

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6514 / March 20, 2019

Administrative Proceeding
File No. 3-17886

In the Matter of

**China Biopharma, Inc.,
China Linen Textile Industry,
Ltd.,
China Water Group, Inc.,
Scout Exploration, Inc., and
Teryl Resources Corp.**

Order on Service

On February 28, 2019, the Division of Enforcement filed a motion requesting that it be allowed to serve an order instituting proceedings (OIP) on China Linen Textile Industry, Ltd., a company located in the People's Republic of China, by posting the motion and OIP on the Securities and Exchange Commission's website or, alternatively, by publishing a legal notice in the *International New York Times*.¹ The motion includes a declaration of David S. Frye in support and exhibits.²

¹ China Linen's predecessor, Aquasol Envirotech Ltd., headquartered in Vancouver, Canada, but incorporated in the Cayman Islands, filed a registration statement pursuant to Section 12(b) of the Securities Exchange Act of 1934 on August 25, 2005. See Aquasol Envirotech Ltd., Registration Statement (Form 20-F) (Aug. 25, 2005). I take official notice of records in the Commission's Electronic Data Gathering, Analysis, and Retrieval database (EDGAR). 17 C.F.R. § 201.323.

² The motion was also filed in *Huixin Waste Water Solutions, Inc., A.P.* No. 3-18187, which is pending before another administrative law judge.

Background

On March 21, 2017, the Commission issued an OIP pursuant to Section 12(j) of the Securities Exchange Act of 1934 against five respondents, alleging they had securities registered with the Commission and had not filed required periodic reports.³ China Linen, a Cayman Islands corporation located in China, is the only respondent remaining.⁴ On February 14, 2019, I requested that the Division tell me how it intended to proceed to achieve service on China Linen. *China Biopharma, Inc.*, Admin. Proc. Rulings Release No. 6460, 2019 SEC LEXIS 179.

In its motion, the Division explained why it has been unsuccessful in serving China Linen. On March 31, 2017, the Commission's Office of International Affairs sent the OIP and other materials to the Chinese Ministry of Justice, for service on China Linen under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163. Mot. at 2; Decl. at 2 & Exs. 4-5.⁵ The Division has not been able to learn whether service has occurred despite numerous inquiries. Decl. Ex. 5 at 16-17. The Chinese Ministry of Justice, which is the designated agency for Hague service in China, has not provided any return of service or estimate of when service would occur, and based on recent experience, the Division doubts that service by the Ministry of Justice will be successful. Mot. at 2, 5-6; Decl. at 4-5.

The Division explained further that serving China Linen in the Cayman Islands is not viable because on January 30, 2015, the Cayman Islands Registrar of Companies struck China Linen from the rolls of registered companies and the Registrar's online files show that the firm's registered agent resigned. Decl. Ex. 7. The Division obtained email addresses from counsel, which it believes are valid, for China Linen's officers, who live in

³ At the same time, the Commission suspended trading in China Linen's securities. Mot. at 3 (citing Order of Suspension of Trading, *China Biopharma, Inc.*, 2017 SEC LEXIS 876 (Mar. 21, 2017)).

⁴ See OIP at 2; *China Biopharma, Inc.*, Initial Decision Release No. 1127, 2017 SEC LEXIS 1253 (ALJ Apr. 27, 2017), *notice of finality*, Exchange Act Release No. 81127, 2017 SEC LEXIS 2063 (July 11, 2017).

⁵ UPS delivered the package to the Chinese Ministry of Justice on April 6, 2017. Mot. at 2; Decl. Ex. 6.

China, but the Commission’s Office of International Affairs advised that the Commission cannot use email service for persons in China. Mot. at 3.

In support of its argument to deem service accomplished through publication of the motion and OIP on the Commission website, the Division provided evidence of web traffic. The motion shows that from March 21, 2017, the date of the OIP, through March 20, 2018, traffic to the Commission’s website from China was 4.9 million “sessions,” almost five percent of the site’s total worldwide traffic. Mot. at 2; Decl. at 3 & Ex. 9.⁶ As broken down by country, only the United States, with 69.9 million sessions, and India, with 5.2 million, originated more sessions than China. Decl. Ex. 9.

