ADMINISTRATIVE PROCEEDING
FILE NOS. 3-14872, 3-15116

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

In the Matter of	:	
	:	
BDO China Dahua CPA Co., Ltd.;	:	
Ernst & Young Hua Ming LLP;	:	
KPMG Huazhen (Special General Partnership);	:	The Honorable Cameron Elliot,
Deloitte Touche Tohmatsu Certified Public Accountants Ltd.;	:	Administrative Law Judge
PricewaterhouseCoopers Zhong Tian CPAs Limited	:	
	:	
Respondents.	:	

DTTC'S POST-HEARING MOTION FOR SUMMARY DISPOSITION AND MEMORANDUM IN SUPPORT

Date: December 3, 2013

Pursuant to U.S. Securities and Exchange Commission (the "SEC" or the "Commission") Rule of Practice 250, 17 C.F.R. § 201.250, Respondent Deloitte Touche Tohmatsu CPA Ltd. ("DTTC") respectfully submits this Post-Hearing Motion for Summary Disposition.

ARGUMENT

The China Securities Regulatory Commission ("CSRC") has produced to the SEC the DTTC Client A and Client G audit workpapers and related documents. These constitute the entirety of the DTTC workpapers at issue in this proceeding, as well as the *only* workpapers requested by the Commission from the CSRC prior to the conclusion of the hearing. These productions dispose of the entire action against DTTC, and decisively repudiate the basic premise and elements of the Division's case against Respondents. With the DTTC Client A and Client G workpapers now in the Division's possession, any possible "genuine issue" regarding the most fundamental fact in this proceeding has been resolved in DTTC's favor, and it is clear "as a matter of law" that: (1) any obligations DTTC had under Section 106 have been satisfied; (2) as a threshold matter, the Section 106 requests are not enforceable; and (3) the Division cannot establish that DTTC's conduct satisfied Section 106's "willful refusal" standard. DTTC is therefore entitled to summary disposition.[1] *See* 17 C.F.R. § 201.250 (authorizing the "hearing officer" to "grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law").[2]

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[1] The CSRC's productions also call for the dismissal of the action against the remaining Respondents, and for that reason, Respondents BDO Dahua, KPMG Huazhen, PwC Shanghai, and EYHM have concurrently filed a motion for summary disposition.

[2] Commission Rule of Practice 250 permits the filing of a motion for summary disposition without leave after "the interested division has completed presentation of its case in chief." 17

In this proceeding, the Division seeks to bar DTTC from auditing U.S. issuers because it is unable to—and therefore did not—produce two sets of audit workpapers (*i.e.*, the DTTC Client A and Client G workpapers) and related documents *directly* to the SEC; such productions would have violated Chinese law and exposed DTTC and its personnel to the risk of severe sanctions in China. *See* Respondents Post-Hearing Brief at 1-2, 6, 23-46. Consistent with the SEC's own practice of seeking assistance from other foreign regulators in obtaining documents located abroad and the express provisions of Section 106(f) regarding alternative means of production (which Congress included in the Sarbanes-Oxley Act ("SOX") in recognition of this practice), the SEC sought to obtain these same workpapers through requests for assistance to its counterpart in China, the CSRC. *Id.* at 47-48, ENF Ex. 192; Respondents Ex. 456. The Division has complained about the timing of the CSRC's response, but these requests to the CSRC were unprecedented, as the CSRC had never produced audit workpapers from China to any foreign regulator and the SEC had never before sought the CSRC's assistance in obtaining audit workpapers. *See* Respondents Post-Hearing Brief at 67-70; Respondents Ex. 469 (E-mail from D. Tong to E. Tafara and K. Brockmeyer (Mar. 30, 2012)).

