needlessly) offensive to a sovereign government explaining its official activities to a U.S. court. Neither the district court nor Appellees made the "affirmative showing of untrustworthiness" necessary to apply the untrustworthiness exception to Rule 803(8). *See Bradford Trust Co. v. Merrill Lynch*, 805 F.2d 49, 54 (2d Cir. 1986) (quoting *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983)); *Blake v. Pellegrino*, 329 F.3d 43, 48 (1st Cir. 2003); *United States v. Regner*, 677 F.2d 754, 759 (9th Cir. 1982).

Further, any concerns about the jury making legal determinations or about undue prejudice to Appellees could have been remedied through appropriate jury instructions. *See United States v. Robinson*, 560 F.2d 507, 516 n.13 (2d Cir. 1977) ("[I]n reaching a decision whether to exclude on the grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.") (quoting FED. R. EVID. 403 advisory committee's note);

Petree v. Victor Fluid Power, Inc., 887 F.2d 34, 41-42 (3d Cir. 1989). Indeed, the judge's statement to the jury that Appellees could not take full document discovery of the Ministry eliminated any possible undue prejudice they may have faced, rendering Rule 403 inapplicable.

The prejudicial error of excluding this evidence and depriving Appellants of the opportunity to give the jury a full understanding of the regulatory and governmental compulsion that gave rise to the conduct at issue – an issue that the jury was directed to make specific findings on – was plainly an abuse of discretion. It thus justifies reversal of the judgment below and remand for a new trial.

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

A. THE DISTRICT COURT LACKED PERSONAL JURISDICTION OVER NCPG

The district court violated due process when it exercised personal jurisdiction over NCPG. In a unanimous decision, the Supreme Court recently reemphasized that a court cannot exercise personal jurisdiction over claims asserted against a party unless that party has sufficient minimum contacts that the "defendant *himself*" creates with the forum. *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (no personal jurisdiction in Nevada for conduct that occurred entirely in Georgia); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791-92 (2011) (no personal jurisdiction where foreign manufacturer, selling through a U.S. distributor, marketed to "anyone in America willing to buy [the

manufacturer's products.]") (Breyer, J., concurring). It is undisputed in the record that NCPG had no contacts whatsoever with New York (or the U.S.) relevant to the claims below, let alone sufficient contacts to satisfy *Walden*. JA-195-98 ¶¶3-4, 11-19.

The court below read *Calder v. Jones*, 465 U.S. 783 (1984), as allowing the exercise of jurisdiction based on "the foreseeability of injury in New York" and NCPG's "significant . . . control" over its indirect affiliate, Hebei. SPA-173-75. The district court's reading of *Calder* was erroneous even prior to *Walden*, as earlier appellate precedent interpreting that decision required such a connection between the alleged tort and the forum that "the forum can be said to be the focal point" of the conduct and the harm. *See Hatfill v. Foster*, 372 F. Supp. 2d 725, 730 (S.D.N.Y. 2005) (applying Third and Fourth Circuit precedent), *reconsidered on other grounds*, 415 F. Supp. 2d 353 (S.D.N.Y. 2006). *Walden* makes clear that *Calder* only applies to circumstances where the forum is "the focal point *both* of the story and of the harm suffered," as where an individual in the forum bore the "brunt" of the injury from a non-resident's publication of a libelous story in the forum that relied on sources from the forum. *Walden*, 134 S. Ct. at 1123-24 (quoting *Calder*, 465 U.S. at 788-89 (emphasis added)).

No such circumstances exist here. *All* the conduct took place in China. NCPG *did not even make a sale of vitamin C* during the class period, let alone cultivate the level of contacts with New York (or even

with the U.S.) to justify the exercise of personal jurisdiction. The district court's exercise of personal jurisdiction over NCPG thus violated due process.

B. The Evidence was Insufficient to Hold NCPG Liable for the Claimed Price-Fixing Conspiracy

The district court held that Appellees presented sufficient evidence for the jury to conclude that NCPG was a participant in the challenged conduct. SPA-262-64. However, the only evidence that the district court cited to support this conclusion is: 1) the fact that Huang Pinqi, who attended Sub-Committee meetings on behalf of Hebei, was referred to by his NCPG position on a Chamber website announcement; 2) the fact that Mr. Huang primarily worked from his NCPG office while attending Sub-Committee meetings on behalf of Hebei; and 3) reports from Hebei to NCPG summarizing Sub-Committee meetings. *Id.* This is insufficient as a matter of law to sustain the jury's verdict that NCPG was liable as a co-conspirator.

