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August 21, 2015

VIA CM/ECF

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *In re Vitamin C Antitrust Litigation*, No. 13-4791

Dear Ms. O'Hagan Wolfe:

Plaintiffs-Appellees present F.R.A.P. 28(j) supplemental authority that Chinese law did not mandate Defendants-Appellants' price-fixing.

On August 14, 2015, the parties appeared before Judge Cogan in the Eastern District of New York on Plaintiffs' motion to hold Defendants in contempt for failure to provide discovery in aid of execution. Defendants argued contempt did not exist because a Chinese government agency ("SASAC") prohibited the ordered discovery.

Similarly, the centerpiece of Defendants-Appellants appeal is that "Chinese Law and Regulations Mandated the Challenged Conduct," *i.e.*, price-fixing of vitamin C. Dkt. 175 p. 23. But Defendants told Judge Cogan last week that the mandate to fix prices was only "broadly drafted" "policy guidance" with "potential ambiguities" and "less clear" than the "flat out prohibition" against providing discovery:

MR. WEICK: I'm not going to reargue our Second Circuit arguments on those points, but it's definitely a very different situation here because I think here you have, first off, a clearer grant of legal authority in the state-owned assets law and the various trade secrets and state secrets laws. You have a flat out prohibition from the SASAC.

Ms. Catherine O'Hagan Wolfe
August 21, 2015
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So I don't think that there are the potential ambiguities here that, Your Honor, found deprived our clients of the defenses that they raised on the merits. (Ex. A at 27:10-19.)

* * *

MR. WEICK: I wouldn't say that. I would say certainly the Chinese legal system is extremely different. I think what you see is you see very broadly drafted statutes that contrary to our American sense that, you know, when you look at the very literal text of the statute and you try to find your gaps, your loopholes, the ways that you can avoid the statutes, the statutes are really meant to provide the parties policy guidance to then local decision-makers and without drastically constraining the decision-makers' discretion. (*Id.* at 31:2-11.)

* * *

Certainly, where you have a clear intervention by the agency here that, arguably, you had less clear involvement of the agency in the merits phase, I think you have to give that effect. (*Id.* at 31:19-22.)

Sincerely,

/s/ James T. Southwick
James T. Southwick

Enclosures

cc w/enclosures: Counsel for all parties via CM/ECF

EXHIBIT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: VITAMIN C ANTITRUST LITIGATION	: : 06-MD-1738 (BMC) (JO) : : United States Courthouse : Brooklyn, New York : : Friday, August 14, 2015 : 4:30 p.m. :
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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

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1 (In open court.)

2 THE COURTROOM DEPUTY: In re: Vitamin C antitrust
3 litigation, docket 06-MD-1738.

4 Counsel, please state your appearances for those who
5 will be on the record.

6 MR. GREEN: Marcus Green of Kobre & Kim for the
7 plaintiff, The Ranis Company.

8 THE COURT: Anyone else going to talk for
9 plaintiffs?

10 MR. SOUTHWICK: No.

11 MR. WEICK: And Daniel Weick from Wilson Sonsini on
12 behalf of defendants and NCPG and Hebei Welcome.

13 THE COURT: Thank you, first of all, for
14 accommodating me on the shifting time of this hearing. I had
15 something come up that I had to cover.

16 I will hear from you on anything more that you want
17 tell me than what is in the papers. I don't need the papers
18 repeated for me, but I did have some questions for each side;
19 principally, plaintiffs, I think.

20 And the questions stem from initial questions I had
21 when we first started enforcement proceedings, I think it was
22 back in early 2014 maybe, maybe even earlier, and what I said
23 to the plaintiffs then, and I don't remember if I said it
24 orally or in a decision, but it was in connection with the
25 suggestion or an actual request for a turnover. I said you

SAM

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RMR

CRR

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1 can't get a turnover against this judgment debtor, you have
2 got to or it has got to be used against a bank or something,
3 some other institution.

4 And the plaintiffs' attorney, I don't think it was
5 you, I think it was somebody else, but pointed out to me, oh
6 no, under the CPLR this is fully applicable, a turnover
7 proceeding can be had against the debtor. And I thought to
8 myself at the time, that's true, but where does it get you?
9 And I think after all this time we've now come to the point
10 where that question has come home to roost. By that I mean
11 this: Let's suppose I grant your motion and I appoint a
12 receiver. You want to be the receiver, right?

13 MR. GREEN: Yes.

14 THE COURT: So I appoint you as receiver, you walk
15 out of here today, you're appointed, you're the receiver of
16 this Chinese company. What do you do tomorrow?

17 MR. GREEN: Well, I'll approach.

18 If the plaintiffs or a neutral party is appointed a
19 receiver, a post-judgment receiver, they can go assert various
20 rights that each of these debtors have, vis-a-vis third
21 parties. So if Hebei Welcome, for example, has a bank account
22 with the Bank of China, and under their --

23 THE COURT: Where? In New York?

24 MR. GREEN: Say, they open the account in Beijing,
25 hypothetically, but they have a contract right based on their

1 account with Bank of China to make a withdrawal at any branch
2 in the world.

