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 Accountants LLP; PricewaterhouseCoopers Zhong Tian CPAs Limited, Respondents.	)

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

Respondents jointly submit this Response to the Division of Enforcement's Motion for Leave to File Supplemental Declaration of Donald Clarke (the "Motion for Leave"), and respectfully state as follows:

1. Respondents do not oppose the introduction of any information or evidence that might assist the Court in resolving the pending motions for summary disposition. Because only the Court can make that determination, Respondents do not oppose the Motion for Leave.

2. That said, Respondents respectfully submit that the Supplemental Declaration of Donald Clarke ("Supplemental Clarke Declaration") does not add anything of substance to the

prior declarations and briefing. Rather, it appears intended to function as a surreply and includes legal argument that extends well beyond the scope of Professor Clarke's stated expertise on China law. *See, e.g.*, Supplemental Clarke Declaration ¶¶ 14-17 (arguing that a purported "concession" in Respondents' Reply Brief (rather than a declaration of Respondents' expert) demonstrates that "the Hague Convention is not the exclusive means of serving defendants located in China…").

3. The offered basis for the Supplemental Clarke Declaration is that Respondents' expert, Professor James V. Feinerman, referenced two Chinese legal authorities in his declaration in support of Respondents' Reply Memorandum in Support of Motion for Summary Disposition as to Certain Threshold Issues (Mar. 8, 2013) ("Reply Declaration") that were not cited in his original declaration accompanying Respondents' opening brief. But the two authorities that Professor Feinerman cites in his Reply Declaration respond directly to assertions made by Professor Clarke in his prior declaration—particularly Professor Clarke's position that he "know[s] of no basis in Chinese law" for concluding that administrative service would be subject to the Hague Service Convention. Declaration of Donald Clarke (February 21, 2013) ("Clark Decl."), ¶ 14; *see also id.* ¶ 17 ("the assertion that the Hague Convention governs administrative proceedings … is not supported by any reference to authority" in Feinerman's initial Declaration). Professor Feinerman's reference to these authorities in his Reply Declaration, in response to Professor Clarke's contention, was therefore entirely appropriate and nothing in Professor Feinerman's Reply Declaration justifies or calls for additional argument by the Division or its expert.

4. In any event, the two arguments set forth in the Supplemental Clarke Declaration do not advance the Division's position that service of the Orders Instituting Proceedings ("OIPs") was proper and effective.

5. *First*, the Supplemental Clarke Declaration repeats the contention that "neither the Hague Convention nor China's Civil Procedure Law apply to these proceedings because both ... apply to civil proceedings, whereas these proceedings are administrative." Supplemental Clarke Declaration at II.A., ¶ 7. Professor Clarke now argues that the two Chinese authorities cited in Professor Feinerman's Reply Declaration—the "Circular on the Service Abroad of Judicial Documents in Foreign-Related Administrative Cases," issued by General Office of China's Supreme People's Court in 2004, and Article 97 of the Interpretation of the Supreme People's Court on Several Issues Regarding Implementation of the PRC Administrative Procedure Law—apply only to "outgoing service in lawsuits against Chinese administrative agencies being heard in Chinese courts." *Id.* ¶¶ 9, 13. But Professor Clarke's argument misses the point.

6. In response to Professor Clarke's previous contention that he "know[s] of no basis in Chinese law" for concluding that administrative service would be subject to the Hague Service Convention, Clarke Decl. ¶ 14, Professor Feinerman identified these two unequivocal statements by the Supreme People's Court making clear that the Chinese authorities broadly view service of administrative process as subject to exactly the same procedures as process in "civil or commercial" matters.[1] Thus, notwithstanding Professor Clarke's efforts to pigeon-hole these

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[1] Professor Clarke's contention that these directives only require that *outgoing* service of administrative documents comply with the Hague Service Convention leaves unanswered the question why, under his view, China would not similarly require resort to the Hague Service Convention for *incoming* service. The answer, of course, is that China did not establish such a one-way street, and instead generally views administrative process—outgoing and incoming—as subject to the Hague Service Convention. Indeed, this is evident from the Division's own

directives, there is no doubt that the Hague Service Convention and China law require the Division to serve the OIPs through China's Central Authority.

7. *Second*, the Supplemental Clarke Declaration attempts to reargue the Division's erroneous premise that Chinese law with respect to service is not relevant because the Division purported to serve Respondents outside of China, by serving an entirely separate set of firms in the United States. In particular, Professor Clarke repeats the Division's ipse dixit that, because the U.S. firms are concededly authorized to receive service for certain purposes, it must also be okay to treat them as authorized to accept service for other, albeit unauthorized purposes. Supplemental Clark Declaration at ¶¶ 14-17. This argument is a straw man: of course parties can be served on their designated agents within the scope of their authority, but that is not the question presented here.

8. As demonstrated in Respondents' papers, the Division has attempted to use *unauthorized* U.S. conduits to reach within China's borders and serve Chinese firms that are otherwise not amenable to such service in the U.S. Respondents' Reply Memorandum at 4-5. Professor Clarke's arguments notwithstanding, serving an officer, employee, or *authorized* agent of a Chinese firm *within* the United States is completely different. In that situation, the presence of the officer, employee, or authorized agent in the United States is the equivalent of the foreign firm's own presence within the territory of the United States. And service is complete at the point the officer, employee, or authorized agent is served within the United States—not when they notify the foreign firm in its foreign jurisdiction about the proceeding. By contrast, in the instant case, there is no dispute that the U.S. member firms are completely separate companies that were not authorized to accept service of OIPs on behalf of Respondents (they were only

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consistent practice of serving China-based entities through China's Central Authority. *See* Respondents' Reply Memorandum at 6-7.

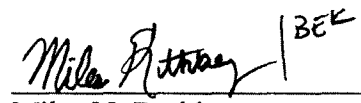
designated to accept service of proceedings to *enforce* Section 106 requests and this proceeding is not such a proceeding by the Division's own admission), and service was not complete upon their receipt of the OIP. *See id.* at 3-5. The Division served the U.S. member firms on the grounds that such service was "reasonably calculated to give notice" to Respondents in China. *Id.* at 4. And it did so precisely because it intended that the U.S. member firms would deliver the OIPs to their China counterparts *in China*. *Id.* at 4-5. Professor Clarke's (and the Division's) arguments continue to ignore this critical distinction, and fail to justify the Division's clear failure to comply with the Hague Service Convention and China law.

CONCLUSION

For the foregoing reasons, Respondents do not object to the Divisions' submission of the Supplemental Clarke Declaration, but respectfully contend that it does nothing to justify the Division's improper service of the OIPs on Respondents. Accordingly, this proceeding should be dismissed.

Dated: March 29, 2013

Respectfully submitted,



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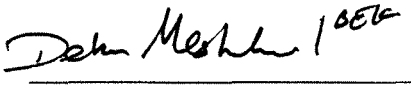

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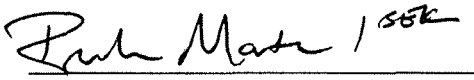

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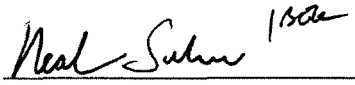

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