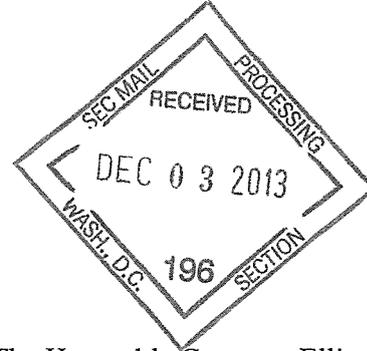


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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



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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 Ltd.;)
PricewaterhouseCoopers Zhong Tian)
CPAs Limited,)
)
Respondents.)
)
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The Honorable Cameron Elliot,
Administrative Law Judge

NON-DTTC RESPONDENTS' JOINDER IN DTTC'S POST-HEARING MOTION FOR SUMMARY DISPOSITION AND SUPPLEMENTAL POST-HEARING MOTION FOR SUMMARY DISPOSITION DISMISSING THE PROCEEDING AS TO ALL RESPONDENTS OR, ALTERNATIVELY, FOR A POSTPONEMENT

Respondents Dahua CPA Co., Ltd. ("Dahua"), Ernst & Young Hua Ming LLP ("EYHM"), KPMG Huazhen (Special General Partnership) ("KPMG Huazhen"), and PricewaterhouseCoopers Zhong Tian CPAs Limited Company ("PwC Shanghai") (collectively, the "Non-DTTC Respondents") hereby join in the post-hearing motion for summary disposition filed by Respondent Deloitte Touche Tohmatsu CPA Ltd. ("DTTC") and respectfully submit this supplemental post-hearing motion for summary disposition dismissing the proceeding as to all Respondents or, alternatively, for a postponement.

An integral component of this consolidated Section 102(e) proceeding was the inability of the Securities and Exchange Commission (the "SEC" or the "Commission") to secure the

assistance of the China Securities Regulatory Commission (the “CSRC”) in obtaining audit work papers related to DTTC Clients A and G. Prior to the hearing in this matter, the SEC never once asked the CSRC for assistance in obtaining audit work paper materials from any of the Non-DTTC Respondents because the SEC believed that requesting assistance of the CSRC as to matters other than DTTC Clients A and G would be fruitless, given its track record as to the DTTC Client A and G materials. The DTTC Client A and G materials have now been provided to the SEC by the CSRC in accordance with Chinese law. It is undisputed that the Chinese government developed and implemented protocols for processing requests from the SEC in the context of the SEC’s requests for assistance as to the DTTC Client A and G materials and that those protocols are now being used successfully to provide the U.S. regulators, including the SEC, with other materials [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The DTTC materials for the only two DTTC clients at issue in this proceeding are now in the hands of the SEC [REDACTED]. DTTC is accordingly moving for summary disposition. The Non-DTTC Respondents submit that they, too, are entitled to summary disposition as a result of these developments. The SEC itself has long suggested that production of the DTTC Client A and G materials by the CSRC would render this proceeding unnecessary. In the alternative, this proceeding should be postponed [REDACTED]

[REDACTED]

[REDACTED]

RELEVANT FACTUAL BACKGROUND

A. The SEC's Requests for Assistance As to DTTC Clients A and G Are Foundational To This Entire Proceeding

Prior to initiating this action against the Non-DTTC Respondents, the Commission had never requested, in accordance with Chinese law and the existing cooperation agreements between the two countries, the assistance of the CSRC or any Chinese governmental authorities to obtain work papers of any of the Non-DTTC Respondents with respect to any of their clients at issue in this proceeding. Through the completion of the hearing in this matter at the end of July 2013, that was still the case, as it was when the parties submitted their initial post-trial briefs. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The only requests for work papers related to clients at issue in this proceeding made by the SEC to the CSRC before the completion of the hearing involved DTTC Clients A and G. It was on the basis of those previously unfulfilled requests for the DTTC Client A and G work papers that the Division premised its central argument in this proceeding. Based on the fact that the SEC had asked the CSRC for assistance with respect to DTTC Clients A and G and had not received documents in accordance with its time expectations, witness after witness presented by the Division at the hearing testified that it would have been fruitless to ask the CSRC for

assistance with respect to other matters. *See* Rana Tr. 182:23-183:14 (“And so based on their experience [not obtaining DTTC 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). Similarly, because the DTTC Client A and G documents had not been produced at the time of the hearing, the Division’s key witness regarding negotiations between the two governments, Alberto Arevalo, offered the centerpiece of the Division’s case – that the CSRC is not a “viable gateway” for the production of work papers to the SEC. *See* 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”); *id.* at 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).

