

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

Administrative Proceedings Rulings
Release No. 6669 / August 29, 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 Deferring Ruling
on Motion for Default Judgment
and Ordering Service
by Alternate Means**

On March 21, 2017, the Commission issued an order instituting proceedings pursuant to Section 12(j) of the Securities Exchange Act of 1934. China Linen Textile Industry, Ltd., a Cayman Islands corporation located in China, is the only Respondent remaining.¹ The allegations in the OIP remain pending as to China Linen because it has not yet been served with the OIP.

On August 5, 2019, the Division of Enforcement moved for default judgment under Article 15 of 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, 658 U.N.T.S. 163. The Division included a declaration by its counsel and exhibits in support. The Division's motion provides updates on the status of the Hague service request pending with the Chinese Ministry of Justice and the Division's diligent efforts to explore other methods of service and the difficulties it has encountered pursuing those methods.

¹ 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).

Since March 30, 2017, when the Division initiated the Hague process by sending a package to the Ministry of Justice for service on China Linen, the Commission's Office of International Affairs has emailed the Ministry of Justice multiple times to check on the status of the service request. Mot. at 3-4; Decl. ¶¶ 14-16, 18-20; Exs. 7-9, 11-13. The Ministry of Justice responded only once, on September 11, 2018, stating that service as to China Linen (and respondents in other proceedings) was "now pending in the court." Mot. at 4; Ex. 7. It has not responded to the most recent Division emails of March and June 2019.

Invoking Article 15 of the Hague Convention, the Division asks for a default judgment against China Linen. Mot. at 9-10. Paragraph 2 of Article 15 permits entry of a default where a document is transmitted by a Convention-prescribed method to a foreign designated authority for service abroad and that authority fails to provide a "certificate of any kind" within six months of transmission despite "every reasonable effort" to obtain a certificate.

To date, Article 15 has not been used to default a respondent in a Commission proceeding. As such, it would be helpful to me if the Division could state its position on whether an Article 15 default comports with the notice requirements of the Due Process Clause, Section 12(j), the Commission's Rules of Practice, and the OIP. See 15 U.S.C. § 78l(j) (requiring "notice and opportunity for hearing"); 17 C.F.R. § 201.141(a); OIP at 4 (requiring service by the Rules of Practice); see also *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d Cir. 2005) ("[I]n addition to the Hague Convention, service of process must also satisfy constitutional due process."); *Celgene Corp. v. Gupta*, No. 2:17-cv-5308, 2018 WL 4027032, at *5 (D.N.J. Aug. 23, 2018) (denying Article 15 motion for default where there was no evidence that due process notice requirements had been satisfied); cf. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) (recognizing that due process notice requirements apply to foreign nationals in context of Hague service).

I will DEFER ruling on the Division's motion until it briefs the above issue.

I note, however, that the Hague Convention is simply one method of providing notice to a foreign corporation. Rule 141(a)(2)(iv)(D) provides that service can be accomplished by "any other means not prohibited by international agreement, as the Commission or hearing officer orders." 17 C.F.R. § 201.141(a)(2)(iv)(D). Federal Rule of Civil Procedure 4(f)(3) is substantively identical to the Commission's rule. See Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,219 (July 29, 2016)

(noting the similarity between the two provisions). Courts interpreting that rule have held “that service of process under Rule 4(f)(3) is neither a ‘last resort’ nor ‘extraordinary relief.’ It is merely one means among several which enables service of process on an international defendant.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002) (internal citation omitted); accord *AngioDynamics, Inc. v. Biolitec, AG*, 780 F.3d 420, 429 (1st Cir. 2015) (“By its plain terms, Rule 4(f)(3) does not require exhaustion of all possible methods of service before a court may authorize service by ‘other means,’ such as service through counsel and by email.”); *Bazarian Int’l Fin. Assocs., LLC v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 16 (D.D.C. 2016); *KG Marine, LLC v. Vicem Yat Sanayi Ve Ticaret As*, 24 F. Supp. 3d 312, 314 (W.D.N.Y. 2014).

To that end, I have ascertained that there is a United States citizen connected to China Linen who may be served with the OIP. China Linen’s most recent annual report lists Stephen Monticelli as an independent director of the company’s board, as well as a member of the board’s audit, compensation, and nominating committees. China Linen, Annual Report at 49-56 (Form 20-F) (Feb. 21, 2012). The report further represents that Monticelli was the second-highest paid officer or director of the company in 2011, with a salary of \$40,500. *Id.* at 51. This fact, along with the multiple positions he holds with the company, show that he has significant ties to the company and is not a mere nominal figure. His independent director agreement with the company describes him as a citizen of the United States and provides a business address for him in San Francisco. China Linen, Report of Foreign Issuer, Ex. 4-1, at 1 (Form 6-K) (Sept. 3, 2010). Monticelli was once registered with the Commission as an investment adviser. Stephen Paul Monticelli, Investment Adviser Representative Summary (CRD No. 4718381), available at <https://adviserinfo.sec.gov/Individual/4718381>. He has a LinkedIn profile page that was updated as recently as one year ago and provides his location as San Francisco. See <https://www.linkedin.com/in/stephen-monticelli-43786b6/>. He purports to be managing director of Mosaic Capital HK Limited, and the Hong Kong companies registry includes a company of that name. See Cyber Search Centre of the Integrated Companies Registry Information System, available at <https://www.icris.cr.gov.hk/csci/>.

China Linen is incorporated and located outside the United States, Hague service has been pending for more than two years, the Division has made diligent efforts to effect service, and there appears to be no other officer or director who can be located let alone served. Under the circumstances, serving Monticelli is the best method reasonably calculated to provide notice to China Linen. Serving Monticelli is functionally similar to serving a

domestic representative or agent of a foreign corporation as courts have authorized under Rule 4(f)(3), which does not depend on whether the individual or entity has been specifically authorized to accept service on the corporation's behalf. *See Freedom Watch, Inc. v. OPEC*, 766 F.3d 74, 83 (D.C. Cir. 2014) (“A number of courts thus have sanctioned service on United States counsel as an alternative means of service . . . without requiring any specific authorization by the defendant for the recipient to accept service on its behalf.”); *see also Microsoft Corp. v. Buy More, Inc.*, 703 Fed. App'x 476, 480 (9th Cir. 2017); *Brown v. China Integrated Energy, Inc.*, 285 F.R.D. 560, 565-66 (C.D. Cal. 2012); *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 437-38 (S.D.N.Y. 2009). Furthermore, the Hague Convention would have no application as to, and thus does not prohibit, this means of service under Rule 141(a)(2)(iv)(D). *See Volkswagenwerk*, 486 U.S. at 707 (“Where service on a domestic agent is valid and complete under both [governing authority] and the Due Process Clause, our inquiry ends and the Convention has no further implications. . . . The only transmittal to which the Convention applies is a transmittal abroad that is required as a necessary part of service.”).

Accordingly, I ORDER the Division to attempt service of the OIP on Monticelli and file a status report by September 27, 2019. The status report should also address the issue I identified with respect to Article 15 of the Hague Convention, if the Division still seeks to pursue a default by that method.

Brenda P. Murray
Chief Administrative Law Judge