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.	)	

RESPONDENT DTTC'S STATEMENT OF POINTS AND AUTHORITIES OPPOSING THE SEC'S APPLICATION FOR ORDER TO SHOW CAUSE AND ORDER REQUIRING COMPLIANCE WITH A SUBPOENA

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CASES

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Day v. Corner Bank (Overseas) Ltd.,
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EEOC v. Lutheran Social Servs.,
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Fed. Maritime Comm'n v. DeSmedt,
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First Am. Corp. v. Price Waterhouse LLP,
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FMAC Loan Receivables v. Dagra,
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Free Enter. Fund v. PCAOB,
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FTC v. Compaignie de Saint-Gobain-Pont-à-Mousson,
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FTC v. Compaignie de Saint-Gobain-Pont-à-Mousson,
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FTC v. Texaco, Inc.,
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In re Fuqi Int'l, Inc. Sec. Litig.,
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Gateways Overseas, Inc. v. Nishat (Chunian) Ltd.,
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Giraldo v. Drummond Co.,
808 F. Supp. 2d 247 (D.D.C. 2011)..38

Gucci Am., Inc. v. Curveal Fashion,
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Herman Miller, Inc. v. Alphaville Design, Inc.,
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Hilton v. Guyot,
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Kaplan v. Hezbollah,
715 F. Supp. 2d 165 (D.D.C. 2010)..42

Krepps v. Reiner,
414 F. Supp. 2d 403 (S.D.N.Y. 2006)...41, 43

Linde v. Arab Bank, PLC,
262 F.R.D. 136 (E.D.N.Y. 2009)...34

Ludlow Corp. v. DeSmedt,
249 F. Supp. 496 (S.D.N.Y. 1966)...21

Marlabs Inc. v. Jakher,
No. 07-cv-04704, 2010 WL 1644041 (D.N.J. Apr. 22, 2010)..43

Minpeco, S.A. v. Conticommodity Servs., Inc.,
116 F.R.D. 517 (S.D.N.Y. 1987)...26

Minpeco, S.A. v. Conticommodity Servs., Inc.,
118 F.R.D. 331 (S.D.N.Y. 1988)..34, 37

Morrison v. Nat'l Austl. Bank Ltd.,
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Nanya Tech. Corp. v. Fujitsu Ltd.,
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Perry v. Duoyuan Printing, Inc.,
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Prewitt Enters., Inc. v. OPEC,
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Rio Props., Inc. v. Rio Int'l Interlink,
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Robinson Eng'g Pension Plan & Trust v. George,
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Roeder v. Islamic Republic of Iran,
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333 F.3d 228 (D.C. Cir. 2003) 40

RSM Prod. Corp. v. Fridman,
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In re Sealed Case,
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SEC v. Anticevic,
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SEC v. Banca Della Svizzera Italiana,
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SEC v. Dresser Indus., Inc.,
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SEC v. Euro Sec. Fund,
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SEC v. Jerry T. O'Brien, Inc.,
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SEC v. Lavin,
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SEC v. Minas de Artemisa, S.A.,
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Societe Internationale v. Rogers,
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Societe Nationale Industrielle Aérospatiale v. U.S. Dist. Court,
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Studio A. Entm't, Inc. v. Active Distribs., Inc.,
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Tiffany (NJ) LLC v. Qi Andrew,
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Trans World Airlines, Inc. v. Franklin Mint Corp.,
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U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Cos.,
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U.S. Commodity Futures Trading Comm'n v. Nahas,
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U.S. ITC v. ASAT, Inc.,
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United States v. Deloitte & Touche USA LLP,
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United States v. Firestone Tire & Rubber,
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United States v. First Nat'l Bank of Chi.,
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United States v. Hill,
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United States v. IBM Corp.,
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United States v. Legal Servs. for N.Y. City,
249 F.3d 1077 (D.C. Cir. 2001) 23

United States v. Ron Pair Enters., Inc.,
489 U.S. 235 (1989)..19

United States v. Shehyn,
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United States v. Villanueva-Sotelo,
515 F.3d 1234 (D.C. Cir. 2008) 20

Volkswagenwerk Aktiengesellschaft v. Schlunk,
486 U.S. 694 (1988)..40

STATUTES AND REGULATIONS

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203,124 Stat. 1376 (2010) 3, 10

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 8

15 U.S.C. § 57b-1(c) 18

15 U.S.C. § 77s(c) 3, 15, 19

15 U.S.C. § 77v 18

15 U.S.C. § 78aa 18

15 U.S.C. § 78u(b) 3, 15, 19

15 U.S.C. § 1312(d)(2) 18

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15 U.S.C. § 7217(b)-(c) 9

28 U.S.C. § 2072 40

15 C.F.R. pt. 730. 33

15 C.F.R. pt. 738 (Supp. 1) 33

15 C.F.R. pt. 774 (Supp. 1) 33

SEC Concept Release Nos. 33-7801, 34-42430, 65 Fed. Reg. 8896 (Feb. 23, 2000) 16

Order Approving Proposed Rules Relating to Registration System, SEC Release No. 34-48180, File No. PCAOB-2003-03, 68 Fed. Reg. 43,242 (July 16, 2003) 9

