

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUI-YANG HUANG,

Plaintiff,

09 CV 8297 (HB)

-Against -

ADVANCED BATTERY TECHNOLOGIES, INC.,

Defendant.
-----X

**AFFIDAVIT OF
XIEZHONG ZENG**

Xiezhong Zeng, an attorney duly admitted to practice law in the People's Republic of China ("PRC"), declares under the penalties of perjury under the law of the United States of America ("United States") as follows:

1. At the request of Plaintiff Sui-Yang Huang ("Dr. Huang"), I was asked to render an opinion on the question of whether or not the People's Court of the City of Shenzhen District of Baoan ("People's Court") would have jurisdiction over an action asserting the same claims as those brought by Dr. Huang in this Court against defendant Advanced Battery Technologies, Inc. ("ABAT"), particularly in light of ABAT's agreement in this action to subject itself to the jurisdiction of the People's Court.

2. On August 8, 2010, Dr. Huang, in fact, brought such litigation, but it was dismissed by the People's Court for lack of jurisdiction in a decision dated August 10, 2010. That decision was appealed to the Intermediate People's Court of the Province of Guangdong City of Shenzhen ("Intermediate Court"), but the lower court decision was affirmed on September 30, 2010.

3. My conclusion is that the People's Court would have no jurisdiction over such a dispute, and that its earlier decision, and its affirmance by the Intermediate Court, was proper. My basis for that conclusion is that the Civil Procedure Law of the People's Republic of China ("Chinese Civil Procedure") does not allow parties to agree to vest a court with jurisdiction where it otherwise would not have it. There must be an *independent* basis for jurisdiction, and *none* exists here. My decision is not affected at all by the fact that the Chinese courts apparently were unaware of ABAT's agreement to be subject to the jurisdiction of the People's Court. That is an irrelevant consideration.

MY BACKGROUND

4. I believe I am particularly well suited to render an opinion on this question. I was a Judge of the People's Court from 1993 to 1999 and of the Intermediate Court from 2002 to 2004. While on the bench, I handled over a thousand civil litigations, many of which, like this one, involved foreign interests.

5. I received a degree from the Law School of Peking University, viewed by many as the premier law school in the PRC, and a master of laws degree from Hong Kong University. I am now a partner and the head of Department of Civil Litigation in Guangdong Chunfeng Law Firm, located in Shenzhen, PRC. I am fluent in written and spoken English.

6. In forming my opinion on the question presented, I reviewed the following documents, all of which are attached hereto as exhibits:

- a. Dr. Huang's First Amended Complaint in this action, dated November 17, 2009 (Exhibit A);

- b. Opinion and Order by Hon. Harold Baer, dated May 26, 2010 (Exhibit B);
- c. Dr. Huang's Complaint in People's Court, dated August 8, 2010 (Exhibit C);
- d. Decision of the People's Court, dated August 10, 2010 (Exhibit D);
- e. Decision of the Intermediate Court, dated September 30, 2010 (Exhibit E);
- f. Affidavit of Zhiguo Fu ("Mr. Fu"), dated December 4, 2009 (Exhibit F);
- g. Dr. Huang's Declaration, dated January 18, 2011 (Exhibit G);
- h. Declaration of Qiqiang Si, dated January 21, 2010 (Exhibit H);
- i. Supplemental Declaration of Mr. Fu, dated February 15, 2010 (Exhibit I); and
- j. Reply Declaration of Dr. Huang in support of his cross motion for partial summary judgment, dated March 6, 2010 (Exhibit J).

OVERVIEW

7. The law of the PRC regarding the commencement of a lawsuit is substantially different from that of the United States, as I understand it. In the PRC, the plaintiff must *prove* the existence of the court's jurisdiction *before* the court will allow the summons and complaint to be served on the defendant. In PRC law, "*proof*" is not a mere allegation or simple evidence. It means that the evidence is so strong that it essentially compels acceptance of the truth of a factual assertion. In this case, there simply is, in that sense, no *proof* that the People's Court had jurisdiction, *and ABAT's agreement to be subject to the jurisdiction of the People's Court is of absolutely no legal consequence, since parties may not vest a court with jurisdiction where it otherwise does not exist.*

THE PARTIES

8. The jurisdictional prerequisites of Article 241 of Chinese Civil Procedure apply if the defendant is not “domiciled” in PRC. (Exhibit K) ABAT is a United States corporation, organized and existing under the laws of the State of Delaware, with its principal (and only) office in the United States located in New York City.

9. ABAT asserted in earlier motions that “its headquarters was located in Heilongjiang,” ABAT, however, never produced any evidence, such as a certificate of incorporation under ABAT’s name, that it was incorporated or licensed to do business in the PRC. Consequently, I have concluded that ABAT is a foreign corporation, with no legal domicile in PRC. Thus, Article 241, *et seq.*, applies to this case, rather than Article 22, *et seq.*, which applies to jurisdiction over domiciliaries.

THE CLAIMS AGAINST ABAT¹

10. On August 30, 2008 Dr. Huang signed an employment contract with ABAT (“Contract”), pursuant to which he became ABAT’s Chief Technology Officer (“CTO”) for a term of 5 years, responsible for research and product development. In addition to a salary, ABAT agreed to give Dr. Huang and his designee a total of 300,000 shares of ABAT stock. That never happened. ABAT failed to honor its agreement.

11. In August 2009, ABAT wrote Dr. Huang that, due to an unspecified “job change”, he was being dropped from ABAT’s payroll. After that, he received no salary whatsoever from ABAT. At the end of October 2009, he was summarily and wrongfully discharged.

¹ This section is based on the court’s records that I reviewed.

12. The day after this action was commenced, Dr. Huang received a death threat in a text message on his cell phone: *"If you don't want to die earlier, you must shut up. Otherwise, you shall die no matter where you are in the world"* The next day he received another death threat: *"You don't want to die? F**king you."* Finally, he was sent the following: *"You don't want to die? Be careful that your whole family will be killed. If you don't believe, wait and see. F**king you."* Thereafter, Dr. Huang filed an amended complaint. Again, he immediately received a death threat on his cell phone: *"All of you now have to be careful, waiting to give you wreath, you all are a bunch of big liar."* (The Chinese word for "wreath" used in the text message is a reference to a specific type of wreath: *a funeral wreath.*) Given the timing and content of the death threats, one can only infer that they came from someone acting on ABAT's behalf.

THE PEOPLE'S COURT

HAS NO JURISDICTION OVER THE CONTRACT CLAIM

13. Pursuant to Article 241, a contract action may be brought against a non-domiciliary in a court such as the People's Court *only* in five limited circumstances, *none* of which is present here. (Article 241 is set forth in Exhibit K.)

14. Those circumstances are:

- a. The non-domiciliary has a representative agency, branch or business agent located in the district.

There is no proof that ABAT has one in Shenzhen.

- b. The non-domiciliary has property located in district that could be used to satisfy a judgment.

There is no proof that ABAT has any such property in Shenzhen.

- c. The contract was signed in the district or was performed there.

There is no proof of either fact. The Contract makes no reference to where it was signed – it was signed outside the district in Haerbin City (see Paragraph 3 of the Declaration of Huang in Exhibit N)– and there is no proof as to how much of the Contract Dr. Huang performed in Shenzhen. (This is further discussed in Paragraphs 15 – 18 below.)

- d. The “objects” of the action are located in the district.

The stock of ABAT and Dr. Huang’s salary - the “objects” of the action – are located in United States. They are not located in Shenzhen. ABAT is a NASDAQ listed Delaware corporation. Thus, Dr. Huang’s stock is located in the United States. And at all times, Huang’s salary was paid by ABAT’s New York office in United States.

- e. The final circumstance (involving tort claims) is discussed in the next section.

15. For purposes of determining whether, pursuant to Article 241, the People’s Court would have jurisdiction over Dr. Huang’s contract claim, the key language is that a local people’s court “where the contract is signed or performed” shall have jurisdiction over any dispute concerning it. (Article 241 is set forth in Exhibit K.)

16. In his accompanying Declaration, dated January 20, 2011 (Exhibit J), Dr. Huang explains that while he did work in Shenzhen during the time period when the Contract (with ABAT) was in effect, he actually was acting as the CEO of SABAT (“Shenzhen Advanced Battery Technologies”), a company that ABAT’s CEO, Mr. Fu, **personally** had purchased from Dr. Huang’s father. (Dr. Huang’s temporary work visa in China was issued based on his employment by SABAT.) Such work as he performed as CTO of ABAT while in Shenzhen was

incidental to his work for SABAT. He did, however, travel to other parts of China, where certain ABAT subsidiaries maintained facilities, where he focused exclusively on the affairs of ABAT.

17. If, in connection with filing his lawsuit in Shenzhen, Dr. Huang had presented me with the above facts (assuming I still sat on the People's Court), I would have dismissed the action for lack of jurisdiction, *and in my opinion so would any other judge of that court*. The reason is that for a people's court to have jurisdiction over a contract action involving a non-domiciliary, the contract has to have been performed predominantly in the district where the court sits. That was not the case here. It is the practice in People's Court and Intermediate Court that the place of performance in a contract dispute is where the contract is predominantly performed.

18. However, there *is* proof that ABAT's performance of its obligations under the Contract predominantly took place in. ABAT paid Dr. Huang's salary in the United States and ABAT transferred stock to him in the United States.

**ABAT'S AGREEMENT TO ACCEPT THE JURISDICTION
OF THE PEOPLE'S COURT IS INEFFECTIVE**

19. I was advised that there was a thought that if a copy of this Court's Opinion and Order (Exhibit B) had been given to the People's Court, or if the People's court had been informed that ABAT was willing to submit to the jurisdiction of the People's Court, that would have made a difference in the outcome of People's Court's decision. It would not have, and for one simple reason. As discussed in the next paragraph, the People's Court would not have jurisdiction over this action in the first place. Only if it *had* jurisdiction would the agreement have any legal significance.

20. Pursuant to Article 242 of Chinese Civil Procedure, in a contract action involving foreign interests, the parties *can*, through a written agreement, choose a court to hear a case, but only if that court has actual connection with the case. However, it does not authorize the parties to vest a Court with jurisdiction where it otherwise does not have in the first place. In fact, it is indicated in the same article that the parties' choice of court cannot violate the existing regulation of jurisdiction. (Article 242 is set forth in Exhibit L.) According to the existing regulation, Article 241, which duly applies to this case, the People's Court does not have jurisdiction. Thus, it does not make any difference whether or not ABAT is willing to subject itself to the jurisdiction of People's Court.

**THERE HAS BEEN NO WAIVER
OF LACK OF JURISDICTION**

21. Finally, ABAT may argue that, pursuant to Article 243, if a defendant answers the summons and complaint without any objection as to the Court's jurisdiction, the Court is deemed to have jurisdiction. (Article 243 is set forth in Exhibit M.) However this argument *only* applies when the Court has already accepted jurisdiction, which in this case, the People's Court never did.

**THE PEOPLE'S COURT
HAS NO JURISDICTION OVER THE TORT CLAIM**

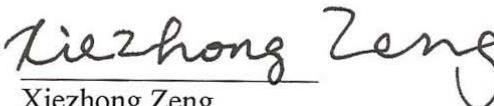
22. In order to *bring* tort claim against ABAT in any Chinese Court, Huang has to prove that the alleged tortious act was committed by ABAT. In the complaint in this action, Dr. Huang alleged that on a number of occasions, he received text messages threatening to kill him or his partner and child. The text messages did not explicitly state that they were sent by ABAT,

although Dr. Huang argues that the circumstances strongly suggest that ABAT was responsible for them. However, under the law of the PRC, some *proof* of that is required in order for the Court to accept jurisdiction. Since in this case, there is none (at this moment), the People's Court could not accept jurisdiction over Dr. Huang's death threat claims.

CONCLUSION

23. Based on the foregoing, the decisions of the People's Court and the Intermediate Court correctly ruled that the People's Court lacked jurisdiction over the contract claim. And also, as explained above, no Chinese Court would accept jurisdiction over the torts claim either.

Dated: January 19, 2011
City of Shenzhen, P.R. China


Xiezhong Zeng

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUI-YANG HUANG,

Plaintiff,

09 CV 8297 (HB)

-Against -

ADVANCED BATTERY TECHNOLOGIES, INC.,

Defendant.

-----X

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUI-YANG HUANG,

Plaintiff,

**FIRST AMENDED
COMPLAINT**

-against-

09 Civ. 8297 (HB)

ADVANCED BATTERY TECHNOLOGIES, INC.,

Defendant.
-----X

Plaintiff Sui-Yang Huang ("Huang"), as and for his complaint against defendant Advanced Battery Technology, Inc. ("ABAT"), alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Huang is citizen of the United States with residences in Pleasanton, CA and Shenzhen, Guangdong Province, China.
2. ABAT is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business located at 15 W. 39th Street, 14th Floor, New York, NY 10018.
3. Jurisdiction is based on diversity of citizenship between Huang and ABAT.
4. Venue is based on ABAT's principal place of business being located within the Southern District of New York.

THE MATTERS COMPLAINED OF

5. ABAT develops, manufactures and distributes rechargeable Polymer Lithium-Ion ("PLI") batteries. Its products include rechargeable PLI batteries for electric automobiles, motorcycles, mine-use lamps, notebook computers, walkie-talkies and other electronic devices. ABAT is listed on NASDAQ.

