

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|------------------------------|---|----------------------|
| U.S. SECURITIES AND EXCHANGE |) | |
| COMMISSION, |) | |
| |) | |
| Petitioner, |) | Miscellaneous Action |
| |) | No. 11-0512 GK/DAR |
| -v.- |) | |
| |) | |
| DELOITTE TOUCHE TOHMATSU |) | |
| CPA LTD., |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

**MOTION OF RESPONDENT DELOITTE TOUCHE TOHMATSU CPA LTD. TO
CLARIFY THE COURT’S ORDER TO SHOW CAUSE**

Respondent Deloitte Touche Tohmatsu CPA Ltd. (“DTTC”), by undersigned counsel, respectfully moves this Court to clarify whether the Court intended in its Memorandum Opinion and Order (“Opinion”) to rule on the manner of service by the Petitioner Securities and Exchange Commission (“SEC”) of the Order to Show Cause and related documents upon DTTC. The Court’s Opinion states that the Court “has no occasion to make findings” to govern service in this matter. The Order to Show Cause submitted by the SEC and signed by the Court allows service on DTTC’s counsel by overnight mail, facsimile, or electronic mail. The Opinion and the Order appear to be inconsistent. This motion seeks clarification so that DTTC and the Court have a common understanding of any ruling on service.

DTTC files this motion and appears through counsel subject to its objections to service of the Order to Show Cause and related documents, to personal jurisdiction, and to subject matter jurisdiction. DTTC expressly reserves its right, at the appropriate time, to raise these objections through motion, responsive pleading, or otherwise. This motion simply seeks clarification of the Court’s *ex parte* decision.

In support of its motion, DTTC states as follows:

1. On May 27, 2011, the SEC issued a Subpoena to DTTC calling for the production of documents located in the mainland of the People's Republic of China ("PRC"). (*See* Document No. 1-2, Ex. C.) On September 8, 2011, the SEC filed an Application for Order to Show Cause and for Order Requiring Compliance with a Subpoena (the "Application") attaching a draft Order to Show Cause (Document 1-4, Ex. A), a supporting brief (Document No. 1-1), and a declaration, with additional exhibits attached (Document No. 1-2).

2. At an October 7, 2011 hearing, the Court inquired whether the SEC was required to serve DTTC pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention") and noted that Fed. R. Civ. P. 4 "contemplates, at least in the first instance, compliance with the requirements of the Hague Convention." (Hr'g Tr. 6-7 & 8, attached as Ex. A.) Both at the October 7 hearing and in its October 13, 2011 Memorandum of Law in Further Support of its Application for Order to Show Cause (Document No. 7 (the "Service Memorandum")), the SEC argued that it was appropriate to allow service of DTTC by mail, facsimile, or e-mail on DTTC's United States counsel under Fed. R. Civ. P. 4(f)(3), rather than pursuant to the Hague Convention under Fed. R. Civ. P. 4(f)(1). (*Id.* at 5-13; Hr'g Tr. 6-7 & 8.)¹

3. On January 4, 2012, the Court issued its Opinion and declined to rule on the service issue: "The court has no occasion to make findings with respect to the provision of the Federal Rules of Civil Procedure [that] would govern service of the application. *See* [Service] Memorandum at 5-13." (Document No. 10 at 3 n. 3.) In so doing, the Court expressly declined

¹ As the SEC has observed, service is a "key issue" with respect to the Order to Show Cause (Hr'g Tr. 6-7), and the Court cannot "turn forthwith to the merits of the case" until the SEC serves the Order to Show Cause (Service Memorandum, Document No. 7 at 13).

to make findings with respect to pages 5-13 of the Service Memorandum—where the SEC addressed the question of service of the Order to Show Cause. (Document No. 7.)