RULES

Fed. R. Civ. P. 4(d)(5) 19

Fed. R. Civ. P. 4(f) 40, 42

Fed. R. Civ. P. 4(h) 39

Fed. R. Civ. P. 12(b)(5) 43

ADMINSITRATIVE RULES

PCAOB Rule 2105 9

PCAOB Rule 2207 9

LEGISLATIVE HISTORY

Administrative Procedure Act: Legislative History, 79th Congress (Pat McCarran, ed. 1946) 23

China's Information Control Practices and the Implications for the United States: Hearing Before U.S.-China Econ. & Sec. Review Comm'n, 111th Cong. (2010). 30

INTERNATIONAL MATERIAL

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents , Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T. S. 163....4, 40

FOREIGN STATUTES AND REGULATIONS

P.R.C. Laws, CPA Law art. 19 25

P.R.C. Laws, Crim. Law art. 253(A) 25

P.R.C. Laws, Guarding State Secrets Law art. 2 29

P.R.C. Laws, Guarding State Secrets Law art. 9 29

CSRC, Regulations on Strengthening the Protection of Secrets and Archive Management related to Issuance and Listing of Securities Overseas (Oct. 20, 2009) 6, 24

P.R.C. Ministry of Finance Supervision Measures art. 56....6

P.R.C. Ministry of Finance Supervision Measures art. 64....6

SCHOLARLY AUTHORITY

D. Stuart & C. Wright, *The Sarbanes-Oxley Act: Advancing the SEC's Ability to Obtain Foreign Audit Documentation in Accounting Fraud Investigations*, 2002 Colum. Bus. L. Rev. 749....22

OTHER AUTHORITIES

Bureau of Consular Affairs, U.S. Dep't of State, *China Judicial Assistance*, http://www.travel.state.gov/law/judicial/judicial_694.html 41

Alex Capri, *Growing U.S.-China Trade Highlights Cumbersome Export Controls*, Forbes.com (June 21, 2011), http://www.forbes.com/2011/06/21/china-export-controls-opinions-contributors-kpmg.html 33

China Jails U.S. Geologist for Stealing State Secrets, BBC News, July 5, 2010, http://www.bbc.co.uk/news/10505350 38

Comment Letter of Frits Bolkestein, Member of the European Commission (Apr. 11, 2003), http://pcaobus.org/Rules/Rulemaking/Docket%20001/ 042_European_Union.pdf 9

CSRC, *Annual Report (2010)*, http://www.csrc.gov.cn/pub/csrc_en/about/annual/201203/ P020120315575855936801.pdf 5, 7, 37

CSRC, *List of Bilateral MOUs Signed Between CSRC and its Overseas Counterparts (As of the end of February 2012)* (Mar. 15, 2012), http://www.csrc.gov.cn/pub/csrc_en/ affairs/Cooperation/201203/t20120315_207208.htm 7

Form 25, Notification of Removal from Listing and/or Registration under Section 12(b) of the '34 Act (Aug. 17, 2011), http://secfilings.nyse.com/filing.php?doc=1&attach =ON&ipage=7775440&rid=23 11

Int'l Org. of Secs. Comm'ns, *Multilateral MOU Concerning Consultation and Cooperation and the Exchange of Information* (May 2002), http://www.iosco.org/ library/pubdocs/pdf/IOSCOPD126.pdf 7

John Lee, *The Uncurious Case of Xue Feng's Jail Sentence*, Forbes.com, July 7, 2010, http://www.forbes.com/2010/07/07/xue-feng-stern-hu-state-secrets-opinions-contributors-john-lee.html 39

Joint Press Release, U.S. SEC, U.S. and Chinese Regulators Meet in Beijing on Audit Oversight Cooperation (Aug. 8, 2011), http://www.sec.gov/news/press/2011/2011-164.htm 3

Joint Press Release, U.S. Dep't of Treasury, The First U.S.-China Strategic and Economic Dialogue Economic Track Joint Fact Sheet (July 28, 2009), http://www.treasury.gov/press-center/press-releases/pages/tg240.aspx 8

Longtop Form 20-F 10

MOU Regarding Cooperation, Consultation and the Provision of Technical Assistance Between the CSRC and the SEC (Apr. 28, 1994), http://sec.gov/about/offices/oia/ oia_bilateral/china.pdf 7

Charles D. Niemeier, PCAOB, *Keynote Address on Recent International Initiatives* (Sept. 10, 2008), http://pcaobus.org/News/Speech/Pages/ 09102008_NiemeierNYSSCPAFAEConference.aspx 17

PCAOB, *List of Issuer Audit Clients of Non-U.S. Registered Firms in Jurisdictions Where the PCAOB Is Denied Access to Conduct Inspections by Jurisdiction and Firm*, http://pcaobus.org/International/Inspections/Pages/ IssuerClientsWithoutAccessListGrouped.aspx (last visited Apr. 11, 2012) 31