The motion includes an English translation of a section of Chinese civil procedure, which allows for “service by public announcement” when a person cannot be found or other methods of service have failed:

If the whereabouts of the person on whom the litigation documents are to be served is unknown, or if the documents cannot be served by the other methods specified in this Section, the documents shall be served by public announcement. 60 days after the date of making a public announcement, the documents shall be deemed to have been served.

The reasons for service by public announcement and the process gone through shall be recorded in the case files.

Decl. Ex. 12 at 2 (translation of Section 2 of Chapter 7 of the Civil Procedure Law of the People’s Republic of China, adopted by the National People’s Congress on April 9, 1991, last revised August 31, 2012).⁷ The term *public announcement* is not defined.

Argument

The Division believes that it has diligently attempted service on China Linen and that service of the OIP by publication—on the Commission’s website or in the *International New York Times*—is the only practical service

⁶ A *session* is defined as the period of time a user is engaged with the website. Decl. at 3 & Ex. 9.

⁷ The Division obtained this translation from Laney Zhang, Foreign Law Specialist (China), Law Library of Congress. Decl. Ex. 12 at 3.

option.⁸ Mot. at 5. The Division argues that Commission Rule of Practice 141(a)(2)(iv)(C) and (D) do not require the Division to exhaust all other means of service or prove they are impossible before seeking to use any particular means of service. Mot. at 4.

Noting that China's domestic law allows service by public announcement, the Division requests that it be allowed to serve China Linen with the OIP by publication on the Commission's website, citing *Microsoft Corp. v. Doe*, No. 12-cv-1335, 2012 U.S. Dist. LEXIS 162122 (E.D.N.Y. Nov. 13, 2012). Mot. at 6. The Division contends the Commission's website will reach a larger audience than newspaper publishing, but if publication on the website is not allowed, it requests that it be allowed to serve China Linen by publishing a legal notice in the *International New York Times*. Mot. at 2, 6; see Decl. Ex. 13 corrected.

The Division notes that federal courts have "regularly authorized" service by publication on the grounds that it is reasonably calculated to provide notice and complies with due process requirements. Mot. at 5 (citing *SEC v. Tome*, 833 F.2d 1086, 1094 (2d Cir. 1987); *SEC v. Anticevic*, No. 05-cv-6991, 2009 WL 361739, at *4 (S.D.N.Y. Feb. 13, 2009); *United States v. Shehyn*, No. 04-cv-2003, 2008 WL 6150322, at *3 (S.D.N.Y. Nov. 26, 2008)).

The Division also points to orders by Commission administrative law judges allowing service by publication in China and other countries. Mot. at 5 (citing *Duoyuan Printing, Inc.*, Initial Decision Release No. 642, 2014 SEC LEXIS 2691 (ALJ July 28, 2014); *Ceyoniq AG*, Admin. Proc. Rulings Release No. 4097, 2016 SEC LEXIS 3048 (ALJ Aug. 26, 2016) (service in Germany); *Alan Smith*, Admin. Proc. Rulings Release No. 1056, 2013 SEC LEXIS 3648 (ALJ Nov. 20, 2013) (service in Latvia); *Gregory D. Tindall*, Admin. Proc. Rulings Release No. 708, 2012 SEC LEXIS 1892 (ALJ June 20, 2012) (service in Canada); *Brokat Techs. Aktiengesellschaft*, Exchange Act Release No. 63715, 2011 SEC LEXIS 157 (ALJ Jan. 14, 2011) (service in Germany)).

Ruling

The Commission's Rules of Practice and the Federal Rules of Civil Procedure have almost identical provisions for serving persons in a foreign country. Compare 17 C.F.R. § 201.141(a)(2)(iv), with Fed. R. Civ. P. 4(f). See also Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212,

⁸ The Division states that service by mail is prohibited, service by email is not an option, and service via Chinese authorities, pursuant to the Hague Convention, has been unsuccessful for almost two years. Mot. at 7.