4. Notwithstanding the fact that the Opinion noted that the Court had “no occasion to make findings” as to whether service was proper under Rule 4(f)(1) (and the Hague Convention) or Rule 4(f)(3), the Court executed the Order to Show Cause prepared by the SEC. In so doing, it included the SEC’s proposed language allowing service “by overnight mail, facsimile or electronic mail delivery upon [DTTC’s] counsel.” (Document No. 11 at 2.) In this respect, the Order to Show Cause appears to be inconsistent with the Court’s holding that it did not have occasion to rule on service issues.

5. DTTC seeks clarification regarding whether the Court intended to address the manner of service in the Order to Show Cause. If the Court did not intend to address service through the Order to Show Cause, DTTC respectfully suggests that the Court make that clear by striking the language in the second ordering paragraph of the Order to Show Cause that the SEC’s filings may be “served upon the Respondent by representatives of the Commission by overnight mail, facsimile or electronic mail delivery upon their counsel” and replace it with “served upon the Respondent by representatives of the Commission by any means authorized by law.”

WHEREFORE, for the foregoing reasons, Respondent Deloitte Touche Tohmatsu CPA Ltd., respectfully requests that the Court

- (1) clarify whether it intended to address service in its Order to Show Cause; and
- (2) if not, strike the language from the second ordering paragraph of the Order to Show Cause that the SEC’s filings may be “served upon the Respondent by representatives of the Commission by overnight mail, facsimile or electronic mail delivery upon their counsel” and

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| CPA LTD., |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

ORDER CLARIFYING THE COURT’S ORDER TO SHOW CAUSE

Respondent Deloitte Touche Tohmatsu CPA, Ltd. (“DTTC”), having filed a Motion to Clarify the Court’s Order to Show Cause, and the Court having considered the Motion, and good cause having been shown, it is hereby,

ORDERED that the Motion is granted.

IT IS FURTHER ORDERED that the Order to Show Cause was not intended to rule on the manner of service by the Petitioner Securities and Exchange Commission (“SEC”) of the Order to Show Cause and related documents upon Respondent DTTC and that the Court strikes the language from the second ordering paragraph of the Order to Show Cause that the SEC’s filings may be “served upon the Respondent by representatives of the Commission by overnight mail, facsimile or electronic mail delivery upon their counsel” and replaces it with “served upon the Respondent by representatives of the Commission by any means authorized by law.”

IT IS FURTHER ORDERED that the schedule set forth in the Order to Show Cause is hereby vacated.

Judge Deborah A. Robinson
United States Magistrate Judge

Dated: _____

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| |) | |
| Respondent. |) | |
| _____ |) | |

CERTIFICATE OF SERVICE

I certify that on January 11, 2011, I served, via first class mail and email, Respondent's Motion to Clarify the Court's Order to Show Cause on:

Mark Lanpher
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549
LanpherM@sec.gov

Dated: Washington, DC

January 11, 2012

Respectfully submitted,

_____/s/ Michael D. Warden/

SIDLEY AUSTIN LLP
Michael D. Warden (419449)
HL Rogers (974462)
Sidley Austin LLP
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(202) 736-8000

Counsel for Deloitte Touche Tohmatsu CPA Ltd.

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

| | |
|-------------------------------|------------------------|
| U.S. SECURITIES AND EXCHANGE. | Case No. 1:11-MC-00512 |
| | (GK/DAR) |
| COMMISSION, | |
| | Washington, D.C. |
| Plaintiff, | October 7, 2011 |
| | |
| v. | |
| | |
| DELOITTE TOUCHE TOHMATSU | |
| | |
| CPA, LTD, DDC, | |
| | |
| Defendant. | |
| | |

STATUS HEARING
BEFORE THE HONORABLE DEBORAH A. ROBINSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

| | |
|---------------------|--|
| For the Petitioner: | U.S. Securities and Exchange Commission By: MARK LANPHER, ESQ. 100 F Street, N.E. Washington, DC 20549 |
| Of Counsel: | By: LISA DEITCH, ESQ. HELAINÉ SCHWARTZ, ESQ. (Firm and address not provided.) |

BOWLES REPORTING SERVICE
P.O. BOX 607
GALES FERRY, CONNECTICUT 06335 - (860) 464-1083

1 (Proceedings commenced at 4:13 p.m.)