3 THE COURT: Right.

4 MR. GREEN: As a receiver, I can go to the Bank of
5 China New York branch and I could ask for the money,
6 hypothetically. Now, they may try to refuse, but now we're a
7 step removed and now we're dealing with whether and to what
8 extent Bank of China is going to honor a receivership order.

9 THE COURT: What do you think they're going to do?

10 MR. GREEN: I think they're going to think long and
11 hard about it depending on the institution that they are and
12 how much commercial interest they have here in the States.

13 THE COURT: Okay, but look where you are now.
14 You're doing what I said ought to be done a year-and-a-half or
15 two years ago, but you're using a receivership to do it. I
16 don't see why you need to be a receiver to do it.

17 MR. GREEN: Well, here is the distinction, Judge
18 Cogan:

19 If Your Honor ordered Bank of China, for example, to
20 turn over the assets in its custody belonging to either of the
21 debtors, if that account is associated with an overseas branch
22 of Bank of China, they can dishonor or not comply with that
23 order because it offends the Separate Entity Rule. Whereas,
24 if a receiver standing in the shoes of the depositor asks to
25 assert its rights, they will comply because they have a

1 contract right to turn over their deposits to their depositor.

2 There are institutions in Hong Kong that have
3 honored U.S. receivership orders. There are even institutions
4 in mainland China that have honored Delaware Chancery
5 receivership orders that were issued because the judgment
6 debtors were in default and in contempt and failed to show up.

7 THE COURT: Okay.

8 MR. GREEN: So it is a substantive distinction
9 and --

10 THE COURT: It's a fine substantive distinction and
11 I'm not sure you're there yet or that you can get there
12 because I mean what do I do about the fact that the CPLR
13 provision that allows appointment of a receiver says, quote:
14 The order of appointment shall specify the property to be
15 received; close quote.

16 What do I do about that?

17 MR. GREEN: It's enough to identify the type of
18 property. And courts, and particularly federal courts, have
19 issued similar receivership orders that actually put all of
20 the debtors' property of any type into the receivership.

21 THE COURT: Okay.

22 MR. GREEN: And that federal receivership statute,
23 which still applies, provides 28 U.S.C. 754 and 1692, they
24 together provide that a federal court receiver has exclusive
25 jurisdiction and control over the receivership estate property

1 in any judicial district in the United States, if the receiver
2 complies with some preliminary formalities.

3 THE COURT: Let me ask you this: Why didn't you
4 follow the easier route to begin with, which is you tear off a
5 Blumberg form, do you know what that is?

6 MR. GREEN: Yes.

7 THE COURT: You're much younger than me, I just want
8 to make sure. I don't even know if they're still out there.

9 MR. GREEN: They are.

10 THE COURT: We would get a pack of Blumberg forms
11 and we would sign them Judgment Creditor, and we would send
12 them to the bank they would say Restraining Notice and
13 Information Subpoena. And in the old days, I'm sure you're
14 too young for this, there was a fee you had to pay the bank.
15 You had to pay 50 cents for information subpoenas. So we
16 would get rolls of quarters from the bank and we would tape
17 two quarters to each one of these Blumberg forms and then send
18 them off to the hundred largest banks in the city. And then
19 the banks would be obligated to either freeze any assets they
20 had or come into court, start a proceeding, a special
21 proceeding -- here they just make a motion, presumably -- and
22 fight it, if they wanted to fight it, or they would fill out
23 the questions on the Blumberg form, which sometimes we would
24 supplement them with our own list of questions, and say here's
25 what we've got. And then you would know what you were

1 fighting over. Why not do that?

2 MR. GREEN: We did that.

3 THE COURT: Okay, and what did you did got?

4 MR. GREEN: We got: We don't have any information
5 responsive to this subpoena for these debtors. And we've
6 subpoenaed, I want to say, 14 banks that we knew or suspected
7 or were likely to be counterparties to these debtors.

8 THE COURT: Okay, but then if they don't have
9 anything, what can you do as a receiver?

10 MR. GREEN: Well, we can go and find out more
11 readily where these assets have been transferred to.

12 THE COURT: How do you know they were transferred?

13 I mean if you ask the right questions as a judgment
14 creditor, you can get a complete history from the banks as to
15 their dealing in the assets of a judgment debtor. You can
16 say: What have you got now? When was the last time you had
17 something? What did you do with it? And you can do that on a
18 Blumberg form. It will cost like a hundred hours in attorney
19 time to do it.

20 MR. GREEN: No, we have -- we have subpoenaed all of
21 the major institutions that we knew or suspected were
22 counterparties to these debtors; and including banks that we
23 know were handling collections accounts, for example, for
24 Hebei, because they had class members owed -- you know, class
25 members bought vitamin C from these folks and they had payment

1 instructions at those institutions.

