UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. Securities and Exchange Commission 100 F Street, N.E. Washington, DC 20549 Movant, -v.- **Deloitte Touche Tohmatsu CPA Ltd.** 30/F Bund Center 222 Yan An Road East Shanghai 200002, PRC Respondent.	)	MISC. No. _____

SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE AND ORDER REQUIRING COMPLIANCE WITH A SUBPOENA

This action seeks enforcement of an administrative subpoena (the "Subpoena") issued by the Securities and Exchange Commission ("SEC" or "Commission") to Deloitte Touche Tohmatsu CPA Ltd. ("D&T Shanghai" or the "Respondent") as part of an investigation (*In the Matter of Longtop Financial Technologies Limited,* SEC File No. HO-11698) into possible violations of the federal securities laws.

I. SUMMARY

Pursuant to the Commission's statutory authority to investigate possible violations of the federal securities laws, the staff of the SEC's Division of Enforcement (the "Staff") is conducting an investigation into possible fraud and other violations concerning the securities of Longtop Financial Technologies Limited ("Longtop"), a foreign private issuer the securities of which are registered with the Commission and traded on U.S. markets. D&T Shanghai audited

Longtop's financial statements for several years, both before and after Longtop's 2007 initial public offering in the United States. D&T Shanghai resigned as auditor for Longtop on May 22, 2011, after discovering numerous financial improprieties while conducting its audit of Longtop for the year ended March 31, 2011.

On May 27, 2011, the SEC staff served the Subpoena on D&T Shanghai's prior United States counsel, who represented that he had authority to accept service of the Subpoena. Notwithstanding the fact that it has acknowledged possessing vast amounts of responsive documents, D&T Shanghai has refused to produce any documents to the SEC.

A district court is bound to enforce an administrative subpoena if the information sought "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Because the Commission has fulfilled these limited requirements, and because D&T Shanghai has not raised any valid challenge to the Subpoena, this Court should enter a show cause order against D&T Shanghai and require compliance with the Subpoena.

II. STATEMENT OF FACTS

A. Deloitte Touche Tohmatsu CPA LTD ("D&T Shanghai")

D&T Shanghai is an accounting firm based in the People's Republic of China and registered in the United States as a public accounting firm with the Public Company Accounting Oversight Board (the "PCAOB"). Deitch Decl. ¶ 6. D&T Shanghai is a Chinese member firm of Deloitte Touche Tohmatsu Limited, a UK private company. *Id.*

B. The Longtop Investigation

Longtop is a Cayman Islands corporation with principal offices in Hong Kong and Xiamen, China. Deitch Decl. ¶ 5. Longtop is a foreign private issuer the securities of which are registered with the Commission pursuant to Section 12 of the Exchange Act [15 U.S.C. §

78(l)]. *Id.* Longtop's American depositary shares ("ADSs") have been listed on the New York Stock Exchange ("NYSE") under the symbol LFT. *Id.* Longtop files annual reports on Form 20-F and furnishes reports on Form 6-K with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder. *Id.* Longtop also filed registration statements with the Commission to raise hundreds of millions of dollars from investors, including on Forms F-1 and Form F-3. *Id.* at ¶ 7.

D&T Shanghai was Longtop's auditor from at least 2007 until D&T Shanghai resigned on May 22, 2011. Deitch Decl. ¶ 6. In that capacity, D&T Shanghai prepared and issued audit reports filed by Longtop with the Commisison. *Id.* at ¶ 8. For example, for the fiscal year ended March 31, 2010, Longtop reported total revenue of $169 million and net income of $59 million, and D&T Shanghai issued an audit report dated July 16, 2010, expressing an unqualified opinion on Longtop's consolidated financial statements. *Id.* at ¶ 9. In addition, in connection with Longtop's raising hundreds of millions of dollars through securities offerings, D&T Shanghai consented to the use of its audit reports in Longtop's registration statements filed with the Commission. *Id.* at ¶ 7.

On May 17, 2011, trading in Longtop's ADSs was halted by the NYSE. Deitch Decl. ¶ 10. At the time trading was halted, Lontop's ADSs were priced at $18.93 per share with 57 million shares outstanding, resulting in a market capitalization of approximately $1.08 billion. *Id.*

On May 23, 2011, Longtop furnished a report on Form 6-K announcing that D&T Shanghai had resigned as its auditor and attaching D&T Shanghai's letter of resignation. Deitch Decl. ¶ 11. In the same Form 6-K, Longtop announced that Derek Palaschuk, Longtop's Chief Financial Officer, tendered his resignation by letter, dated May 19, 2011. *Id.*

As discussed further in the accompanying declaration of Lisa Deitch, D&T Shanghai indicated in its letter of resignation that it was resigning because it had identified numerous indicia of financial fraud at Longtop and it further indicated that D&T Shanghai's prior year audit reports for Longtop could no longer be relied upon by investors. *Id.* at ¶¶ 12-13.