2 THE CLERK: Miscellaneous Case Number 11-512.

3 This is the matter of U.S. Security and
4 Exchange Commission v. Deloitte Touche Tohmatsu.

5 Counsel for the Petitioner, Mark Lanpher.

6 Of Counsel, Lisa Deitch and Helaine Schwartz.

7 This is scheduled for a motions hearing.

8 MR. LANPHER: Good afternoon, Your Honor.

9 THE COURT: Now, good afternoon.

10 The Court received the District Judge's
11 referral of this matter for the purpose of full case
12 management.

13 The obvious question that must be addressed
14 at this time, Mr. Lanpher, is the status of the
15 Petitioner's efforts to serve the Respondent with the
16 motion.

17 The record, of course, reflects that no one
18 has entered an appearance on behalf of the Respondent,
19 and it is not -- the Court is unable to discern from
20 any matter -- from any of the materials that have been
21 filed by the Petitioner, what efforts were undertaken
22 to serve the Respondent, and when I say, "Serve the
23 Respondent", I don't mean with the subpoena, I mean
24 with the motion.

25 MR. LANPHER: Certainly, Your Honor. Let me

1 address that.

2 In our view --

3 THE COURT: I can hear you, but I need you
4 closer to the microphone to ensure that you're
5 recorded.

6 MR. LANPHER: Yes, Your Honor.

7 In our view, in a case such as this, where
8 we're applying for an order to show cause, the order to
9 show cause itself would act as, in effect, the
10 complaint or summons, which we would then serve upon
11 the Respondent once it has been issued by the Court.

12 In this case, the day we filed our motion we
13 provided a copy to Defense Counsel. We have been in --

14 THE COURT: Who is -- Let me ask you to be
15 more specific, please.

16 MR. LANPHER: Defense Counsel, or Counsel for
17 the Respondent, Deloitte Touche Tohmatsu --

18 THE COURT: I assume you meant Counsel for
19 the Respondent and not --

20 MR. LANPHER: That's correct.

21 THE COURT: -- the defendants because there
22 is no defendant in this case.

23 MR. LANPHER: That's correct, Your Honor.

24 Counsel for the Respondent is Sidley Austin,
25 and specifically Michael Warden, who is actually

1 present in the courtroom in the first row today.

2 We have been in touch with Mr. Warden, both
3 prior to the filing of this litigation and since our
4 filing of this litigation.

5 It is -- As I said, we provided copies of our
6 papers to Mr. Warden the day we filed it, and what we
7 are asking for the Court to do is to enter the order to
8 show cause and, as part of that, order that service can
9 be made in a case such as this, on Deloitte Touche's
10 U.S. counsel.

11 Deloitte Touche, of course, is a foreign
12 entity, but in our view, in a case such as this, where
13 they have U.S. counsel, U.S. counsel has been
14 representing them in all the pre-litigation stages of
15 this, and in negotiations during the pendency of the
16 litigation.

17 They're obviously fully aware of this
18 proceeding. Indeed, Counsel is present in the
19 courtroom today.

20 In our view, serving counsel is perfectly
21 appropriate pursuant to -- it's Rule 4(f)(3) of the
22 Rules of Civil Procedure. This Court can order that
23 service may be made in any manner not prohibited by
24 international agreement, and courts have repeatedly
25 held that one such approvable method is service on a

1 foreign entity's U.S. counsel.

2 So we are asking the Court, as part of its
3 order to show cause, to direct that service may be made
4 on Deloitte Touche, including through its U.S. counsel.
5 We would, of course, seek international processes, as
6 well, to serve the order on Deloitte Touche.

7 But that is where we are, and that's why no
8 Respondent has actually appeared in the case. It's
9 because the order to show cause has not yet been
10 entered.

