

## Anderson, Sybil

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**Subject:** FW: Filing for Docket No. CAA-HQ-2-15-8065  
**Attachments:** Respondent Taotao USA, Inc.'s Motion for Extension of Time.pdf; Respondents' Motion to Quash and Dismiss.pdf

**From:** John Stone [<mailto:jstone.wmchulaw@gmail.com>]  
**Sent:** Wednesday, December 16, 2015 11:26 AM  
**To:** oaljfilng <[ojalfiling@epa.gov](mailto:ojalfiling@epa.gov)>  
**Subject:** Filing for Docket No. CAA-HQ-2-15-8065

Ms. Anderson,

Attached to this email are Respondent Taotao USA, Inc.'s Motion for Extension of Time and Respondents,' Taotao Group Co., Ltd., and Jinyun County Xiangyan Industry Co., Ltd., Motion to Quash and Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(5) and Brief in Support.

Please file these documents into Docket No. CAA-HQ-2015-8065.

The original documents and two copies of each were sent by certified mail, overnight delivery, on December 15, 2015 to:

Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

Additionally copies were served upon Robert Klepp and Ed Kulschinsky by certified mail, overnight delivery, on December 15, 2015.

Regards,

John Stone  
The Law Offices of William Chu  
4455 LBJ Freeway #909  
Dallas, Texas 75244  
Tel: (972) 392-9888  
Fax: (972) 392-9889

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

**In the Matter of:**

**Taotao USA, Inc.,  
Taotao Group Co., Ltd., and  
Jinyun County Xiangyuan Industry  
Co., Ltd.,**

**Respondents.**

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**Docket No.  
CAA-HQ-2015-8065**

**RESPONDENTS' MOTION TO QUASH AND DISMISS PURSUANT TO  
FEDERAL RULE OF CIVIL PROCEDURE 12(b)(5) AND BRIEF IN SUPPORT**

Respondents Taotao Group Co., Ltd., and Jinyun County Xiangyan Industry Co., Ltd., (hereinafter collectively "Respondents") hereby specially appear for the limited purpose of filing this motion and move pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure for entry of an order quashing and dismissing the purported service of process upon Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd., by the United States Environmental Protection Agency. In support of their motion, Respondents rely on the accompanying Memorandum of Law in Support of Respondents' Motion to Quash and Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(5). Counsel appearing for Respondents conferred with EPA's counsel, and explained the nature of the motion and its legal basis. EPA's counsel indicated it would oppose the motion.

WHEREFORE, Respondents respectfully pray that the Court quash the purported service of process upon Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd., and dismiss the Complaints against them for insufficient service of process, and that it grant such other relief as it deems just and proper.

## SUMMARY OF ARGUMENT

Respondents respectfully submit this Memorandum of Law in Support of Respondents' Motion to Quash and Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(5). Taotao Group Co., Ltd., and Jinyun County Xiangyan Industry Co., Ltd. (hereinafter "Respondents"), have not been properly served notice of this action. Respondents are organized and existing under the laws of the People's Republic of China, a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, better known as the Hague Convention, 20 U.S.T. 361, *reprinted at* 28 U.S.C. Federal Rules of Civil Procedure, Rule 4 (hereinafter "Hague Convention"). Therefore, any service of process upon Respondents for litigation in the United States must be made pursuant to the Hague Convention.

Complainant United States Environmental Protection Agency ("EPA") attempted service of Respondents on November 25, 2015, was ineffective because it failed to satisfy the requirements of the Hague Convention. Specifically, EPA purports to have served Respondents by and through their authorized agent for service of process in the United States, Taotao USA, Inc. Because EPA's attempted service on the Foreign Corporations was performed by serving Taotao USA, Inc., a separate legal entity that has not been authorized to act as an authorized agent for Respondents, rather than through China's central authority designated pursuant to the Hague Convention, it was deficient under Article 5 of the Hague Convention - the only means by which China has approved service under the Convention.