Press Release, PCAOB, PCAOB Enters into Cooperative Agreement with United Kingdom Audit Regulator (Jan. 10, 2011), http://pcaobus.org/News/Releases/Pages/ 01102011_UK.aspx 32

Restatement (Third) of Foreign Relations Law § 442(1)(c) (1986) 26, 27

SEC Enforcement Manual (Mar. 9, 2012) 37

SEC Order, *In re Longtop Fin. Techs., Ltd.*, Exchange Act Release No. 65,948, File No. 3-14622 (Dec. 14, 2011), http://www.sec.gov/litigation/admin/ 2011/34-65948.pdf 11

Statement of Protocol between the Public Company Accounting Oversight Board of the United States and the Professional Oversight Board of the United Kingdom on Cooperation and the Exchange of Information Related to the Oversight of Auditors (Jan. 10, 2011), http://www.frc.org.uk/images/uploaded/documents/PCAOB-POB%20Statement%20of%20Protocol%20FINAL1.pdf 32

Terms of Reference for Cooperation and Collaboration (May 2, 2006), http://sec.gov/about/offices/oia/oia_bilateral/chinator.pdf 7

Richard H. Walker, Dir. of SEC Div. of Enforcement, Remarks Before the AICPA National Conference on Current SEC Developments (Dec. 5, 2000), http://www.sec.gov/ news/speech/spch447.htm 16

Deloitte Touche Tohmatsu CPA Ltd. ("DTTC"), by undersigned counsel, respectfully submits this Statement of Points and Authorities Opposing the Securities and Exchange Commission's ("SEC") Application for Order to Show Cause and Order Requiring Compliance with a Subpoena (Document No. 1 ("Application")).

PRELIMINARY STATEMENT

Through its Application, the SEC asks this Court to enter an order that would require DTTC, an accounting firm in the mainland of the People's Republic of China ("PRC"), to violate PRC law and disobey an express directive of its primary PRC regulator. The Subpoena underlying the SEC's Application would require DTTC to produce—directly to the SEC—workpapers from mainland China relating to an audit DTTC conducted in China. Yet China's chief securities regulator, the China Securities Regulatory Commission ("CSRC"), following well-established China laws, has prohibited DTTC from producing those workpapers directly to the SEC. Instead, the CSRC requires that foreign regulators such as the SEC must work through the CSRC to obtain access to workpapers of DTTC and other major Chinese accounting firms—just as many other nations' securities regulators require. The CSRC's directive was explicit and unambiguous: DTTC must comply with PRC law, and direct production to the SEC would violate that law.

If DTTC were to defy the CSRC's command and produce the workpapers directly to the SEC, the severest of sanctions could be imposed on DTTC and its personnel: China regulators would be authorized to dissolve the firm entirely and to seek prison sentences up to life in prison for any DTTC partners and employees who participated in the violation. DTTC has informed the SEC of the CSRC's directive and the consequences of defying it. Nonetheless, the SEC chose not to request these documents directly from the CSRC and instead initiated this action.

The SEC Subpoena at issue here relates to audit work DTTC performed exclusively in the PRC for Longtop Financial Technologies Ltd. ("Longtop"), a corporation with substantially all of its operations in the PRC whose securities were traded on the New York Stock Exchange ("NYSE"). When DTTC's audit of Longtop's 2010 financial statements revealed potential fraud, DTTC acted appropriately: it noisily resigned as Longtop's auditor, alerting the SEC and U.S. investors of what it had discovered. Three days later, the SEC commenced an investigation of Longtop. Eventually, the SEC revoked Longtop's registration, and the NYSE delisted its shares.

DTTC recognizes the legitimacy of the SEC's investigation regarding Longtop and has cooperated with that investigation to the greatest extent it can under China law. But the legitimacy of that investigation is not before the Court. Rather, the question is whether this Court should order DTTC to perform an act—in mainland China—that indisputably would violate PRC law. As the D.C. Circuit has explained, "it causes . . . considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) (per curiam). At bottom, the SEC's action has placed DTTC between the competing demands of two regulators—the CSRC, which has indicated that the SEC must proceed on a regulator-to-regulator basis to secure access to DTTC's workpapers, and the SEC, which has issued the Subpoena requiring DTTC to produce the workpapers directly to the SEC.

The SEC's real dispute regarding access to audit workpapers in China is and has been with the CSRC, and resolution of that dispute can best be achieved through diplomatic negotiations, not a court order against a private party. After July 2011 meetings in Beijing to "exchange[] views on how to deepen cooperation on cross-border audit oversight," the SEC and the CSRC jointly proclaimed that those meetings were "very productive" and an "important step

toward Sino-U.S. cooperation on audit oversight of public companies." Joint Press Release, U.S. SEC, U.S. and Chinese Regulators Meet in Beijing on Audit Oversight Cooperation (Aug. 8, 2011), http://www.sec.gov/news/press/2011/2011-164.htm. Within weeks of that announcement, however, the SEC filed this action, and the next round of negotiations was promptly cancelled. Face-to-face negotiations resumed in January of this year. Because this Court cannot order either government to resolve the issue of the SEC's access to workpapers from China accounting firms, an order compelling compliance with the Subpoena will only order a PRC citizen to break PRC law and face the consequences.

