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

Administrative Proceedings Rulings
Release No. 6698 / October 22, 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 Regarding Service

Background

Since this proceeding was reassigned to me, I have been reviewing the history of attempts to serve the order instituting proceedings (OIP) on the only remaining Respondent, China Linen Textile Industry, Ltd. China Linen is located in China and was registered in the Cayman Islands, although its registration has been stricken. *See* Motion for Service by Publication (Feb. 28, 2019), Decl. of David S. Frye ¶ 6 & Ex. 7.

The OIP was issued on March 21, 2017. Because China Linen is located in China—which objects to service by mail—the Division of Enforcement initiated service via the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.[1] On March 30, 2017, the Commission's Office of International Affairs (OIA) sent the OIP and other materials to the Chinese Ministry of Justice, for service on China Linen. Frye Decl. ¶ 4 & Exs. 4-5. The service package was delivered via UPS to the Chinese Ministry of Justice on April 6, 2017. Frye Decl. ¶ 5 & Ex. 6.

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1 *Done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

OIA has emailed the Chinese Ministry of Justice multiple times to check on the status of the service request but only once received a response, which came on September 11, 2018, and stated that service as to China Linen (and respondents in other proceedings) was "now pending in the court." *See* Motion for Default Judgment (Aug. 6, 2019), Decl. of Robert F. Schroeder ¶¶ 14-16, 18-20 & Exs. 7-9, 11-13. The Ministry of Justice has not responded to more recent emails.

While service under the Hague Convention has been pending, the Division has pursued other means of service.

In February 2019, the Division requested that the Chief Administrative Law Judge, then presiding over the proceeding, find service based on the publication of the OIP on the Commission's website or by authorizing service by publication in the *International New York Times*. The Division reported that although it had email addresses for officers of China Linen, OIA advised that it could not "use email service for China." Motion for Service by Publication at 2. The Chief Judge deferred ruling on the motion, expressed concerns about finding service by either form of publication, and suggested that the Division reconsider service by email to the officers of China Linen. The Chief Judge's order included citations to case law indicating that service could be effected by email to persons in China without contravening the Hague Convention. *China Biopharma, Inc.*, Admin. Proc. Rulings Release No. 6514, 2019 SEC LEXIS 557 (Mar. 20, 2019).

The Division responded in April 2019, noting its continued consultation with OIA and, through OIA, the Department of State. The Division stated that it was looking into newspapers in circulation near China Linen's headquarters and had also been provided with the name of an investigative entity in China. It also noted that Gao Ren—the chief executive officer, president, and chairman of the board of China Linen—appeared to be associated with another company in China and that it had sent a copy of its motion for service by publication to that company by email and United States Postal Service. The Division noted that its email transmission "revealed that the e-mail address is currently active" without explaining the basis for that statement. Division Response (Apr. 26, 2019) at 2 n.4.

In August 2019, the Division filed a motion for default judgment under Article 15 of the Hague Convention. In doing so, the Division stated that it had been in contact with China Linen's former counsel in the United States, who had provided "last known" email addresses for Gao Ren and another employee. Motion for Default Judgment at 5. It also stated that it was unable to engage the investigative firm in China. Nor was the firm regularly employed by the Division for service in the United States able to provide

assistance. Further, OIA and State had advised that service by publication in a newspaper would likely be unsuccessful and could even be "pursued by China as a violation of its internal law." *Id.* at 7. Finally, the Division was not able to establish a border watch for Gao Ren with Customs and Border Protection.

The Chief Judge deferred ruling on the motion for default and ordered the Division to attempt service on Stephen Monticelli, an independent director of China Linen named in the company's most recent filings with the Commission, who appeared to be a United States citizen. *China Biopharma, Inc.*, Admin. Proc. Rulings Release No. 6669, 2019 SEC LEXIS 2350 (Aug. 29, 2019). In response, the Division reported that it was successful in reaching Monticelli by email. Monticelli asserted that he resigned as a director of China Linen several years ago and has not had contact with the company since that time. He also asserted that he now resides in Hong Kong.

Rulings

Service on Monticelli and by email

I agree with the Chief Judge that attempting to effect service through Monticelli accorded with due process, as it was "reasonably calculated"—at that time—"under all the circumstances, to apprise [China Linen] of the pendency of the action." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). But if, before legal action is taken against a party, information is received tending to show that the attempt at notice has failed, *in some cases* due process requires that such information be taken into account and that any "reasonable additional steps" be taken to provide notice. *Jones v. Flowers*, 547 U.S. 220, 226-34 (2006).

The question is, what reasonable additional steps are available in this proceeding? Because "if there were no reasonable additional steps [that] could have [been] taken, . . . [the Division] cannot be faulted for doing nothing." *Id.* at 234.

