UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of	:
BDO CHINA DAHUA CPA CO., LTD.,	:
ERNST & YOUNG HUA MING LLP,	:
KPMG HUAZHEN (SPECIAL GENERAL PARTNERSHIP),	:
DELOITTE TOUCHE TOHMATSU CERTIFIED PUBLIC ACOUNTANTS LTD., and	:
PRICWATERHOUSECOOPERS ZHONG TIAN CPAs LIMITED	:

DIVISION OF ENFORCEMENT'S OPPOSITION TO ZHONGGUANCUN LISTED COMPANIES ASSOCIATION'S MOTION TO FILE AN AMICUS BRIEF

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June 9, 2014

The Division of Enforcement ("Division") of the U.S. Securities and Exchange Commission ("SEC" or "Commission") submits this brief in opposition to the motion of Zhongguancun Listed Companies Association ("ZLCA") to file an amicus brief in this proceeding, or, in the alternative, to file a statement of its views.

I. The Rules of Practice Do Not Permit ZLCA To File an Amicus Brief In This Proceeding

ZLCA's motion should be denied, because the Commission's Rules of Practice do not allow it. Rule 210(a)(1) states, "No person shall be granted leave to become a party or a non-party participant on a limited basis in an enforcement or disciplinary proceeding." 17 C.F.R. 201.210(a). ZLCA's request for leave to file an amicus brief addressing issues raised by the Initial Decision is a request "to become a party or a non-party participant on a limited basis." As this proceeding, which seeks to protect the Commission's processes pursuant to Rule 102(e), is a disciplinary proceeding under Rule 210(a), ZLCA's motion should be denied. *See Exmocare, Inc.*, Admin. Proc. File No. 3-15455, 2013 SEC LEXIS 2962, at *3 (Sept. 27, 2013) (Murray, Chief ALJ) (denying application for leave to file amicus brief, stating, "My review convinces me that the Commission's Rules of Practice do not allow persons to become a party or a non-party participant in this enforcement proceeding").

II. ZLCA Fails To Meet Requirements For Filing An Amicus Brief

Assuming, *arguendo*, the Commission's Rules of Practice potentially allow the filing of an amicus brief in this proceeding, ZLCA's motion should be denied because ZLCA does not meet the requirements under Rule 210(d) of the Rules of Practice. Neither the Commission nor the hearing officer requested ZLCA's participation in this proceeding as amicus curiae; nor has

the Division consented to ZLCA's participation.[1] Accordingly, pursuant to Rule 210(d), ZLCA could file an amicus brief only if granted leave to do so. 17 C.F.R. 201.210(d).

Participation as an amicus in this proceeding is not a matter of right. Rule 210(d) states that the movant must identify its interest in the proceeding and state the reasons why a brief of an amicus curiae is desirable. 17 C.F.R. 201.210(d)(2).[2] Generally speaking, the criterion for determining whether to permit the filing of an amicus brief is whether the brief will assist the process by presenting ideas, arguments, theories, insights, facts or data that are not found in the parties' briefs. 4 Am. Jur. 2d, *Amicus Curiae*, § 3 (2014). ZLCA's motion and supporting brief do not come close to meeting those criteria.

A. ZLCA's Does Not Adequately Explain Its Interest

ZLCA's request should be denied because ZLCA fails adequately to explain its interest in this proceeding. ZLCA does not explain what the organization is, where it is located, when or why it was created, or, most glaringly, who its members are. Rather, ZLCA's motion provides only the vague statement that "many" U.S.-listed Chinese companies for which the Respondents in this proceeding have issued audit opinions "are members of the ZLCA." Brief of Points and Authorities In Support of Motion of Zhongguancun Listed Companies Association For Leave to File Amicus *Curiae* Brief, at 2 ("ZLCA Brief"). Yet ZLCA fails even to identify its members who are Respondents' clients. Absent such rudimentary information about ZLCA and its make-

[1] The Division was unaware of ZLCA's intention to file its motion until undersigned counsel received it at his SEC mail stop on June 5, 2014.

[2] The comments to Rule 210(d) state that "the provisions for amicus participation [in an SEC administrative proceeding] are based on Rule 29 of the Federal Rules of Appellate Procedure." *Rules of Practice*, SEC Release No. 34-35883, 60 Fed. Reg. 32738, at 32759 (June 9, 1995). FRAP 29(b) requires that a motion seeking leave to file an amicus brief "must be accompanied by the proposed brief." ZLCA has not done this here.

up, the Commission cannot begin to assess any purported "interest in the proceeding" stated by ZLCA.[3]

B. ZLCA's Arguments Will Not Assist The Process

ZLCA's request also should be denied because ZLCA fails to demonstrate how its intended brief will assist the Commission's decision-making. In particular, ZLCA does not explain why such a brief would be "desirable." In *KPMG Peat Marwick LLP*, Exchange Act Rel. 44050, 2001 WL 223378, 74 SEC Docket 1351 (Mar. 8, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002), the Commission denied the motion of the American Institute of Certified Public Accountants ("AICPA") to participate as amicus in a proceeding brought under Rule of Practice 102(e) where, among other circumstances, "AICPA tenders argument, which, for the most part, merely reiterates that of Peat Marwick and does not call on the expertise of the AICPA." *Id.* at *7 n. 18. Similarly here, ZLCA fails to identify any arguments or theories regarding the Initial Decision that have not already been made, or that can be made, by Respondents,[4] nor does ZLCA identify any special expertise that it would bring to bear on these arguments or theories.