On May 25, 2011, the Commission issued an Order Directing Private Investigation and Designating Officers to Take Testimony in a matter entitled *In the Matter of Longtop Financial Technologies Limited,* SEC File No. HO-11698 (the "Formal Order"). Deitch Decl. ¶ 3, Ex. A. The Formal Order authorizes members of the SEC Staff to investigate whether antifraud and/or reporting provisions of the federal securities laws have been or are being violated by any persons or entities in connection with the offer, sale and/or purchase of securities in Longtop. *Id.* The Formal Order also authorized the staff to determine whether any person or entity involved in the matter has engaged "in any acts or practices of similar purport or object." *Id.*

C. The Subpoena

As part of the *Longtop* investigation, the SEC Staff served an administrative subpoena (the "Subpoena") on D&T Shanghai's prior United States counsel, Douglas Cox, of Gibson Dunn & Crutcher LLP, on May 27, 2011. Deitch Decl. ¶ 17. On May 23, 2011, Mr. Cox had confirmed to the Staff that he was authorized and willing to accept service of the Subpoena on D&T Shanghai's behalf. *Id.* D&T Shanghai has not contested the service or the validity of the Subpoena. *Id.* Accordingly, this constituted proper and valid service of process on D&T Shanghai.

In the Subpoena, the SEC Staff requested that D&T Shanghai, through its custodian of records, produce documents, from between January 1, 2007 and the date of the Subpoena, related to D&T Shanghai's business and, in particular, its activities as Longtop's auditor. *See*

Deitch Decl. Exhibit C. The Subpoena required responsive documents to be produced to the Staff in Washington, D.C. by June 10, 2011. *Id.* On June 9, 2011, the Staff granted D&T Shanghai a one-week extension, until June 17, 2011, to respond to the Subpoena. *Id.* at ¶ 19. The Staff was subsequently contacted by new legal counsel for D&T Shanghai, Michael Warden of Sidley Austin LLP, who requested that the Staff further extend the return date of the Subpoena. *Id.* at ¶ 19-20. The Staff agreed to extend further the return date of the Subpoena until July 8, 2011. *Id.*

To date, D&T Shanghai has failed to comply with the Subpoena in every respect. Deitch Decl. ¶ 21. Instead, as described more fully in the accompanying Deitch declaration, on July 8, 2011, in lieu of producing the required documents, counsel for D&T Shanghai submitted a letter to the Staff indicating that it was refusing to comply with the Subpoena because, among other things, it believed that (i) it could not be compelled to produce documents predating July 21, 2010, the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), P.L. 111-2003 (July 21, 2010), and (ii) it believed producing *any* of the responsive documents may subject it to sanctions under Chinese law. *Id.* at ¶¶ 22-24.

III. ARGUMENT

A. This Court Has Jurisdiction Over This Action and Over the Respondent.

This Court has subject matter jurisdiction to enforce the Subpoena in aid of the Commission's investigation. Congress has authorized the Commission to seek, and the federal courts to issue, an order compelling compliance with its subpoenas upon application by the Commission. Section 21(c) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78u(c)]; Section 22(b) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C.

§ 77v(b)].[1] Section 21(c) of the Exchange Act provides that the Commission may make application in any jurisdiction where its investigation is being carried on or where a person to whom the subpoena is issued resides or does business. Here, not only is the investigation being carried on in Washington, D.C., the Subpoena requires that documents and other information be produced here. Deitch Dec. Ex C.

This Court also has personal jurisdiction over D&T Shanghai. It is well recognized that "[t]he Securities Exchange Act permits the exercise of personal jurisdiction to the limits of the Due Process Clause of the Fifth Amendment." *SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996); *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990); *accord Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994); *SEC v. Compania Internacional Financiera S.A.*, No. 11 Civ. 4904, 2011 WL 3251813, at *4 (S.D.N.Y. July 29, 2011); *SEC v. Lines Overseas Mgt., Ltd.*, No. 04-302, 2007 WL 581909, at *2 (D.D.C. Feb. 21, 2007). Under the Due Process Clause of the Fifth Amendment, personal jurisdiction over a party exists as long as that party has sufficient "minimum contacts" with the jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The exercise of jurisdiction must not "offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Put differently, the party's activities within the jurisdiction must render it foreseeable that the party should reasonably anticipate being hailed into the forum court. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

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[1] The Commission may seek an order requiring compliance with a subpoena upon application because subpoena enforcement proceedings are generally summary in nature, and, under exceptions contained in Rule 81(a)(3) of the Federal Rules of Civil Procedure, can be heard without strict adherence to the Federal Rules. *See e.g., SEC v. Sprecher*, 594 F.2d 317, 320 (2d Cir. 1979); *SEC v. First Security Bank of Utah,* 447 F.2d 166, 168 (10th Cir. 1971).