Accordingly, because EPA's purported service of process upon Foreign Corporations was ineffective, it should be quashed, and EPA's Complaint should therefore be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(5).

## STATEMENT OF FACTS

EPA initiated the instant litigation by filing its Complaint on November 12, 2015. On November 16, 2015, EPA attempted to effectuate serve on Respondents through personal service on “Taotao USA. Attn. Matao Coa President.” On November 25, 2015, EPA filed its Certificate of Service with the Court.

The EPA claims, in its December 11, 2015 email, that this manner of service was effective and in compliance with the Hague Convention on the basis that:

“manufacturers are required to name an agent for service located in the United States for any action by EPA. 40 C.F.R. 86.416-80(a)(2)(ix), 1051.205(w). Accordingly, each of Taotao’s applications for Certificates of Conformity contain a contractual agreement between Taotao USA, Inc., and the appropriate manufacturer, either Taotao Group Co., Ltd. or Jinyun County Xiangyuan Industry Co., Ltd., appointing Taotao USA, Inc. as the manufacturer’s “agent for service of process, for process from the US EPA.” It is the government’s position that these contractual agreements do authorize Taotao USA, Inc., to receive service on behalf of Taotao Group Co., Ltd, and Jinyun County Xianyuan Industry Co., Ltd., and that service on the Chinese entities was properly executed in this matter.”

Taotao USA, Inc., is an entirely separate legal entity from Respondents. Taotao USA, Inc., is an importer and has individually applied for a Certificates of Conformity. At no point did Taotao USA, Inc., or Matao Cao, accept service of EPA’s Summons and Complaint, voluntarily or otherwise, in compliance with the Hague Convention.

## STANDARD OF REVIEW

Once a defendant contests service via a motion to dismiss under Federal Rule of Civil Procedure 12(b)(5), the plaintiff bears the burden of showing that service was valid. *Frederick v. Hydro-Aluminum S.A.*, 153 F.R.D. 120, 123 (E.D.Mich. 1994) (“When the validity of the service of process is contested, the plaintiff bears the burden of proving that proper service was effected.”); see also Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1353 at 342

(2004). Here, EPA cannot meet its burden because its attempt to serve Respondents were ineffective under the Hague Convention.

### ARGUMENT

Federal Rule of Civil Procedure 4(h) governs service of process upon corporations, with Rule 4(h)(2) providing that service on a foreign corporation outside of the United States may generally be completed as prescribed in Rule 4(f). In turn, Rule 4(f)(1) provides for service “by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.”

Contrary to the assertion by EPA’s counsel in its December 11, 2015 email, compliance with the Hague Convention is mandatory. The United States Supreme Court has held that plaintiffs must comply with the requirements of the Convention when serving foreign corporations in signatory-nations. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) (“compliance with the Convention is mandatory in all cases to which it applies”); see also *Gateway Overseas, Inc. v. Nishat (Chiunian) Ltd.*, 2006 WL 2015188, \*3 (S.D.N.Y. 2006) (“As Pakistan ... is a signatory to the Hague Convention, the Federal Rules required service to [the Pakistani defendant] in a manner consistent with the Convention's provisions.”). Because both the United States and the People’s Republic of China are signatories to the Hague Convention, the Convention therefore applies to this case. See, e.g., *Pac. Worldwide, Inc. v. Ample Bright Dev., Ltd.*, No. 11 Civ. 107(LTS)(HBP), 2011 WL 6224599, at \*2 (S.D.N.Y. Dec. 14, 2011). Foreign defendants are entitled to “insist on service pursuant to the Hague Convention.” *Sheets v. Yamaha*, 891 F.2d 533, 536 (5th Cir. 1990).