ZLCA contends that the Initial Decision "would have a significant adverse impact on the ZLCA, its members, and on the United States investors of many Chinese companies." ZLCA Brief at 3. But this merely repeats Respondents' position that imposing a practice bar on them would have "collateral consequences" on issuers and U.S. investors. Respondents' Petition For Review Of ALJ's Initial Decision, at 28-29 (Feb. 12, 2014). In the hearing before the ALJ, Respondents proffered two alleged expert witnesses who opined on, among other subjects, "the

[3] Notably, Rule 29 of the Federal Rules of Appellate Procedure, upon which Rule 210(d) is based, requires an amicus brief to include "a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file." FRAP 29(c)(4). The amicus brief containing this statement must accompany any motion for leave to file the brief. *See* FRAP 29(b).

[4] The Respondents are Deloitte Touche Tohmatsu Certified Public Accountants Ltd., Ernst & Young Hua Ming LLP, KPMG Huazhen (Special General Partnership), PricewaterhouseCoopers Zhong Tian CPAs Limited, and Dahua CPA Ltd.

number and characteristics" of PCAOB-registered accounting firms in China and U.S.-listed securities that are incorporated in China or have significant operations in China, and alleged consequences of a practice bar imposed on Respondents. Expert Report of Laura E. Simmons ¶ 3 & *passim* (July 1, 2013); *see also* Rebuttal Expert Report of Laura E. Simmons (July 19, 2013); Expert Report of Paul S. Atkins ¶¶ 36-45 (July 1, 2013); Initial Decision at 68-72, 76-82 (summarizing Simmons' and Atkins' testimony). In their post-hearing briefs, Respondents devoted at least twenty-five (25) pages to the assertion that "sanctions would have substantial negative collateral consequences," which included subsidiary contentions about (among other things): the numbers of audits performed by Respondents in China; whether there are "adequate substitutes" for Respondents in China; whether accounting firms outside China could be "viable substitutes;" the market capitalization of affected issuers; potential switching costs of issuers; the possibility that "impacted issuers" might de-list from U.S. exchanges; the alleged harm to U.S. investors from such possible de-listings (including allegations about the magnitude of a potential drop in stock price); and the alleged future impact of the Division's proposed bar. Respondents' Post-Hearing Brief at 90-109 (Aug. 30, 2013); Respondents' Post-Hearing Reply Brief at 76-82 (Sept. 20, 2013).

The Initial Decision found Respondents' discussion and alleged evidence of collateral consequences to be "unrealistic and unpersuasive." Initial Decision at 108-09. But if there was a stone left unturned by Respondents' extensive treatment of these issues, ZLCA does not identify it or explain why ZLCA is uniquely positioned to address the issue on appeal. ZLCA appears to suggest that even its U.S.-listed members that have their financial statements audited by China-based accounting firms *other than Respondents* "face the possibility" of de-listing. ZLCA Brief at 3 ("If the decision is not reversed or modified, all of the ZLCA's members who are U.S. listed

and have their financial statements audited by a Chinese certified public accountant . . . will face the possibility of having their shares delisted from U.S. stock exchanges . . . . ."). But this is nonsensical. Even assuming de-listing from U.S. markets of issuers whose auditors are subject to a practice bar were a realistic possibility, any practice bar imposed in this proceeding would be limited to Respondents. Any argument based on how other *audit firms* might respond to future requests under Sarbanes-Oxley (let alone what action the SEC might take in response to non-compliance) is speculative and, in any event, far removed from any expertise that ZLCA members (who apparently are issuers) could offer. It is also ground that Respondents have covered. *See* Respondents' Post-Hearing Brief at 93.[5]

[5] ZLCA also contends that direct production of audit workpapers by China-based audit firms to the SEC, under Section 106 of Sarbanes-Oxley, would "willfully violate the law of the People's Republic of China." ZLCA Brief at 3. The Division disputes this contention. The Division further notes that ZLCA's contention, as it applies to China-based audit firms other than Respondents, is undermined by the particular circumstances of this proceeding; Respondents here have alleged that they are subject to specific, oral instructions from the Chinese government not to produce documents to the SEC. In any event, issues related to Chinese law restrictions on the production of documents also have been addressed by Respondents and their experts, and ZLCA does not identify anything new that it can offer on this subject.

CONCLUSION

For the foregoing reasons, ZLCA's Motion To File An Amicus Brief should be denied.[6]

Dated: June 9, 2014

Respectfully submitted,

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[6] The Division takes no position on whether ZLCA should be permitted to file a statement of views, except that such a proposed statement would be of limited value to this proceeding. Any new assertions of fact made by ZLCA that are unsupported by the record cannot be considered by the Commission, as per Rule 201(e) of the Rules of Practice.