Here, the mandates of the Fifth Amendment's Due Process Clause have been satisfied. As reflected in the accompanying declaration, the Subpoena is directly related to the numerous purposeful contacts D&T Shanghai has and currently maintains with the United States securities markets, including the fact that D&T Shanghai consented that its audit reports for Longtop could be filed annually with the Commission knowing full well that they would be relied upon by U.S. investors. *See, e.g.*, Deitch Dec. ¶¶ 7-9 (discussing D&T Shanghai's involvement in auditing Longtop's financial statements and filing reports with the Commission). That is more than sufficient to constitute "minimum contacts." *See Knowles*, 87 F.3d at 417 (former president of Bahamian companies had sufficient minimum contacts with United States to support district court's exercise of personal jurisdiction enforcing administrative subpoena, based on his trading activities directed toward United States and relating to matters underlying the SEC investigation); *Unifund SAL*, 910 F.2d at 1033 (upholding personal jurisdiction over foreign investors alleged to have conducted insider trading in securities of a United States corporation traded on a United States exchange); *Perez-Rubio v. Wyckoff*, 718 F. Supp. 217, 229-31 (S.D.N.Y. 1989) (upholding personal jurisdiction over a foreign investment house and its individual officers because the purpose of the corporation was to purchase United States securities on United States exchanges, in part for United States citizens), *overruled on other grounds by PT United Can Co., Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65 (2d Cir. 1998); *SEC v. Gilbert*, 82 F.R.D. 723, 725-26 (S.D.N.Y. 1979) (holding that exercise of personal jurisdiction over a Swiss bank whose only contacts with the United States were four brokerage accounts maintained at three U.S. securities dealers would satisfy due process). Indeed, in correspondence to date, D&T Shanghai has not in any way challenged the service of the Subpoena or its validity.

B. The Commission Has Met Its Burden for Enforcement of the Subpoena.

A district court is bound to enforce an administrative subpoena "if the inquiry 'is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.'" *Morton Salt*, 338 U.S. at 652; *see also SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023-24 (D.C. Cir. 1978); *In re Administrative Subpoena John Doe v. United States*, 253 F.3d 256, 262 (6th Cir. 2001). Because the Commission has met these criteria in this case, the Court should enforce the Subpoena.

First, the Commission has authority to conduct the investigation authorized by the Formal Order. Congress gave the Commission broad authority to conduct investigations into possible violations of the federal securities laws and to demand production of evidence germane to such investigations. The investigative powers of the Commission are statutory and are analogous to those of a grand jury. *Morton Salt*, 338 U.S. at 642-43. Like a grand jury, an agency "can investigate merely on suspicion that the law is being violated, or just because it wants assurance that it is not." *Id.* Thus, courts have recognized that the SEC is acting within the scope of its Congressionally-granted authority even where its investigation is based on nothing more than "official curiosity." *See, e.g., Arthur Young & Co.*, 584 F.2d at 1023-24 & n. 45. Furthermore, Section 21(b) of the Exchange Act empowers the Commission, or its designated officers, to subpoena witnesses, compel their attendance, take evidence, and "require the production of *any* books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." 15 U.S.C. § 78u(b) (emphasis added). Section 19(c) of the Securities Act vests the Commission and its designated officers with essentially the same power. *See* 15 U.S.C. § 77s. In light of this statutory language, courts have consistently recognized the SEC's broad authority to issue

administrative subpoenas. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("The provisions vesting the SEC with the power to issue and seek enforcement of subpoenas are expansive."); *SEC v. Dresser Indus.*, 628 F.2d 1368, 1379-80 (D.C. Cir.) (*en banc*) ("Given this broad statutory mandate, there is virtually no possibility that in issuing this subpoena, the SEC was acting ultra vires."); *Arthur Young & Co.*, 584 F.2d at 1023-24.

Here, the Commission has exercised its statutory authority and authorized the SEC Staff to investigate whether, among other things, antifraud and/or other provisions of the federal securities laws have been or are being violated by any persons or entities in connection with the offer, sale and/or purchase of securities in Longtop. The Staff, consistent with the Formal Order, seeks to obtain documents from D&T Shanghai related to its audits of Longtop, which may provide evidence of potential violations of U.S. law. The SEC's investigation—and the Subpoena issued to D&T Shanghai in connection therewith—are unquestionably within the scope of the Formal Orders and the SEC's authorized law-enforcement powers.