In response to these and other requests (including a Commission request for DTTC's workpapers concerning Longtop Financial Technologies Ltd. ("Longtop")), the CSRC established a screening and document production process that was approved by the State Council

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C.F.R. § 201.250(a); *see In the Matter of Rita Villa*, Exchange Act. Rel. No. 39518 (Jan. 6, 1998) (Commission order upholding ALJ order granting a motion for summary disposition under Rule 250 that was filed after "close of the Division's case" and styled as a motion for a "'directed verdict.'"). In considering such a motion, the "facts of the pleadings of the party against whom the motion is made shall be taken as true, *except as modified by stipulations or admissions by that party, by uncontested affidavits, or by facts officially noted pursuant to § 201.323.*" *Id.* § 201.250(a) (emphasis added). The Division has specifically informed DTTC (and represented in this proceeding) that the CSRC has produced DTTC Client A and Client G documents to the SEC.

of China. *See* George Tr. 1635:13-21, 1635:22-1636:5; Chiu Tr. 1796:9-13, 1779:2-23, 1783:2-19, 1785:2-7, 1815:18-1817:3; *see also* Leung Tr. 1476:1-14, 1480:23-25. Among other things, these procedures provide for the CSRC to coordinate with other relevant stakeholders in the Chinese government, and to produce requested workpapers to the SEC, PCAOB, and other foreign regulators. *Id.* Pursuant to these procedures, the CSRC provided specific instructions to DTTC concerning the proper means for preparing the DTTC Client A and Client G (as well as Longtop) workpapers for production, including screening them for State Secrets. *Id.* DTTC invested substantial resources in promptly reviewing these audit workpapers and related documents, completing its part of the screening process, and producing the DTTC Client A, Client G, and Longtop workpapers and related documents to the CSRC. *See, e.g.*, George Tr. 1635:11-1638:23; Chiu Tr. 1784:2-11, 1791:3-1792:22. In July 2013, the CSRC produced the Longtop audit workpapers and related documents to the SEC, which consisted of 20 boxes of hard copy documents and an electronic storage device. Respondents Exs. 637, 640-42. In early November 2013, the CSRC produced the Client G workpapers and related documents (which consist of five boxes of hard copy documents and an electronic storage device) and the DTTC Client A workpapers and related documents (which, according to the Division, comprise at least eight boxes of hard copy documents). *See* Declaration of David A. Gordon ¶¶ 5, 8; Division's Opposition to Motion to Supplement Record at 7 n.5.[3]

The production of these workpapers goes to the very core of this case. Indeed, the Division's purported inability to obtain the DTTC Client A and Client G workpapers was the entire premise upon which the Division's case against DTTC rested. *See, e.g.*, DTTC Client A

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[3] During this same time, the CSRC also produced EYHM Client C audit workpapers to the PCAOB (which then in turn provided those documents to the SEC), and substantial progress has been made in preparing the production of all other workpapers at issue in this proceeding that the SEC has requested from the CSRC. *See* Respondents Motion to Supplement the Record at 4-6.

OIP ¶ 12 ("Commission staff does not have the audit workpapers and other relevant documents sought in the Sarbanes-Oxley Section 106 request."); Omnibus OIP ¶ 18 ("the Commission does not have possession of the audit workpapers and other relevant documents sought in any of the Section 106 requests."). Perhaps even more critically, the SEC has acknowledged that [redacted] Respondents Ex. 482 ([redacted]). Indeed, senior SEC personnel reiterated this exact position [redacted]. Respondents Ex. 638 ([redacted]). And when it sought a stay in the DTTC Proceeding to continue negotiations with the CSRC, the Division itself stated:

> "If these renewed negotiations can develop a viable alternative means by which the SEC can obtain the audit workpapers for Client A, *it would have a significant impact on the appropriate resolution of this case*. Indeed, if Commission staff is able to obtain a complete set of DTTC's audit workpapers for Client A under satisfactory terms from the CSRC through these renewed negotiations, *the Division would likely seek to dismiss the instant OIP*."

Division's Unopposed Mot. for Stay at 3 (emphasis added).