50,218-19 (July 29, 2016). As described above, several of the standard methods of service mentioned are not available in this situation.⁹ The focus here is on two provisions of Rule 141(a)(2)(iv) that allow notice of a proceeding to a person in a foreign country by, in relevant part, “[a]ny method that is reasonably calculated to give notice . . . [a]s prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction”; or “[b]y any other means not prohibited by international agreement, as the Commission or hearing officer orders.” 17 C.F.R. § 201.141(a)(2)(iv)(C)(1), (D).¹⁰

I recognize the Division’s effort to effectuate the Commission’s mission of protecting the public but I need to defer ruling on the Division’s request for the following reasons. In addition to complying with the Rules of Practice, any method of service must also satisfy constitutional due process, which requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002). The present record raises some concerns about meeting this standard.

Service via publication on the Commission’s website

The Commission does not require that issuers of registered securities regularly check its administrative proceedings webpages where OIPs are posted. In addition, the Commission’s website is only in English. One would have to search through the exhibits attached to the Division’s motion, when it is posted on the website, to find the Chinese translation of the OIP. These deficiencies are fatal to finding that publication of the OIP on the

⁹ The Cayman Islands allow service by leaving a document with a company or sending it by mail addressed to the company’s registered office. *See* Cayman Islands Companies Law (2018 Revision) § 70, https://www.cima.ky/upimages/commonfiles/CompaniesLaw2018Revision_1543503729.PDF. But China Linen has no registered office in the Cayman Islands. Decl. Ex. 7.

¹⁰ Federal Rule 4(f) states that an individual in a foreign country may be served “by a method that is reasonably calculated to give notice . . . as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction” or “by other means not prohibited by international agreement, as the court orders.” Fed. R. Civ. P. 4(f)(2)(A), (3).

Commission's website is reasonably calculated to provide persons located in China with notice of the OIP.

The Division's support for service via the internet is *Microsoft Corp. v. Doe*, 2012 U.S. Dist. LEXIS 162122. There the court faced a default situation because alleged unidentified cybercriminals "operated surreptitiously" from a foreign jurisdiction and the standard methods of service were difficult if not impossible to accomplish. *Id.* at *3. The court noted that other jurisdictions had approved service on foreign internet businesses by email and that in this situation the "email and internet-based service of process" met the due process standard. *Id.* at *5-8. While *Microsoft* provides some support for the Division's position, it is not conclusive because in *Microsoft* (1) certain defendants had responded to service of process thereby proving the sufficiency of service and demonstrating that they had adequate notice of the action against them; and (2) the court does not explain what it means by the terms "internet publication" and "internet-based service." *Id.* at *2, *8.

Publication in the International New York Times

Service by newspaper publication has been allowed in a few cases, but those cases are distinguishable on their facts. For example, in *SEC v. Tome*, the leading case cited by the Division, the court reasoned that service by publication in the *International Herald Tribune* was adequate "in the circumstances surrounding this action" because, among other reasons, the "SEC reasonably concluded that the purchasers resided or conducted business in Europe and chose a publication likely to be read by international investors," and "members of the securities industry like [the defendants] may be expected to be aware of a publicly announced SEC investigation involving insider trading during a high-visibility takeover." 833 F.2d at 1093. The court emphasized that the defendants had more than constructive notice, they *knew* of the lawsuit and the claims against them. *Id.* at 1093-94; *see also Gurung v. Malhotra*, 279 F.R.D. 215, 220 (S.D.N.Y. 2011) ("Second Circuit case law permits service by publication where the published notice is reasonably likely to come to the defendant's attention, especially where, as here, the defendant already has actual notice of the litigation.").

In *SEC v. China Intelligent Lighting & Electronics, Inc.*, No. 13-cv-5079, 2014 WL 338817, at *1 (S.D.N.Y. Jan. 30, 2014), the district court found that the Commission had not shown that service by publication in the *International New York Times* in China satisfied due process because the Commission had not presented evidence of the paper's "circulation (generally or within China), where in China it is distributed, and in what languages it is published." *Accord* 4A Charles Alan Wright & Arthur R. Miller, Federal

Practice and Procedure § 1074 (4th ed. 2018) (discussing several cases where the Supreme Court has found service by publication invalid).