A parent company is presumed to be separate from its subsidiary, and liability cannot be imputed to the parent unless the parent "exercise[d] complete domination . . . so that the subsidiary had . . . no separate will of its own[.]" *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988); *Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 53 (2d Cir. 1984). However, the undisputed evidence in this case demonstrates that NCPG's indirect minority ownership of Hebei

did not meet the standard for imputation of Hebei's conduct to NCPG. *See*, *e.g.*, JA-1721-22, 1836 (NCPG had no involvement in the day-to-day activities of Hebei); JA-1845 (NCPG never shared bank accounts with Hebei, paid its bills, or guaranteed its loans).

The overwhelming evidentiary record precludes a finding that NCPG was a co-conspirator. *See*, *e.g.*, JA-1790-93 (NCPG was never eligible to join the Vitamin C Sub-Committee or attend Sub-Committee meetings); JA-1847-50. Notably, NCPG did not ever produce, manufacture, sell, or set pricing on vitamin C during the relevant time period. JA-1727-31, 1837-38.

Further, it is well-established that executives often hold positions with both a parent company and its subsidiary and will often "change hats to represent the two corporations separately[.]" *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (internal marks and citation omitted). "[C]ourts generally presume that the [executives] are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary." *Id.* Despite overwhelming evidence confirming that Mr. Huang attended meetings on behalf of Hebei *only*, the district court improperly found Mr. Huang's position with NCPG sufficient to show that NCPG was a co-conspirator. This error further justifies reversal of the judgment as to NCPG.

V. THE DISTRICT COURT ERRED IN CERTIFYING THE CLASSES DESPITE CLASS CONFLICTS

To satisfy the adequacy of representation requirement of Rule 23(a)(4), a proposed class cannot encompass members with conflicting interests in the litigation. *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997). Where fundamental conflicts exist within the class, certification is improper. *See, e.g.*, *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1193-94 (11th Cir. 2003) (finding fundamental conflicts where some class members benefited from higher purchase prices that resulted in more profitable downstream sales); *Bieneman v. City of Chi.*, 864 F.2d 463, 465-66 (7th Cir. 1988).

The evidence shows that vitamin C wholesaler Graymor benefited from the conduct at issue because it believed that it derived higher profits from higher market-wide prices. *See* JA-188-93. Nevertheless, when certifying the classes, the district court rejected an inquiry into such class conflicts on that ground that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), required courts to disregard the downstream sales of direct purchasers. SPA-121. The district court's decision thus treated *Hanover Shoe* in the precise way the Eleventh Circuit has held it should not be treated—as "a talisman warding away the requirements of Rule 23 and barring th[e] court from exercising its duty to conduct an inquiry into whether the plaintiffs'

proposed class satisfies the four requirements of Rule 23(a)." *Valley Drug*, 350 F.3d at 1192.

In its decision, the district court expressly rejected *Valley Drug*, and alternatively attempted to limit the decision "to the particular characteristics of the pharmaceutical industry." SPA-123. However, there is nothing in the *Valley Drug* decision to suggest that its holding should be limited to the pharmaceutical context. *See* 350 F.3d at 1193 ("[W]e will not interpret the 'fundamental conflict/antagonistic interests' prong of the Rule 23(a)(4) inquiry in this case any differently than we would apply it in all other contexts."); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) (similar conflicts analysis in beef farming context).

Since the distinction drawn by the district court is unsupportable, the only way its conflicts analysis could be affirmed is if this Court rejected *Valley Drug* and created a circuit split. This Court should not do so, and should instead reverse the district court's class certification order. *See Lozada v. United States*, 107 F.3d 1011, 1016 (2d Cir. 1997) ("[W]ith the Eleventh Circuit having ruled thoughtfully and comprehensively on the issue . . . , we are reluctant to precipitate a circuit split[.]").

VI. THE DISTRICT COURT ERRED IN EXERCISING JURISDICTION OVER FOREIGN PURCHASER CLAIMS

The district court erred by allowing the Damages Class to recover damages based on foreign purchases made by foreign entities where both the purchase order and the payment occurred outside of the U.S. Damages claims associated with such purchases are not within the jurisdiction of U.S. courts, for the Foreign Trade Antitrust Improvements Act ("FTAIA") bars claims relating to "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations" unless several conditions are met. 15 U.S.C. § 6a.