Second, the Staff that issued the Subpoena has met the only administrative prerequisites to issuing the Subpoena: the Commission's issuance of a formal order of investigation designating its officers to, among other things, issue subpoenas on its behalf. *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980) (citing the Rules of Practice Relating to Investigations, 17 C.F.R. §§ 203.1 *et seq.* (1979)). Here, the Commission issued its Formal Order in the *Longtop* investigation prior to issuing the Subpoena. The Subpoena was issued pursuant to this Formal Order and was signed by an officer designated in the Formal Order as required by SEC Rules. Deitch Decl. ¶ 4. *See* SEC Rules Relating to Investigations. 17 C.F.R. § 203.8 (referencing 17 C.F.R. § 201.232(c) and 201.150(c)(1)). Accordingly, the Subpoena is valid and proper.

Finally, the documents being sought by the Subpoena are not indefinite and are reasonably relevant to, and within the scope of, the Commission's investigation. Information is reasonably relevant to an investigation when it is "not plainly incompetent or irrelevant to any legal purpose." *Endicott Johnson v. Perkins*, 317 U.S. 501, 509 (1943). The scope of the Staff's subpoena power is "co-extensive" with its investigative power, and the Staff is given the sole discretion to determine what is relevant to an investigation. *Arthur Young & Co.*, 584 F.2d at 1031.

In the present case, the Staff has determined that the information and documents sought from D&T Shanghai are relevant to the Commission's investigation. For example, the Staff believes the documents sought by the Commission from D&T Shanghai relating to its incomplete audit of Longtop for the year ended March 31, 2011, may reveal information as to D&T Shanghai's discovery of false financial records at Longtop. Deitch Decl. ¶ 26. Similarly, documents related to prior year audits that D&T Shanghai completed of Longtop may reveal how any fraud schemes at Longtop were able to continue for years undetected. *Id.* In short, the Subpoena seeks the basic information necessary to ferret out whether there was a fraud and, if there was, who was behind it, how significant it was, and how it was conducted. Thus, the Commission has met its threshold requirements for enforcement of the subpoena issued to D&T Shanghai.

C. This Court Should Order D&T Shanghai To Produce All Documents Responsive To The Subpoena.

In correspondence with the Commission, D&T Shanghai has asserted that even though the Subpoena calls for the production of documents from January 1, 2007 through the date of the Subpoena, D&T Shanghai objects to the production of any documents that pre-date July 21, 2010, the effective date of the Dodd-Frank Act. This objection is entirely without merit, and the

Commission respectfully requests that this Court order D&T Shanghai to produce *all* documents that are responsive to the Subpoena, irrespective of their date.

Respondent's argument is apparently based on a misunderstanding of the legal basis for the Subpoena. As set forth above, the Commission's subpoena is a proper administrative subpoena, and the documents it seeks are well within its mandate. *See* Section 21(b) of the Exchange Act [15 U.S.C. § 78u(b)] (empowering the Commission, or its designated officers, to subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry); Section 19(c) of the Securities Act [15 U.S.C. § 77s]; *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("The provisions vesting the SEC with the power to issue and seek enforcement of subpoenas are expansive."); *SEC v. Dresser Indus.*, 628 F.2d 1368, 1379 (D.C. Cir.) (*en banc*) ("Given this broad statutory mandate, there is virtually no possibility that in issuing this subpoena, the SEC was acting ultra vires."); *Arthur Young & Co.*, 584 F.2d at 1023-24. This administrative subpoena power has been in place for decades prior to the enactment of the Dodd-Frank Act.

D&T Shanghai, however, has suggested that the Subpoena's scope is necessarily constrained by Section 106 of the Sarbanes-Oxley Act, 15 U.S.C. § 7216 ("Section 106"), as amended by § 929J of the Dodd-Frank Act. Section 106 provides, in relevant part, that:

> If a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall ---
>
> (A) produce the audit work papers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the [PCAOB], upon request of the Commission or the [PCAOB]; and
>
> (B) be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for such documents.[2]

D&T Shanghai apparently claims that Section 106 provides the *sole* means by which the Commission can request or obtain its audit work papers.[3] Simply put, there is no basis for such a claim. Nothing in either the text or the legislative history of Section 106 can be read to suggest that, either before or after its enactment, let alone its amendment by the Dodd-Frank Act in 2010, the SEC lacked the authority to subpoena audit work papers or any other documents from foreign public accounting firms. Indeed, it has always been the law that foreign public accounting firms – just like any other accounting firm, person or other entity – can be subject to properly issued subpoenas. *See, e.g., First American Corp. v. Price*

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[2] Prior to July 21, 2010, the effective date for the amendments contained in the Dodd-Frank Act, Section 106 plainly required any domestic public accounting firm that relied on a foreign public accounting firm's work in conducting an audit to produce the audit work papers and related documents prepared by that foreign public accounting firm; however, it was arguably less clear whether Section 106, prior to the Dodd-Frank Act amendments, established a direct requirement on foreign public accounting firms to produce their audit work papers to the Commission when such firms issued audit reports.