As set forth below, the Subpoena should not be enforced for four independent reasons:

First, neither of the statutory provisions of the securities laws pursuant to which the SEC issued the Subpoena authorizes the SEC to obtain the documents at issue here, which are located abroad. The plain text of Section 19(c) of the Securities Act of 1933 (the "'33 Act"), 15 U.S.C. § 77s(c), and Section 21(b) of the Securities Exchange Act of 1934 (the "'34 Act"), 15 U.S.C. § 78u(b), provide the SEC with subpoena authority carefully limited to the territorial U.S. Indeed, Congress recognized this limitation when, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), Congress granted the SEC separate and *new* authority to seek audit workpapers from abroad. But Congress *also* recognized that imposing an unqualified duty on foreign accounting firms to produce workpapers in the U.S. could conflict with foreign law and allowed foreign accounting firms to use "alternate means" of production—a production to their home regulators—where direct production to the SEC would violate a foreign country's laws. 15 U.S.C. § 7216(f). In this case, the SEC has expressly disclaimed reliance on that new statutory authority.

Second, even if the SEC's subpoena authority extended to DTTC's documents, this Court should not enforce the Subpoena because doing so would impose an extraordinary and undue

burden on DTTC. It is hard to imagine a more severe burden than potential dissolution of DTTC and imprisonment of its involved partners and employees.

Third, judicial principles of international comity preclude enforcement of the Subpoena. The key legal factors governing whether U.S. courts may order a party to violate the laws of its home country sharply favor DTTC: DTTC is a PRC citizen; its documents are located in mainland China; important sovereign interests of the PRC underlie the CSRC's requiring the SEC to work through it; severe hardships would result to DTTC and its partners and employees if DTTC were required to produce documents directly to the SEC; and the SEC has available to it alternative means of seeking the documents.

Finally, even if the Court were empowered to enforce the Subpoena, it should not do so until service of the show cause order is properly effected. Indeed, it would be especially inappropriate for the SEC in a case involving an underlying sovereign-to-sovereign dispute to ignore U.S. treaty obligations under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents art. 3, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 ("Hague Convention"). Service of process under the Hague Convention is mandatory in this case.

BACKGROUND

I. DTTC And The PRC Laws Governing It.

DTTC: DTTC is a limited liability corporation that provides audit and other professional services in the mainland of the PRC. DTTC is a member firm in the Deloitte network, is headquartered in Shanghai, and has seven offices in mainland China.[1] Declaration of Charles Lip ¶¶ 6–7 ("Lip Decl."). DTTC's partners are in China. DTTC employs almost 4,000

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[1] Each member firm within the Deloitte network is a separate and independent legal entity, subject to the local laws of the particular country or countries in which it operates. *See United States v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39, 41 (D.D.C. 2009), *aff'd in part, vacated in part on other grounds*, *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010).

accountants, and a total of approximately 5,000 employees. *Id.* ¶ 4; Form 2, DTTC Annual Report to PCAOB (June 30, 2011) (Exh. 15 to the Declaration of Michael D. Warden ("Warden Decl.")).

DTTC's China-based audit clients' securities are listed on exchanges throughout the world, including on the Shanghai Stock Exchange, the Hong Kong Stock Exchange and, as with Longtop, the New York Stock Exchange. DTTC also performs audit procedures at the request of the U.S. Deloitte firm with respect to U.S.-based multinational corporations with significant operations in China because DTTC possesses licenses in the PRC that U.S. auditors lack.

China Regulators, China Law, and Cross-Border Regulation: As a PRC audit firm, DTTC is supervised and regulated by the CSRC and the PRC Ministry of Finance ("MOF"). The CSRC is the PRC's principal securities regulator and, together with the MOF, operates within the PRC much as the SEC operates within the U.S. (and, as it relates to accounting firms, somewhat like the Public Company Accounting Oversight Board ("PCAOB")). *See generally* CSRC, *Annual Report* (2010), http://www.csrc.gov.cn/pub/csrc_en/about/annual/201203/P020120315575855936801.pdf ("CSRC Annual Report") (Warden Decl. Exh. 8).

The MOF and CSRC enforce a comprehensive legal regime that prohibits the disclosure of audit workpapers without government authorization because audit workpapers commonly include commercially-sensitive information and what are known as "State secrets" and "archives" in China. The PRC's protections for State secrets and archives are codified in numerous China laws. (Declaration of Xin Tang ("Tang Decl.") ¶¶ 18-20, 22, 27-29, 32-33, 40-41, 45, 47, 50, 52.)[2] The most notable law for present purposes is "Regulation 29,"[3] a directive

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[2] DTTC submits herewith the declarations of Professor Xin Tang and Professor James Feinerman, each of whom is an expert in Chinese law.