The FTAIA Applies. The district court concluded that FTAIA did not apply because the sales made to foreign purchasers fell within the "import trade or commerce" parenthetical. SPA-195. This was error for two reasons: 1) the district court adopted an improperly narrow view of the "conduct" at issue, and 2) the district court adopted an improperly broad view of what constitutes conduct "involving" import trade or commerce.

In *Kruman v. Christie's Int'l PLC*, this Court evaluated an alleged agreement between the Christie's and Sotheby's auction houses to fix buyer premiums and seller commissions for auctions worldwide. 284 F.3d 384, 389 (2d Cir. 2002), *abrogated on other grounds by F.*

Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).[9] This Court held that the "conduct" at issue was "not the *imposition* of high prices pursuant to an illicit agreement, but the alleged *agreement* by the defendants to fix prices in foreign auction markets." *Id.* at 398-99 (emphasis added). As in *Kruman*, the conduct at issue here is Appellants' alleged participation in a conspiracy to set volumes and price floors for exports regardless of destination.

The district court wrongly limited its consideration of Appellants' conduct to sales within the class definition. SPA-196-97. Whether the FTAIA's import exception applies to a defendant's conduct does not depend on which plaintiff brings suit. *See Turicentro S.A. v. Am. Airlines*, 303 F.3d 293, 302 (3d Cir. 2002), *overruled on other grounds by Animal Sci. Prods. Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3d Cir. 2011). The fact that only sales of vitamin C that reached the U.S. are at issue in this case is a consequence of the class definition, *not* Appellants' alleged conduct.

The district court also erred by reading the word "involving" too broadly. The term "involving" in the FTAIA must be given a strict construction. *See Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, Inc.*,

---

[9] Much of the *Kruman* decision was abrogated by the Supreme Court's holding in *Empagran*, but the construction of the term "conduct" was not and remains law of the Circuit. *See Sniado v. Bank Austria AG*, 378 F.3d 210, 212 (2d Cir. 2004).

227 F.3d 62, 72 (3d Cir. 2000), *overruled on other grounds by Animal Sci.*, 654 F.3d at 467-68. It extends solely to conduct "directed at an import market." *Animal Sci.*, 654 F.3d at 470 (quoting *Kruman*, 284 F.3d at 395).

As the district court acknowledged, there is no dispute that the sales at issue were made outside of the U.S. to foreign purchasers. SPA-194. The only connection these sales have to the U.S. is that the goods were shipped to the U.S. at the foreign purchasers' request. *Id.* This connection is not enough to transform a purely foreign sale into one "involving" import trade or commerce.

The Third Circuit addressed an analogous issue in *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363 (3d Cir. 2005), where the court held that a plaintiff cannot get around the federal bar on indirect purchaser damages claims by claiming to be "direct purchasers" of products purchased through an intermediary but sent directly to the end-customer because the shipping arrangement does not "affect the economic substance of the transaction." *Id.* at 372-73. The same is true in this case: the economic substance of the transactions at issue is a sale between two foreign entities occurring outside the U.S. To hold otherwise would potentially permit a foreign customer reselling into the U.S. to maintain an action against a foreign supplier in a U.S. court simply by insisting on direct shipments to the U.S., opening U.S.

courts to the same type of worldwide jurisdiction that troubled the Supreme Court in *Empagran*. 542 U.S. at 166-67.

The district court relied on its observation that "defendants . . . knew, by the terms of those very contracts, that the vitamin C was to be delivered directly to the United States." SPA-198. While that fact may be pertinent to the question of whether an effect on import trade or domestic commerce was "reasonably foreseeable," it has no bearing on whether Appellants' conduct—the sale of vitamin C to a foreign party at allegedly inflated prices—was actually directed at U.S. markets. Because all economically meaningful aspects of Appellants' conduct occurred outside the U.S., it is clear that such conduct was directed at foreign trade or commerce, not an import market.

The Domestic Effects Exception Does Not Apply. The "domestic effects" exception of the FTAIA requires two conditions. First, the conduct must have a "direct, substantial, and reasonably foreseeable" effect on domestic or import trade or commerce. 15 U.S.C. § 6a(1). Second, such effect must "give[] rise to a claim under the [Sherman Act]." *Id*. § 6a(2). In *Empagran*, the Supreme Court clarified that this second requirement means the domestic effect must give rise to the specific claim of the foreign plaintiff. 542 U.S. at 169.