[3] Notably, on September 2, 2011, the Commission issued a formal request to D&T Shanghai for its audit work papers and other documents pursuant to Section 106. Deitch Dec. 9 n.3. The Commission first issued this request to D&T Shanghai's counsel, which refused to accept service of the request – purportedly because the Commission was unwilling to permit D&T Shanghai to satisfy its Section 106 obligations by the alternative means of producing documents to a Chinese regulator. *Id.* Accordingly, the Commission has also issued this request to D&T Shanghai's registered agent for service of process of Section 106 requests. *Id.*

Waterhouse LLP, 988 F.Supp. 353 (S.D.N.Y. 1997) (ordering United Kingdom accounting partnership to comply with subpoena for audit work papers in private securities fraud litigation). As long as the subpoenaed documents are properly within the scope of the SEC's broad investigative authority, the subpoena is valid. *See SEC v. Dresser Indus.*, 628 F.2d at 1379 ("Given this broad statutory mandate, there is virtually no possibility that in issuing this subpoena, the SEC was acting ultra vires."). Section 106 merely provides an additional mechanism for the SEC to request audit work papers and related documents from foreign accounting firms, which firms may at times be difficult to serve with a subpoena.[4]

In sum, D&T Shanghai's claim that it should not be required to produce documents that were created prior to July 21, 2010, notwithstanding the fact that such documents are plainly responsive to the Subpoena, is entirely without merit.

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[4] Even if Section 106 *did* provide the only means for the SEC to request production of audit work papers, which it does not, D&T Shanghai would *still* be wrong to claim that the SEC was only entitled to obtain documents created after the effective date of the Dodd-Frank Act on July 21, 2010. Assuming (without conceding) that the Dodd-Frank amendments substantively altered Section 106, rather than simply clarifying an already-existing obligation for foreign public accounting firms, applying the as-amended version of Section 106 to request audit work papers from before the amendments' enactment would be entirely appropriate. Again, Section 106 created an additional procedural mechanism for the Commission to obtain documents in the course of investigations. While D&T Shanghai is apparently arguing that using this new tool to request the production of documents that were created before the Dodd-Frank amendments would be an impermissibly retroactive application of the law, that is not correct. *See Director of Office of Thrift Supervision v. Ernst & Young*, 786 F. Supp. 46, 54 (D.D.C. 1992) (permitting OTS to subpoena documents from Ernst & Young that were created prior to the enactment of FIRREA); *In the Matter of Segmond*, 589 F. Supp. 568, 571 (S.D.N.Y. 1984) ("[T]he TEFRA amendments effected a change in the procedures of administrative investigations and summonses, not in the substantive law governing taxpayers' conduct; thus, the amendments are being applied prospectively, and not retroactively in any way."); *Resolution Trust Company v. Grief*, 906 F. Supp. 1457, 1469 (D. Kan. 1995).

D. Chinese Law Provides No Justification for the Respondent's Non-Compliance with the Commission's Subpoena.

D&T Shanghai's alternative basis for not complying with the Subpoena—namely, that it is precluded from doing so by Chinese law—is equally unavailing. D&T Shanghai's counsel has argued that foreign secrecy laws *may* prohibit it from disclosing responsive documents to the Commission. *See* Deitch Decl. ¶¶ 22-23. More specifically, D&T Shanghai's counsel has claimed that without prior authorization from several different Chinese regulatory agencies (including the Ministry of Finance, the State Secrets Bureau, and the State Archives Bureau),[5] which have thus far apparently not consented to D&T Shanghai's production of the subpoenaed documents, it would be a potential violation of Chinese law for D&T Shanghai to produce the responsive documents. *See id.* These vague assertions of possible conflicts with a foreign law provide no justification for D&T Shanghai's continued non-compliance with the Subpoena. *See SEC v. Euro Security Fund*, Case No. 98 CIV. 7347 (DLC), 1999 WL 182598, *3 (S.D.N.Y. April 2, 1999) (noting that the party opposing discovery bears the burden of proving the existence of an actual conflict between the foreign law and U.S. discovery obligations; "[i]llusory references to foreign secrecy without any specifics are insufficient to create a conflict").

