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	The Honorable Cameron Elliot, Hearing Officer

DIVISION OF ENFORCEMENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL DECLARATION OF DONALD CLARKE

The Division of Enforcement ("Division") of the U.S. Securities and Exchange Commission ("SEC" or "Commission"), by and through undersigned counsel, pursuant to Rule 154 of the Commission's Rules of Practice, hereby respectfully moves the Court for leave to file a Supplemental Declaration of Professor Donald Clarke ("Clarke Supplemental Declaration"), attached hereto, in response to certain reply papers submitted by Respondents on March 8, 2013, in these proceedings.[1]

[1] The Division informed counsel for Respondents of the Division's intent to file this Motion earlier on this same date, March 25, 2013, on which it was filed. Respondent Deloitte Touche Tohmatsu CPA LLP stated that it was not in a position to consent or object to this Motion without first reviewing the Motion. The other Respondents have not stated whether they consent or object to the Motion.

In support of this motion, the Division states as follows:

1. The January 9, 2013 Order Following Prehearing Conference, in relevant part, established a briefing schedule under which Respondents' prehearing motions were due February 1, 2013; the Division's opposition briefs were due February 22, 2013; and Respondents' reply briefs were due March 8, 2013.

2. On February 1, 2013, pursuant to the above-described schedule, Respondent Deloitte Touche Tohmatsu CPA LLP ("DTTC") filed a Motion for Summary Disposition as to Certain Threshold Issues, together with the Declaration of James V. Feinerman ("First Feinerman Declaration"). The First Feinerman Declaration, in broad summary, contended that Chinese law prohibited the method by which the Division served the OIP on Respondents. The other Respondents joined DTTC's motion on this issue.

3. On February 22, 2013, pursuant to the above-described schedule, the Division filed a Consolidated Opposition to Respondents' Motions for Summary Disposition as to Certain Threshold Issues. The Division also filed, among other materials, a Declaration of Donald Clarke ("First Clarke Declaration"), which responded to Respondents' arguments on the service issue, including, specifically, the assertions set forth in the First Feinerman Declaration.

4. On March 8, 2013, pursuant to the above-described schedule, as modified by the Court's March 7, 2013 Order Granting Respondents' Consent Motion Regarding Number and Page Limitations of Reply Briefs, DTTC filed a Reply Memorandum in Support of Respondents' Motions for Summary Disposition as to Certain Threshold Issues ("Reply Memorandum"). DTTC also filed a Supplemental Declaration of James V. Feinerman ("Feinerman Supplemental Declaration"), which cited authorities that Professor Feinerman did not rely upon in his First Declaration. Specifically, in his Supplemental Declaration, Professor Feinerman cited: (1) a

2004 document issued by the General Office of China's Supreme People's Court, the "Circular on the Service Abroad of Judicial Documents in Foreign-Related Administrative Cases" (the "Circular"), and (2) Article 97 of the Interpretation of the Supreme People's Court on Several Issues Regarding Implementation of the PRC Administrative Procedure Law (the "Interpretation").

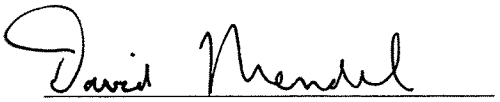
5. The Division now seeks leave to submit the Clarke Supplemental Declaration for the Court's consideration. As the Division explained in its February 22, 2013 Consolidated Opposition, the Court need not even consider what, if anything, Chinese law may say about whether service of the OIP was properly effectuated on Respondents in this proceeding, as the issue of service within the United States is governed solely by U.S. law. *See* Division's Consolidated Opposition, at 10-15. However, in the event the Court determines that Chinese law is relevant, the Division offers the Clarke Supplemental Declaration as further support for its position that Respondents have failed to show that Chinese law prohibited service of the OIPs through the U.S. member firms of Respondents' respective global networks. The Clarke Supplemental Declaration is narrowly tailored because it is addresses only the new, above-mentioned authorities that the Feinerman Supplemental Declaration purports to rely on, as well as DTTC's new assertion in its Reply Memorandum (at page 7) that "[n]either the Hague Service Convention nor China law prohibits service of Chinese entities abroad where they have consented to service through a U.S. agent." Given that these points are raised for the first time in Respondents' reply papers, it is appropriate for the Court to consider Professor Clarke's responses to these points as set forth in his Supplemental Declaration.