In this case, to the extent the foreign purchasers were injured at all, they were injured solely by the foreign effects of the conduct—increased prices abroad—not by its domestic effects. The domestic

effects exception is not satisfied when the plaintiff's claim "rests solely on . . . independent foreign harm." *Id.* at 159. In fact, since *Empagran*, courts have consistently held that the domestic effect of the defendant's anticompetitive conduct must be the proximate cause of the plaintiff's foreign injury. *See Motorola Mobility LLC v. AU Optronics Corp.*, --- F.3d ---, 2014 WL 1243797, at *3 (7th Cir. 2014); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 989 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 537 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005). The higher prices allegedly paid by the foreign purchasers are the result of "the overall price-fixing conspiracy itself" rather than its "effect in the United States." *DRAM*, 546 F.3d at 988-89.

Even if the FTAIA Does Not Apply, Jurisdiction is Still Lacking. Even if the sales to foreign purchasers are deemed to be "import commerce" to which the FTAIA does not apply, these transactions would still be outside of the jurisdiction of the Sherman Act. The Supreme Court in *Hartford Fire*, opined that the Sherman Act applies to foreign conduct involving import commerce only if it "was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796. Here, the only intended effect of sales of vitamin C to foreign purchasers located overseas was to affect the price paid by those foreign purchasers in a foreign jurisdiction. The fact

that the foreign purchasers asked that the product be delivered in the United States had no impact on the price quoted to them or on the intended effects of the particular export transaction. Absent evidence that Appellants actually intended to affect the U.S. domestic market through these sales to foreign purchasers outside of the U.S., the district court lacked jurisdiction over such claims under the standard articulated in *Hartford Fire*.

* * *

The district court's error resulted in the Damages Class improperly recovering $10.6 million in damages (pre-trebling). JA-4018. Therefore, the damages award must be reduced by $31.8 million to eliminate the treble damages associated with those claims.

VII. THE DISTRICT COURT ERRED IN FAILING TO REQUIRE PLAINTIFFS TO PROVE THAT ALL SALES FOR WHICH THEY CLAIMED DAMAGES WERE INCLUDED IN THE CLASS DEFINITION

Appellees were required to clearly and precisely define the contours of the Damages Class and to limit their claims to those that belonged within that class definition. *See Marcus v. BMW of N. Am.*, 687 F.3d 583, 591-92 (3d Cir. 2012); *IPO*, 471 F.3d at 44-45. Likewise, they bore the burden of establishing the amount of damages without "speculation or guesswork." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297

F.2d 906, 910 (2d Cir. 1962) (Friendly, J.); *Raishevich v. Foster*, 247 F.3d 337, 343 (2d Cir. 2001).

The Damages Class definition expressly excluded purchases made "pursuant to a contract containing an arbitration clause[.]" SPA-108. Appellees' damages expert, Professor Douglas Bernheim, included in his calculation of damages $7.5 million (pre-trebling) in purchases from Hualong and Tiger, neither of which was named as a defendant. JA-1862-63. However, Professor Bernheim testified at his deposition that he had no idea whether or not those purchases were made pursuant to contracts with arbitration clauses. JA-997-98.

The district court erred by shifting the burden to Appellants to prove the contracts did have arbitration clauses. SPA-264-65. This is contrary to controlling law governing burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (party seeking summary judgment need only show "an absence of evidence to support the nonmoving party's case."). *Accord Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) ("[A] party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23.") (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011)). This error resulted in Appellees recovering $7.5 million (pre-trebling) for sales that they had not shown were within their class definition. JA-1857-61. Therefore, the damages award must be reduced by $22.5 million to eliminate this category of treble damages.

CONCLUSION

The judgment of the district court should be reversed.

Dated: August 11, 2014

Respectfully submitted,

s/ Jonathan M. Jacobson

JONATHAN M. JACOBSON
DANIEL P. WEICK
JUSTIN A. COHEN
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
1301 AVENUE OF THE AMERICAS
40TH FLOOR
NEW YORK, NEW YORK 10019
(212) 497-7700

SCOTT A. SHER
BRADLEY T. TENNIS
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
1700 K STREET N.W.
FIFTH FLOOR
WASHINGTON, D.C. 20006
(202) 973-8800

COUNSEL FOR DEFENDANTS-APPELLANTS

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 13,890 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/ Jonathan M. Jacobson
Jonathan M. Jacobson