Assuming (without conceding) that Chinese laws may prohibit the disclosure of certain responsive documents, this Court should nevertheless order D&T Shanghai to comply with the Subpoena. In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), the Supreme Court rejected an argument that the existence of

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[5] D&T Shanghai has stated that it initially sought authorization to produce the documents from the China Securities Regulatory Commission (the "CSRC"); according to D&T Shanghai, the CSRC did not grant or refuse D&T Shanghai authorization to produce the documents but, rather, directed it to seek authorization from the other named regulatory agencies.

foreign secrecy laws precluded a U.S. court from ordering a foreign party under its jurisdiction to disclose information in a U.S. judicial proceeding. *Id.* at 204-05. In rejecting this argument, the Supreme Court reasoned that adoption of such a broad rule would thwart an important public policy interest in enforcing federal statutes. *Id.*; *see also Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n.29 (1987) (observing that blocking statutes do not "deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate [those] statute[s]." (citing *Societe Internationale*, 357 U.S. at 204-206))

Following *Societe Internationale*, where subpoena recipients cite foreign laws as a defense to compliance with a subpoena, courts consider the recipient's good faith along with a series of factors drawn from the Restatement on Foreign Relations Law, including: (a) the competing interests of the nations whose laws are in conflict; (b) the extent and nature of hardship of compliance for the party or witness from whom discovery is sought; (c) the extent to which the required conduct is to take place in the territory of the other state; (d) the nationality of the person; (e) the importance to the litigation of the information and documents requested; and (f) the ability to obtain the subpoenaed information through alternative means. *See, e.g.*, *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.28 (endorsing Restatement factors as relevant to comity analysis); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 116-17 (S.D.N.Y. 1981) (collecting cases); *Minpeco v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987); *Euro Security Fund,* 1999 WL 182598, at *3; *cf. United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1389-91 (11th Cir. 1982) (applying similar balancing test in the context of a grand jury subpoena).

Even assuming (without conceding) that D&T Shanghai is acting in good faith by refusing to comply with the Subpoena in any respect, a review of these various factors makes plain that this Court should enforce the Subpoena and require D&T Shanghai to produce the requested documents directly to the Commission and without further delay.

(a) *Competing National Interests*. Most importantly, the United States' interest in obtaining the subpoenaed documents, which are necessary to an ongoing investigation into an apparently massive fraud on the domestic securities markets, far outweigh China's secrecy interests. Prior courts have reached a similar conclusion when considering whether foreign states' secrecy laws preclude compliance with SEC subpoenas, *see, e.g.*, *Euro Security Fund,* 1999 WL 182598, at *4; *Banca Della*, 92 F.R.D. at 117, and the United States' interests are particularly strong here. There are already indications that Longtop may have perpetrated an extensive fraud during and after seeking out and obtaining hundreds of millions of dollars in financing through the United States securities markets. *See* Deitch Decl. ¶¶ 7-15. D&T Shanghai, wittingly or unwittingly, audited Longtop's financial statements throughout this period, and consented to the inclusion of its audit reports in Longtop's registration statements and other filings, knowing full well that these audit opinions would be relied upon by U.S. investors. *See id.* The pending Subpoena is narrowly tailored to obtain precisely the documents and information that D&T Shanghai has that can help the Commission ferret out any fraud involving Longtop.

The national interest in obtaining compliance with the Subpoena is underscored by the fact that Congress enacted Section 106 of the Sarbanes Oxley Act, in responding to concern over precisely this issue—that U.S. investors may be harmed by the lack of transparency in foreign auditing firms. As explained in Part C above, Section 106 created an additional

mechanism for the Commission to seek out and obtain audit work papers and related documents from foreign public accounting firms when those firms were conducting audits. Here, while the Commission was able to serve the Subpoena on D&T Shanghai successfully, that does not diminish the strong national interest in obtaining foreign audit work papers that is exemplified in Section 106.

By contrast, the secrecy interests of China here are impossibly vague. According to D&T Shanghai, Chinese law prohibits the production of audit working papers to people or entities outside of China without express approvals from Chinese authorities. *See* Deitch Decl. ¶¶ 22-23. Similarly, according to D&T Shanghai, China's "States Secrets" laws preclude the production of information and documents "relating to the national economy" without prior approvals. *Id.* However, it is entirely unclear what national interests of China are truly at stake. If the documents reveal large-scale fraud at Longtop, *a Cayman Islands company* with significant operations in China, one might naturally conclude that it is in China's interest to have documents produced so that the truth behind any fraud could be uncovered. D&T Shanghai has not asserted any way in which China's secrecy interests would actually be implicated, let alone compromised, by production of the responsive documents.