B. The SEC Has Repeatedly Made the Point That Production of DTTC Client A and G Materials Through the CSRC Would Be a Gamechanger

Commission staff has stated repeatedly that this proceeding would be rendered unnecessary if the CSRC became a viable gateway for the production of audit work papers. In July 2012, in seeking a stay in the instant proceeding against DTTC based upon developments in its negotiations with the CSRC, the Division itself observed:

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.

ENF Unopposed Motion for a Stay of the Proceedings (July 18, 2012) (“ENF Motion for Stay”)

at 3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]²

¹ [REDACTED]
[REDACTED] Administrative Proceeding File No. 3-15116, filed against the Non-DTTC Respondents in addition to DTTC, was initiated in December 2012.

² The Division’s recent attempt to discount the effect of these prior statements is unavailing. *See* ENF Opposition to Motion to Supplement the Record (Nov. 27, 2013) (“ENF Opp’n to Motion to Supplement”) at 4 & n.2. First, the Division focuses solely on the statements of OIA staff and ignores the fact that the Division itself also stated in July 2012 that the proceeding related to DTTC Client A would be rendered unnecessary if the CSRC became a viable gateway for the production of audit work papers. *See* ENF Motion for Stay at 3. [REDACTED]

In any event, [REDACTED] the DTTC Client A and G requests are
(....continued)

C. The CSRC Has Now Produced to the SEC the DTTC Client A and G Work Papers

The Division has now confirmed that the CSRC has produced to the SEC the DTTC Client A and G work papers (as well as the work papers related to Longtop). DTTC has accordingly moved for summary disposition of this action against it. Having invoked alternate means to obtain the DTTC Client A and G materials in accordance with Chinese law and consistent with principles of international comity and the SEC's long-established practices, and having now received the requested materials, there is no reasonable basis on which to sanction DTTC for abiding by Chinese law and the express directives of the CSRC. To do so would be purely punitive and arbitrary and capricious.

ARGUMENT

A. The Proceeding Should Be Dismissed As to the Non-DTTC Respondents As Well

Recent events have decisively demonstrated that the CSRC is now a viable gateway for obtaining audit work papers. As discussed above and detailed in DTTC's post-hearing motion for summary disposition, the CSRC has produced to the Commission work papers relating to DTTC Client A and Client G – the only work papers at issue in this proceeding that the Commission had actually requested from the CSRC prior to the conclusion of the hearing. The CSRC has also produced to the Public Company Accounting Oversight Board (the "PCAOB") work papers relating to EYHM Client C [REDACTED]

[REDACTED]. See ENF Opp'n to Motion to Supplement at 6-7 n.4. [REDACTED]

[REDACTED]

(continued...)
foundational to this entire proceeding and [REDACTED], at a minimum, the proceeding should be postponed to allow the CSRC time to complete production of the Non-DTTC Respondents' work papers [REDACTED]. See *infra* Section II.B.

[REDACTED]

[REDACTED]

- Dahua Client A: [REDACTED]

[REDACTED] the CSRC served a document request on Dahua on October 15, and Dahua is currently in the process of preparing its Client A work papers for delivery to the CSRC. *See* Respondents' Motion to Supplement the Record (Nov. 20, 2013) ("Motion to Supplement"); Declaration of Deborah R. Meshulam (Nov. 20, 2013). The CSRC is then expected to produce those work papers to the Commission.

- EYHM Clients B and C: [REDACTED]

[REDACTED] The CSRC served its own request on EYHM for the Client B work papers on October 15, and EYHM completed its state secret screening and produced the work papers to the CSRC on November 18, 2013 for production to the SEC. *See* Motion to Supplement; Declaration of Richard A. Martin (Nov. 20, 2013) ("Martin Decl."). As noted above, in mid-October 2013, the Client C work papers were produced by the CSRC to the PCAOB in response to an earlier request [REDACTED]

[REDACTED]. *See* Motion to Supplement; Martin Decl.; ENF Opp'n to Motion to Supplement at 6-7 n.4.

- KPMG Huazhen Clients D and F: Although the Commission has not requested the CSRC's assistance in obtaining any KPMG Huazhen work papers, the PCAOB has requested work papers relating to Clients D and F from the CSRC. KPMG Huazhen completed its review of the Client D work papers and produced those work papers to the CSRC on October 8, 2013 for production to the PCAOB, from whom the Commission will be able to obtain copies. *See* Motion to Supplement; Declaration of Timothy B. Nagy (Nov. 20, 2013) ("Nagy Decl."). Similarly, the Client F work papers will be produced to the CSRC within the next one to two months, and the CSRC is expected to then produce them to the PCAOB, at which point they too will be available to the Commission. *See* Motion to Supplement; Nagy Decl. Neither the Commission nor the PCAOB has made a request to the CSRC for the work papers relating to Client E.