specifically instructing that any material containing "State secrets," "archives," or other information relating to important State interests, "*including workpapers*," "shall not be carried or shipped overseas, or delivered to overseas institutions or individuals" without express prior approval from China authorities, including the CSRC. PRC Reg. 29, art. 6 (Tang Decl. Exh. 2, Item 19); Tang Decl. ¶ 17. Sanctions for violating Regulation 29 and the PRC State secrets and archives laws that Regulation 29 is designed to implement include severe criminal, civil, and administrative penalties. *See infra* at 25, 38-39. Under unambiguous China laws, if DTTC were to produce the subpoenaed documents to the SEC without the PRC government's consent, PRC regulators would have full authority to suspend DTTC from practicing accounting or dissolve the firm altogether. MOF Supervision Measures arts. 56 & 64 (Tang Decl. Exh. 2, Item 6); Tang Decl. ¶ 54-55. The PRC also would have full authority to seek to imprison any DTTC partners and employees who cooperated in the violation. This is not simply a hypothetical parade of horribles—it is a power that the China government has not hesitated to exercise in the past. *See infra* at 38-39.

China's laws reflect that the PRC zealously guards its sovereignty and resists perceived intrusions by other governments into its territory and affairs. The PRC's strong belief is that, before the establishment of the PRC in 1949, China had suffered "100 years of humiliation" resulting from foreign sovereigns. Feinerman Decl. ¶ 40. As the PRC has developed its own civil law system over the last 30 years, it has naturally been guided by this perspective and is careful to act in a manner that preserves respect for its sovereignty. *Id.*

Importantly, however, the CSRC is committed to developing a cooperative cross-border enforcement regime, consistent with its interests, because China views foreign listings as an

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[3] CSRC, Regulations on Strengthening the Protection of Secrets and Archive Management Related to the Issuance and Listing of Securities Overseas (Oct. 20, 2009) ("PRC Reg. 29").

important source of capital for China-based companies. *See* CSRC Annual Report at 53-54. Thus, the CSRC has engaged with various sovereigns on cross-border securities issues. When doing so, however, the CSRC, like securities regulators in many other countries, has insisted on protecting its sovereignty while also recognizing the importance of cooperation in today's international economy. When the PRC has entered into various agreements with other nations' securities regulators, including the SEC, it consistently has done so on the basis that cross-border issues (including requests for documents by overseas regulators) must be addressed on a regulator-to-regulator basis, both to protect PRC sovereignty and to enforce PRC law. To date, the CSRC has entered into cross-border securities agreements with 51 national securities regulators. *See* CSRC, *List of Bilateral MOUs Signed Between CSRC and its Overseas Counterparts (as of the end of February 2012)* (Mar. 15, 2012), http://www.csrc.gov.cn/pub/csrc_en/affairs/Cooperation/201203/t20120315_207208.htm. Three of those agreements have been with the SEC, and each one recognizes the importance of the CSRC and SEC providing assistance to the other, "*consistent with the domestic laws of the*[*ir*] *respective states*".[4] More recently, the U.S. and China announced that they both "welcome continued dialogue between the bilateral competent authorities on the oversight of accounting firms providing audit services for

[4] *See MOU Regarding Cooperation, Consultation and the Provision of Technical Assistance Between the CSRC and the SEC* ¶ 2 (Apr. 28, 1994), http://sec.gov/about/offices/oia/oia_bilateral/china.pdf (emphasis added); *see also Terms of Reference for Cooperation and Collaboration* (May 2, 2006), http://sec.gov/about/offices/oia/oia_bilateral/chinator.pdf (agreeing to "provide timely and thorough assistance to one another, *consistent with domestic laws*") (emphasis added); Int'l Org. of Secs. Comm'ns, *Multilateral MOU Concerning Consultation and Cooperation and the Exchange of Information* (7)(a), (b) (May 2002), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf (agreeing to "provide each other with the fullest assistance permissible to secure compliance with the respective Laws and Regulations" of the other signatories).

public companies in the two countries *based on mutual respect for sovereignty and laws*."[5] Joint Press Release, U.S. Dep't of Treasury, The First U.S.-China Strategic and Economic Dialogue Economic Track Joint Fact Sheet (July 28, 2009), http://www.treasury.gov/press-center/press-releases/pages/tg240.aspx (emphasis added). Meetings between CSRC and SEC officials on cross-border issues were held in Beijing in July 2011 and again in Washington in January 2012.

It is in the context of these PRC laws and bilateral negotiations—and as a considered exercise of PRC sovereignty—that the CSRC informed DTTC that DTTC was prohibited from producing the subpoenaed documents without the CSRC's consent, and that the SEC was required to request the documents from the CSRC directly. Ltr. from CSRC to DTTC (Oct. 11, 2011) ("CSRC Letter") (Warden Decl. Exh. 20); *infra* at 11-12.