As set forth above and in the accompanying declaration, D&T Shanghai has represented that it has reached out to the CSRC, which declined to consent to the production of materials and directed D&T Shanghai to consult three different Chinese Agencies (the Ministry of Finance, the States Secrets Bureau and the States Archives Bureau). Deitch Decl. ¶ 23. It appears that these agencies have not yet authorized disclosure, nor have they explicitly instructed D&T Shanghai not to produce the documents (let alone explained their reasoning). Even if these agencies explicitly direct D&T Shanghai not to produce the subpoenaed

documents, it is hard to conceive of what legitimate Chinese interests such action would protect. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992) (upholding contempt sanctions against corporation that refused to produce discovery by citing Chinese blocking statutes, and noting that neither the defendant nor China had "identified any way in which disclosure of the information requested here will significantly affect the PRC's interests in confidentiality"); *Euro Security Fund,* 1999 WL 182598, at *10 (dismissing respondent's claim that Swiss secrecy laws precluded production of materials, in part, because respondents "provided no evidence of Swiss interests besides a generic appeal to 'Swiss secrecy'"); *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 19 (S.D.N.Y. 1984) (ordering discovery notwithstanding presence of French blocking statute, in part because "the legislative history of the [French] statute gives strong indications that it was never expected nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts." (citation omitted)).[6] Accordingly, the Commission respectfully submits that this factor weighs heavily in favor of enforcing the Subpoena.

(b) *Hardship to D&T Shanghai.* While D&T Shanghai has claimed that it would be subject to potential civil and criminal sanctions if required to comply with the Subpoena, those claims appear entirely speculative. Admittedly, a genuine risk of imprisonment "constitutes a weighty excuse for nonproduction." *Societe Internationale Pour Participations Industrielles et Commerciales*, 357 U.S. at 211. But here, not only does that risk appear illusory, it is a risk

[6] If D&T Shanghai or China can at some point identify genuine secrecy interests implicated by certain categories of documents (something they have yet to do), it is likely that a protective order could adequately address their concerns. *See, e.g., Remington Products, Inc. v. North American Phillips Corp.*, 107 F.R.D. 642, 651-52 (D. Conn. 1985) (imposing

D&T Shanghai knowingly accepted by availing itself of the U.S. securities markets. D&T Shanghai should not be permitted to willfully avail itself of the benefits of auditing financial statements of issuers with securities registered with the Commission and then claim hardship to avoid the U.S. legal requirements that come along with those benefits. *See Richmark*, 959 F.2d at 1477 ("[I]f the hardship is self-imposed, or if [the defendant] could have avoided it, the fact that it finds itself in an undesirable position will not work against disclosure of the requested information."); *Banca Della*, 92 F.R.D. at 117 (rejecting defendant's request to preclude discovery based on Swiss secrecy laws and observing that "[the defendant] invaded American securities markets and profited in some measure thereby. It cannot rely on Swiss nondisclosure law to shield this activity.").

As explained in the accompanying declaration, D&T Shanghai received over $4 million for audit-related services it provided to Longtop since 2006. Deitch Decl. ¶ 27. It performed these services and accepted these fees knowing full well that it could be subject to subpoenas and all other forms of U.S. legal process. It should not now be surprised by the consequences of its own choices. *See Banca Della*, 92 F.R.D. at 119 ("It would be a travesty of justice to permit a foreign company to invade American markets, violate American laws if they were indeed violated, withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law."). Accordingly, the Commission respectfully submits that this factor is at least neutral.

(c) *Location of compliance*. It is the Staff's understanding that the bulk of the responsive files were generated in and are currently located in China. However, D&T Shanghai has also represented that the vast bulk of the responsive materials are maintained in

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sanctions on Dutch corporation that refused to produce discovery and concluding that any

electronic form, which minimizes any hardship of actual physical production, and limits the amount of material that has to be gathered from a foreign jurisdiction. Moreover, the actual production would take place here in the United States. *See Banca Della*, 92 F.R.D. at 119 ("Performance may be said to occur here as well as in Switzerland since the actual answering of the interrogatories will presumably take place in the United States, where [the respondent]'s lawyers are."). Accordingly, the Commission respectfully submits that this factor is at least neutral.

(d) *The Nationality of the Respondent.* As noted above, D&T Shanghai is a Chinese member firm of Deloitte Touche Tohmatsu Limited, a UK private company. In addition, D&T Shanghai has made millions of dollars from auditing foreign issuers seeking capital from the U.S. securities markets. Thus, while D&T Shanghai is formally a Chinese entity, it has also long benefited from its international connections, minimizing any protection it should get for being foreign. *See Banca Della*, 92 F.R.D. at 119 (noting, in deciding to enforce subpoena, that "it is true that [respondent] is a Swiss corporation. However, its transnational character, as evidenced by its large number of foreign affiliates, and its New York 'subsidiary' (so styled by it), render this Court less reluctant to order [the respondent] to conform to our laws even where such an order may cause conflict with Swiss law."). Accordingly, the Commission respectfully submits that this factor is at least neutral.