- PwC Shanghai Client I: [REDACTED]

The CSRC served its own request on PwC Shanghai for the Client I work papers on October 15, and PwC Shanghai completed its state secret screening and produced the documents to the CSRC at the end of November for production to the SEC. *See* Motion to Supplement; Declaration of Michael S. Flynn (Nov. 20, 2013); *see also* Supplemental Declaration of Michael S. Flynn (Dec. 3, 2013) and Exhibit A thereto (receipt signed by the CSRC acknowledging production by PwC Shanghai of 15 boxes containing hardcopy work papers, 7 discs containing electronic work papers, 79 discs containing electronic documents other than work papers, and 9 discs containing e-mails and

attachments). Neither the Commission nor the PCAOB has made a request to the CSRC for the work papers relating to Client H.

[REDACTED]

[REDACTED]³ As

the Court has acknowledged, these developments are “relevant to the question of the Respondents’ 106(f) argument.” Tr. 2693:10-16.

The Non-DTTC Respondents have maintained all along that the Division should allow them to satisfy their production obligations through the “alternate means” of production to the CSRC, as Section 106(f) of the Sarbanes-Oxley Act expressly permits.⁴ For example, in response to the Section 106 requests it received relating to Clients H and I, PwC Shanghai “urge[d] the [the Division] to agree that it should work with the CSRC directly.”⁵ ENF Ex. 107 (Letter from M. Flynn to J. Kaleba (Apr. 12, 2012)) at 5; ENF Ex. 118 (Letter from M. Flynn to S. Kaiser (Apr. 12, 2012)) at 5; *see also* London Tr. 915:23-917:2. The other Non-DTTC Respondents made similar pleas to the Division. *See, e.g.*, ENF Ex. 47 (Letter from R. Cohen and R. Martin to M. Johnson (May 25, 2012)) at 7 (“To obtain the documents it is seeking, we urge the Commission to contact the PRC regulators directly.”); ENF Ex. 56 (Letter from R. Cohen and R. Martin to D. Gordimer (Apr. 4, 2012)) at 13 (“We urge the SEC to help EYHM

[REDACTED]

⁴ Section 106(f) states: “Notwithstanding any other provisions of this section, the staff of the Commission or the Board may allow a foreign public accounting firm that is subject to this section 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).

⁵ Indeed, PwC Shanghai encouraged the Division to work with the CSRC long before it received any Section 106 requests. In an August 2011 telephone call with the Division in response to an informal request related to Client I, PwC Shanghai and its external Chinese legal counsel “suggested to [the Division] that ultimately any request from a foreign regulator . . . would have to [be] report[ed] to the CSRC and that [it] might be more efficient if the SEC would contact the CSRC for assistance in getting the information they wanted.” D. Wong Tr. 1854:8-13; *see also* ENF Ex. 114 (Letter from M. Flynn to H. Ramrattan (Nov. 2, 2011)) at 3 (same).

avoid this unfair dilemma and contact the PRC regulators directly.”); ENF Ex. 35 (Letter from Dahua to D. Weinstein (Apr. 2, 2012)) at 3 (“Our hope is that the SEC can work with the CSRC pursuant to the memoranda of understanding between China and the United States.”); ENF Ex. 67 (Letter from G. Aronow and T. Nagy to B. Kamar, R. Boudreau, and J. Finnell (Mar. 27, 2012)) at 2 (“[A]ny resolution of this matter requires the SEC to contact the [CSRC] and to seek to obtain the audit work papers and other documents through that agency of the PRC government.”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Even through post-hearing briefing, the Division had consistently asserted that “making additional requests to the CSRC would be a waste of its time, as the CSRC had shown that it was simply not a viable gateway for obtaining assistance.” ENF Post-Hearing Brief (Aug. 30, 2013) at 41. That position has now been proven to be wrong.

It is an abuse of discretion for the Division to continue this proceeding now that it has invoked Section 106(f) [REDACTED] and the alternate means are working. Indeed, even the power to exercise discretion is and should be limited by notions of reasonableness and fairness, and must not be arbitrary and capricious. *See, e.g., Pub. Util. Comm’n v. Fed. Energy Regulatory Comm’n*, 462 F.3d 1027, 1060 (9th Cir. 2006) (finding

⁶ As noted above, the PCAOB earlier requested the CSRC’s assistance in obtaining work papers related to additional clients at issue in this proceeding.

that agency's failure to exercise discretion was arbitrary and capricious and an abuse of discretion); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746-47 (D.C. Cir. 1986) (finding that agency's failure to exercise discretion was arbitrary and capricious).