6. Huang has over 25 years of experience in chemical engineering, including over 21 years experience in the Chinese battery industry. Most recently, he was the founder and Chief Executive Officer ("CEO") of Luke Battery Corp. ("LBC"). (Huang's father, who financed the formation of LBC, was its sole shareholder.) Previously, he was the CEO of Apower Electronics Co., Ltd. Huang, who holds a Ph.D. from the Universite de Bordeaux (France), also is a professor in polymer materials and engineering at the South China University of Technology and a Joint Project Researcher with the Chinese Academy of Sciences – GIG. Huang holds 7 U.S. patents and 20 Chinese patents, primarily relating to the design and manufacture of batteries. He is also currently preparing 3 potential patents for submission, relating to battery technology. He has authored over 30 studies, published in academic journals in the United States, Europe and Asia.

7. On or about August 30, 2008, Huang, as agent for his father, entered into an agreement with ABAT's Chairman and CEO, Zhiguo Fu ("Fu"), whereby LBC was sold to Fu for \$1,000,000. (A copy of the agreement in the original Chinese and in English translation is attached hereto as Exhibit A.) Fu subsequently changed LBC's name to Shenzhen Advanced Battery Technologies Co. ("SABAT").

8. Also on or about August 30, 2008, Huang entered into two agreements with ABAT. The first agreement provided that:

a. Huang licensed all of his patents to ABAT, effective as of the day of the signing of the agreement;

b. In consideration of the license, ABAT would give Huang 200,000 shares of ABAT by no later than November 30, 2008 (See, also, Paragraph 9 hereof);

c. Huang became ABAT's Chief Technology Officer ("CTO") for a term of 5 years, responsible for research and product development; and

d. ABAT would pay Huang a salary of \$60,000 per year for his work as CTO. (A copy of the agreement in the original Chinese and in English translation is attached hereto as Exhibit B.)

9. The second agreement between Huang and ABAT is in the nature of an addendum to the first. In it, ABAT grants Huang the right to another 100,000 shares of ABAT, the owner of which he could (and did) designate. These shares were to be delivered by no later than September 30, 2008. (A copy of the agreement in the original Chinese and in English translation is attached hereto as Exhibit C.)

10. Huang began work as ABAT's CTO on or about September 1, 2008.

11. By September 30, 2008, Huang's designee had received none of the promised shares, nor did Huang receive his shares by November 30, 2009. When questioned, Fu told Huang that it would take until the end of the year to make the transfers.

12. In early January 2009, in violation of its agreement with him, ABAT delivered only 40,000 of the 200,000 promised shares to Huang, and only 20,000 of the promised 100,000 shares to his designee.

13. Huang demanded an explanation from Fu. Fu said that he changed his mind and would not follow the contracts. He said he was afraid Huang would quit once he received his shares. Fu said he would give Huang and his designee 20% of their shares for each of 5 years (the duration of the employment portion of the first August 30th agreement with ABAT). Fu also claimed this was an "American custom." Fu said that Huang should accept this custom because he is an American citizen. In July 2009, Huang asked Fu again for the remaining shares. Fu said that he knew he was violating the agreement with Huang but he would not give Huang the remaining shares. He added that

he was prepared to litigate the matter and had so advised his attorneys in New York. No further shares have been forthcoming.

14. In a letter dated August 4, 2009, Fu informed Huang that, due to an unspecified "job change," he (Huang) no longer would be on the payroll of ABAT, but rather of SABAT, and that his salary would be reduced to \$17,000. (A copy of the letter in the original Chinese and in English translation is attached hereto as Exhibit D.)

15. Huang continued to press Fu for the remainder of the shares, threatening litigation if ABAT did not give them to him. In a telephone conversation between the two men (which was recorded, but not yet transcribed), Fu threatened Huang about bringing any litigation. This action was commenced on September 30, 2009. The very next day, Huang began receiving death threats directed at him and his family. (Copies of the threats in the original Chinese and in English translation are attached hereto as Exhibit E.) Counsel for Huang immediately brought this to the attention of counsel for ABAT, and the death threats stopped.

16. On October 25, 2009, Huang received a written "notice" from Fu firing Huang as ABAT's CTO and directing him to report to work on October 27, 2009, for work at an ABAT facility located over 1,800 miles from his home. (A copy of the notice in the original Chinese and in English translation is attached hereto as Exhibit F.)

17. Huang and his family have suffered, and continue to suffer, extreme emotional distress as a result of the death threats and the fear of further retaliation.

FIRST CLAIM

BREACH OF CONTRACT

18. ABAT has breached its agreement with Huang in three ways: (a) it failed to deliver the agreed upon shares by the specified dates; (b) it wrongfully removed him from the ABAT payroll and reduced his salary; and (c) it fired him as ABAT's CTO.

19. As a result of these breaches of contract, Huang has been damaged in the approximate amount of \$1,250,000, the exact amount to be determined at trial.

SECOND CLAIM

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

20. ABAT's actions described in Paragraphs 15 and 16 above constitute intentional infliction of emotional distress.

21. As a result, Huang and his family have suffered, and continue to suffer, extreme emotional distress and are entitled to damages of \$1,000,000 or more, plus punitive damages, the exact amount to be determined at trial.

THIRD CLAIM

RETALIATION

22. ABAT's actions described in Paragraphs 15 and 16 above constitute unlawful retaliation.

23. As a result, Huang is entitled to damages of \$1,000,000 or more, plus punitive damages, the exact amount to be determined at trial.

FOURTH CLAIM

BREACH OF IMPLIED CONTRACTUAL COVENANT OF GOOD FAITH

24. ABAT's actions constitute a breach of the implied contractual covenant of good faith.

25. As a result, Huang is entitled to damages of \$1,000,000 or more, plus punitive damages, the exact amount to be determined at trial.

FIFTH CLAIM

PRIMA FACIE TORT

26. ABAT's claims constitute a *prima facie* tort.

27. As a result, Huang is entitled to damages of \$1,000,000 or more, plus punitive damages, the exact amount to be determined at trial.

PRAAYER FOR RELIEF

WHEREFORE, Plaintiff asks this Court for a judgment awarding him damages against Defendant as follows:

- a. on the First Claim, damages in the approximate amount of \$1,250,000, the exact amount to be determined at trial;
- b. on the Second Claim, damages in the approximate amount of \$5,000,000, plus punitive damages, the exact amount to be determined at trial;
- c. on the Third Claim, damages in the approximate amount of \$5,000,000, plus punitive damages, the exact amount to be determined at trial;
- d. on the Fourth Claim, damages in the approximate amount of \$5,000,000, plus punitive damages, the exact amount to be determined at trial;
- e. on the Fifth Claim, damages in the approximate amount of \$5,000,000, plus punitive damages, the exact amount to be determined at trial; and

- f. prejudgment interest and all costs and expenses of this action, including attorney's fees, and such additional relief as the Court deems just and proper on the Third Claim, damages in the approximate amount of \$5,000,000, the exact amount to be determined at trial, plus punitive damages, the exact amount to be determined at trial;

Dated: November 17, 2009

Dai & Associates, P.C.

By: 

John J. O'Connell
(CO1934)

Attorneys for Plaintiff
138-20 38th Avenue, Suite 9F
Flushing, New York 11354
718-888-8880

JURY DEMAND

Plaintiff demands trial by jury.

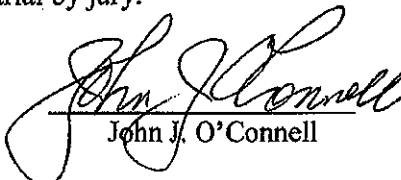

John J. O'Connell

Exhibit A

收 购 协 议

收购方：付治国（以下称甲方）

被收购方：深圳喜胜科技有限公司（以下称乙方）

双方经友好协商，就甲方收购乙方达成如下协议：

一、 甲方全资收购乙方所有资产包括：

1. 固定资产
2. 流动资产，包括原材料、产成品、再产品。
3. 银行帐面资金余额。

二、 双方协定，收购资金为壹佰万美元（100 万美元）。

三、 本合同签定后在 10 个工作日内，将收购资金汇入被收购方指定
帐户。

四、 本合同签定后，收购方将派会计人员进入乙方进行清产核资。

五、 本合同签定后，被收购方将原企业更名为深圳中强能源科技有
限公司

六、 公司更名后，所有权发生变化，但经营管理权仍由乙方管理，
总体发展目标按总公司发展规划进行运作。

七、 协议未尽事宜，双方友好协商解决。

八、 本合同一式两份，双方各持一份。

收购方：

被收购方：

二零零八年八月三十一日

收购协议
Acquisition Agreement

收购方：付治国（以下称甲方）

Acquiring company: Zhiguo Fu (Party A)

被收购方：深圳喜胜（译者注：输入错误，应为“胜喜”）科技有限公司（以下称乙方）

Target Company: Shenzhen Shengxi Technology Co., Ltd. (viz. Luke Battery Co., Ltd.) (Party B)

双方经友好协商，就甲方收购乙方达成如下协议：

Through friendly negotiation, Party A and Party B enter this agreement as follow:

一、甲方全资收购乙方所有资产包括：

Part A acquires all assets of Party B, which includes,

1. 固定资产

1. Fixed assets

2. 流动资产，包括原材料、产成品、再生品

2. Floating assets, including raw materials, final products and semi-products

3. 银行账面资金余额。

3. Bank account balance

二、双方协定，收购资金为一百万美元（100 万美元）。

The acquisition price is one million U.S. dollars (\$1,000,000) according to the agreement between Party A and Party B.

三、本合同签订后在 10 个工作日内，将收购资金汇入被收购方指定账户。

The payment should be remitted to the account appointed by Party B within 10 business days after signing this agreement.

四、本合同签订后，收购方将派会计人员进入乙方进行清产核资。

After signing this agreement, Party A shall designate accountants to audit Party B.

五、本合同签订后，被收购方将原企业更名为深圳中强能源科技有限公司（译者注：即 SABAT）。

After signing this agreement, Party B shall change the company's name to Shenzhen Zhongqiang Energy Technology Co., Ltd. (Remark: viz. SABAT)

六、公司更名后，所有权发生变化，但经营管理权仍由乙方管理，总体发展目标按总公司（译者注：ABAT）发展规划进行运作。

After changing the name of Party B, its ownership shall be transferred to Party A; but Party B shall continue to execute the business management rights and run the business under the general plan of the controlling company (Remark: viz. ABAT).

七、协议未尽事宜，双方友好协商解决。

Both parties shall resolve the issues not stipulated under this contract through friendly

negotiation.

八、本合同一式两份，双方各持一份。

This agreement is in duplicate with both parties holding one copy each.

收购方:付治国

Acquiring Company: Zhiguo Fu

[Signature]

被收购方: 黄穗阳

Target Company: Suiyang Huang

[Signature]

二零零八年八月三十一日

August 31, 2008

Exhibit B

聘用合同

甲方：美国 ABAT 公司

乙方：黄穗阳博士

双方经友好协商，就甲方聘任乙方为公司技术总监达成如下协议：

- 一、 聘任职务：美国 ABAT 公司技术总监
- 二、 聘任期限：五年，自二零零八年九月一日起至二零一三年八月十一日止。
- 三、 任期职责：
 1. 负责主抓技术的全面管理工作。
 2. 负责制定公司的中长期技术发展规划，技术路线，并组织实施。
 3. 负责编制近期新产品发展计划并组织实施。
 4. 负责制定科研规划，技术改造规划，并组织实施。
 5. 负责组织新产品开发及开发应用工作。
 6. 负责技术标准和工艺操作规程的审批。
 7. 负责解决生产过程中产品质量出现的重大技术问题。
 8. 负责对技术人员的技术培养工作。
 9. 负责审定新设备采购及旧设备改造工作。

四、 专利应用

本合同签定生效日起，乙方已获所有专利及申请专利（30 项），

不能和第三方转让及应用,乙方保证现有专利及申请专利(30项)在合同期内不会出现任何法律纠纷。

五、 聘用期内待遇

1. 赠予美国 ABAT 股票贰拾万股,待合同生效后,由甲方负责于 2008年 11月 30日办理完毕。

2. 年薪资为:六万美元

六、 合同未尽事宜,双方友好协商解决。

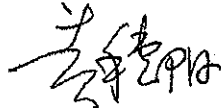
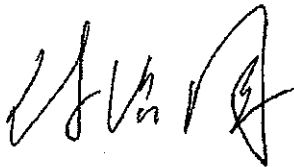
七、 本合同期满后,经双方协商同意可延续合约,合同期满前,经双方协商同意可以解除本合同,但需提前一个月提出。

八、 本合同一式三份,经甲乙双方签字确认以后生效,双方各持一份,甲方人事部备案一份。

甲方:美国 ABAT 公司

乙方:

代表:



二零零八年八月三十日

聘用合同

Appointment Contract

甲方：美国 ABAT 公司

Party A: American ABAT Company

乙方：黄穗阳博士

Party B: Doctor Huang Suiyang

双方经友好协商，就甲方聘任乙方为公司技术总监达成如下协议：

Through friendly negotiations, both parties enter this contract regarding the appointment of Party A's Chief Technology Officer (CTO).