DTTC's Registration and Reservations of Rights: The fact that DTTC is prohibited from producing documents in response to the Subpoena directly to the SEC came as no surprise to the SEC. Not only are the SEC and CSRC in ongoing negotiations on this very issue, but DTTC also has told the SEC for nearly a decade that PRC law prohibits it from producing documents absent government authorization. Pursuant to Section 102 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "SOX"), Pub. L. No. 107-24, 116 Stat. 745 (2002), all public accounting firms that audit issuer financial statements (including "foreign public accounting firms," such as DTTC, as defined in Section 106(d)) must register and file annual reports with the PCAOB. The PCAOB adopted rules that explicitly permit a foreign public accounting firm to register with the

[5] The SEC Chairman has recognized that the PRC views the SEC's efforts to obtain "direct access to witnesses and information" as "a possible violation of sovereignty and/or national interest," and that, "[i]n such cases" the SEC will "generally work with the jurisdiction's home regulator to pursue our enforcement aims." Ltr. from SEC Chairman Mary L. Schapiro to Hon. Patrick T. McHenry, Chairman of the Subcomm. on TARP, Fin. Servs., & Bailouts of Pub. and Private Programs, Comm. on Oversight and Gov't Reform at 6–7 (Apr. 27, 2011) (Warden Decl. Exh. 12).

Board despite withholding information based on a conflict with non-U.S. laws. *See* PCAOB Rules 2105, 2207.[6] Consistent with the SEC's statutory (and constitutionally required) oversight of the PCAOB, including its authority to approve and alter PCAOB Rules, *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3148 (2010); 15 U.S.C. § 7217(b)-(c), the SEC itself *approved* these conflict of law rules, *see* Order Approving Proposed Rules Relating to Registration System, SEC Release No. 34-48180, File No. PCAOB-2003-03, 68 Fed. Reg. 43,242 (July 16, 2003).

As authorized by these SEC-approved regulations, DTTC declined to sign Exhibit 8.1 to its PCAOB registration form, which calls for consent to "cooperate in and comply with any request for . . . the production of documents." DTTC Application for PCAOB Registration (Apr. 16, 2004) (Warden Decl. Exh. 3). Instead, in compliance with PCAOB Rule 2105, DTTC provided a legal opinion and explained that PRC law prevents DTTC from providing "full cooperation" with overseas document requests, but that DTTC would cooperate with those requests to the fullest extent permitted by applicable laws." *Id.* at 227. The PCAOB (and, by extension, the SEC) allowed DTTC's registration here—along with those of numerous other PRC accounting firms, including each of the other "Big Four" China accounting firms, who included a similar reservation.[7]

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[6] The inclusion of this provision regarding conflicting non-U.S. laws in the PCAOB's rules (approved by the SEC) was a response to sharp criticisms from foreign regulators, including those in the European Union, who pointed out that their home countries' laws prohibited firms from providing certain information to U.S. regulators. *See, e.g.*, Comment Letter of Frits Bolkestein, Member of the European Commission (Apr. 11, 2003), http://pcaobus.org/Rules/Rulemaking/Docket%20001/042_European_Union.pdf.

[7] *See, e.g.*, Ernst & Young Da Hua CPAs Application for Registration, Exs. 8.1 and 99.2 (May 25, 2004) (Warden Decl. Exh. 6); PricewaterhouseCoopers Zhong Tian CPAs Ltd. Co. PCAOB Application for Registration, Ex. 8.1 and 99.2 (Apr. 26, 2004) (Warden Decl. Exh. 5); KPMG Huazhen PCAOB Application for Registration, Ex. 8.1 and 99.2 (Apr. 26, 2004) (Warden Decl. Exh. 4).

Second, and more recently, in 2010, Dodd-Frank amended SOX Section 106 to require foreign firms to designate an agent in the U.S. for the sole purpose of accepting service of requests made pursuant to Section 106. Dodd-Frank § 929J(1)(d). When DTTC filed its designation, it again made clear that it could consent only "to the extent permitted by applicable law of the People's Republic of China." DTTC Section 106 Consent (Warden Decl. Exh. 11).

II. The SEC's Requests For DTTC's Audit Workpapers Relating To Longtop.

DTTC's Engagement by Longtop and the SEC's Investigation: Longtop is a software development company that provides services to banks and insurance companies in the PRC. Longtop is incorporated in the Cayman Islands, but its controlling shareholders are in China, and substantially all of its operations are conducted in China through wholly-owned China subsidiaries. Longtop Form 20-F at 21-24 (Warden Decl. Exh. 9). Longtop conducted an initial public offering in 2007 and originally listed its shares on the NYSE. *Id.* DTTC audited annual financial statements of Longtop from March 31, 2007 through March 31, 2010 that Longtop included in its Annual Reports on Form 20-F filed with the SEC. All of DTTC's audit work was performed in the PRC, and the workpapers documenting that audit work are maintained by DTTC in the PRC.

In conducting its audit of Longtop's financial statements for the year ended March 31, 2011—an audit that was never completed—DTTC became aware of certain management irregularities. *See* DTTC Resignation Ltr. at 1 (May 22, 2011) (Warden Decl. Exh. 13). DTTC responded appropriately by performing follow-up audit procedures, during which it discovered that a bank doing business with Longtop had no record of certain transactions recorded by Longtop, and that confirmations previously received were false. *Id.* DTTC promptly initiated a further review, but Longtop management stopped the audit and forcibly seized certain of DTTC's audit files. *Id.* at 1-2. On May 20, Longtop's Chairman acknowledged to DTTC that

Longtop had reported false revenue, creating false records of cash on its books. *Id.* at 2. On May 22, 2011, DTTC resigned from the audit engagement and advised Longtop's Audit Committee of what it had learned.[8] *Id.*

On May 25, 2011, the SEC initiated a formal investigation regarding Longtop. Exh. A to Declaration of Lisa Deitch (Document No. 1-2). Then, on May 27, 2011, as an accommodation to the SEC and because the SEC was authorized to serve a Section 106 document request on DTTC's appointed Section 106 agent, DTTC's then-U.S. counsel accepted service of the Subpoena. *See* Ltr. from M. Warden to L. Deitch & H. Schwartz (July 8, 2011) (Warden Decl. Exh. 17).