Now that these productions have occurred, the Division cannot downplay their dispositive effect. The Division devoted pages of its briefs and numerous witnesses to its purported inability to obtain the workpapers at issue from the CSRC (which allegedly left the

Division with no alternative but to obtain the documents directly from Respondents—even if that meant requiring Respondents to violate Chinese law on Chinese soil and expose themselves to serious sanctions in China).[4] Among the SEC's witnesses was the Assistant Director of the Office of International Affairs (Alberto Arevalo), who stressed—even in the face of the CSRC's production of the Longtop workpapers—that the CSRC allegedly was not a viable alternative means for obtaining audit workpapers.[5] Critically, the Division directly tied its position that the CSRC is not a viable alternative means of production to the fact that "not a single Client A workpaper has been produced to the SEC," and that " [i]n addition, the SEC still has not received any of the DTTC workpapers for Client G...." ENF Post-Hearing Brief at 34-35. Each of these positions has been completely overtaken by events. The Division is in possession of the requested DTTC workpapers. The sovereign-to-sovereign approach not only works as a general matter, but has provided the documents to the Division in *both* of the DTTC matters at issue. As a result, there is no longer any justification or basis for maintaining this action against DTTC.

In addition to eliminating the *raison d'être* of the entire proceeding against DTTC, the CSRC's productions of the DTTC Client A and Client G workpapers decisively refute the key elements of the Division's case, entitling DTTC to summary disposition:

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[4] *See, e.g.*, ENF Post-Hearing Brief at 4, 34-35, 74, 81, 101-102; ENF Post-Hearing Reply Brief at 24, 26, 34, 35; *see also* Rana Tr. 182:23-183:14 ("And so based on their experience [not obtaining Client A and G work papers], we sort of concluded that seeking the assistance of the CSRC was not likely to yield any success. We weren't going to get documents out of that process, so we decided not to go that route."); Peavler Tr. 276:9-16 (same); Kaiser Tr. 385:8-13 (same); Weinstein Tr. 623:9-19 (same); Kazon Tr. 757:19-758:4 (same); London Tr. 868:21-869:14 (same).

[5] *See, e.g.*, Arevalo Tr. 1045:22-1046:4 (stating that "the CSRC was not a viable gateway for the delivery of audit work papers from China to the SEC"); *see also id.* 1066:17-1067:22 (despite the production of Longtop work papers, the CSRC was not a viable gateway "[b]ecause, in spite of these development, [Arevalo] know what these 20 boxes [were] going to contain. [He didn't] know what condition the CSRC [was] going to deliver these materials to the SEC."); *id.* 1067-23-1068:5 (stating that the CSRC was not a viable gateway because it had not produced the DTTC Client A or Client G work papers).

First, it is now beyond dispute that the "production obligations" under Section 106 concerning the DTTC Client A and Client G workpapers have been satisfied. Under Section 106(f), the Staff "may allow a foreign public accounting firm ... to meet production obligations under this section through alternate means, such as through foreign counterparts of the Commission or the Board." 15 U.S.C. § 7216(f). This provision—as well as the "willful refusal" language of 106(e) and other provisions—was added to Section 106 as part of the Dodd-Frank amendments to SOX, and reflects the Congressional recognition that administrative demands for foreign workpapers may implicate sensitive issues of international comity that can be resolved on a sovereign-to-sovereign basis. *See* Respondents Post-Hearing Brief at 11-13. Here, the Staff invoked Section 106(f) and pursued such "alternate means" by requesting the DTTC Client A and Client G workpapers directly from the CSRC. And the "alternate means" has borne fruit: DTTC produced the requested workpapers and related documents to a "foreign counterpart[] of the Commission," *i.e.*, the CSRC, which in turn produced the documents to the SEC.