2 THE COURT: Okay.

3 MR. GREEN: Now these banks have -- these banks have
4 disclaimed having responsive documents.

5 THE COURT: Are they lying to you?

6 MR. GREEN: I think they are.

7 THE COURT: Oh.

8 MR. GREEN: Or I think that they are willing to --
9 to -- well, there's two things. They will argue that the
10 account information is not in their possession or control
11 because the foreign branch is a separate entity and they don't
12 have access to their records.

13 And then we are then to resort to Hague evidence
14 collection in mainland China to get the information, which is
15 a near impossibility to get the information. So the banks are
16 structured so that they can prevent or make it extremely
17 onerous to pierce through their different structural levels to
18 argue that the entity in New York or anywhere in the U.S. is
19 the same entity as the one who has custody and control of the
20 relevant documents and, therefore, we're not -- we can't get
21 the information.

22 Some banks are less careful than others. Some banks
23 there's a parent who is in New York. You can argue that their
24 control of the subsidiary overseas gives them the practical
25 ability to get the documents, okay; but say we get disclosure

1 of an account overseas, okay. Now, we can't seek an order
2 from the Court directed to the bank to turn over that money
3 because of this vestige of common law called the Separate
4 Entity Rule.

5 THE COURT: The law has evolved on that, and I'm
6 not, frankly, sure where it is at the present time.

7 MR. GREEN: It's stronger than it had been. The
8 certified question to the New York Court of Appeals went up,
9 came back in the affirmative on both the restraining notice
10 issue and on the turnover order issue.

11 THE COURT: Tell me what you mean by the
12 affirmative.

13 MR. GREEN: Oh, you cannot -- that the Separate
14 Entity Rule is still vital as a doctrine.

15 THE COURT: Okay.

16 MR. GREEN: And when we first came and made our
17 enforcement application to this Court, it wasn't so settled.
18 It was -- the questions had been certified, but not answered.

19 THE COURT: I remember that the Second Circuit sent
20 it over within the last couple of years and got a response
21 fairly recently.

22 MR. GREEN: So the in personam relief that you can
23 get against the debtor is the recourse that you have because
24 the debtor is deemed to be in possession of that money at the
25 overseas branch, which is why we moved for a turnover order

1 against the debtor.

2 Now, the debtor is prepared to be in contempt of a
3 turnover order, without question. So then what do we do?

4 The Blumberg form subpoenas and the Blumberg form
5 restraining notices have utility in potentially finding
6 information about current location of assets. We've not been
7 able to find it. Okay? The restraining notice is ineffective
8 as to assets that are associated with overseas branches.

9 Now, a order directed to the debtor, and in this
10 case you allowed us to serve a CPLR restraining notice on
11 Hebei through substitute service on their counsel, that would
12 be effective to -- presumably, if they complied with it to
13 retain the status quo; but they wouldn't disclose where their
14 assets are and they won't even confirm compliance with the
15 restraining notice. So we are left with now going to
16 contempt-type remedies.

17 THE COURT: Okay.

18 MR. GREEN: Which were on deck, quite presumably,
19 this whole time.

20 THE COURT: Listen, I would just feel better if we
21 had a known res that we were fighting about, and we don't
22 know, but let me ask another question about the Separate
23 Entity Rule.

24 If I understand, the Separate Entity Rule would not
25 require a New York branch to turn over the proceeds of an

1 account that is maintained by its parent in a foreign country,
2 if not even a foreign United State, but does that still apply
3 with regard to discovery.

4 MR. GREEN: No.

5 THE COURT: So if it doesn't apply with regard to
6 discovery, it would not be a defense for the branch to say: I
7 don't know anything about this debtor because he is not in our
8 local records and we are not checking with our parent branch.

9 I mean, presumably, if you, as receiver, can stroll
10 in there and say: Empty my account in China or Japan, or
11 wherever the headquarters of the bank is, and the branch could
12 type a few buttons and say: Well, you have \$235,000, here is
13 a check; then they do have access to the information, right?

14 MR. GREEN: You would think, but they make
15 inconsistent arguments and representations to their commercial
16 counterparties where they have a contractual right to make a
17 withdrawal from any branch in the world, and that's the most
18 common arrangement. Okay?

19 But the bank -- and to answer your question more
20 directly, the Separate Entity Rule is not a defense to
21 discovery. The issue is whether the New York branch, the
22 entity, the actual legal person that controls the New York
23 branch, has an argument that it is not in possession, custody
24 or control of the records associated with its affiliate.

25 THE COURT: Right, but if it can cash a check --

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1 MR. GREEN: You would think.

2 THE COURT: -- then it can access the records. And
3 you tell me you think they're lying when they say or, at
4 least, acting in bad faith when they say: We can't get this
5 information.

6 MR. GREEN: I think that they can initiate a
7 transaction on behalf of their depositors, okay, to cause the
8 money to be transferred through the international banking
9 affiliates and through probably correspondent accounts at
10 domestic banks, if it's a dollar-denominated account, okay,
11 they can effect the transaction to get you the money.