一、 聘任职务：美国 ABAT 公司技术总监

I. Position of appointment: the Chief Technology Officer of the American ABAT Company

二、 聘任期限：五年，自二零零八年九月一日起至二零一三年八月三十一日止。

II. Term of Appointment: five years, from September 1st, 2008 to August 31st, 2013.

三、 任期职责：

III. Duties and Responsibilities during the term of appointment

1. 负责主抓技术的全面管理工作

In charge of general technique management

2. 负责制定公司的中长期技术发展规划，技术路线，并组织实施

In charge of the plan-making and direction of the company's technology development and organizing implementation accordingly

3. 负责组织新产品开发及开发应用工作

In charge of research and development of new products

4. 负责技术标准和工艺操作规程的审批

In charge of the examination and approval of technical norms and operation procedures

5. 负责解决生产过程中产品质量出现的重大技术问题

In charge of resolution of important technical quality problems in course of production

6. 负责对技术人员的技术培养工作

In charge of training and guiding for technical staffs

7. 负责审定新设备采购及旧设备改造工作

In charge of the technical examination and evaluation of purchasing new equipments and remolding the used equipments

四、 专利应用

IV. Patent application

本合同签定生效日起，乙方已获所有专利及申请专利（30 项），不能和第三方转让及应用，乙方保证现有专利及申请专利（30 项）在合同期内不会出现任何法律纠纷。

From the date when this contract is signed and taking effect, Party B* possesses of license of all patents and patent submissions of Party B (thirty items), these patents shall not be transferred to or applied by the third party. Party B assures that all of his patents and patent submissions (thirty items) will not be involved in any legal disputes during the term of this contract.

Remark: * "Party B" was mistyped. It shall be Party A here.

五、 聘用期内待遇

V. Treatment during the term of appointment

1. 赠与美国 ABAT 股票二十万股，待合同生效后，由甲方负责于 2008 年 11 月 30 日办理完毕。

Donate 200,000 stock shares of the American ABAT when this contract takes effect, Party A shall finish the transaction on November 30, 2008.

2. 年薪资为：六万美元

Annual salary: 60,000 dollars

六、 合同未尽事宜，双方友好协商解决。

VI. Both parties shall resolve the issues not stipulated under this contract through friendly negotiation.

七、 本合同期满后，经双方协商同意可延续合约，合同期满前，经双方协商同意可以解除本合同，但需提前一个月提出。

VII. When this contract expires, it may be extended with mutual consents. This contract can be terminated with mutual consents; if either of the two parties asks for terminating this contract before its expiration, he shall forward his request to the other party one month in advance.

八、 本合同一式三份，经甲乙双方签字确认以后生效，双方各持一份，甲方人事部备案一份。

VIII. This contract shall come into force upon signing by Party A and Party B and is written in triplicate with both parties holding one copy each. One copy is put on record to Party A's Personnel Office.

甲方：美国 ABAT 公司

Party A: American ABAT company

代表：付治国

Representative: Zhiguo Fu (signature)

乙方：黄穗阳

Party B: Suiyang Huang (signature)

二零零八年八月三十日

August 30, 2008

Exhibit C

备忘录

美国 ABAT 公司董事局主席付治国先生与黄穗阳博士，于 2008 年 8 月 30 日签订了技术总监聘任合同。按双方约定赠予黄穗阳博士叁拾万股美国 ABAT 公司的股票，其中：贰拾万股股票标明在聘用合同内。另拾万股股票由黄穗阳博士指定人员（包括姓名，法定证明）由甲方负责转入。本备忘录与聘用合同具有同等法律效力。

（2008 年 9 月 30 日办理完毕）

甲方：美国 ABAT 公司

乙方：黄穗阳

代表：

付治国

二零零八年八月三十日

备忘录
Memorandum

美国 ABAT 公司董事局主席付治国先生与黄穗阳博士，于 2008 年 8 月 30 日签订了技术总监聘任合同。按双方约定赠与黄穗阳博士三十万股美国 ABAT 公司的股票，其中：二十万股股票标明在聘用合同内。另十万股股票由黄穗阳博士指定人员（包括姓名，法定证明）由甲方负责转入。本备忘录与聘用合同具有同等法律效力。

Chairman of the board of American ABAT Company Mr. Fu Zhiguo and Doctor Huang Suiyang signed the Appointment Contract of Chief Technology Officer on August 30, 2008. According to the foregoing contract, Doctor Huang Suiyang is donated 300,000 stock shares of American ABAT Company. 200,000 stock shares are indicated in the Appointment Contract. The other 100,000 stock shares shall be transferred by Party A to the person (include name and legal ID) appointed by Doctor Huang Suiyang. This Memorandum shares the same legal validity with the Appointment Contract.

(2008 年 9 月 30 日办理完毕)

(The transaction shall be completed on September 30, 2008.)

甲方：美国 ABAT 公司
Party A: American ABAT company
代表：付治国【签名】
Representative: Zhiguo Fu [signature]

乙方：黄穗阳【签名】
Party B: Suiyang Huang [signature]

二零零八年八月三十日
August 30, 2008

Exhibit D

FROM : WTPGJMDAKOL

PHONE NO. : 9

AUG. 04 2009 05:03PM P1

通 知

美国公司、深圳公司、黄穗阳：

因黄穗阳工作调动，现将调动后的工资支付方式及调整后的月工资标准通知如下：

- 一、美国公司自 2009 年 8 月 1 日起停发黄穗阳工资。
- 二、黄穗阳工资调整为每月壹万元人民币，执行时间为 2009 年 8 月 1 日起。
- 三、自 2009 年 8 月 1 日起黄穗阳工资由深圳中强按实际考勤支付。

特此通知。

董事长：



二 00 九年八月四日

通知
Notice

美国公司、深圳公司、黄穗阳：
ABAT, SABAT and Suiyang Huang,

因黄穗阳工作调动，现将调动后的工资支付方式及调整后的月工资标准通知如下：
Due to the job change, Suiyang Huang's salary will be adjusted according to the statements as below.

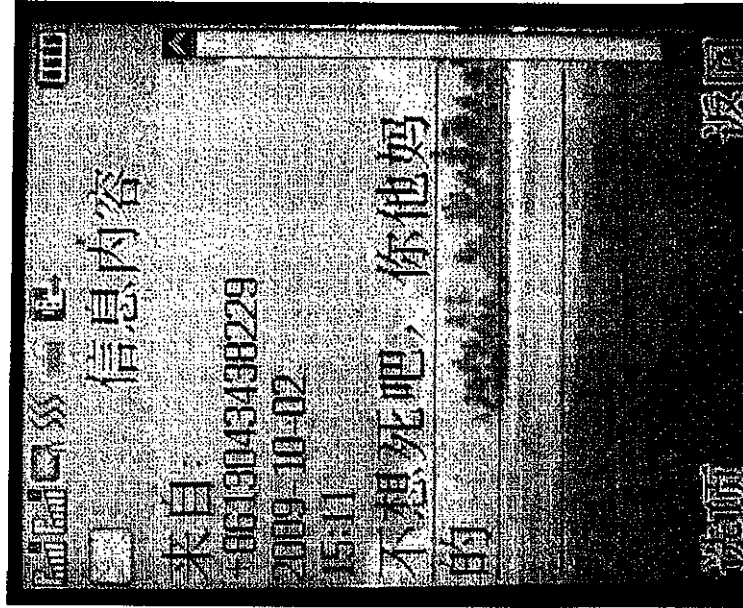
- 一、 美国公司自 2009 年 8 月 1 日起停发黄穗阳工资。
1. American ABAT stops paying Suiyang Huang from August 1, 2009.
- 二、 黄穗阳工资调整为每月一万元人民币，执行时间为 2009 年 8 月 1 日起。
2. Suiyang Huang's salary was adjusted to ten thousand RMB per month from August 1, 2009.
- 三、 自 2009 年 8 月 1 日起黄穗阳工资由深圳中强按实际考勤支付。
3. SABAT (Shenzhen Zhongqiang New Energy Technology Co., Ltd.) shall pay salary to Suiyang Huang according to his work attendance check from August 1, 2009.

特此通知。

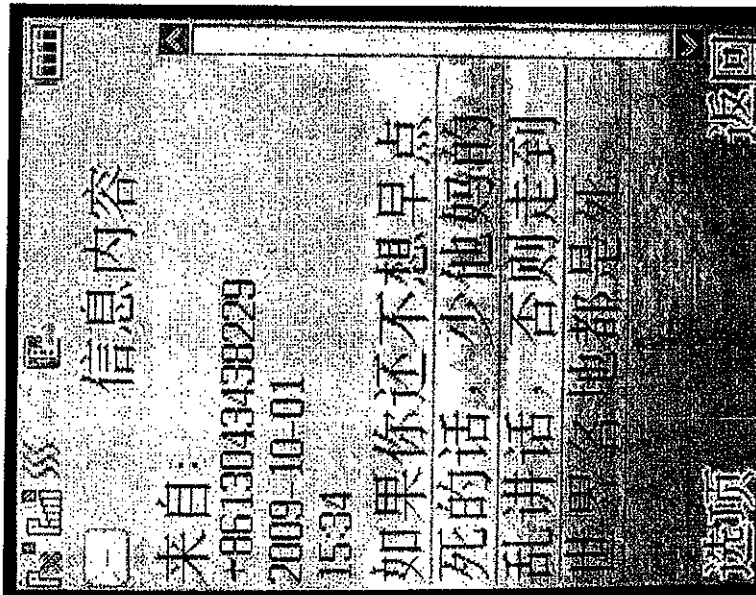
It is hereby noticed.

董事长：付治国
Chairman: Zhiguo Fu
二零零九年八月四日
August 4, 2009

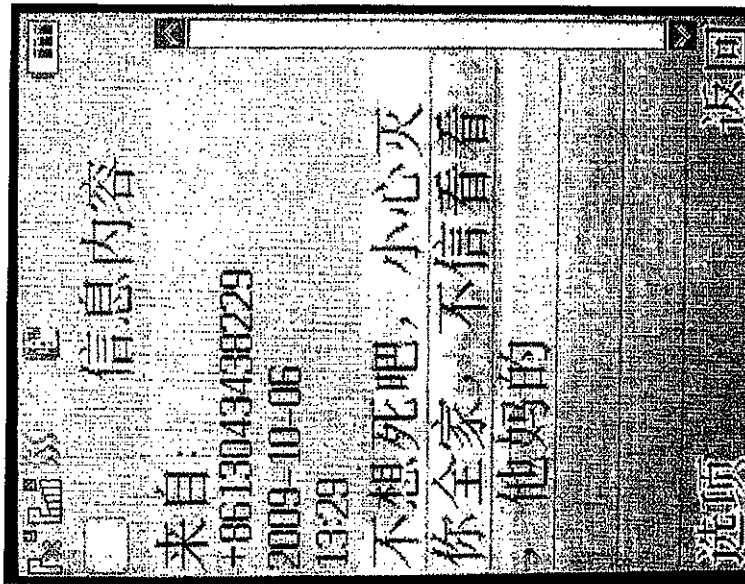
Exhibit E



You don't want to die? Fucking you.



If you don't want to die earlier, you must shut up. Otherwise, you shall die no matter where you are in the world.



You don't want to die? Be careful that your whole family will be killed. If you don't believe, wait and see. Fucking you.

Exhibit F


通 知

黄穗阳：

请你务必于2009年10月29日到哈尔滨生产基地参加对A、B栋设备改造方案的制定，必须服从公司总体工作安排。

特此通知。

董事长：



二〇〇九年十月二十八日

Notice

Huang Sui-yang:

You must come to Harbin production facility on Oct-29, 2009 and attend the project of equipment improvement for Buildings A and B. You must obey to this work arrangement from the company.

This is the notice.

Chairman of the director board: Fu Zhiguo (signature)

2009-10-28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUI-YANG HUANG,

Plaintiff,

09 CV 8297 (HB)

-Against -

ADVANCED BATTERY TECHNOLOGIES, INC.,

Defendant.
-----X

Exhibit B

**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK**

-----X	
SUI-YANG HUANG,	:
	:
Plaintiff,	:
	:
- against -	:
	:
ADVANCED BATTERY TECHNOLOGIES, INC.,	:
	:
Defendant.	:
	:
	:
-----X	

**09 CV 8297 (HB)
 OPINION &
 ORDER**

Hon. Harold Baer, Jr., District Judge:

This action arises out of an employment agreement for a Chief Technology Officer at a publicly held battery manufacturer in China. Plaintiff Sui-Yang Huang (“Plaintiff” or “Huang”), a United States citizen who resides primarily in China, brings this action against Defendant Advanced Battery Technologies, Inc. (“Defendant” or “ABAT”), a Delaware corporation with production facilities in China, for breach of the terms of his employment contract. Huang also claims to have suffered intentional infliction of emotional distress due to death threats that he received after bringing suit. ABAT moved to dismiss on *forum non conveniens* grounds and for failure to state a claim. Huang opposed the motion and filed a cross-motion for summary judgment. For the reasons that follow, ABAT’s motion to dismiss is GRANTED on *forum non conveniens* grounds. As such, I need not reach Plaintiff’s motion for summary judgment.

I. FACTUAL BACKGROUND

Huang is a United States citizen with residences in Pleasanton, California and Schenzhen, Guandong Province, China. He currently resides in China, where he has three homes, along with his partner and their child. Plaintiff has some twenty-five years of experience in chemical engineering, and over twenty-one years experience “in the Chinese battery industry.” Am. Compl. ¶ 6. He claims to hold seven United States and twenty Chinese patents “related to the design and manufacture of batteries.” *Id.* Huang is also a professor at South China University of Technology and a researcher for the Chinese Academy of Sciences. Defendant ABAT is a corporation that manufactures and distributes polymer lithium-ion batteries. ABAT is

incorporated in Delaware and has a New York office. All but one of ABAT's executives, as well as its production facilities and "headquarters," are located in Harbin, China.