CONCLUSION

For the reasons set forth above, the Division respectfully submits that that the Division's Motion for Leave To File Supplemental Declaration of Donald Clarke be granted.

Dated: March 25, 2013

Respectfully submitted,



David Mendel (202) 551-4418
Amy Friedman (202) 551-4520
Douglas Gordimer (202) 551-4891
Marc E. Johnson (202) 551-4499
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-5971

COUNSEL FOR DIVISION OF ENFORCEMENT

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SUPPLEMENTAL DECLARATION OF DONALD CLARKE

I, Donald Clarke, declare as follows:

1. I have been retained by the U.S. Securities and Exchange Commission's Division of Enforcement ("Division") in the above-captioned proceeding. I submitted a declaration (the "First Declaration"), dated February 21, 2013, in this proceeding in support of the Division's Consolidated Opposition to Respondents' Motions for Summary Disposition as to Certain Threshold Issues.
2. I incorporate by reference paragraphs 2 through 12 of that Declaration.
3. In addition to the documents listed in my First Declaration and the Chinese legal documents referred to herein, I have reviewed the following documents:
    - Reply Memorandum in Support of Respondents' Motion for Summary Disposition as to Certain Threshold Issues, submitted by Respondent Deloitte Touche Tohmatsu CPA LLP, dated March 8, 2013 ("Reply Memo"); and
    - Supplemental Declaration of James V. Feinerman appended to Reply Memo, dated March 8, 2013 ("Supplemental Feinerman Declaration").
4. My opinions in this Supplemental Declaration address whether the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial

Matters (the "Hague Convention") and China's Civil Procedure Law apply to administrative proceedings such as the present one.

I. Summary of Opinion

5. The Chinese documents cited in the Supplemental Feinerman Declaration by their very terms do not apply to the current proceedings and therefore do not support the conclusion of that declaration.

6. Respondents assert that the SEC failed to effect proper service because it did not use the Hague Convention—the alleged *exclusive* means of service on parties located in China—and thereby violated Chinese law. But the Respondents concede in their Reply Memo that service through an authorized agent of a Respondent within the United States would operate as valid service on that Respondent without violating either the Hague Convention or any prohibition of Chinese law. It follows that the Hague Convention is *not* the exclusive means of service and that the method of service used in this case does not offend Chinese law. Every objection founded in the Hague Convention or Chinese law that Respondents have raised to the method of service used in this case would *apply with equal force* to service through an authorized agent in the U.S. Thus, Respondents' concession that there could be proper service through such an agent directly contradicts their argument that the *method of service* used in this proceeding was prohibited under Chinese law *because* it was not undertaken using Hague Convention procedures.

II. Analysis

A. The Chinese Supreme People's Court Documents Cited in the Supplemental Feinerman Declaration Do Not Support the Proposition that the Hague Convention and Chinese Civil Procedure Law Apply to These Proceedings

7. In my First Declaration, I stated that neither the Hague Convention nor China's Civil Procedure Law apply to these proceedings because both, by their explicit terms, apply to civil proceedings, whereas these proceedings are administrative.