DTTC's Efforts to Provide the SEC with the Documents It Seeks: DTTC acted promptly upon learning of the SEC's Subpoena and did all it could to cooperate to the extent permitted by China law and to facilitate production of the documents to the SEC. As required by China law, DTTC informed the CSRC of the Subpoena and sought its guidance. Ltr. from DTTC to CSRC (June 2, 2011) (Warden Decl. Exh. 14). The CSRC orally declined to authorize a direct production to the SEC. Lip Decl. ¶ 25. Then, on October 11, 2011, after an in-person meeting called by the CSRC with DTTC, the other "Big Four" China firms, and two other China accounting firms, Lip Decl. ¶ 26, the CSRC responded to DTTC's request for guidance in writing—an exceedingly rare step for that agency. Tang Decl. ¶ 22; Feinerman Decl. ¶ 46. Invoking Longtop by name, the CSRC Letter expressly informed DTTC that "CPA firms,"

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[8] By that time, the NYSE already had halted trading in Longtop shares. The NYSE delisted Longtop's stock later that summer. *See* Form 25, Notification of Removal from Listing and/or Registration under Section 12(b) of the '34 Act (Aug. 17, 2011), http://secfilings.nyse.com/filing.php?doc=1&attach=ON&ipage=7775440&rid=23. In December 2011, the SEC revoked the registration of Longtop's U.S. securities based on its failure to file its required annual reports with audited financial statements. SEC Order, *In re Longtop Fin. Techs., Ltd.*, Exchange Act Release No. 65,948, File No. 3-14622 (Dec. 14, 2011), http://www.sec.gov/litigation/admin/2011/34-65948.pdf.

including DTTC, that "*provide audit archives and other documents overseas without authorization* . . . shall be subject to legal liabilities." (Warden Decl. Exh. 20). The Letter further declared that any "[o]verseas securities regulatory agency" (like the SEC) seeking audit workpapers and related documents from within China must "work together and consult" with the CSRC to obtain the documents through "co-operative regulation mechanism[s]." *Id.* Contrary to the SEC's prior suggestion that the conflict between the Subpoena and China law is somehow "vague," SEC Mem. of Points and Authorities in Support of Application for Order to Show Cause and Order Requiring Compliance With a Subpoena at 14 (Document No. 1-1) ("SEC Mem."), the CSRC Letter unambiguously confirms what the CSRC previously had communicated orally: that the conflict is direct, and the prescribed path for the SEC to obtain the documents is through a regulator-to-regulator request to the CSRC.

In the meantime, DTTC prepared to produce the documents to the CSRC in anticipation of the SEC's making the requisite regulator-to-regulator request. To prepare quickly for such a production, DTTC dispatched personnel from Hong Kong and attorneys from Sidley Austin LLP's Hong Kong office to Shanghai to commence a review of potentially responsive documents. The attorneys reviewed potentially relevant documents, copied them, and otherwise prepared them for immediate production. Warden Decl. ¶¶ 17-18. DTTC also urged the SEC to negotiate a method of access to the documents mutually acceptable to both sovereigns. DTTC informed the SEC of its communications with the CSRC and repeatedly advised the SEC (and the CSRC by copy) that, if authorized by the CSRC, DTTC readily would produce the subpoenaed documents to the CSRC. The CSRC and the SEC then could negotiate the proper treatment of the documents. *See* Ltr. from M. Warden to L. Deitch & H. Schwartz (July 1, 2011) (Warden Decl. Exh. 16); Warden Decl. ¶ 2.

Despite DTTC's efforts and knowing full well that the CSRC had prohibited DTTC from producing documents directly to the SEC and that the required process for obtaining the documents was for the SEC to make a direct request to the CSRC, the SEC (to DTTC's knowledge) did not contact, and still has not contacted, the CSRC to request access to the documents. *See* Ltr. from M. Warden to L. Deitch and H. Schwartz (July 8, 2011) (Warden Decl. Exh. 17); Ltr. from M. Warden to H. Schwartz (Nov. 10, 2011) (Warden Decl. Exh. 20); Warden Decl. ¶ 2.[9] Instead, the SEC bypassed the CSRC and initiated this action insisting that DTTC produce the documents directly to the SEC in violation of China law.