Huang was the founder and CEO of a company called Luke Battery Corporation ("LBC"),¹ and his father financed its formation and was its sole shareholder. On August 30, 2008, Huang, acting as an agent for his father, entered into an acquisition agreement with ABAT Chairman and CEO Zhiguo Fu ("Fu") to sell LBC to ABAT for one million dollars. In conjunction with the sale, the company was renamed Shenzhen Advanced Battery Technologies Co., or "SABAT." Contemporaneously, Huang entered into two other agreements with ABAT that pertained directly to him. In the first agreement, Huang licensed all of his patents to ABAT. Additionally, ABAT agreed to employ Plaintiff as the company's Chief Technology Officer for five years from September 1, 2008 to August 31, 2013 for a salary of \$60,000 in U.S. dollars per year, as well as to provide him with 200,000 shares of ABAT stock. The second agreement² provided for an additional 100,000 shares of ABAT stock to be transferred to a designee of Huang's choice.

The nub of this dispute is over precisely when Huang was to receive the shares of stock. According to Defendant's translation, ABAT agreed to provide the 200,000 shares "during the time after the effective date of the contract, which Party A is responsible for completing no later than November 30, 2008," or according to one of Plaintiff's translations, "[a]fter this Contract has become effective – and on November 30, 2008." McPherson Decl., Ex. A; Huang Decl., Ex. E.³ The agreement to provide 100,000 shares to Huang's designee "shall be completed on September 30, 2008" or was "concluded on September 30, 2008," depending on Plaintiff's translation.⁴ Am. Compl., Ex. C; Huang Decl., Ex. E. Plaintiff interpreted this to mean that his designee would receive all 100,000 shares on September 30, 2008, and he would receive all 200,000 shares on November 30, 2008. Defendant, on the other hand, claims the shares were intended to be distributed on a pro rata basis over the five years of Plaintiff's employment.

¹ Oddly, since it has no bearing on this motion, the parties dispute the company's actual name. Defendant claims the company is called Shenzhen Shengxi Science and Technology Co., Ltd. ("Shenzhen SST"). Plaintiff's translated version of the Acquisition Agreement provides both names, *see* Am. Compl., Ex. A, though as noted, *infra*, Defendant challenges the accuracy of Plaintiff's translations.

² Defendant treats this agreement as an "addendum" to the "Employment Contract," rather than as a separate agreement.

³ Plaintiff's initial translation, attached to the complaint, is in English as "Donate 200,000 stock shares of the American ABAT when this contract takes effect, Party A shall finish the transaction on November 30, 2008." Am. Compl., Ex. B.

⁴ Defendant did not provide a translation of this part of the agreement.

According to Huang, neither he nor his designee received the shares by what he believed were the deadlines. When Plaintiff confronted CEO Fu about this, Fu allegedly told Huang that “it would take until the end of the year to make the transfers.” Am. Compl. ¶ 11. In early January 2009, Plaintiff received 40,000 of the 200,000 shares, while his designee received 20,000 of the 100,000 shares, consistent with Defendant’s projected pro rata payments. Plaintiff claims that this was not the agreement, and Fu actually told Huang that he “changed his mind and would not follow the contracts” because he was “afraid Huang would quit once he received his shares.” Am. Compl. ¶ 13.

On August 4, 2009, Fu allegedly informed Plaintiff by letter that due to a “job change,” Huang would not longer be paid by ABAT, and instead would now be paid by SABAT at the greatly reduced salary of \$17,000 per year. *Id.* ¶ 14. Huang continued to seek the remaining shares, did not receive them, was “threatened [by Fu]...about bringing any litigation,” and ultimately brought suit on September 30, 2009. *Id.* at ¶15. Plaintiff claims that the day after he filed suit, he received death threats via text message to his cell phone directed at him and his family. On October 25, 2009, Plaintiff was allegedly fired as ABAT’s CTO by Fu, and directed to “work at an ABAT facility located over 1,800 miles from his home.” *Id.* at ¶ 16. By contrast, Defendant claims that Plaintiff failed to perform his job duties, failed to report to work regularly, ignored direct orders from the CEO, did not respond to a request to check problems at a facility in October, was provided two formal notices to perform his job duties, and was ultimately terminated in November 2009.

Huang brings causes of action for breach of contract, intentional infliction of emotional distress, retaliation, breach of implied contractual covenant of good faith, and prima facie tort. Defendant moved to dismiss the action on *forum non conveniens* grounds, or alternatively to dismiss the tort and implied contract claims for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendant believes this action would be better suited for litigation in China, where ABAT’s primary facilities are located, where the agreement was negotiated, and where Plaintiff was employed. Plaintiff opposed the motion and cross-moved for partial summary judgment on his breach of contract claim. Oral argument was held on March 22, 2010.

II. DISCUSSION

A. Legal Standard

“[T]he doctrine of *forum non conveniens* contemplates the dismissal of lawsuits brought by plaintiffs in their favored forum in favor of adjudication in a foreign court.” *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2d Cir.2000). A district court has “broad discretion” to apply this principle. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005). The Second Circuit has “outlined a three-step process to guide the exercise of that discretion.” *Id.* That process requires the court to (1) determine the degree of deference accorded to the plaintiff’s forum choice; (2) consider the adequacy of the alternative forum to adjudicate the dispute; and (3) balance the private and public interests implicated by the choice of forum. *Id.* at 153 (citing *Iragorri v. United Tech. Corp.*, 274 F.3d 65, 73-74 (2d Cir. 2001)); see also *Aracruz Trading Ltd. v. Japaul Oil and Mar. Servs., PLC*, No. 08 Civ. 3511(JGK), 2009 WL 667298, at *2 (S.D.N.Y. Mar. 16, 2009).

B. Deference to Plaintiff’s Forum Choice

Generally speaking, a plaintiff’s choice of forum is entitled to significant deference. “Unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” *Iragorri*, 274 F.3d at 70-71 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). The Second Circuit found that the deference accorded to a plaintiff’s choice of forum should be weighed on a “sliding scale depending on several relevant considerations.” *Iragorri*, 274 F.3d at 71. Chiefly, the court must look at whether the choice was made due to a “bona fide connection” with the forum or for forum shopping purposes. *Id.* at 72. A court should consider the “totality of circumstances” that support or undermine the deference accorded to this choice. *Norex*, 416 F.3d at 155. Factors that counsel against dismissal include “the convenience of the plaintiff’s residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant’s amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense.” *Iragorri*, 274 F.3d at 71; see also *Norex*, 416 F.3d at 155.

Here, Plaintiff chose the Southern District of New York to bring a diversity action for common law contract and tort claims. His primary argument is that he is a United States citizen,

ABAT was incorporated in the United States, and ABAT was amenable to personal jurisdiction in this district because it has an office in New York. That Plaintiff is a United States citizen is highly relevant, but it is not itself dispositive. *See, e.g., ; Iragorri*, 274 F.3d at 74 (“neither the plaintiff’s citizenship nor residence, nor the degree of deference given to her choice of forum, necessarily controls the outcome”); *Wiwa*, 226 F.3d at 102 (“we apply the *Gilbert* factors in evaluating a *forum non conveniens* motion, even when the plaintiff is a U.S. citizen or resident”). Since Huang is a U.S. citizen, he should initially be accorded “great deference” for his choice of a U.S. forum. *See Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 71 (2d Cir. 2003). However, Plaintiff’s United States residence, such as it is, finds him on the other side of the country in Pleasanton, California. While this is relevant, because the distance of the residence from the forum suggests less actual convenience for Plaintiff, it will not necessarily eliminate the deference normally accorded his choice where there is little suggestion of forum-shopping. *See Iragorri*, 274 F.3d at 73. Here, Plaintiff’s choice to sue in New York to ensure personal jurisdiction over ABAT since they have an office here is not alone indicative of forum-shopping. Nonetheless, bringing suit in a forum twenty-five hundred miles away from one’s residence is hardly the model of convenient litigation.

More importantly, Huang actually resides almost exclusively in China rather than at his residence in California. Significantly less deference need be accorded to a US citizen that permanently resides abroad since the US forum is obviously not as convenient as the foreign forum where the citizen lives. *See Iragorri*, 274 F.3d at 73 n.5, 75; *see also Cavlam Business Ltd. v. Certain Underwriters at Lloyd’s, London*, No. 08 Civ. 2225 (JGK), 2009 WL 667272, at *4 (S.D.N.Y. Mar. 16, 2009) (“American nationals residing abroad are given little deference with respect to their choice of a forum in the United States”); *Seales v. Panamanian Aviation Co.*, No. 07 Civ. 2901 (CPS), 2009 WL 395821, at *11 (E.D.N.Y. Feb. 18, 2009) (“Because plaintiff [a dual citizen of the United States and Panama] was living abroad at the time this action was commenced, the deference due to his choice of a New York forum is diminished.”). Here, while Plaintiff has a home in California, he resides primarily in China. Huang has three residences in China, where his partner and their child also live, and he refers to at least one of these residences as his “home.” *See Am. Compl.* ¶16.⁵ ABAT’s production facilities are in

⁵ While not in the Amended Complaint, the number of homes was disclosed by Plaintiff’s counsel in a correspondence to this Court. Plaintiff claims a residence in Shenzhen, China. ABAT’s production facilities are in

China and, as the description of his job duties in his employment agreement notes, his responsibilities include the “development of technical personnel” and “resolving any major technical problems in the manufacturing process,” Huang’s position as CTO required him to work primarily if not exclusively in China. *See* Huang Decl., Ex. E. His previous position with SABAT (formerly LBC) was also in China, besides which he holds a professorship with a Chinese University and a research position with the Chinese Academy of Sciences. Based on these facts, while Huang merits some deference for his forum choice, it is not the “great deference” ordinarily appropriate for a U.S. citizen who is also a resident in the United States in or near the chosen forum.

In support of his forum choice, Plaintiff points out that Defendant was incorporated in the United States and is therefore likewise a United States citizen. The fact that ABAT was incorporated in Delaware may, in some cases, indicate some lesser inconvenience for defending a suit in the United States, but it is not a dispositive factor in the analysis of Plaintiff’s forum choice. *See, e.g., Pollux*, 329 F.3d at 74 (“it is an untenable leap of logic to jump from that holding to the blanket assertion that a plaintiff’s choice of forum deserves presumptive deference simply because the chosen forum is defendant’s home forum”). That ABAT has an office in New York is also relevant, as it further indicates that it would not be entirely inconvenient to litigate here. However, as Defendant points out, the office has virtually no connection to this action.

Plaintiff also notes that the death threats, which came from China, make him fear for his security in that country. Safety or government bias is a valid concern in a *forum non conveniens* analysis, but unlike cases where this played a significant role in the decision, Huang still resides in the country where he allegedly fears bringing suit. *See, e.g., Iragorri*, 274 F.3d at 75 (Florida residents fear for their safety if forced to litigate in Cali, Columbia); *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006) (“eminently reasonable” for Canadian residents to bring suit in U.S. rather than Egypt, where their property was seized by the government because they are Jewish). While I do not doubt the good faith of Plaintiff’s fears, a concern about litigating in a foreign country is seriously diminished when the plaintiff still resides in that country.

Harbin, China. In the complaint, Plaintiff alleges that ABAT ordered him to report to work “at an ABAT facility located over 1,800 miles from his home.” Am. Compl. ¶ 16. Harbin is around 1750 to 2000 miles away from Shenzhen.

Other than Defendant's amenability to suit in New York, few other *Iragorri* factors suggest this forum is convenient or more appropriate than litigation in a Chinese court. Less deference is accorded a Plaintiff's choice where it appears that it was "motivated by forum-shopping reasons ... such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum." *Iragorri*, 274 F.3d at 71; *see also Norex*, 416 F.3d at 155. Plaintiff's residences are primarily on the other side of the globe in China, and at best across the country in California. As described more fully, *infra*, there are virtually no witnesses or evidence currently in this forum, and litigation in China would likely be more convenient and less expensive since most, if not all, of the witnesses and evidence are located in that country. There is little indication that Plaintiff's choice was expressly motivated by forum-shopping, but given the few reasons to sue in New York, it is worth noting that China has a somewhat tarnished reputation in United States fora, and Plaintiff may also be relying on what he may believe is the "habitual generosity" of New York juries. *See Gallup*, 2010 Country Favorability Ratings, <http://www.gallup.com/poll/126116/Canada-Places-First-Image-Contest-Iran-Last.aspx> (last visited May 6, 2010) (poll results show 53% of Americans view China unfavorably). Huang lives in China, made this agreement in China from a company essentially based in China, worked exclusively in China, and should have been reasonably aware that he might have to litigate in China.

C. China as an Adequate Alternative Forum

The next step in the *forum non conveniens* analysis is to determine whether China would serve as an adequate alternative forum for this action. "An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute." *Pollux*, 329 F.3d at 75. By contrast, "[a] forum may be deemed inadequate if it is characterized by a complete absence of due process or an inability of the forum to provide substantial justice," *Turedi v. Coca-Cola Co.*, 343 Fed. Appx. 623, 625-626 (2d Cir. 2009), or "if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir.