11 THE COURT: My initial question, of course,
12 was what effort you made to serve the Respondent with
13 the motion.

14 MR. LANPHER: And, Your Honor, we provided
15 that to the Respondent's Counsel the day it was filed.

16 THE COURT: So is it a fair summary of your
17 request, that the petitioner now asks that the Court
18 enter the show cause order and authorize you to serve
19 -- authorize Petitioner to serve the show cause order
20 by delivering it by hand to the Respondent's local
21 counsel?

22 MR. LANPHER: That's exactly correct, Your
23 Honor.

24 THE COURT: Are you satisfied that you have
25 provided the Court with authorities in support of that

1 request?

2 MR. LANPHER: Your Honor, I can orally
3 present authorities. If the Court would prefer to
4 receive a written brief on this issue, we can provide
5 one.

6 If I may, Your Honor?

7 (Pause.)

8 MR. LANPHER: As I mentioned, the applicable
9 rule here, for service on a foreign entity, is Rule
10 4(f) of the Rules of Civil Procedure, and one of those
11 -- Rule 4(f)(1) permits service to be made via the
12 Hague Convention. However, 4(f)(3) provides that
13 service can also be made, and I quote:

14 "By other means not prohibited by
15 international agreement, as the Court
16 orders."

17 And so what --

18 What is the reason that the Court ought not
19 expect Petitioner to effect service in accordance with
20 the Hague Convention?

21 MR. LANPHER: Your Honor, I think -- there is
22 no requirement under the law, that a petitioner proceed
23 under the Hague Convention.

24 THE COURT: That was not my question.

25 My question is, why should the Court not

1 require that you do so?

2 MR. LANPHER: Because the point of service,
3 as the Supreme Court has indicated, is to ensure that a
4 Respondent has notice of action, and has an opportunity
5 to be heard.

6 In this case, in this instance, there is no
7 question that the Respondent is well aware of this
8 action. They have been quoted in the press speaking
9 about this action. They have --

10 THE COURT: You're not suggesting that that
11 relieves you, the Petitioner, of the obligation to
12 serve the Respondent, are you?

13 MR. LANPHER: No, we're not, but nor is there
14 any specific obligation that we serve the Respondent
15 through the Hague Convention, but the law clearly
16 permits service by any other means that the Court deems
17 appropriate, as long as it's not prohibited by some
18 other provision of law, and in this case, what we have
19 -- as we set out in our papers, we have an ongoing
20 fraud. Time is of the essence.

21 There's no question that the Respondent is
22 well aware of this, and ultimately what they would
23 suggest -- Let me start that differently.

24 To serve through the Hague Convention invites
25 delay, and we're talking months and months and months

1 for us to send documents to China, through a Chinese
2 agency, also that those documents can get back here to
3 the U.S. counsel, who is in the back of this courtroom.

4 What we are proposing is for the Court to
5 order and authorize us to walk those papers straight
6 over to their U.S. counsel. We think that affects the
7 same purpose, puts the Respondent on notice, allows
8 them to be heard, and is entirely consistent with the
9 law.

10 The Court --

11 THE COURT: And what is the law to which you
12 refer, since we recognize that Rule 4 contemplates, at
13 least in the first instance, compliance with the
14 requirements of the Hague Convention?

15 MR. LANPHER: Your Honor, I actually disagree
16 that Rule 4 contemplates compliance with the Hague
17 Convention in the first instance.

18 Rule 4 sets out three alternative means, Rule
19 4(f), rather, sets out three alternative means for
20 service of process.

21 One --

22 THE COURT: Isn't the first one means
23 authorized by the Hague Convention?

24 MR. LANPHER: Yes, Your Honor, but that does
25 not mean -- nowhere in that rule does it say, "You must

1 try number one first, number two second, and if those
2 are unsuccessful, turn to number three," and there is
3 case law on this point.