12 THE COURT: Okay, I mean that's clear, but in order
13 to do that that also means they can find out, they have
14 custody and control of the information, forget about the
15 money, just the information about how much money there is. If
16 you're a receiver or if you're the bank, you're the defendant,
17 you can walk into the bank and say: I need to know how much
18 is in my account, tell me. And although the banks may be
19 telling you differently, you and I know they can find that
20 out. Right?

21 MR. GREEN: There is, I would say, at any given time
22 between this District and the Southern District of New York
23 probably 50 pieces of miscellaneous case litigation with
24 judgment creditors litigating motions to compel against banks,
25 foreign banks, international banks, where these very issues

1 have to be litigated. And the banks are increasingly careful,
2 especially Chinese banks and other banks, in, let's say, bank
3 secrecy jurisdiction, banks with jurisdictions with blocking
4 statutes and bank secrecy statutes. They are, because of some
5 recent, you know, orders compelling discovery broadly based
6 upon a practical ability standard, not whether you actually
7 have legal right to get the documents, but because you've
8 shown yourself in the past to be able to do it, right, they're
9 structuring themselves increasingly to avoid this problem and,
10 ostensibly, insulating themselves.

11 Now, I don't know whether the banks are making false
12 statements or whether they actually have some very carefully
13 constructed structures so I go into the bank and say: I would
14 like to withdraw a million dollars. And they say: Okay,
15 well, let me check with my affiliate through these various
16 channels to see if that can happen. Right?

17 Our position is that a receivership is materially
18 better than sending subpoenas out to banks and having these
19 fights with banks where we have a party who is in possession
20 of all this information, who is obligated to give it to us,
21 and they refuse to.

22 THE COURT: Well, I think that's where you and I may
23 have a disagreement. The reason is this: That bank has some
24 assets in New York. This defendant may or may not. I can
25 hurt that bank, I'm not sure I can do anything to this

1 defendant.

2 You know, you say there are all these motions, which
3 I'm surprised, frankly, I've never heard of, where the banks
4 say: Oh, no, we can't give this discovery because our system
5 is set up so that we can't access it, even though if the
6 customer walked into our branch we could access it. I find
7 that an incredible argument, if that's actually what they're
8 saying. I've not seen a case where they're saying that. But
9 if I reject that argument, well, then you've got somebody on
10 the hook, right? If I impose a contempt remedy against a bank
11 with a branch in New York for \$10 million, you're going to get
12 that \$10 million.

13 MR. GREEN: Well, I'm probably going to get the
14 documents, but I'm never going to get any money.

15 THE COURT: Okay, but then let's look at the
16 alternative that you're giving to me.

17 Under your alternative, I hold the defendants in
18 contempt, and I'll hear from the defendants, but I tend to
19 agree with you, they're in contempt. I then tell them:
20 You've got to pay \$10,000 a day until you purge your contempt.
21 Well, they owe you \$150 million and they haven't paid a penny,
22 so how is it efficacious for me to say: And in addition to
23 that, we're going to make it \$151 million? They're not going
24 to pay that either, right?

25 MR. GREEN: Right, that's why we are requesting a

1 more intrusive sanction in the form of a receivership.

2 Now, you said you could hurt the banks. You can
3 hurt the banks, you can't make them turn over the debtors'
4 assets at an overseas branch because of the Separate Entity
5 Rule.

6 THE COURT: I can make them turn over the
7 information.

8 MR. GREEN: You can make them turn over the
9 information. Then if we have the information, I have the res.

10 THE COURT: Then I can give you a receivership.

11 MR. GREEN: Well, but then I can go back to another
12 turnover order against Hebei and say: Give us the assets.

13 THE COURT: Right.

14 MR. GREEN: And they say no.

15 THE COURT: Right, then what do we do?

16 MR. GREEN: Well, if I have a receivership order
17 now, we skip the contempt proceeding to fight with the bank
18 over whether they're going to honor the receivership. We skip
19 the second turnover order that identifies the res and then
20 they're in contempt of that and now we're going to ask for, I
21 guess, a different sort of receiver that maybe is more limited
22 in scope to authority over that property. Okay?

23 But you have in your discretion the ability to
24 appoint a receiver generally for -- in this case, it's the
25 Hebei's property since we don't have to deal with the foreign

1 sovereign immunity issues.

2 So, you know, it's clearly a threat, okay. And, you
3 know, they can, as Your Honor knows, they can bond the appeal;
4 they can settle the case; they can pay the judgment. They can
5 do all sorts of things if they want to avoid the receivership.

6 THE COURT: Right, I mean obviously to the extent --
7 I think you and I are on the same page, which is that to the
8 extent we can bring sufficient pressure on a derelict debtor
9 to meet its legal obligations -- and since it has not been
10 stayed, this judgment is a legal obligation -- then I should
11 take action to do that.