2009); *see also Norex*, 416 F.3d at 150 (where foreign forum would deem claim precluded, it is not adequate alternative). “[W]hile the plaintiff bears the initial burden of producing evidence of corruption, delay or lack of due process in the foreign forum, the defendant bears the ultimate burden of persuasion as to the adequacy of the forum.” *Abdullahi*, 562 F.3d at 189.

Here, a Chinese court is an adequate alternative forum for the purposes of this contract and tort action. Although confronted with dissimilar factual circumstances, courts have previously found China to be an adequate alternative for *forum non conveniens* purposes. *See, e.g., Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 435 (dispute between Chinese corporation and Malaysian company over misrepresentations to Chinese admiralty court dismissed in favor of suit in China); *S. Megga Telecomm. Ltd. v. Lucent Tech., Inc.*, No. 96-357-SLR, 1997 WL 86413, at *11 (D.Del. Feb. 14, 1997) (United States corporate defendant’s counterclaims against Hong Kong corporate plaintiff for breach of contract and intellectual property violations are dismissed where adequate alternative forum exists in Chinese courts). This case presents a straightforward contractual dispute with similarly uncomplicated ancillary tort claims that a Chinese court can adequately manage. Defendant’s expert on Chinese law has explained that Huang can sue ABAT and bring both contract and tort claims in a Chinese “Basic People’s Court.” *See Li Decl.* ¶¶ 25-33. According to the expert, Chinese Civil Procedure Law provides jurisdiction for a civil suit “in the place where the defendant has its domicile,” and therefore Huang could sue in Harbin, where ABAT is primarily located. *Id.* ¶¶ 26-27. In addition to suit where ABAT is domiciled, Chinese procedure also allows a contract dispute to be heard by a court “where the contract is performed” or, in a tort action, where the “infringing act took place.” *Id.* ¶¶ 28-31. Defendant’s claim that most of Huang’s work occurred near his residence in Shenzhen, he occasionally traveled to Harbin, and that the death threats he received were sent to a cell phone registered in China. As such, it is likely that he could also bring suit closer to his residence in Shenzhen. Additionally, Defendant’s expert notes that a plaintiff that brings a contract or tort action, “may seek injunctive relief or monetary damages, including cessation of infringement, compensation for losses, payment of breach of contract damages, extension of apology, and others.” *Id.* ¶ 32.

Plaintiff’s Chinese law expert claims that a Chinese forum would be inadequate because “[o]nly an employment contract between a Chinese company and Chinese/foreign worker will have legal force in China” and since both parties are U.S. citizens, the courts would not accept

the contract claim; the expert makes a similar argument for the tort claims. *See* Si Decl. ¶¶ 8-10. However, Plaintiff's expert does not cite any specific Chinese law in support of his argument, and Defendant's expert provided a detailed rebuttal with citations to Chinese procedural law that argue persuasively that a Chinese court would in fact accept these claims. That these claims may not be identical to those that he could bring in the United States does not render the forum inadequate. *See Norex*, 416 F.3d at 158 ("the availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum, nor on identical remedies.") (quoting *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998)). Indeed, "some inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) (internal citations and quotations omitted).

Regardless, "the degree of certainty with which a movant must establish an adequate alternative forum may be relaxed if sufficient protection can be provided the non-movant by a conditional dismissal." *Norex*, 416 F.3d at 159-60 (citing *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. Bank of Pakistan*, 273 F.3d 241, 247-48 (2d Cir.2001)); *see also Pollux*, 329 F.3d at 75. Here, Defendant has stipulated that it will consent to personal jurisdiction in a Chinese court for these civil actions, will toll any statute of limitations claim for 120 days from the date of dismissal by this Court, will make available any evidence or witnesses in its possession that the Chinese court may deem relevant, and pay any final post-appeal judgment awarded against it. Defendant's expert has sufficiently demonstrated that a Chinese court would likely be an adequate alternative forum for this dispute, and any concerns that it may not consider the case on its merits may be alleviated by Defendant's stipulations and conditional dismissal by this Court. In addition, given the massive distance between Plaintiff's residence in Shenzhen and ABAT's facilities in Harbin, this Court will further condition dismissal on Defendant's claim that the suit could be brought in a court near Plaintiff's residence.

D. Balancing Private and Public Interest Factors

The final step in the process is to analyze and balance the private and public interest factors "to ascertain whether the case should be adjudicated in the plaintiff's chosen forum or in the alternative forum proposed by the defendant." *Iragorri*, 274 F.3d at 73. Private interest

factors include, “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Id.* at 74 (quoting *Gilbert*, 330 U.S. at 508); *see also Alfadda v. Fenn*, 159 F.3d 41, 46 (2d Cir. 1998). Public interest factors include administrative difficulties for courts “when litigation is piled up in congested centers instead of being handled at its origin,” the burden of jury duty on a community “which has no relation to the litigation,” the local interest in “having localized controversies decided at home,” and the avoidance of problems associated with applying foreign law. *See Gilbert*, 330 U.S. at 508; *Iragorri*, 274 F.3d at 74; *see also Alfadda*, 159 F.3d at 46.

In considering the balance of private factors, a court should “focus on the precise issues that are likely to be actually tried, taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues.” *Iragorri* at 74. As explained in detail above, this is a law suit over the meaning of a contract that was negotiated in China by parties located in China, with additional tort claims related to death threats from a Chinese source. An analysis of these “precise issues” and the attendant underlying facts indicates that virtually all of the private factors favor a Chinese court as the more convenient forum. As the nature of Huang’s employment responsibilities, his residences, and even his Chinese-registered cell phone indicate, the locus of both the contract and tort action is in China. *See Pollux*, 329 F.3d at 74 (dismissal of breach of contract claim for English forum appropriate where “[plaintiffs’] interactions with Chase were centered in London”). As one would surmise from the location of events, Defendant asserts that all or nearly all of the evidence and witnesses are located in China. Plaintiff does little to contradict this point, other than to argue that the case is so simple that the only necessary evidence is the contract attached to the complaint, and the only witnesses needed are Plaintiff and ABAT CEO Fu. While the case does seem to be a common contract dispute, my own experience with these cases indicates that whether easy or not, it is a rare day when no discovery is sought. This view was borne out by the different views expressed at a mediation session held between the parties before this Court. Indeed, Defendant plans to defend its termination decision in part based on claims of poor work performance, lackluster attendance, and misstatements about the number of patents Huang actually owns. As a consequence, potential evidence will doubtless include emails, performance evaluations, and

Chinese patent documents. *See Alfadda*, 159 F.3d at 47 (“all the defendants and nearly all the documentary evidence are located in France”) (emphasis in original). Additionally, the few documents that are currently a part of the record, like the contract documents and death threat text messages, are all in Mandarin Chinese (hereafter “Mandarin”), a dialect fraught with nuance, most if not all of the witnesses apparently speak Mandarin and little to no English, and if tried here almost every document would need to be translated from Mandarin to English. *See Blanco*, 997 F.2d at 982. Further, the cost and availability of witnesses would likely be less in China, and as noted previously, Defendant stipulates it would make witnesses it controls outside of the jurisdiction, if any, available in China.

Plaintiff’s only refrain is that ABAT has a New York office, that he was paid in U.S. dollars through that office, and that ABAT trades its stock shares on the NASDAQ stock exchange. Other than payment of Plaintiff’s salary, there is no other indication that ABAT’s New York office, which Defendant asserts is only a small “investor relations” office, has any connection to the facts in dispute in this matter. The Second Circuit has previously upheld dismissal for *forum non conveniens* where “[t]he sole connection to the local forum ... is the fact that payments under the Loan Agreement were to be made in dollars in New York City.” *See Blanco*, 997 F.2d at 982.

The public factors also counsel dismissal in favor of a Chinese forum. The meaning of an employment contract for a job located in China is precisely the sort of dispute where there is a local interest in deciding the interpretation of the agreement. *See Gilbert*, 330 U.S. at 508; *Iragorri*, 274 F.3d at 74. Further, Defendant accurately notes that under New York choice of law rules, contract and tort claims would in any event likely be governed by Chinese law. There is no express choice of law provision in the agreement, and New York’s “center of gravity” test, which considers factors like “the place of contracting, negotiation, and performance,” all strongly favor the application of Chinese law. *See, e.g., Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of New Jersey, Inc.* 448 F.3d 573, 583 (2d Cir. 2006) (describing test). The tort claims arising out of the alleged death threats would also probably be governed by Chinese law, since the tortious act occurred in China and the choice of law revolves around conduct-regulation, i.e. whether a death threat is an actionable tort. *See, e.g., GlobalNet Financial.Com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006) (“If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because

that jurisdiction has the greatest interest in regulating behavior within its borders.”). Since Defendant intends to dispute the validity of Plaintiff’s Chinese patents as a partial defense to the breach, Chinese patent law may also need to be considered. “When deciding a *forum non conveniens* motion, a court may properly rely on the difficulties attending the resolution of questions of foreign law.” *Scottish Air Intern., Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996); *see also Pollux*, 329 F.3d at 74.

Lastly, it is worth noting that this case is comparable to two other cases that were dismissed in favor of an alternative forum. In *Adamowicz v. Barclays Private Equity France S.A.S.*, this Court dismissed a securities action in favor of a French forum. *See* No. 05 Civ. 0961(HB), 2006 WL 728394 (S.D.N.Y. Mar. 22, 2006). There, the French citizen plaintiff resided in Connecticut, one defendant was American but stipulated to jurisdiction in France, the documents and witnesses were likely in France, the agreement at the heart of the dispute was written in French and executed in Paris, and French law would likely govern the interpretation of at least the supplemental common law claims. *See id.*, at *3-4. Similarly, in *Realuyo v. Villa Abrille*, Judge Koeltl dismissed a suit brought by a United States citizen in favor of a Philippines forum. *See* No. 01 Civ. 10158(JGK), 2003 WL 21537754 (S.D.N.Y. July 8, 2003). In that case, the plaintiff deserved “great deference” as a resident of New Jersey who brought suit in New York to ensure jurisdiction over the defendants, but both the private and public interest factors favored the Philippines because nearly all of the relevant materials and witnesses were related to and located in that forum. *See Realuyo*, 2003 WL 21537754, at *14.

Let me not conclude without a caveat: that if this were a civil liberties lawsuit rather than a contract and tort case, my view with respect to the appropriateness of the forum could be different. *Accord Wiwa*, 226 F.3d at 103-05 (Alien Torts Claims Act, as supplemented by Torture Victim Prevention Act, “expresses a policy favoring receptivity by our courts” to such human rights litigation). Even in this case my concern about a fair trial free from corruption gives me pause. Yet with the conditions provided here, and because the law seems clear, I have concluded that the matter must be dismissed on *forum non conveniens* grounds.

III. CONCLUSION

For the foregoing reasons, Defendant’s motion to dismiss for *forum non conveniens* is GRANTED and the case is dismissed. The dismissal is conditioned on the Chinese forum’s

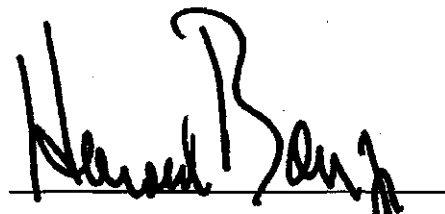
acceptance of jurisdiction over the dispute, the above-detailed stipulations made by Defendant, and Plaintiff's ability, if he so chooses, to bring the action in a court near his residence in China.

The Clerk of the Court is instructed close the case and remove it from my docket.

SO ORDERED

May 26, 2010

New York, New York

A handwritten signature in black ink, appearing to read "Harold Baer, Jr.", written over a horizontal line.

Hon. Harold Baer, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUI-YANG HUANG,

Plaintiff,

09 CV 8297 (HB)

-Against -

ADVANCED BATTERY TECHNOLOGIES, INC.,

Defendant.
-----X

Exhibit C

民事起诉状

原告: **Huang Sui-Yang** (黄穗阳), 男, 汉族, 生于 1958 年 4 月 28 日, 美国国籍, 现暂居深圳市宝安区沙井街道新二居委新二红巷工业路 42 号 101 号。

被告: **Advanced Battery Technologies, Inc.** (先进电池技术股份有限公司), 美国国籍, 美国纳斯达克上市公司, 纳斯达克上市代码 ABAT, 简称美国 ABAT 公司。地址在美国纽约市 39 大街西 15 号, 邮编 NY10018。

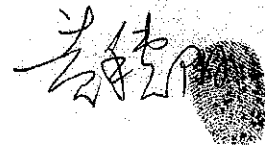
诉讼请求: 1、请求法院依法判决被告聘用合同违约, 赔偿原告两万。
2、本案诉讼费用由被告承担。

事实和理由: 2008 年 8 月 30 日, 原告和被告签订一份聘用合同和一份备忘录, 合同中约定: 被告聘用原告担任被告公司的技术总监, 聘任期限为五年, 从 2008 年 9 月 1 日起至 2013 年 8 月 11 日止。并且合同中约定了被告给予原告的年薪资陆万美元和被告赠与原告其公司股票叁拾万股。该叁拾万股被告公司股票分成二个部分, 其中贰拾万股赠与原告, 于 2008 年 11 月 30 日办理完毕; 另外拾万股赠与原告指定的受益人, 在备忘录中规定于 2008 年 9 月 30 日办理完毕。到原告起诉之日止被告均未履行合同, 只支付给原告肆万股股票和支付给原告指定的受益人贰万股股票; 并且于 2009 年 8 月 1 日没有任何理由将聘用合同规定的陆万年薪降为 1.7 万美元, 严重损害了原告的合法权益, 特起诉到贵院, 维护自己的合法权益。

此致

深圳宝安区人民法院

起诉人:



二〇一〇年八月八日

CIVIL COMPLAINT

Plaintiff: Huang Sui-Yang, male, Han nationality, born on April 28, 1958, US citizen and now temporarily resides in Apartment 101, 42 Industrial Road, Shajing Street Xiner Juwei Xiner Hongxiang, Baoan District, Shenzhen.