8. In response, the Supplemental Feinerman Declaration notes the existence of a 2004 document issued by the General Office of China's Supreme People's Court, the "Circular on the Service Abroad of Judicial Documents in Foreign-Related Administrative Cases" (the "Circular"), and the Reply Memo observes that I "seem[] to have omitted" any reference to this document in my Declaration.[1]

9. My Declaration did not refer to this document because it does not bear on the present proceedings and does not support Respondents' position. Both the title of the document and its text make clear that it is a set of instructions to Chinese courts about how to serve process on foreigners in administrative cases that come before them. In other words, it is about *outgoing* service in *lawsuits against Chinese administrative agencies* being heard in *Chinese courts*. It is not an interpretation of the Hague Convention as it applies to *incoming* service: the attempts of foreigners to serve Chinese parties. And it is about

[1] Reply Memo at 6, n.6.

proceedings within Chinese courts, not proceedings within administrative agencies, whether foreign or domestic.[2]

10. Incoming requests for service of process under the Hague Convention are handled not by the Supreme People's Court, but by China's designated Central Authority, the Ministry of Justice. The Supreme People's Court has no authority to tell the Ministry of Justice which incoming requests for service of process it should accept or reject. In any event, the Circular does not purport to do so.

11. In short, the Circular is about how Chinese courts should go about serving parties abroad when they handle litigation against Chinese administrative agencies.[3] *It has nothing to say about how parties in China may or may not be served in foreign administrative proceedings, including proceedings before the U.S. Securities and Exchange Commission.*

12. The Supplemental Feinerman Declaration also argues that Article 277 of China's Civil Procedure Law applies to these proceedings by virtue of Article 97 of the Interpretation of the Supreme People's Court on Several Issues Regarding Implementation of the PRC Administrative Procedure Law (the "Interpretation").[4] I do not agree.

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[2] It is worth noting that the Circular explicitly acknowledges that in the view of the Supreme People's Court, the Hague Convention does *not*, as a legal matter, govern administrative litigation in Chinese courts. It states that "China may request a foreign country to provide assistance in the service of judicial documents in a foreign-related administrative case *by referring to* the Hague Convention . . ." (emphasis added). Supplemental Feinerman Declaration, Exhibit A. The term "by referring to" (sometimes translated as "with reference to") (*canzhao*) is a term of art in Chinese law. Where a law directly applies, terms such as "in accordance with" (*genju*) are used. "With reference to" is used where it is acknowledged that the norm in question does not directly apply, but one is supposed to follow its procedures nonetheless. The Circular tells Chinese courts that a procedure for service of process abroad has already been worked out for civil and commercial matters; instead of re-inventing the wheel for lawsuits they are hearing against Chinese administrative agencies, Chinese courts should try that procedure. China's Supreme People's Court did not and could not claim that foreign authorities were obliged to follow Hague Convention procedures when they received such requests from Chinese courts in cases involving litigation against Chinese administrative agencies.

[3] It is important to note that China's Administrative Litigation Law (sometimes translated as "Administrative Procedure Law") is *solely* about litigation brought *in Chinese courts against Chinese government agencies* for improper performance of their duties. See, for example, Article 2 of the Law:

> If a citizen, a legal person or any other organization considers that his or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel, he or it shall have the right to bring a suit before a people's court in accordance with this Law.

Thus, like the Civil Procedure Law, the Administrative Litigation Law has nothing to do with administrative proceedings of the kind occurring in this case. It is not a law of administrative procedure in the American sense, and what it calls administrative proceedings would in the United States be called judicial proceedings: they occur before a court.

[4] *See* Supplemental Feinerman Declaration, Paras. 12-13. The text of the Interpretation is reproduced in Exhibit B thereto.

13. By its very terms, the Interpretation does not apply to these proceedings. Like the Circular, the Interpretation governs litigation *in Chinese courts against Chinese administrative agencies*;[5] it tells courts what to do when they find that the relevant law does not answer certain questions. It does not cover administrative proceedings in the American sense of the term, and does not cover these proceedings in particular. These proceedings are, of course, not being heard in a Chinese court, and do not involve a lawsuit brought against a Chinese administrative agency.