The Division has argued that Section 106(f) merely "gives the SEC the *option* of allowing a foreign firm to satisfy its duties under Section 106 by producing audit workpapers to foreign regulators," ENF Post-Hearing Brief at 101 (emphasis original), and that its pursuit of such "alternate means" does "not preclude it from also issuing mandatory requests directly to DTTC under Section 106(b)...." ENF Post-Hearing Reply Brief at 43. But those particular issues are now beside the point because the Division in fact *exercised* that option and it has *worked.* The documents have been produced. Whatever the precise scope of its discretion under Section 106(f), the Division surely cannot obtain the documents through "alternate means" under Section 106(f) but nonetheless punish foreign firms for not producing documents directly to the

Division.[6] The Section 106(f) alternative has been successful here, and thus the obligations under Section 106 are satisfied.[7] As a matter of law, the action against DTTC must be dismissed.[8]

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[6] Indeed, exposing foreign firms to punishment in such circumstances would have wide-ranging and negative repercussions. The SEC regularly works with foreign regulators to obtain documents located abroad, *see* Respondents Post-Hearing Brief at 55-59, and that is the process Congress has endorsed in Section 106(f).

[7] In its Opposition to Respondents' Motion to Supplement the Record, the Division suggests that the productions have "limited ... probative value" until the Division has "review[ed] the claimed productions of audit workpapers for completeness." Opp. to Mot. to Supp. Record at 6-7. But even a substantial production of workpapers (which indisputably has occurred now) would render the Section 106 requests unenforceable and preclude a finding of "willful refusal." *See infra.* In any event, the Division should not be permitted to use the purported issue of "completeness" as a pretext for delay. The Division has offered no credible, non-speculative basis to conclude the productions may be incomplete, and the only evidence in the record is to the contrary. *See* Chiu Tr. 1807-1810 (testifying that only a "very, very small portion of the working papers" were redacted to protect state secrets). Further, the Division cannot use its own delay in reviewing the documents to its tactical advantage. The notion that it could take "*a number of months*" for the Division to confirm that the productions are complete is unacceptable. *See* Opp. to Mot. to Supp. Record at 9 (emphasis added). Ultimately, if the Division insists on questioning the completeness of the productions, it should be required to issue a report on the productions promptly, and no initial decision should issue prior to that report.

[8] The Division has contended that "any present-day thaw in the CSRC's historical intransigence is wholly irrelevant to Respondents' liability under Section 106(e) stemming from their *pre-OIP* conduct." ENF Post-Hearing Reply Brief at 34 (emphasis original). The Division offers no legal citation in support of that position—and that is because the Division has simply invented it. The bottom line is that the SEC cannot impose a sanction on DTTC for a "willful refusal" to comply with document requests at a time when the Division is in possession of the very documents at issue. *Cf. Office of Thrift Supervision Dept. of Treasury v. Dobbs*, 391 F.2d 956, 957 (D.C. Ct. App. 1991) ("Once the party has complied with the subpoena and the party issuing the subpoena has obtained the testimony or documents it is seeking, there is no longer a live controversy between the parties."). A contrary approach would contravene the plain language and purpose of Section 106(f), be completely inconsistent with Congressional intent, and in any event would constitute impermissibly arbitrary and capricious agency action. Further, the Division's position is flatly inconsistent with the its own prior statements and earlier position when it sought a stay in the DTTC Proceeding—an action that *post-dated* the issuance of the OIP in that matter. According to the Division, it sought the stay "because, at that time, the SEC was attempting to negotiate with ... the CSRC, to develop a mechanism by which the SEC could obtain audit workpapers and other documents from audit firms based in China." Mot. to Consolidate at 3. The Division explained unequivocally that "[t]hose efforts, if successful,

Second, the CSRC's productions of the DTTC Client A and Client G workpapers conclusively establish that the Division's Section 106 requests for these same documents are not enforceable. As set forth in Respondents' pre- and post-hearing briefs, there can be no finding that DTTC "willfully refused" under Section 106 if the SEC's document demands are unenforceable in the first instance, such that DTTC would not be required to comply with them. Respondents' Post-Hearing Brief at 63. And, to date, those requests have never been deemed to be enforceable, by any tribunal. Because the Section 106 requests at issue here would require DTTC to violate Chinese law, their enforceability depends on a number of factors derived from the Restatement of Law of Foreign Relations and principles of international comity, including the Division's "ability to obtain the ... information through alternative means." *Id.* at 63-64. The evidence presented at the hearing made clear that the CSRC constituted such an "alternative means," *id.* at 64-71, and, in light of the recent productions by the CSRC, there can no longer be any "genuine issue" in this regard. The Division not only has the "ability to obtain" the documents at issue—it in fact *has* obtained them.