Defendant: Advanced Battery Technologies, Inc. US Company, listed on NASDAQ, listed as ABAT, hereinafter "ABAT," with the address of 15 W. 39 Street, Zip Code 10018.

LEGAL RELIEFS:

1. Ask this Court to rule in favor of Plaintiff on the basis of breach of employment contract, and pay Plaintiff compensation of 20,000 RMB.
2. Defendant will pay Plaintiff's attorney fees associated with this action.

FACTS AND REASONS:

On August 30, 2008, Plaintiff and Defendant entered into an employment agreement and memorandum, in which Defendant agreed to hire Plaintiff as ABAT's Chief Technology Officer ("CTO"), for a term of five years, from September 1, 2008 to August 11, 2013. ABAT further agreed to pay Plaintiff a salary of \$60,000 per year and Defendant would grant Plaintiff 300,000 shares of ABAT. The 300,000 shares would be divided into two parts: 200,000 shares would be given to Plaintiff as gift by no later than November 30, 2008; another 100,000 shares would be delivered to Plaintiff's designee by no later than September 30, 2008. To the date that Plaintiff filed this Complaint, Defendant did not deliver the promised shares, except 40,000 shares of the promised 200,000 shares to Plaintiff and 20,000 of the promised 100,000 shares to his designee. On August 1, 2009, without any cause, ABAT reduced Plaintiff's salary to \$17,000 from the original \$60,000. Because Defendant's actions seriously injured Plaintiff's legal rights, Plaintiff hereby files this case with the Court for your adjudication.

TO: Shenzhen City People's Court of Baoan District

Plaintiff: Huang Sui-Yang
(Signature and fingerprint)

August 8, 2010

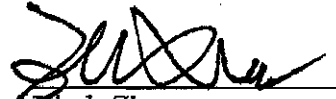
Certification of Translation

I, Xiaole Zhang, do certify, under penalty of perjury that I understand the Chinese and English languages, and that to be best of my knowledge and belief, the translation I have rendered of the foregoing document entitled as follows:


CIVIL COMPLAINT

is a true, complete, and accurate translation.

Sworn and subscribed this 16th day of November, 2010


Xiaole Zhang

Sworn to before me
this 16th day of November, 2010


Notary Public
SHIWEI CHANG
NOTARY PUBLIC STATE OF NEW YORK
NO 01CH6189884
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRE JULY 07, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUI-YANG HUANG,

Plaintiff,

09 CV 8297 (HB)

-Against -

ADVANCED BATTERY TECHNOLOGIES, INC.,

Defendant.
-----X

Exhibit D

深圳市宝安区人民法院

民事裁定书

(2010)深宝法立民裁字第12号

起诉人 Huang Sui-Yang, 黄穗阳 (以下称黄穗阳), 男, 汉族, 生于1958年4月28日, 美国国籍, 现暂居深圳市宝安区沙井街道新二居委新二红巷工业路42号101号。

本院于2010年8月9日收到起诉人黄穗阳诉被起诉人 Advanced Battery Technologies, Inc. 先进电池技术股份有限公司 (以下称先进电池技术股份有限公司) 劳动报酬纠纷一案的起诉材料。起诉人诉称: 2008年8月30日, 起诉人和被起诉人签订一份聘用合同和一份备忘录, 合同中约定: 被起诉人聘用起诉人担任被告公司的技术总监, 聘任期限为五年, 被起诉人给予起诉人年薪陆万美元并赠与起诉人其公司股票叁拾万股。该叁拾万股被起诉人公司股票分成二个部分, 其中贰拾万股赠与起诉人, 于2008年11月30日办理完毕; 另外拾万股赠与起诉人指定的受益人, 在备忘录中规定于2008年9月30日办理完毕。到起诉人起诉之日止被起诉人均未履行合同, 只支付给起诉人肆万股股票和支付给起诉人指定的受益人贰万股股票; 并且于2009年8月1日没有任何理由将聘用合同规定的6万美元年薪降为1.7万美元, 严重损害了起诉人的合法权益, 起诉人诉求: 1、请求法院依法判决被告聘用合同违约, 赔偿原告2万元。2、本

案诉讼费用由被告承担。

经审查,被起诉人先进电池技术股份有限公司系美国国籍公司,其地址在美国纽约市 39 大街西 15 号,不在本院的管辖范围之内,且起诉人不能提供案件由本院管辖的其他依据。依照《中华人民共和国民事诉讼法》第二十四条、第一百零八条之规定,裁定如下:

对黄穗阳的起诉,本院不予受理。

如不服本裁定,可在本裁定书送达之日起十日内,向本院递交上诉状,上诉于广东省深圳市中级人民法院。

本件与原本核对无异 (005)

审 判 长 庞 梅 生

审 判 员 郑 松

助理审判员 李 娜

二〇

书 记 员



PEOPLE'S COURT OF THE CITY OF SHENZHEN DISTRICT OF BAOAN

Civil Ruling Paper

(2010) Shenbaofalimincai No. 12

Plaintiff, Huang Sui-Yang (herein after "Huang Sui-Yang"), male, Han nationality, born on April 28, 1958, US citizen and now temporarily resides at Apartment 101, 42 Industrial Road, Shajing Street Xiner Juwei Xiner Hongxiang, Baoan District, Shenzhen.

This court received Plaintiff's Complaint against Defendant Advanced Battery Technologies, Inc. (herein after "ABAT"), on August 9, 2010, on the basis of breach of employment contract. Plaintiff claim is as follows: On August 30, 2008, Plaintiff and Defendant entered into an employment agreement and memorandum, in which Defendant agreed to hire Plaintiff as ABAT's Chief Technology Officer ("CTO"), for a term of five years, from September 1, 2008 to August 11, 2013. ABAT further agreed to pay Plaintiff a salary of \$60,000 per year and Defendant would grant Plaintiff 300,000 shares of ABAT. The 300,000 shares would be divided into two parts: 200,000 shares would be given to Plaintiff as gift by no later than November 30, 2008; another 100,000 shares would be delivered to Plaintiff's designee by no later than September 30, 2008. To the date that Plaintiff filed this Complaint, Defendant did not deliver the promised shares, except 40,000 shares of the promised 200,000 shares to Plaintiff and 20,000 of the promised 100,000 shares to his designee. On August 1, 2009, without any cause, ABAT reduced Plaintiff's salary to \$17,000 from the original \$60,000. Because Defendant's actions seriously injured Plaintiff's legal rights,

Plaintiff asked this Court to:

1. Rule in favor of Plaintiff on the basis of breach of employment contract, and pay Plaintiff compensation of 20,000 RMB.
2. Defendant pay Plaintiff attorney fee associates in this action.

After inspection, Advanced Battery Technologies, Inc. is an US Company, with the address of 15 W. 39 Street, Zip Code 10018, beyond this Court's jurisdiction, additionally; Plaintiff cannot provide other jurisdiction reason. For the reasons presented above, in accordance with Articles twenty-four and one hundred and eight, as set forth in the People's Republic of China's Civil Procedure Law, this court decides as follows:

Dismiss Huang Sui-Yang's Complaint.

If the parties refuse to accept the first-instance judgment, within ten days from the date of service of this decision, you can send a Notice of Appeal to this Court and appeal to Shenzhen Intermediate People's Court of Guangdong Province.

Presiding Judge: Pang Meisheng

Acting Judge: Zheng Song

Assistant Acting Judge: Wang Lina

(Seal: SHENZHEN CITY
PEOPLE'S COURT OF BAOAN
DISTRICT)

August 10, 2010

Clerk: Cao Bin

It is a true Copy of the Original Judgment (005)


Certification of Translation

I, Xiaole Zhang, do certify, under penalty of perjury that I understand the Chinese and English languages, and that to the best of my knowledge and belief, the translation I have rendered of the foregoing document entitled as follows:


**PEOPLE'S COURT OF THE CITY OF SHENZHEN DISTRICT OF BAOAN
Civil Ruling Paper**

is a true, complete, and accurate translation.

Sworn and subscribed this 16th day of November, 2010


Xiaole Zhang

Sworn to before me
this 16th day of November, 2010


Notary Public
SHUEI CHANG
NOTARY PUBLIC STATE OF NEW YORK
NO. 01CH8182684
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRE JULY 07, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SUI-YANG HUANG,

Plaintiff,

09 CV 8297 (HB)

-Against -

ADVANCED BATTERY TECHNOLOGIES, INC.,

Defendant.

-----X

Exhibit E

广东省深圳市中级人民法院 民事裁定书

(2010)深中法立上裁字第 2216 号

上诉人 Huang Sui-Yang, 黄穗阳 (以下称黄穗阳), 男, 汉族, 生于 1958 年 4 月 28 日, 美国国籍, 护照号码: 20715433。

上诉人黄穗阳因劳动报酬纠纷一案, 不服深圳市宝安区人民法院 (2010) 深宝法立民裁字第 12 号民事裁定, 向本院提起上诉。上诉人上诉认为, 上诉人暂住在深圳市沙井街道, 属于深圳市宝安区人民法院管辖范围。因此, 上诉人认为深圳市宝安区人民法院对本案有管辖权。请求二审法院撤销原审裁定, 裁定深圳市中级人民法院依法受理本案。

本院依法组成合议庭对案件进行审理。经审查, 本院认为, 本案上诉人为美国国籍, 被起诉人先进电池技术股份有限公司亦系美国法人, 公司注册地址在美国纽约市 39 大街西 15 号。本案属涉外民事纠纷, 不适用《中华人民共和国民事诉讼法》第二十二条关于“由被告住所地人民法院管辖”的规定; 而且上诉人也无证据证实本案具有《中华人民共和国民事诉讼法》第二百四十一条规定的由我国法院管辖的几种情形。因此, 原审裁定不予受理, 并无不当。上诉人主张由我院依法受理本案的上诉理由, 缺乏事实及法律依据, 其上诉请求本院不予支持。依据《中华人民共和国民事诉讼法》第一百五十四条、第一百五十八条之规定,

裁定如下：

驳回上诉，维持原审裁定。

本裁定为终审裁定。

审 判 长 许 小 霞

审 判 员 丘 庆 均

代 理 人 黄 新

二 〇 一 一 年 一 月 三 日



本件与原本核对无异

书 记 员 许 海 锚

**INTERMEDIATE PEOPLE'S COURT OF THE
PROVINCE OF GUANGDONG CITY OF SHENZHEN**

Civil Ruling Paper

(2010) Shenzhongfalishangcaizi No. 2216

Appellant Huang Sui-Yang, (herein after "Huang Sui-Yang"), male, Han ethnic group, DOB April 28, 1958, US citizen, Passport # 20715433.

Appellant Huang Sui-Yang, not satisfied with, and appealed in this court, the decision (2010) Shenbaofalimincai No. 12 of People's Court of the City of Shenzhen District of Baoan. Appellant appeals and claims that Appellant temporarily resides in Shajing Street, Shenzhen City, which is within the jurisdiction of People's Court of the City of Shenzhen District of Baoan. Thus, Appellant alleges People's Court of the City of Shenzhen District of Baoan has the jurisdiction over this case and asks this Court to overrule the decision of People's Court of the City of Shenzhen District of Baoan, and to decide to accept this case.

This court, based on law, organized a collegiate panel on this matter. Based on the investigation, this court finds out, Appellant is a U.S. citizen; and Defendant, Advanced Battery Technologies, Inc. is a U.S. corporation, with registration address at 15 W. 39 Street, New York, NY 10018. This case is a civil action involving foreign interests, and the Articles Twenty Two: "People's Court, where Defendant resides, has jurisdiction" of Civil Procedure Law Of The People's Republic Of China does not apply here; and Appellant is not able to prove that Articles Two Hundred Forty First of Civil Procedure Law Of The People's Republic Of China apply here. Thus, the previous decision to dismiss is correct. Appellant is not able to establish a factual and legal foundation in his appeal, thus this court does not agree with Appellant. Based on Articles one hundred and fifty four and one hundred and fifty eight, as set forth in the People's Republic of China's Civil Procedure Law, this court decides as follows:

Dismiss the appeal, Support the previous decision.

This decision is the final decision.

Presiding Judge: Xu Xiaoxia
Acting Judge: Qiu Qingyun
Assistant Acting Judge: Huang Xin
(Seal: Guangdong Province Shenzhen
City Intermediate People's Court)
September 30, 2010

It is a true Copy of the Original Judgment

Clerk: Xu Haimao

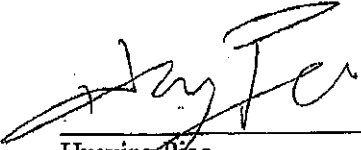
Certification of Translation

I, Huaying Piao, do certify, under penalty of perjury that I understand the Chinese and English languages, and that to be best of my knowledge and belief, the translation I have rendered of the foregoing document en-titled as follows:

**INTERMEDIATE PEOPLE'S COURT OF THE
PROVINCE OF GUANGDONG CITY OF SHENZHEN
Civil Ruling Paper**


is a true, complete, and accurate translation.