12 I think where we may have a difference, although I
13 hear what you're saying, is you may have to go through the
14 extra stage of using that leverage against the banks with the
15 information simply because the shortcut of me presuming that
16 there is some asset you can realize without knowing what it is
17 may not be sufficient under my equity jurisdiction to appoint
18 a receiver. I mean it would be an improper exercise of
19 judicial resources to appoint a receiver who gets nothing
20 because he can't identify nothing. And your hope is that by
21 appointing you receiver, you'll get some greater recognition
22 from both the New York banks and maybe foreign entities than
23 you would otherwise have. That's a hope, and it may be right,
24 I'm not sure it crosses the threshold of giving you a choate
25 enough interest to justify receivership.

1 I'm not ruling against you. I'm not going to rule
2 today at all, but that's really my holdup. I would almost
3 say, yes, I know it's some extra work, but it's also an extra
4 avenue for pressure to try to get the information out of local
5 banks and institutions.

6 MR. GREEN: Not every bank has a presence in the
7 United States at all.

8 THE COURT: Right.

9 MR. GREEN: Based upon the responses that we have
10 from the banks that we have subpoenaed, we believe that
11 they're holding all of their cash and cash equivalents in
12 mainland China institutions.

13 THE COURT: Let me ask one other question about
14 that. Let's assume that's the case.

15 As I recall from the trial, this company had
16 substantial wholesale Hebei, who everyone mispronounced, but
17 it's Hebei in Chinese, they have substantial transactions at
18 the wholesale level involving U.S. companies. That was the
19 whole basis of the case, that they had both direct and
20 indirect sales of wholesale vitamin C. Someone is buying it
21 and the ones who are buying it owe money for those purchases.
22 Why can't you get to those people?

23 MR. GREEN: According to Hebei, they ceased all
24 sales, at least to the United States, in 2010. We have
25 alleged -- well, we have adduced evidence from public sources,

1 customs declarations and shipping documents principally, that
2 show that an affiliate called NCPC Victor, which is a joint
3 venture between the owner of Hebei, which is the publicly-
4 traded entity, the operating company, and another company that
5 had historically manufactured and distributed vitamin B-12 and
6 some allied products. The shipping records, which we
7 presented in applications before this court showed that people
8 who had previously been receiving vitamin C from Hebei were
9 getting shipments, containers, cargo containers full of
10 vitamin C, if you believe the declarations, instead from this
11 entity called NCPC Victor.

12 So we said it appears that there has been what may
13 amount to a fraudulent transfer or there's a fraudulent use of
14 an intermediary to obscure the ownership of the accounts
15 receivable that are traceable to the United States; which, of
16 course, you're right, we could garnish those all over the
17 place, but for the fact that Your Honor didn't give us
18 permission to register the judgment in other districts because
19 we couldn't identify any property in other districts. That's
20 another matter.

21 THE COURT: Maybe I was wrong about that.

22 MR. GREEN: The accusation or the allegations or the
23 evidence that we set forth about that issue was met with
24 conclusory declarations under oath by various folks on the
25 debtor's side to say: No, no, those are mistakes. Those are

1 mistakes. And by the way, we're not going to give you any
2 discovery about any of this. Right?

3 And so we're left with what appears on its face to
4 be a massive up-tick in a vitamin B-12 affiliate of vitamin C
5 sales at the same time that they ceased operations. And so
6 they also represented that they're selling to now -- now
7 Hebei, to the extent it's still manufacturing and distributing
8 vitamin C, they're selling through arm's length wholesalers in
9 China. So there is no accounts receivable asset belonging to
10 this debtor outside of China. That's their story.

11 THE COURT: Right.

12 MR. GREEN: So that just aggravates the harm caused
13 by this contempt. It's not just the banks, Your Honor.

14 THE COURT: What's your inability to frustrate that
15 scheme?

16 Why can't you go after the intermediary or, at
17 least, try to get some kind of injunction against the buyers
18 of vitamin C from this new intermediary telling them they
19 can't pay this company?

20 I mean if you can make the threshold showing that
21 you just outlined, you might qualify for some type of
22 injunctive relief.

23 MR. GREEN: Well, for one, we would need the ability
24 to register the judgment in other judicial districts where
25 these counterparties may be. Secondly, we have a slightly

1 delicate position where some of these buyers may be members of
2 the class.

3 Now, I am not going to opine on whether there is a
4 actual or potential conflict, I just point that out to, Your
5 Honor, that that's an added complicating factor in this case.

6 Now --

7 THE COURT: And the reason I didn't let you register
8 the judgment is because I said you had to identify property
9 first?

10 MR. GREEN: Yes.

11 THE COURT: It's possible the time has come to
12 revisit that, in light of the unsuccessful collection evidence
13 to date.