Given that the alternate means of production contemplated by Section 106(f) are clearly working, it is arbitrary and capricious for the Division to seek to sanction Respondents merely for abiding by the express directives of Chinese regulatory authorities not to produce documents directly to the SEC in accordance with Chinese law. Under the circumstances, the Section 106 requests that are the predicate of this proceeding are not even enforceable. Well-settled principles of international comity counsel that, in evaluating whether to order the production of information located abroad, courts should take into account, *inter alia*, "the availability of alternative means of securing the information." Restatement (Third) of Foreign Relations Law of the U.S. § 442(1)(c) (1987). Where, as here, such alternative means exist, there is simply no basis for ordering the violation of foreign law on foreign soil.

It would be especially inappropriate and unreasonable to continue this proceeding only against the Non-DTTC Respondents. Had the Division requested the Non-DTTC Respondents' work papers from the CSRC before commencing this proceeding, the Commission would very likely currently be in possession of all of those documents, just as it is in possession of DTTC's documents. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The sanctions in this proceeding cannot properly turn on the fact that the process of screening and governmental production under Chinese law is not yet finally completed as to the Non-DTTC Respondents,

[REDACTED]

[REDACTED]. The only appropriate course of action is to dismiss the proceeding against all Respondents.

B. In the Alternative, the Proceeding Should Be Postponed

To the extent that the Court agrees that the availability of alternate means of production renders this proceeding unnecessary, but believes that production must be complete prior to dismissal, the Non-DTTC Respondents request in the alternative that this proceeding be postponed pursuant to SEC Rule of Practice 161, 17 C.F.R. § 201.161, [REDACTED]

[REDACTED].

Requesting a stay is precisely what the Division itself did earlier with respect to DTTC Client A. There, nearly two years after making a request for assistance to the CSRC, the Division recognized in requesting a stay the importance of “whether there is a viable alternative means for the SEC to obtain” audit work papers through the CSRC. ENF Motion for Stay at 2. Because there were signs that a viable gateway was developing, the Division asked for a stay, even though its request for assistance to the CSRC had been outstanding for nearly two years.

Here, if the Court is not inclined to dismiss the matter as to the Non-DTTC Respondents at this juncture, a postponement is undeniably warranted under the Division’s own logic and prior positions. [REDACTED]

[REDACTED]

[REDACTED] More importantly, when the Division previously requested a

stay, it was on the grounds that negotiations between the two governments were thought to be progressing well, but no protocols had been established under Chinese law to process those requests and no documents had been provided by the CSRC to the SEC. Now, not only are protocols firmly established and being followed under Chinese law, but documents are flowing to the SEC and to the PCAOB from the CSRC in accordance with those protocols.

The Non-DTTC Respondents recognize that they and the Division disagree about the consequences to the capital markets and investors that would occur if the sanctions the Division seeks are imposed in this matter. Nevertheless, there is no reasonable dispute that the sanctions being sought against Respondents are severe and unprecedented. Whether or not the impact is as Respondents demonstrated at the hearing, there is certainly significant risk of harm to investors and the markets, not to mention to Respondents, their networks, and their employees. Because there is a viable gateway for production of materials to the SEC, consistent with Chinese law, [REDACTED] it would be unjust and irresponsible not to postpone these proceedings for some reasonable amount of time [REDACTED]

[REDACTED]

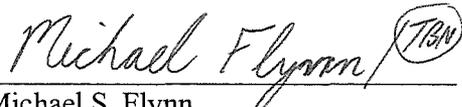
When the Division requested a stay with respect to DTTC Client A to permit the SEC and the CSRC additional time to unlock the intergovernmental gateway, the Court found that good cause existed for a postponement. Order (July 19, 2012) at 1. That same reasoning applies *a fortiori* now. At a minimum, postponing the proceeding so as to permit the now-open intergovernmental gateway to function would avoid unnecessary and potentially calamitous consequences. It would also give proper deference to established principles of international comity, and is frankly the right and just approach under the circumstances.

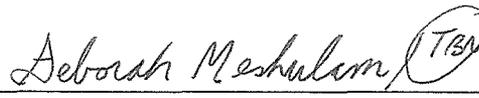
CONCLUSION

Based on the foregoing, the Court should dismiss this proceeding in its entirety. In the alternative, the Non-DTTC Respondents respectfully request that the proceeding be postponed.

Dated: December 3, 2013

Respectfully submitted,


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