Moreover, the Division candidly concedes that publication in the *International New York Times* “will be hard-pressed to attract as much interest as the original postings” on the Commission website. Mot. at 6. Indeed, according to The New York Times Company’s annual report, average circulation of the international edition of its paper was less than 175,000 internationally for the fiscal years ending December 30, 2018, and December 31, 2017. The New York Times Co., Annual Report at P-3 (Form 10-K) (Feb. 26, 2019).¹¹

Other alternatives—service via email

The Division, on the advice of the Office of International Affairs, has not asked for permission to serve the OIP by emailing China Linen’s officers. The basis for that advice is not stated and my research did not disclose a basis for the advice.¹² Mot. at 3. My research shows that the Hague Convention, which went into effect long before email existed, does not prohibit service by email. See *Lexmark Int’l, Inc. v. Ink Techs. Printer Supplies, LLC*, 295 F.R.D. 259, 261 (S.D. Ohio 2013); *MacLean–Fogg Co. v. Ningbo Fastlink Equip. Co.*, No. 08-cv-2593, 2008 WL 5100414, at *2 (N.D. Ill. Dec. 1, 2008). Service by email does not appear to be prohibited by any other international agreement. See *Advanced Access Content Sys. Licensing Adm’r, LLC v. Shen*, No. 14-cv-1112, 2018 WL 4757939, at *6 (S.D.N.Y. Sept. 30, 2018) (concerning email service on a defendant in China); cf. *Nagravision SA v. Gotech Int’l Tech. Ltd.*, 882 F.3d 494, 498 (5th Cir. 2018) (holding that a defendant had “not shown that [email] service is prohibited by international agreement”). And most courts have held that an objection to Hague Convention Article 10(a), which permits service by postal channels, is not an express objection to service by email. *Gurung*, 279 F.R.D. at 220; see *Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 332 (S.D.N.Y. 2015) (“China’s objection to service by postal mail does not cover service by email”); *Lexmark*, 295 F.R.D. at 262 (“Email service has been approved even where, as here, the country objects to Article 10 of the Hague Convention.”). *But see*

¹¹ I would consider a motion for service by publication in other newspapers or online publications, if evidence is provided to enable a determination that the publication is sufficiently widespread in China or sufficiently targeted to China Linen or its officers to satisfy due process.

¹² If the Division decides to seek service by email, it needs to explore the advice it has received.

Agha v. Jacobs, No. 07-cv-1800, 2008 WL 2051061, at *1-2 (N.D. Cal. May 13, 2008).

It appears that service of the OIP by email pursuant to Rule 141(a)(2)(iv) is a possibility. This does not mean that simply emailing English and Chinese versions of the OIP to the email addresses of China Linen’s officers obtained from counsel would be sufficient to satisfy due process. *See FTC v. PCCare247 Inc.*, No. 12-cv-7189, 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) (allowing service by email when there was “a high likelihood that defendants will receive and respond to emails sent to these addresses”); *Williams-Sonoma Inc. v. Friendfinder Inc.*, No. 06-cv-6572, 2007 WL 1140639, at *2 (N.D. Cal. Apr. 17, 2007) (concluding that the email accounts proposed for service “have been effective means of communicating with the defendants”). Rather, for service by email to be effective, the Division would need to show that one or more officers responded to an email sent to the email address or that a reputable third-party source represents that the email address is an active account for the named individual. In other words, there has to be a showing that the email account belongs to an officer of China Linen and the account is used by that person so that there is a high likelihood that the person will receive the email.

For the reasons stated, I DEFER ruling on the motion and suggest that the Division consider whether service can be achieved by email to the officers of China Linen. I ORDER the Division to inform me on the status of service on China Linen by April 26, 2019.

Brenda P. Murray
Chief Administrative Law Judge