Recognizing the importance of this threshold issue, the Division contested the notion that the CSRC constituted an alternative means by which it could obtain the requested workpapers. Indeed, the Division staked its case on the argument that the CSRC was "simply not a viable gateway for obtaining assistance," and that cooperative efforts with the CSRC would be a "waste of time." ENF Post-Hearing Brief at 41; *see also* Mot. to Consolidate at 4 ("[T]here is no realistic possibility that international sharing mechanisms will affect the resolution of the DTTC Proceeding."). But the CSRC's productions of the DTTC Client A and Client G

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would have affected the appropriate resolution of the DTTC Proceeding." *Id.* Such a position rightfully recognizes that developments occurring after the OIP are highly relevant—and here, dispositive—to this proceeding.

workpapers (as well as the Longtop workpapers and EYHM Client C workpapers) indisputably refute the Division's position. *See* ENF Post-Hearing Brief at 81. The Division's efforts to portray the CSRC's supposed past "intransigence," *see* ENF Post-Hearing Reply Brief at 34, have been rendered irrelevant (and in any event can no longer be credited).

Indeed, *the CSRC has actually produced the requested workpapers and they are in the Division's possession.* Well-settled principles of law and international comity (as well as common sense) do not permit the enforcement of a document request that would require the recipient to violate the law of its home country when the requesting party already has the documents in its possession. *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) ("If the information sought can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law."). This is particularly true in the D.C. Circuit, which has expressed significant reticence about ever ordering a violation of foreign law. *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) ("[I]t causes . . . considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question."). With the DTTC Client A and Client G workpapers sitting in the Division's files in Washington, D.C., the Section 106 requests for those same workpapers (which call for DTTC to violate Chinese law) are not enforceable. Thus, there can be no finding—as a matter of law—that DTTC "willfully refused" to comply with the Division's Section 106 requests.[9]

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[9] The fact that the requested documents are now in the Division's possession is alone sufficient to render the Section 106 requests unenforceable. But it also dramatically impacts the analysis of the sovereign's respective interests, which is another comity factor that must be considered in this context. Respondents Post-Hearing Brief at 74-75. Specifically, now that the Division has received the documents and there is an undeniable alternative means available, any interest it may have in obtaining the workpapers directly from DTTC is negligible—particularly

Third, the CSRC's productions of the DTTC Client A and Client G workpapers preclude the Division from establishing that DTTC's conduct satisfied Section 106(e)'s "willful refusal" standard.[10] As Respondents have demonstrated, the proper construction of "willful refusal" under Section 106(e) requires the Division to prove that Respondents lacked good faith or acted with conscious wrongdoing. *See* Respondents Post-Hearing Brief at 8-20. The hearing evidence showed DTTC's good faith, and the CSRC's recent productions serve to powerfully underscore it further. DTTC produced its Client A and Client G workpapers to the CSRC, expecting that they would be produced to the SEC, undertook substantial efforts to facilitate their production on a sovereign-to-sovereign basis, and those documents are now in the possession of the Commission.

Indeed, the recent productions vindicate DTTC's position that it never "chose" to "flout U.S. law in favor of Chinese law," ENF Post-Hearing Brief at 70, 72, or that DTTC sought to "make 'deliberate use of [Chinese] nondisclosure law to evade ... the strictures of American securities law," *id.* at 73, but instead that DTTC reasonably expected that it could comply with both legal regimes through a sovereign-to-sovereign solution. Respondents Post-Hearing Brief at 55-60. That expectation has come to fruition. The productions also refute any notion that Respondents followed a "legal regime" that "was designed to block, and in fact did block, the SEC's access to audit workpapers." ENF Post-Hearing Brief at 4. And the productions demonstrate the value of DTTC's longstanding efforts to work with the SEC and CSRC to

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when viewed against China's substantial and understandable interest in ensuring that Chinese entities comply with Chinese law on Chinese soil.