Sworn and subscribed this 16th day of November, 2010



Huaying Piao

Sworn to before me
this 16th day of November, 2010



Notary Public
SHWEI CHANG
NOTARY PUBLIC STATE OF NEW YORK
NO. 01CHB189684
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRE JULY 07, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUI-YANG HUANG,

Plaintiff,

09 CV 8297 (HB)

-Against -

ADVANCED BATTERY TECHNOLOGIES, INC.,

Defendant.
-----X

Exhibit F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUI-YANG HUANG,

Plaintiff,

-against-

ADVANCED BATTERY TECHNOLOGIES, INC.

Defendant.

Index No. 1:09 CIV 08297 (HB) (MHD)

付治国为支持被告 ABAT 公司撤案申请所做的声明

本人付治国声明：

1. 本人是哈尔滨中强能源科技有限公司（简称“ABAT”）的首席执行官。本人自 2004 年以来一直担任 ABAT 的首席执行官。作为首席执行官，我负责管理 ABAT 的业务、战略、财务事宜以及 ABAT 与高级雇员及其它公司的谈判。
2. 本人是中华人民共和国公民，中文流利。本人不会讲英文，也不懂英文。本人现住中华人民共和国。本人也曾经到深圳拜访过黄先生。
3. ABAT 是在特拉华州成立的，但其总部位于中华人民共和国黑龙江省哈尔滨市。
4. ABAT 开发、生产并经销可充电聚合物锂离子电池。公司的产品包括电动汽车、摩托车、矿灯、笔记本电脑及其它电子设备使用的可充电聚合物锂离子电池。

5. 作为母公司, ABAT 有两家中国子公司, 包括中强能源科技有限公司(由本人于 2002 年创立)和无锡中强自动车有限公司, 在英属维尔京群岛也有一家子公司, 名为 Cashtech, Inc.。ABAT 没有任何美国子公司。

6. ABAT 的各种管理职位设于位于中国黑龙江省哈尔滨市的总部。除高级副总裁张书源(Dan Chang)及其它行政人员之外, 大部份 ABAT 的所有管理人员均全部或主要在中国工作。这些管理人员包括我本人和财务总监万国华(Guohua Wan)。

7. ABAT 的生产设施全部位于中国。其最大的工厂位于哈尔滨及无锡。

8. ABAT 的哈尔滨工厂雇有大约 607 名职工, 无锡约有 250 名职工。ABAT 在中国共有大约 860 名雇员。据本人所知, 职工似乎都是中文为母语。

9. ABAT 在纳斯达克资本市场上市。为协助处理与在纳斯达克上市有关的投资者关系, ABAT 在纽约设有一个小型办事处。ABAT 的纽约办事处有四名雇员。与原告诉状指称的情况相反, 该纽约办事处绝非 ABAT 的主要经营场所。

10. 据本人所知, 深圳喜胜科技有限公司(现名“SABAT”)的全部雇员均在中国深圳生活和工作。SABAT 用中文保存其业务记录。本人对于深圳喜胜科技有限公司的谈判是在位于中国南部的深圳市进行的, 所用语言为中文。

11. 本人还通过谈判商定了 ABAT 和黄穗阳先生之间的聘用合同。这些谈判是在哈尔滨市进行的, 所用语言为中文。

12. 根据聘用合同, 黄先生在五年聘用期限内将按比例获得股份。因此, ABAT 于 2009 年 1 月(黄先生受聘近五个月后)授予黄先生 60,000 股股份, 即黄先生在五年聘用合同期间应获得的股份的五分之一。

13. 本人与黄先生之间有关聘用合同和薪酬方案的所有谈话都是在中国进行的，所用语言为中文。

14. ABAT 曾期望，为履行聘用合同规定的职责，黄先生将主要在中国深圳工作，但他会根据需要到 ABAT 的黑龙江总部和中国境内的其它工厂出差。据本人所知，黄穗阳先生一直在中国深圳或中国境内的 ABAT 总部或其它工厂履行其工作义务（就已经履行的义务而言）。

15. 因为黄先生的工资最初是用美元支付，在 2009 年 8 月份之前，对黄先生的工资支付是通过纽约办事处进行的。黄先生和纽约办事处从未有过任何其他联系。纽约办事处从未参与对黄先生的聘用、对其聘用合同的商定或对其工作的监督。本人既未获悉纽约办事处有任何与黄先生的主张有关的文件，也未获悉纽约办事处有任何人对黄先生的权利主张有任何了解。对黄先生聘用合同的谈判、履行以及黄先生对其聘用合同的违反均不是在纽约办事处进行的。

16. 自 2009 年夏末起，黄先生便不再按时上班。即使上班，他往往不会工作一整天。相反，短短几个小时后就离开。此外，黄先生对屡次要求其按聘用合同履行工作职责的直接命令视而不见。

17. 10 月份，ABAT 发出通知，命黄审定哈尔滨工厂的新设备采购和旧设备改造工作。这些均属聘用合同中载明的工作职责。通知是用中文写的，而是从哈尔滨市送到深圳市的。黄未对以上任何命令做出答复，也未执行其须执行的工作。他根本没有为履行其工作职责采取任何行动。

18. ABAT 向黄发出了两份正式通知，要求他履行其工作职责。在黄无视这两份通知甚至未以任何方式就此做出答复后，公司别无选择，只能终止对黄先生的聘用。ABAT 于 2009 年 11 月 13 日向黄发函，终止了对他的聘用。

19. 在聘用合同理，黄先生保证他持有的权力在合同期内这些权利不会出现任何法律纠纷。本人了解，黄先生仅持有一项合法的美国专利及其所主张的中国专利的一小部分。

20. 2009 年秋，黄先生多次与万国华商谈要求得到全部股份。本人也与黄先生谈过他的要求。九月的某个时间，黄先生打电话给我要求继续就此商谈。我告诉黄先生，在我方支付其薪水并无任何过错的情况下，他起诉 ABAT 是无耻行为，因为黄先生经常不来上班，即使上班，他一般呆几个小时就走了，我还特别问他到底想不想来上班。我告诉他如果必要，我不怕跟他打官司。后来当他的律师发给 ABAT 一份部分这次谈话的录音拷贝，我才发现黄先生偷偷地录下了这次谈话。我很震惊，并因黄先生违背了我的信任及其律师的行为深感困扰。我没有发给黄先生任何短信威胁他，也没有理由相信 ABAT 的任何人发过任何短信。发短信不是我的交流方式。ABAT 查了我们执行官们的电话号码，这些号码与黄先生的律师提供的发短信的号码根本不符。

21. ABAT 的供应商可以作为本次事件的重要证人。ABAT 认为黄先生拒绝按合同要求监督新设备安装工作的行为部分违反了其聘用合同。因为根据 ABAT 供应商合同的规定，技术总监须监督所有新设备的安装工作，黄先生拒绝履行其监督职责的行为导致了严重延误，并给 ABAT 的生产计划造成了不利影响。ABAT 的供应商几乎都是中国公司。

22. ABAT 尚未对黄先生的诉状提交答辩状，而是选择请法院将其本身视为对处理双方争议不适当的受理法院。但在时间适当时，无论黄先生的诉讼是在美国法院还是在中国法院继续进行，ABAT 均计划反驳黄先生提出的认为 ABAT 违反了其聘用合同的主张。认为黄先生的诉讼没有法律依据的理由包括：(a) 他对聘用合同的解释依赖的是对该合同的错误翻译，所依据的合同解释方法与合同简单明了的条款（中文）以及 ABAT 的标准聘用报酬惯例相左；以及(b)由于对各项专利所有权状况做出不实陈述及不履行其工作职责，黄先生已自己违反了聘用合同。

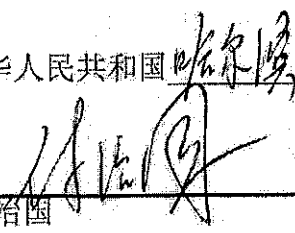
23. ABAT 的业务记录一般是用中文保存于中国的，包括 ABAT 和黄先生之间的聘用合同。就本人所知，ABAT 掌握的与黄先生的聘用合同有关的全部通信、票据和其它文件用的也都是中文，包括全部出勤和工作表现记录，以及与黄的专利有效性有关的全部证明。

24. 作为该法院撤销此项待决案件转由中国法院审理的条件，ABAT 同意采取下列全部行动：

- 为对本项民事诉讼提出抗辩，同意服从中国法院的管辖权；
- 在撤销此项诉讼后，将任何适用的诉讼时效中止 120 天时间；
- 向中国法院提供由 ABAT 掌握、保管或控制的，中国法院认为有关的任何证人或文件；以及
- 支付上诉后中国法院针对 ABAT 判处的任何款项。

本人声明，上述内容是真实、准确的，否则愿根据美利坚合众国法律接受伪证罪处罚。

2009年 12 月 4 日于中华人民共和国哈尔滨 签字

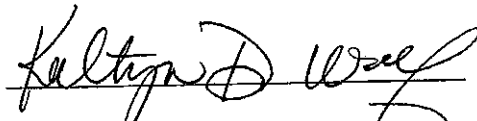

付治国



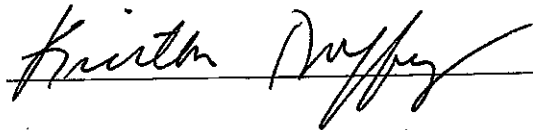
STATE OF NEW YORK)
)
) SS
COUNTY OF NEW YORK)

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Chinese into English of the attached Declaration of Zhiguo Fu.


Kathryn Wolf Project Manager
Geotext Translations, Inc.

Sworn to and subscribed before me
this 5 day of December, 2009.



KRISTEN DUFFY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01DU6121852
Qualified in Queens County
My Commission Expires January 31, 2013

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUI-YANG HUANG,

Plaintiff,

-against-

ADVANCED BATTERY TECHNOLOGIES, INC.

Defendant.

Index No. 1:09 CIV 08297 (HB) (MHD)

FU Zhiguo's declaration in support of Defendant ABAT's application for dismissal

I, FU Zhiguo, declare:

1. I am the CEO of Harbin Zhongqiang Energy Science and Technology Co. Ltd. (abbreviated "ABAT"). I have been the CEO of ABAT since 2004. As CEO, I am in charge of managing matters pertaining to ABAT's business, strategy, and finances, and negotiations between ABAT and its senior employees and other companies.

2. I am a citizen of the People's Republic of China and am fluent in Chinese. I cannot speak English, and I do not understand English. I currently live in the People's Republic of China. In the past, I have also visited Mr. HUANG in Shenzhen.

3. ABAT is incorporated in Delaware, but its headquarters are located in Harbin, Heilongjiang Province, the People's Republic of China.

4. ABAT develops, produces and sells rechargeable polymer lithium-ion batteries. The company's products include rechargeable polymer lithium-ion batteries for use in electric automobiles, motorcycles, miner's lamps, notebook computers, and other electronic equipment.

5. As a parent company, ABAT has two Chinese subsidiary companies, Zhongqiang Energy Science and Technology Co. Ltd. (established by myself in 2002) and Wuxi Zhongqiang Autocycle Co. Ltd.; and it also has a subsidiary in the British Virgin Islands, called Cashtech, Inc. ABAT does not have an American subsidiary.

6. ABAT's various management positions are at the company headquarters located in Harbin, Heilongjiang Province, China. Except for senior vice president ZHANG Shuyuan (Dan CHANG) and other executives, most of ABAT's management personnel work solely or primarily in China. These management personnel include myself and Chief Financial Officer WAN Guohua.

7. All of ABAT's production facilities are located in China. The company's biggest plants are located in Harbin and in Wuxi.

8. ABAT's Harbin plant employs approximately 607 employees; Wuxi employs approximately 250 employees. ABAT has a total of approximately 860 employees in China. As far as I know, I believe that the Chinese language is the mother tongue of all of these employees.

9. ABAT is listed on the NASDAQ Capital Market. To assist in handling investor relationships associated with our being listed on NASDAQ, ABAT has a small office in New York. ABAT's New York office has four employees. Contrary to what is alleged in the Plaintiff's complaint, this New York office is not ABAT's primary place of business.

10. As far as I know, all the employees of Shenzhen Xisheng Science and Technology Co. Ltd. (now called "SABAT") live and work in Shenzhen, China. SABAT's business records are kept in Chinese. My negotiations with regard to Shenzhen Xisheng Science and Technology Co. Ltd. were conducted in Shenzhen, a city located in southern China, and were conducted in Chinese.

11. I also decided the employment contract between ABAT and Mr. HUANG Suiyang, through negotiations. These negotiations were conducted in Harbin and were conducted in Chinese.

12. In accordance with the employment contract, Mr. HUANG would receive shares on a *pro rata* basis during his five-year term of employment. Thus, in January 2009 (approximately five months after Mr. HUANG had been hired), ABAT conferred 60,000 shares of stock to Mr. HUANG, or one-fifth of the shares that Mr. HUANG was to receive over the course of his five-year term of employment.

13. All my negotiations with Mr. HUANG with regard to an employment contract and compensation plan were conducted in China and were conducted in Chinese.

14. ABAT had expected that, in performing the responsibilities stipulated in his employment contract, Mr. HUANG would primarily work in Shenzhen, China, but that when necessary he would visit ABAT's headquarters in Heilongjiang and ABAT's other plants in China. As far as I know, Mr. HUANG Suiyang performed his work obligations (that is, to the extent that his obligations were performed) in Shenzhen, China, or at ABAT's headquarters or its other plants in China.