B. Effect of Respondents' Concession that Neither the Hague Convention nor Chinese Law Would Prohibit or Otherwise Invalidate Service on Respondents Through an Authorized Agent in the United States

14. Respondents concede that "neither the Hague Service Convention nor China law prohibits service of Chinese entities abroad where they have consented to service through a U.S. agent[.]"[6] This concession highlights the fact that the service-related issue in this case is the *U.S. law* issue of whether there is a relevant difference between such an authorized agent and the member firms to whom the OIPs were delivered in the current proceedings, and not the *Chinese law* issue of whether the method of service used is prohibited.

15. This is so because every objection founded in the Hague Convention or Chinese law that Respondents have raised to the method of service used in this case would apply with equal force to service upon an authorized agent in the U.S.

16. For example, Respondents and Professor Feinerman have stated emphatically in several places that service under the Hague Convention is the *exclusive* means of serving defendants located in China.[7] Yet service through an authorized agent in the United States is not accomplished through the procedures of the Hague Convention. If, as Respondents concede, such service is lawful and valid, then it necessarily follows that the Hague Convention is *not* the exclusive means of serving defendants located in China, and that service via the delivery of documents to an entity in the United States is not for that reason invalid or prohibited. The question becomes one of whether the party receiving documents was an authorized agent or was an otherwise adequate conduit for service: a U.S. law question.

17. Similarly, Respondents and Professor Feinerman have stated that the Hague Convention and Chinese law apply because, contrary to the opinion stated in my Declaration, service *did* occur within the territory of the People's Republic of China.[8] They reach this

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[5] *See supra* note 3.

[6] Reply Memo at 7.

[7] Respondents' Motion for Summary Disposition as to Certain Threshold Issues and Memorandum In Support, dated February 1, 2013 ("Respondents' Motion"), at 7; Declaration of James Feinerman filed in support of Respondents' Motion, dated February 1, 2013, Para. 24; Reply Memo at 6; Supplemental Feinerman Declaration, Para. 5. The Supplemental Feinerman Declaration allows only one exception to this categorical statement—it states in Para. 15 that a foreign country may request China to assist in service through diplomatic channels where there is no applicable treaty.

[8] Supplemental Feinerman Declaration, Para. 20; Reply Memo at 4.

conclusion on the grounds that service to U.S. member firms necessarily contemplated the delivery of documents to Chinese counterparts in China. For reasons stated in my First Declaration, I do not agree with this reasoning. I note, however, that if it is true, it is then equally true of service through an authorized agent in the U.S., and that such service must therefore offend Chinese law to the same degree. Since Respondents agree that service through an authorized agent does *not* for this reason offend the Hague Convention or Chinese law, then service via delivery of documents to the member firms in these proceedings, whether or not such firms are conceded by Respondents to be authorized agents, must be equally inoffensive.

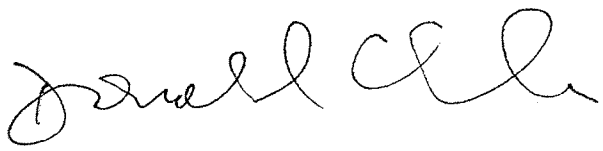
III. Conclusion

18. In short, with their concession, Respondents agree with my position that there is nothing inherently illegal under the Hague Convention or Chinese law with serving a defendant located in China by means of delivering papers to an entity located abroad. As far as the question of *the legality of the method of service* is concerned, the Respondents, in two briefs and two expert opinions, have not identified any basis in either the Hague Convention or Chinese law for distinguishing between (i) delivery of documents to a concededly authorized agent and (ii) delivery of documents to the member firms as was done in these proceedings. Whether the delivery made in these proceedings is adequate is a U.S. law issue, not a Chinese law or Hague Convention issue.

19. Furthermore, the Chinese legal documents cited in the Supplemental Feinerman Declaration can be seen by their very terms to be inapplicable to the present proceedings. Those documents tell *Chinese courts* what to do in the course of *lawsuits against Chinese administrative agencies*. That is a very long distance from non-judicial administrative proceedings in the United States against Chinese entities and there is no reason why they should be thought applicable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2013, in Washington, D.C.



Donald Clarke