Because of China Linen's location and registration status, there is no address to which service can be mailed without going through the Hague process, nor state secretary or registered agent upon whom service can be made. According to the most recent available information—which may or may not be accurate—China Linen's officers and directors all reside in China. Monticelli claims to have severed his association with the company years ago. The Division has investigated several other methods of service but none are viable.

However, one option remains not fully explored. In April, the Division noted that it had sent a copy of its motion for service by publication via email to Gao Ren at another company with which he is believed to be associated and that the email address is "currently active." Division Response (Apr. 26, 2019) at 2 n.4. But the Division has not explained the basis of the advice that it has received that it cannot serve China Linen via email to its officers and directors. If the Division believes that principles of law prohibit it from doing so, I ORDER the Division to provide a brief setting forth its argument with appropriate citations to authority. I acknowledge that there is a split of authority as to whether email service to a person or entity located within a signatory to the Hague Convention is appropriate, but I concur with the Chief Judge that such service does not contravene the Hague Convention. *China Biopharma*, 2019 SEC LEXIS 557, at *14-17. If the Division has been advised that it cannot attempt email service for other reasons, I ORDER it to state as much, without divulging any privileged information, as that will inform my determination of whether reasonable additional steps exist. In either case, the Division should provide an update by December 6, 2019.

Motion for Service by Publication

The Chief Judge's March 20, 2019, order explained why the Division's proposed methods for service by publication are inadequate, and I adopt those reasons here. I would add the following points regarding service by publication online. The Division contends that data shows that the web page containing the OIP was viewed over two thousand times in the first six months after this proceeding was instituted. Division Response (Sept. 27, 2019) at 2. But that fact is hardly any indication that China Linen should have or likely would have known of the OIP's posting.

The Division also contends that the trading suspension "is likely responsible for attracting additional attention to the proceedings, and most especially from [China Linen's] officers." Motion for Service by Publication at 6. But that is speculation. The Division provides no analysis or evidence suggesting that trading suspensions generally capture the attention of company officers or that China Linen's officers should have or likely would have been actively monitoring the stock's domestic trading.

In virtually every proceeding under Section 12(j), the OIP is posted online and a trading suspension is issued. There is no basis to conclude that such methods are satisfactory notice as a matter of law or in the particular circumstances of this case. Without such basis, I would be authorizing an end-run around Rule 141's service requirements that could be requested in every other proceeding as well, which I will not do.

Accordingly, the Division's February 28, 2019, motion for service by publication is DENIED, without prejudice to the Division proposing other methods for service by publication that meet due process standards.

Motion for Default

Paragraph 2 of Article 15 of the Hague Convention 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. The United States has adopted the default provision of Article 15. *CGI Techs. & Sols. Inc. v. Acacio*, No. 17-cv-1943, 2019 WL 978097, at *3 (C.D. Cal. Jan. 4, 2019); Declaration No. 3 of the United States, https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=428&disp=resdn.

Although the Commission's Rules of Practice do not expressly authorize a default under Article 15, *see* 17 C.F.R. § 201.155, the provisions of the Hague Convention are the supreme law of the land and self-executing; they have the same force as any federal statute. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *Brown-Thomas v. Hynie*, 367 F. Supp. 3d 452, 463 (D.S.C. 2019). As far as I am aware, there is no discernable basis to conclude that the United States intended to limit the Convention or Article 15's applicability in the context of administrative proceedings, and there has been no statute passed by Congress limiting its applicability in this context. Thus, it is arguable that the Convention supplements, and is not limited by, the Commission's rules. *Cf. Millbrook v. United States*, 569 U.S. 50, 57 (2013) (emphasizing the well-established rule that the Supreme Court will "decline to read . . . a limitation into unambiguous text"); *Ackermann v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986) ("[T]he Convention 'supplements'—and is manifestly *not* limited by—Rule 4 [of the Federal Rules of Civil Procedure].").

In the order of August 29, 2019, the Chief Judge directed the Division to "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." 2019 SEC LEXIS 2350, at *2. The Division's response did not address this question from the standpoint of precedent and legal principles. If the Division wishes for me to further consider its motion for default, it would be helpful if it submitted a brief by December 6, 2019, addressing the following issue with citations to legal authority:

> Whether the notice requirements of the Due Process Clause and Section 12(j) are satisfied where a foreign

securities issuer is reachable only via its mailing address in China as provided on its most recent filing with the Commission and other service methods are unavailable; service on that foreign issuer has been attempted under the Hague Convention by sending the OIP and related material for service via the designated Central Authority; and the requirements for a default under Article 15, paragraph 2—including reasonable efforts to obtain a certificate—are met.

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Jason S. Patil
Administrative Law Judge