15. Because Mr. HUANG's salary was initially paid in United States dollars, prior to August 2009, Mr. HUANG's salary was paid through the New York office. There has never been any other contact between Mr. HUANG and the New York office. The New York office never participated in the hiring of Mr. HUANG, in the negotiation and deciding of his employment contract, or in the supervision of his work. I am not aware of the New York office possessing any documents related to Mr. HUANG's claims, nor am I aware of anyone at the New York office having any knowledge of Mr. HUANG's claims. Neither the negotiations regarding Mr. HUANG's employment contract, the performance of his employment contract, nor Mr. HUANG's violation of his employment contract took place at the New York office.

16. Beginning at the end of the summer of 2009, Mr. HUANG stopped coming to work on time. And even when he came to work, he frequently would not work the entire day. Rather, he would leave after just a few hours. In addition, Mr. HUANG ignored direct orders, which he was given repeatedly, to perform his job responsibilities in accordance with his employment contract.

17. In October, ABAT issued a notice instructing HUANG to examine and approve the work pertaining to the acquisition of new equipment and the renovation of old equipment for the Harbin plant, job responsibilities that are explicitly stated in his employment contract. The notice was issued in Chinese and was sent from Harbin to Shenzhen. HUANG did not reply to any of the above instructions, and nor did he perform the work he was required to perform. He simply took no action at all to perform his job responsibilities.

18. ABAT sent HUANG two official notices requesting that he perform his job responsibilities. After HUANG not only disregarded both of these notices but also failed to give a response of any kind, the company had no other option than to terminate Mr. HUANG's employment. On November 13, 2009, ABAT sent HUANG a letter terminating his employment.

19. In his employment contract, Mr. HUANG guaranteed that no legal challenges of any kind would arise with regard to the patents in his possession. I understand that Mr. HUANG is only in possession of one valid United States patent and a small portion of the Chinese patents claimed by him.

20. In the fall of 2009, Mr. HUANG had multiple discussions with WAN Guohua in which Mr. HUANG asked to be given all of his shares. I also had discussions with Mr. HUANG regarding this request. On one occasion in September, Mr. HUANG telephoned me, asking to continue discussing this matter with me. I told Mr. HUANG that, for him to sue ABAT given that we were paying his salary and were innocent of any malfeasance, was a shameless act; and I especially asked Mr. HUANG if he planned on coming to work at all, given that he frequently didn't come to work and, even when he did show up, he generally left after a few hours. I told him that, if it became necessary, I was unafraid of engaging in a lawsuit with him. It was only later, after his lawyer sent ABAT a copy of a recording of a portion of this conversation, that I realized that Mr. HUANG had surreptitiously recorded this conversation. I was extremely shocked and felt deeply disturbed by Mr. HUANG's violation of my trust and by his lawyer's behavior. I never sent Mr. HUANG a text message in which I threatened him, nor do I have any reason to believe that anyone at ABAT sent any such text message. It is not my practice to communicate by means of text messaging. ABAT checked the telephone numbers belonging to our executives and found that these numbers were simply not the same as those provided by Mr. HUANG's lawyer as the source of the text messages in question.

21. ABAT's suppliers can serve as important witnesses with regard to this incident. ABAT believes that Mr. HUANG's actions in refusing to supervise the installation of the new equipment in accordance with the requirements of his contract constitute a breach of this portion his employment contract. Because the Chief Technical Officer is required, in accordance with the provisions of ABAT's supplier contract, to supervise the installation of all new equipment, Mr. HUANG's actions in refusing to perform his supervisory responsibilities resulted in serious delays and had a negative impact on ABAT's production plan. ABAT's suppliers are almost all Chinese companies.

22. ABAT has not submitted an answer to Mr. HUANG's complaint but rather has chosen to petition the court to designate itself as not competent to hear the dispute between the parties. However at the appropriate time, whether Mr. HUANG's suit is tried in a United States court or a Chinese court, ABAT plans to refute Mr. HUANG's claim that ABAT has violated his employment contract. Reasons for our belief that Mr. HUANG's suit lacks a basis in law include: (a) His interpretation of the employment contract is reliant on an erroneous translation of this contract, and this interpretation is at odds both with simple, clear contract provisions (Chinese) and with ABAT's standard practices regarding compensation for employment; and (b) Mr. HUANG is himself in breach of his employment contract in that he made false statements regarding various patent rights and failed to perform his job responsibilities.

23. In general, ABAT's business records are kept in Chinese and are kept in China; this includes the employment contract between ABAT and Mr. HUANG. As far as I know, all correspondence, bills, and other documents in ABAT's possession pertaining to Mr. HUANG's employment contract are also in Chinese, including all attendance and work performance records, as well as all documentation of the validity of HUANG's patents.

24. As a condition of this court's dismissal of this pending case and the transfer of this case to a Chinese court, ABAT agrees to take all of the following actions:

- consent to a Chinese court's jurisdiction for these civil matters;
- toll any applicable statute of limitations for 120 days after *forum non conveniens* dismissal by this court;
- make available in the courts of China any evidence or witnesses in its possession, custody, or control in the United States that a Chinese court hearing these cases may deem relevant, and;
- pay any final, post-appeal judgment awarded against it by a Chinese court.

I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Signed on December 4, 2009 in Harbin, the People's Republic of China.

[signature:] FU Zhiguo

FU Zhiguo

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUI-YANG HUANG,

Plaintiff,

-against-

ADVANCED BATTERY TECHNOLOGIES, INC.

Defendant.

Index No. 1:09 CIV 08297 (HB) (MHD)

付治国为支持被告 ABAT 公司撤案申请所做的声明

本人付治国声明：

1. 本人是哈尔滨中强能源科技有限公司（简称“ABAT”）的首席执行官。本人自 2004 年以来一直担任 ABAT 的首席执行官。作为首席执行官，我负责管理 ABAT 的业务、战略、财务事宜以及 ABAT 与高级雇员及其它公司的谈判。

2. 本人是中华人民共和国公民，中文流利。本人不会讲英文，也不懂英文。本人现住中华人民共和国。本人也曾经到深圳拜访过黄先生。

3. ABAT 是在特拉华州成立的，但其总部位于中华人民共和国黑龙江省哈尔滨市。

4. ABAT 开发、生产并经销可充电聚合物锂离子电池。公司的产品包括电动汽车、摩托车、矿灯、笔记本电脑及其它电子设备使用的可充电聚合物锂离子电池。

5. 作为母公司, ABAT 有两家中国子公司, 包括中强能源科技有限公司(由本人于 2002 年创立)和无锡中强自动车有限公司, 在英属维尔京群岛也有一家子公司, 名为 Cashtech, Inc.。ABAT 没有任何美国子公司。

6. ABAT 的各种管理职位设于位于中国黑龙江省哈尔滨市的总部。除高级副总裁张书源(Dan Chang)及其它行政人员之外, 大部份 ABAT 的所有管理人员均全部或主要在中国工作。这些管理人员包括我本人和财务总监万国华(Guohua Wan)。

7. ABAT 的生产设施全部位于中国。其最大的工厂位于哈尔滨及无锡。

8. ABAT 的哈尔滨工厂雇有大约 607 名职工, 无锡约有 250 名职工。ABAT 在中国共有大约 860 名雇员。据本人所知, 职工似乎都是中文为母语。

9. ABAT 在纳斯达克资本市场上市。为协助处理与在纳斯达克上市有关的投资者关系, ABAT 在纽约设有一个小型办事处。ABAT 的纽约办事处有四名雇员。与原告诉状指称的情况相反, 该纽约办事处绝非 ABAT 的主要经营场所。

10. 据本人所知, 深圳喜胜科技有限公司(现名“SABAT”)的全部雇员均在中国深圳生活和工作。SABAT 用中文保存其业务记录。本人对于深圳喜胜科技有限公司的谈判是在位于中国南部的深圳市进行的, 所用语言为中文。

11. 本人还通过谈判商定了 ABAT 和黄穗阳先生之间的聘用合同。这些谈判是在哈尔滨市进行的, 所用语言为中文。

12. 根据聘用合同, 黄先生在五年聘用期限内将按比例获得股份。因此, ABAT 于 2009 年 1 月(黄先生受聘近五个月后)授予黄先生 60,000 股股份, 即黄先生在五年聘用合同期间应获得的股份的五分之一。

13. 本人与黄先生之间有关聘用合同和薪酬方案的所有谈话都是在中国进行的，所用语言为中文。

14. ABAT 曾期望，为履行聘用合同规定的职责，黄先生将主要在中国深圳工作，但他会根据需要到 ABAT 的黑龙江总部和中国境内的其它工厂出差。据本人所知，黄穗阳先生一直在中国深圳或中国境内的 ABAT 总部或其它工厂履行其工作义务（就已经履行的义务而言）。

15. 因为黄先生的工资最初是用美元支付，在 2009 年 8 月份之前，对黄先生的工资支付是通过纽约办事处进行的。黄先生和纽约办事处从未有过任何其他联系。纽约办事处从未参与对黄先生的聘用、对其聘用合同的商定或对其工作的监督。本人既未获悉纽约办事处有任何与黄先生的主张有关的文件，也未获悉纽约办事处有任何人对黄先生的权利主张有任何了解。对黄先生聘用合同的谈判、履行以及黄先生对其聘用合同的违反均不是在纽约办事处进行的。

16. 自 2009 年夏末起，黄先生便不再按时上班。即使上班，他往往不会工作一整天。相反，短短几个小时候后他就会离开。此外，黄先生对屡次要求其按聘用合同履行工作职责的直接命令视而不见。

17. 10 月份，ABAT 发出通知，命黄审定哈尔滨工厂的新设备采购和旧设备改造工作。这些均属聘用合同中载明的工作职责。通知是用中文写的，而是从哈尔滨市送到深圳市的。黄未对以上任何命令做出答复，也未执行其须执行的工作。他根本没有为履行其工作职责采取任何行动。

18. ABAT 向黄发出了两份正式通知，要求他履行其工作职责。在黄无视这两份通知甚至未以任何方式就此做出答复后，公司别无选择，只能终止对黄先生的聘用。ABAT 于 2009 年 11 月 13 日向黄发函，终止了对他的聘用。

19. 在聘用合同理，黄先生保证他持有的权力在合同期内这些权利不会出现任何法律纠纷。本人了解，黄先生仅持有一项合法的美国专利及其所主张的中国专利的一小部分。

20. 2009 年秋，黄先生多次与万国华商谈要求得到全部股份。本人也与黄先生谈过他的要求。九月的某个时间，黄先生打电话给我要求继续就此商谈。我告诉黄先生，在我方支付其薪水并无任何过错的情况下，他起诉 ABAT 是无耻行为，因为黄先生经常不来上班，即使上班，他一般呆几个小时就走了，我还特别问他到底想不想来上班。我告诉他如果必要，我不怕跟他打官司。后来当他的律师发给 ABAT 一份部分这次谈话的录音拷贝，我才发现黄先生偷偷地录下了这次谈话。我很震惊，并因黄先生违背了我的信任及其律师的行为深感困扰。我没有发给黄先生任何短信威胁他，也没有理由相信 ABAT 的任何人发过任何短信。发短信不是我的交流方式。ABAT 查了我们执行官们的电话号码，这些号码与黄先生的律师提供的发短信的号码根本不符。

21. ABAT 的供应商可以作为本次事件的重要证人。ABAT 认为黄先生拒绝按合同要求监督新设备安装工作的行为部分违反了其聘用合同。因为根据 ABAT 供应商合同的规定，技术总监须监督所有新设备的安装工作，黄先生拒绝履行其监督职责的行为导致了严重延误，并给 ABAT 的生产计划造成了不利影响。ABAT 的供应商几乎都是中国公司。

22. ABAT 尚未对黄先生的诉状提交答辩状，而是选择请法院将其本身视为对处理双方争议不适当的受理法院。但在时间适当时，无论黄先生的诉讼是在美国法院还是在中国法院继续进行，ABAT 均计划反驳黄先生提出的认为 ABAT 违反了其聘用合同的主张。认为黄先生的诉讼没有法律依据的理由包括：(a) 他对聘用合同的解释依赖的是对该合同的错误翻译，所依据的合同解释方法与合同简单明了的条款（中文）以及 ABAT 的标准聘用报酬惯例相左；以及(b)由于对各项专利所有权状况做出不实陈述及不履行其工作职责，黄先生已自己违反了聘用合同。


23. ABAT 的业务记录一般是用中文保存于中国的，包括 ABAT 和黄先生之间的聘用合同。就本人所知，ABAT 掌握的与黄先生的聘用合同有关的全部通信、票据和其它文件用的也都是中文，包括全部出勤和工作表现记录，以及与黄的专利有效性有关的全部证明。

24. 作为该法院撤销此项待决案件转由中国法院审理的条件，ABAT 同意采取下列全部行动：

- 为对本项民事诉讼提出抗辩，同意服从中国法院的管辖权；
- 在撤销此项诉讼后，将任何适用的诉讼时效中止 120 天时间；
- 向中国法院提供由 ABAT 掌握、保管或控制的，中国法院认为有关的任何证人或文件；以及
- 支付上诉后中国法院针对 ABAT 判处的任何款项。

本人声明，上述内容是真实、准确的，否则愿根据美利坚合众国法律接受伪证罪处罚。

2009年 12 月 4 日于中华人民共和国 哈尔滨 签字


付治园