4 If you'll bear with me for a moment, I can --

5 THE COURT: Is there some reason that the
6 Petitioner didn't brief this in writing?

7 MR. LANPHER: Yes. To be candid, Your Honor,
8 we expected that the Respondent would accept service of
9 process because prior to our litigation, they had
10 accepted service of the subpoena, they had indicated
11 their intent to cooperate with the SEC in this
12 investigation --

13 THE COURT: Since the Petitioner did not file
14 a timely opposition or other response to the motion,
15 you didn't anticipate, after that time, that the
16 Respondent would accept service, did you?

17 MR. LANPHER: Actually, yes, Your Honor. We
18 did until a conversation yesterday, when the Respondent
19 made clear that they would not, and again, we
20 understand that the operative document to which they
21 will have to respond is not our motion for an order to
22 show cause, but the order to show cause itself. That
23 is the time at which service becomes the key issue, and
24 that is the document to which they would have to
25 respond, not our motion.

1 THE CLERK: We're back on the record, Your
2 Honor.

3 THE COURT: Now, Mr. Lanpher, you indicated
4 that you wish one week from today, in other words until
5 next Friday; is that correct?

6 MR. LANPHER: Yes, Your Honor.

7 THE COURT: Friday, October 14th, in order to
8 address the issues which have been the subject of the
9 Court's inquiry.

10 Just so the record is clear, the Court
11 directs you to address two matters, and I will
12 summarize them now.

13 The first is authority for the proposition
14 that the Court can require the Respondent to appear to
15 show cause whether Respondent has not been served and
16 has not appeared through counsel. Perhaps I should say
17 has not appeared through counsel or otherwise.

18 MR. LANPHER: We understand, Your Honor.

19 THE COURT: Very well. I refer, of course,
20 to the page, it's not numbered, the next to the last
21 page of the application for an order to show cause, the
22 page with the heading, "Requested Relief", at the top.

23 Do you have that in front of you?

24 MR. LANPHER: Yes, Your Honor.

25 THE COURT: The first request, of course, is

1 that the Court enter an order to show cause in the form
2 submitted, and the matter that -- the first matter that
3 I will ask you to address is the authority for the
4 Court to do -- the authority for the proposition that
5 the Court could do so, where the Respondent has not
6 been served and has not appeared.

7 MR. LANPHER: Understood.

8 THE COURT: Very well.

9 The second matter that the Court will direct
10 that you address in this memorandum, is the authority
11 in support of your request that service be permitted
12 pursuant to Rule 4(f)(3) of the Federal Rules of Civil
13 Procedure, rather than 4(f)(1).

14 MR. LANPHER: Yes, Your Honor.

15 THE COURT: In other words, through the
16 alternative means, rather than in accordance with the
17 Hague Convention.

18 MR. LANPHER: I understand.

19 THE COURT: Now, pending the Court's review
20 of this -- and we will call this a memorandum,
21 "Memorandum of Law."

22 Pending the Court's consideration of the
23 memorandum of law, further consideration of the
24 application will be stayed. And by, "The application",
25 I mean document number one, the application for an

1 order to show cause.

2 MR. LANPHER: Understood.

3 THE COURT: Very well. Thank you, very much.

4 MR. LANPHER: Thank you, Judge, and have a
5 pleasant week.

6 THE COURT: Our ECF entry for today will
7 indicate that we conducted a status hearing, and that
8 the Court directed that counsel for the Movant, or
9 Petitioner, file a memorandum to address the matter as
10 set forth by the Court on the record, and that the
11 petitioner do so by -- Is next Friday still sufficient
12 time?

13 MR. LANPHER: Yes, Your Honor.

14 THE COURT: Very well. By next Friday,
15 October 14th.

16 MR. LANPHER: Thank you, Judge.

17 THE COURT: Very well. Thank you, very much.

18 (Proceedings concluded at 4:53 p.m.)
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20
21
22
23
24
25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings
in the above-entitled matter.

/s/ _____

October 15, 2011

STEPHEN C. BOWLES