[10] As demonstrated herein, because DTTC fulfilled its obligations under Section 106 and did not fail to "comply" with the Division's Section 106 requests, the case has been resolved without the need to consider whether its conduct amounted to a "willful refusal."

facilitate production of its workpapers.[11] *See* Respondents Post-Hearing Brief at 49-53. The Division contested each of these points, but in each case the Division's arguments were unsustainable at the hearing and the recent productions have defeated them entirely. At bottom, the recent productions eliminate any possible "genuine issue" concerning DTTC's good faith—or even the notion it made a voluntary "choice" to not comply with the Section 106 requests.[12]

Ultimately, the SEC itself has repeatedly acknowledged that [redacted]; Division's Unopposed Mot. for Stay at 3 ("[W]e acknowledge that if the SEC were able to obtain DTTC's audit workpapers for Client A through the CSRC it would have an impact on the case."). Although the Division has attempted to move the finish line back as these productions became increasingly imminent, even its post-hearing reply brief acknowledged that the CSRC's production of the DTTC Client A and Client G workpapers would be an extremely substantial development in this matter. ENF Post-Hearing Reply Brief at 37-38 ("Until such time as the SEC receives [the DTTC Client A and Client G workpapers], it is premature to assess whether

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[11] The productions also (once again) show that DTTC was correct that the CSRC was the appropriate Chinese government entity for addressing these cross-border production issues, and not the State Secrets Bureau or State Archives Administration.

[12] The productions of the DTTC Client A and Client G workpapers also further underscore the uncertainty of DTTC's legal obligations, and thus preclude a finding of "willfulness" under *Safeco*. DTTC cannot be found to have acted "willfully"—much less to have "willfully refused"—when its legal obligations are objectively uncertain. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69-70 & n.20 (2007). Even if the Court now determined that DTTC could be punished despite the Division being in possession of the requested workpapers, such an incongruous result is clearly not the only "objectively reasonable" outcome that is available under Section 106. DTTC has sought to satisfy its legal obligations by producing its workpapers to the CSRC, which in turn produced them to the SEC, and those efforts have been successful. To now hold that such conduct constitutes a "willful refusal" is plainly inconsistent with the U.S. Supreme Court's holding in *Safeco*.

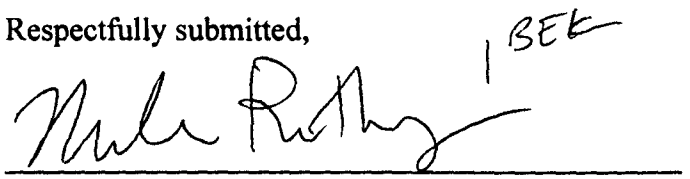
the CSRC has become a viable and dependable gateway for the production of audit workpapers in China."). The SEC's position rightly recognizes that there is no reason or legal basis for these proceedings now that the DTTC Client A and Client G workpapers have been produced. Rather than continuing to pursue this action against DTTC, the Division should celebrate the success of its cooperation with the CSRC. The CSRC's production of the DTTC Client A and Client G workpapers resolves this action as a matter of law.

CONCLUSION

For the foregoing reasons, Respondent DTTC is entitled to summary disposition and the action against DTTC should be dismissed.

Dated: December 3, 2013

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that DTTC's Post-Hearing Motion for Summary Disposition and Memorandum in Support (the "Motion") complies with the length limitations of SEC Rule of Practice 154(c) because it contains 4,379 words (as determined by the Microsoft Word 2010 word-processing system used to prepare the Motion).

Dated: December 3, 2013

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