The Hague Convention establishes clear procedures by which service of process must be effectuated in China. Specifically, under the Convention, each country shall establish a central authority to which all service requests from other signatory nations must be sent directly. Hague Convention, Articles 2 and 3. Once the central authority receives a service request, Article 5 of the Convention specifies that the central authority shall then “itself serve the document or shall arrange to have it served by an appropriate agency.” *Id.* at Article 5. Because China has formally objected to alternative forms of service under Article 10 of the Hague Convention - as permitted under Article 21 - formal service upon a Chinese corporation must be effectuated pursuant to Article 5. *Id.* at n.7a; see also *Pac. Worldwide, Inc.*, 2011 WL 6224599, at \*2 (“China has objected to service by mail.”). Furthermore, China requires that all documents served be translated into the language of that country. *See, e.g., Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).

The EPA’s Complaint is subject to the mandatory provisions of the Hague Convention. Despite the clear directives of the Convention, the EPA has wholly failed to comply with the Convention’s mandatory provisions. They have not served China’s central authority, and have not translated the documents into the appropriate language. The EPA has offered no more than a general statement that “manufacturers are required to name an agent for service located in the United States for any action by EPA.” In support thereof, the EPA has wholly failed to offer any evidence supporting their claim that service was proper through Taotao USA, Inc.

Taotao USA, Inc., is an entirely separate legal entity from Respondents. Taotao USA, Inc., is an importer and has individually applied for a Certificates of Conformity. At no point did Taotao USA, Inc., or Matao Cao, accept service of EPA’s Summons and Complaint, voluntarily or otherwise, in compliance with the Hague Convention.

### **A. The EPA Has Attempted to Circumvent the Hague Convention Through Regulation**

The EPA has attempted to circumvent the Hague Convention, the supreme Law of the Land, through regulation requiring designation of agents for Certificates of Conformity. Administrative regulations of a federal agency may not contract or expand an international compact. *Samann v. C.I.R.*, 313 F.2d 461, 463 (4th Cir. 1963) and citations therein; U.S.C.A. Const. art. 6, cl. 2. The EPA's requirement that a manufacturer must contract for an authorized agent within the United States is a clear attempt to carve out exceptions to the Hague Convention. Such erosion would defeat the spirit and intent of the convention, "to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time." Convention Done at the Hague Nov. 15, 1965;, T.I.A.S. No. 6638 (Feb. 10, 1969).

### **CONCLUSION**

For the foregoing reasons, Foreign Corporations respectfully request that EPA's purported service on Foreign Corporations be quashed, and that all claims against Foreign Corporations in this civil action be dismissed pursuant to Rule 12(b)(5) on account of insufficient service of process.

In the alternative, should this Court reject Respondents' Motion to Quash Pursuant to Federal Rule of Civil Procedure 12(b)(5), Respondents respectfully request that this Court grant Respondents additional time to adequately answer the EPA's Complaint.

Respectfully submitted,

By: \_\_\_\_\_

William Chu

Texas State Bar No. 04241000

The Law Offices of William Chu

4455 LBJ Freeway, Suite 909

Dallas, Texas 75244

Telephone: (972) 392-9888

Facsimile: (972) 392-9889

[wmchulaw@aol.com](mailto:wmchulaw@aol.com)

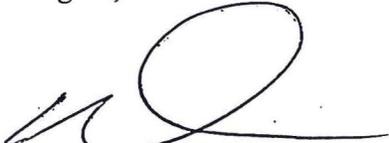
**CERTIFICATE OF SERVICE**

This is to certify that on December 15, 2015 a copy of this document was served by certified mail on Ed Kulschinsky, counsel for Complainant, Robert Klepp, counsel for Complainant, and the Headquarters Hearing Clerk for the EPA Office of Administrative Law Judges, as follows:

Ed Kulschinsky  
Air Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
1200 Pennsylvania Ave., NW  
William J. Clinton Federal Building  
Room 1142C, Mail Code 2242A  
Washington, DC 20460  
(202) 564-4133  
[Kulschinsky.edward@epa.gov](mailto:Kulschinsky.edward@epa.gov)

Robert G. Klepp  
U.S. EPA, Air Enforcement Division  
1200 Pennsylvania Ave., NW  
Mail Code 2242A  
Washington, DC 20460

Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

  
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William Chu