14 MR. GREEN: I think whether or not as a matter of
15 legal doctrine we have to identify property in a particular
16 district, I think based upon the contempt by the party, we
17 can make an -- Your Honor can make an adverse inference that
18 there's property in other districts to justify registering,
19 but at this point without something more that doesn't get us
20 beyond what -- much more what we have, which is subpoena
21 power. We have post-judgment subpoena power, but there's no
22 assets. They've ceased operations, so there is no receivables
23 assets. We can sue -- we can sue some entities in mainland
24 China, that's going to get us far with this defendant and with
25 the provincial authorities.

1 So, you know, we're faced here with, you know, plain
2 contempt. And I think based on your comments about the
3 receivership option, the comfort level that you're looking for
4 on an identified res, that's not a doctrinal limitation,
5 that's just, Your Honor, I think, feeling more comfortable as
6 a matter of discretion.

7 So it's within your discretion to appoint a receiver
8 for all their property. An entity that you have personal
9 jurisdiction over, that this Court has personal jurisdiction
10 over, can be put into receivership. Its intangible interests
11 in the ownership of its own equity can be judicially assigned
12 to a third-party.

13 THE COURT: No, there's no question I have the
14 power. I agree with that.

15 The only question I have is the efficacy of it and
16 whether there are better ways to apply pressure than
17 receivership. But I have not considered some of the points
18 you've made, so I want to think about that.

19 Okay, anything else you need to tell me?

20 MR. GREEN: Just lastly, on the issue of contempt,
21 although I'd hate to talk more after you said you were
22 inclined to hold them in contempt.

23 I didn't -- we didn't brief this statement
24 specifically, but I think it warrants pointing out and I think
25 it gives up the game on the contempt issue.

1 So they rely on five things on their impossibility
2 defense, and we've pointed out the deficiencies in that
3 defense and the fact that they haven't met their burden.

4 In the March 30th declaration from Hebei's deputy
5 general manager and legal counsel, there is a passage in there
6 that is particularly interesting. Now, they disclose that
7 they wrote to the provincial state-owned assets commission and
8 said: We have a discovery request. They wrote again and
9 said: We have a discovery request that the judge says is
10 okay. Now, in recounting the sequence of that there is a
11 description of a meeting and the declarant says, and I quote:

12 Having received the request, Hebei SASAC called a
13 meeting with Hebei Welcome. At the meeting Hebei SASAC's
14 legal counsel explicitly advised that providing asset
15 information at the enforcement stage is different from
16 providing such information at the more uncertain trial stage,
17 in that the former may result in substantial loss of the state
18 assets under the administration of the Hebei SASAC.

19 So this is not about a generally applicable criminal
20 prohibition, this is a litigation position that is shared by
21 the provincial authorities and these clients. They were happy
22 to give discovery in the merits phase. They're happy to give
23 discovery now disclaiming specific bank accounts. I mean are
24 they going to be prosecuted when they give a declaration that
25 says: We have no money at the following accounts after I

1 check the records? And they're giving up the game when they
2 say it's because this may have teeth.

3 THE COURT: Right, this actually matters.

4 MR. GREEN: This actually matters now, so we're
5 going to say no.

6 THE COURT: Right.

7 MR. GREEN: I have nothing further unless you have
8 questions.

9 THE COURT: Thank you very much.

10 I think you have a bad problem. First of all, let's
11 make one thing certain, you owe the money. You owe the 150,
12 it's probably up to 160 or more million by now, and I have to
13 categorically reject the notion that, oh, the Chinese
14 government made us do it. The Chinese government let you
15 produce documents for ten years and you can't change your mind
16 now and say: Oh, really we're not allowed to do this.

17 MR. WEICK: Well, the documents there were very
18 different on NCPG's side.

19 THE COURT: They were all aimed to get us where we
20 are today.

21 MR. WEICK: Yes, but they weren't going to the core
22 operational financial information that is trade secret and
23 state secret under Chinese law.

24 THE COURT: I'll give you a sealing order or you can
25 pay the money and avoid unsealing it.

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24

1 MR. WEICK: Well, it's not whether it's available to
2 the public, it's about producing it to any American, even me.
3 I mean it's not a question of --

4 THE COURT: I just don't see how your client can
5 directly or indirectly do all these sales and then say, the
6 legal consequences of that, we're immune from producing them
7 because the Chinese government doesn't want us to.

8 And by the way, the letter from the agency, it
9 doesn't say anything like that. It really doesn't say you
10 can't produce them if you want to produce them.

11 MR. WEICK: Well, no, the question --

12 THE COURT: It says, we like the Hague convention.

13 MR. WEICK: Well, no, the question presented in the
14 memo is whether you, NCPG, and Hebei Welcome Pharmaceutical
15 Co., Ltd., Hebei Welcome, are allowed to furnish the
16 plaintiffs of the U.S. Vitamin C antitrust case with corporate
17 financial information as evidence. And the conclusion is that
18 the regulations cited are legally binding on you and Hebei
19 Welcome.

20 THE COURT: And what happens if you produce them?

21 MR. WEICK: Well, certainly for any individual
22 employee that defied this SASAC order, they would be in
23 serious trouble.