(e) *Importance of Information.* The importance to the investigation of the information under Subpoena, like the importance of the U.S. interests at stake more generally, is significant. *See In re Air Crash at Taipei, Taiwan on October 31, 2000*, 211 F.R.D. 374, 377-78 (C.D. Cal. 2002) (ordering compliance with discovery over foreign law objections and

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Dutch interests in confidentiality could be adequately protected via a protective order).

noting that "this information is crucial to plaintiffs' ability to prosecute their claims; therefore, this factor weighs in favor of disclosure"). As set forth above and in the accompanying declaration of Lisa Deitch, the Subpoenaed documents are critical to the ongoing investigation of Longtop, particularly because of the inability of the Commission to obtain documents or information from certain other parties about Longtop. *See* Deitch Decl. ¶ 26. Even if the Commission is able to take testimony from or obtain documents from Longtop or third parties, there is simply no substitute for D&T Shanghai's audit work papers and related files. These documents are unquestionably necessary to complete the picture of any fraud at Longtop and identify who was involved. Accordingly, the Commission respectfully submits that this factor weighs heavily in favor of enforcing the Subpoena.

(f) *Alternative Means*. Finally, there do not appear to be any alternative means of obtaining the subpoenaed information. It is beyond serious dispute that there is no third party from which the Commission could obtain the requested information—D&T Shanghai is the sole entity that possesses its audit work papers and related information. Nevertheless, in correspondence prior to the commencement of this enforcement action, D&T Shanghai has claimed that it is willing to provide a subset of the documents under Subpoena to the CSRC, and suggested that the SEC can and should seek to obtain the requested information from that foreign regulator. Indeed, D&T Shanghai has claimed that this is an "alternative means" that is expressly contemplated in Section 106 of the Sarbanes Oxley Act.[7] In fact, the Commission respectfully submits that this is not an acceptable alternative means of production.

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[7] Section 106(f) provides that: "Notwithstanding any other provisions of this section, the staff of the Commission or the [PCAOB] *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 [PCAOB]." D&T Shanghai would apparently like this Court to substitute the words "must allow" for "may

First, there is no assurance that, if D&T Shanghai were to produce documents to Chinese regulators, those regulators would provide them to the SEC. Indeed, based upon D&T Shanghai's representations, it appears that such regulators would *not* produce the subpoenaed documents on to the SEC. Second, any interim production of the documents to Chinese regulators would necessarily result in significant delay. While such delays may be tolerable in the context of routine reviews of foreign auditing practices, in the context of an active investigation into a possible billion dollar fraud scheme—where Longtop remains a going concern with countless investors—such a delay is simply untenable.

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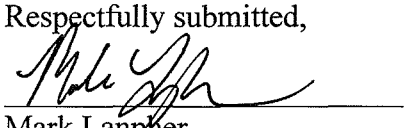
allow." Of course, there is no basis for doing so. Section 106 gives the *Commission* the option of allowing a foreign public accounting firm to satisfy its duties under that section by producing audit work papers to foreign regulators; however, that is a discretionary decision. While production of audit work papers through a foreign regulator may be acceptable in the context of certain investigations by the Commission or the PCAOB, it is a wholly unsatisfactory solution in a case such as this, where there are indications of possibly massive fraud and the auditors are withholding critical evidence that could allow the Commission to conduct an investigation in a timely fashion.

IV. CONCLUSION

The Commission is unable to gain access to relevant information and documents in an investigation that has been authorized for the protection of public investors, notwithstanding the fact that it has properly served an administrative subpoena on the Respondent and the Respondent has acknowledged that it is in possession of vast numbers of responsive documents. Accordingly, the Commission requests that the Court act expeditiously to grant this application and issue: (i) an order, in the form submitted, requiring the Respondent to show cause why it should not be ordered to comply with the Subpoena; (ii) if the Respondent fails to show adequate cause as to its refusal to comply with the Subpoena, an order requiring it to comply with the Subpoena by immediately producing all responsive documents; and (iii) such other and further relief as may be necessary and appropriate to achieve compliance with the Subpoena directed to the Respondent.

Dated: September 8, 2011

Respectfully submitted,



Mark Lanpher
Attorney for Plaintiff
SECURITIES AND EXCHANGECOMMISSION
100 F Street, NE
Washington, DC 20549
(202) 551-4879 (Lanpher)
Fax: (202) 772-9228
E-mail: lanpherm@sec.gov

Of Counsel:
ANTONIA CHION
New York Bar Attorney Registration No. 1873405
LISA WEINSTEIN DEITCH
California Bar No. 137492
HELAINE SCHWARTZ
New York Bar Attorney Registration No. 1917046