24 THE COURT: Really?

25 MR. WEICK: It's -- the trade secret criminal

1 prohibition has three to seven years in prison. The state
2 secret prohibition has five years to death penalty.

3 THE COURT: No one even asked the question during
4 the lawsuit and they all produced.

5 MR. WEICK: Well, I don't think there's any reason
6 to believe that they didn't keep the SASAC apprised during
7 the lawsuit, but the more important thing is the information
8 that was produced during the lawsuit on NCPG's site, it was
9 information about corporate structure. It was not core
10 financial information.

11 THE COURT: It was also information about amount of
12 sales and degree of sales.

13 MR. WEICK: Not NCPG because it had no sales.

14 Hebei Welcome produced information about sales into
15 the United States and about sales contracted to the United
16 States, but that's information that's already been in the
17 hands of foreigners. Again, it's not the kind of core trade
18 secret, state secret information under the statute that
19 Dr. Shen elaborates on in her report.

20 THE COURT: I don't know. You know, it would be one
21 thing if you had a letter from the agency saying we have
22 looked at these categories of documents. There is a certain
23 disingenuousness in this letter where the conclusion is almost
24 unavoidable that there was a nod and a wink in getting the
25 letter. We don't want to produce these documents. Why would

1 you want to produce the documents? And you needed the Chinese
2 government to give you some cover. So you asked for it and
3 you got it.

4 MR. WEICK: I don't think that's the case. This is
5 very different from, say, the Richmark case in the Ninth
6 Circuit where the issue was only raised after the motion to
7 compel came through.

8 According to Mr. Zhao's declaration, they were in
9 communication with the SASAC as soon as they received the
10 discovery requests. They made two formal written requests to
11 the SASAC, one concurrent with plaintiff's motion to compel
12 and one shortly following Your Honor's order. So I -- I think
13 the record here, as a factual matter, really only supports an
14 inference of good faith in this.

15 THE COURT: It's hard to have good faith when you've
16 got \$150 million unpaid, right?

17 MR. WEICK: Well, I understand that it's a
18 substantial judgment that's outstanding, but ultimately the
19 SASAC has legal authority under the state-owned assets law to
20 control my clients, in particular under Articles 30 to 33 of
21 that law it controls the -- any major divestiture of assets.

22 THE COURT: You know, there's just this eerie
23 parallel between the defense you're raising now and the
24 defense that was raised in the merits of the case when, in
25 fact, your client objectively said: Well, yes, we were fixing

1 prices, but the Chinese government required us to do that.
2 And I rejected that legally. I found that what the Chinese
3 government had required was not price fixing, but merely anti
4 dumping-below-cost restrictions. And the jury rejected it
5 factually listening to the Chinese witness and saying, they're
6 making this up, essentially, in order to cover one of their
7 companies.

8 And it sounds to me like we've got the same thing
9 here.

10 MR. WEICK: Well, Your Honor, I'm not going to
11 reargue our Second Circuit arguments on those points, but it's
12 definitely a very different situation here because I think
13 here you have, first off, a clearer grant of legal authority
14 in the state-owned assets law and the various trade secrets
15 and state secrets laws. You have a flat out prohibition from
16 the SASAC.

17 So I don't think that there are the potential
18 ambiguities here that, Your Honor, found deprived our clients
19 of the defenses that they raised on the merits.

20 THE COURT: All right, anything else you need to
21 tell me?

22 MR. WEICK: On the receivership issue, I did want to
23 just reenforce, and we mentioned it in our brief, but it's
24 black letter law that the receiver can take no better
25 authority over the property than the judgment debtor has.

1 THE COURT: Right.

2 MR. WEICK: Ranis, as receiver, would have no
3 authority to dispose of Hebei Welcome's assets, absent
4 permission of the SASAC because that's the competent entity to
5 approve --

6 THE COURT: If I appoint someone as a receiver, that
7 gives them the ability to take control of the assets, not to
8 dispose of them without order of the Court, but they can take
9 control.

10 MR. WEICK: Well, not necessarily, because if they
11 wanted to take control they would have to have them
12 expatriated from China; and that, too, would take order of the
13 SASAC. So there's a major practical problem.

14 THE COURT: Yes, but it comes down to the same
15 defense, which is, essentially, the SASAC, forgive my mumbling
16 the acronym, is that an impediment, a legitimate impediment to
17 any remedy here at all?

18 MR. WEICK: Well --

19 THE COURT: It is, I agree with you, it's an
20 impediment to both a contempt finding and a receivership
21 appointment.

22 MR. WEICK: Yes, and I think it's a very legitimate
23 impediment. They are the sovereign over these assets and they
24 immediately have legal authority to control the activities
25 that are happening on their own territory.

1 I mean this is an active of a sovereign in its own
2 territory. This is core act-of-state issues.

3 THE COURT: It's kind of selective core sovereignty.
4 It's kind of like there was no sovereignty until we wanted
5 there to be. It's a non-state owned company, and suddenly we
6 think it's in the national interest -- it's almost like
7 instant nationalization of a company for the protection of the
8 local economy.

9 MR. WEICK: Well, that's not the case.

10 Under -- and I think it's Exhibit 6 to my
11 declaration -- the Hebei Welcome registration certificate,
12 their status is heads, I believe, state-owned company under
13 de facto control or something along those lines. So the
14 Chinese government, and, obviously, they're too far removed
15 for SFIA purposes, other than China's possessory interest in
16 their assets, we haven't asserted that Hebei Welcome
17 institutionally would have any argument under that statute,
18 but they are under the immediate control and have been
19 forever. I mean this is not just something that happened.

20 THE COURT: Is there any Chinese company that's not?
21 Is it not the case that the Chinese government could
22 at any time say: This company's assets are under the control
23 of the government?

24 MR. WEICK: They certainly could. They did not just
25 magically do that here. This has been Hebei's corporate

1 structure since well before this litigation. I mean there's
2 no situation where the Chinese government is suddenly saying
3 Hebei is in de facto state control. It's always been a
4 grandchild company of a state-owned pharmaceutical investment
5 vehicle.

6 THE COURT: I still think you're positing a
7 situation where any American company dealing with a Chinese
8 company does so at the risk of the Chinese government just
9 saying: We have a national interest in this company and we
10 are not authorizing the production of any documents or
11 repatriation of any assets.

12 MR. WEICK: Well, that's potentially the situation,
13 and that's certainly a policy concern for the Chinese
14 officials in deciding whether, you know, the disincentive
15 toward Americans doing business with them in light of those
16 policies outweighs any sovereignty that they're seeing and has
17 been vindicated by these decisions, but that doesn't mean that
18 it's not a formal legal prohibition, that it's not an act of
19 the Chinese state and, therefore, not a legitimate defense to
20 both the contempt motion and the receivership request.

21 THE COURT: There's just this assumption running
22 through the debtor's arguments that law in China is analogous
23 to law in the United States. And I've had this feeling
24 throughout the case that it is more a question of what people
25 want at any particular time in China than what any law

1 actually says in China.

2 MR. WEICK: I wouldn't say that.

3 I would say certainly the Chinese legal system is
4 extremely different. I think what you see is you see very
5 broadly drafted statutes that contrary to our American sense
6 that, you know, when you look at the very literal text of the
7 statute and you try to find your gaps, your loopholes, the
8 ways that you can avoid the statutes, the statutes are really
9 meant to provide the parties policy guidance to then local
10 decision-makers and without drastically constraining the
11 decision-makers' discretion.

12 THE COURT: Well, I think what you just said, that's
13 the best formulation of it that I've heard. I think that's
14 probably perfectly accurate and the question is, that is so
15 different than what we have, then as a court how much
16 deference do I give that?

17 MR. WEICK: When you're talking about an act of the
18 Chinese state on its own soil, I think pretty much conclusive
19 deference. And certainly, where you have a clear intervention
20 by the agency here that, arguably, you had less clear
21 involvement of the agency in the merits phase, I think you
22 have to give that effect.

23 THE COURT: We had plenty of involvement of the
24 agency in the merits phase. They asserted throughout the case
25 that they would not furnish any of their employees for

1 depositions because of sovereign immunity; and that was
2 recognized. And then when the eve of trial came and there was
3 a potential exposure, they decided, well, we've come up with
4 someone who retired and, therefore, he's not protected by
5 sovereign immunity.

6 And, of course, law in this country is well settled;
7 if you have sovereign immunity when you're employed, the fact
8 that you retire does not effectuate its elimination. So it
9 was effectively a one-off determination that we will now let
10 this person testify.

11 MR. WEICK: Well, and there you're discussing the
12 involvement in the briefing and in the presenting of
13 witnesses, I'm speaking more toward the actual conduct being
14 scrutinized. And where here you have very clear agency
15 involvement and very clear, I mean, Mr. Zhao's affidavit, the
16 parts that were not read were that they threatened him and
17 restrained him with criminal penalties, that they made very
18 clear that they were prohibited from providing this financial
19 information.

20 THE COURT: All right, anything else you need to
21 tell me?

22 MR. WEICK; I think unless you have other questions,
23 I think that's it.

24 THE COURT: Thank you very much.

25 MR. WEICK: Thank you.

1 THE COURT: Okay, I'm going to reserve decision.
2 I should ask plaintiff, anything else?

3 MR. GREEN: Nothing from the plaintiff.

4 THE COURT: I'll reserve decision. I'll try to get
5 you something quickly. I know it's been pending a while, it's
6 a complex issue and that's why it's been pending a while, but
7 I'm getting good work now.

8 Thank you all very much. Have a good weekend.

9 ALL: Thank you, Your Honor.

10 (Matter adjourned.)

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17 I certify that the foregoing is a correct transcript from the
18 record of proceedings in the above-entitled matter.

18

19 /s/ Stacy A. Mace

August 17, 2015

20 _____
STACY A. MACE

DATE

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