The SEC's Circumvention of the Hague Convention: The manner in which the SEC attempted to serve the Order to Show Cause on DTTC was not in accordance with the requirements of the Hague Convention. The SEC's Application proposed that the Order to Show Cause be served on DTTC via e-mail service on its U.S. counsel, notwithstanding the requirements of the Hague Convention, to which both the U.S. and China are signatories. DTTC's U.S. counsel made clear prior to that e-mail service that it was not authorized to accept service of the Order to Show Cause. Ltr. from M. Warden to M. Lanpher (Sept. 12, 2011) (Warden Decl. Exh. 18); *see also* Ltr. from M. Warden to M. Lanpher (Oct. 7, 2011) (Warden Decl. Exh. 19). Pursuant to the SEC's further request (Document No. 7 ("Service Mem.") (Oct.

[9] DTTC respectfully requests that no order granting the SEC's Application or otherwise enforcing the Subpoena be entered unless and until DTTC has had the opportunity to conduct appropriate discovery. *See* SEC's Notice of Filing Proposed Briefing Schedule 4 n.2 (Document No. 19) (arguing that it is "premature to schedule a period of discovery *before* [DTTC] has opposed the Commission's Application") (emphasis added); Scheduling Order 2 (Document No. 22) (denying leave to conduct discovery only "before [DTTC] files its opposition"). For example, to the extent the SEC disputes various contentions made by DTTC in this Opposition, the Court should allow the parties to conduct written discovery related to those issues. If, for instance, DTTC is mistaken in its belief that the SEC has not made a request to the CSRC for access to Longtop workpapers, DTTC seeks discovery of information related to any such request by the SEC. Or, if the SEC's position is that it should not be required to make such a request to the CSRC for access to these documents, DTTC seeks discovery regarding the SEC's submission of document requests to foreign citizens through foreign government agencies.

13, 2011)), this Court issued the Order to Show Cause (Document No.11). The SEC served the Order on DTTC's U.S. counsel via e-mail on January 5, 2012.

ARGUMENT

The Subpoena cannot be enforced by this Court. "[F]ederal courts have drawn a sharp distinction between agency power to *issue* subpoenas and judicial power to *enforce* them." *United States v. Hill*, 694 F.2d 258, 263 (D.C. Cir. 1982) (emphasis in original). The SEC expends substantial effort arguing that it complied with all "administrative prerequisites" before "*issuing* the Subpoena." SEC Mem. at 5-6, 8-10 (emphasis added). It then leaps from this premise to the conclusion that "there is virtually no possibility that in issuing this subpoena, the SEC was acting ultra vires."[10] *Id*. at 9, 11, 13 (internal quotations omitted). But, in so doing, the SEC altogether neglects the fundamental question at issue in this case—whether the Subpoena, regardless of whether it was properly issued, is judicially *enforceable*. It is not, for four independent reasons: (1) the SEC lacks statutory authority to compel the production of documents in China; (2) enforcement of the Subpoena would impose an extraordinary burden on DTTC and its personnel; (3) settled principles of international comity overwhelmingly suggest that the Court should not order DTTC to produce its audit workpapers over the objection of the PRC and expose DTTC to criminal liability, particularly where the SEC has available alternative means of seeking the information that it has declined to invoke; and (4) service of the show cause order was invalid.

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[10] The cases on which the SEC principally relies for this assertion, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984), and *SEC v. Dresser Industries Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc), are entirely beside the point. *Jerry T. O'Brien* addresses "whether the Commission must notify the 'target' of . . . an investigation when it issues a subpoena to a third party." 467 U.S. at 737. *Dresser* addresses a subpoena issued to a U.S. corporation for documents located in the U.S. 628 F.2d at 1371. Neither has any relevance whatever to the enforceability of a subpoena issued to a foreign firm for documents located abroad.

I. This Court Cannot Enforce The Subpoena Because The SEC Has Refused To Proceed Under Section 106, And The SEC's Authority Under The '33 Act And '34 Act Does Not Extend To DTTC's Workpapers Abroad.

A. The Plain Text Of The '33 Act And '34 Act Limits The SEC's Subpoena Authority To The Territorial United States.

In the Subpoena itself and in its filings with this Court, the SEC claims the authority to compel production of DTTC's Longtop-related workpapers and documents from China based on two statutes, the '33 Act and the '34 Act. SEC Subpoena (Declaration of Lisa Deitch, Document No. 1-2, Exh. C); SEC Mem. at 5-6. Because the plain language of Section 19(c) of the '33 Act and Section 21(b) of the '34 Act limit the territorial reach of the SEC's subpoena power to the U.S., however, neither provision authorizes the SEC to subpoena documents from DTTC in China.

The '33 and '34 Acts expressly and unambiguously limit the SEC's subpoena authority to documents within the U.S. Section 21(b) of the '34 Act states that "attendance of witnesses and the production of . . . records *may be required from any place in the United States or any State*." 15 U.S.C. § 78u(b) (emphasis added). Section 19(c) of the '33 Act contains a nearly identical limitation, stating that "attendance of witnesses and the production of . . . documentary evidence *may be required from any place in the United States or any Territory*." *Id.* § 77s(c) (emphasis added). DTTC is not located in the U.S., and none of the subpoenaed documents in DTTC's possession is located in the U.S. Thus, neither the '33 Act nor the '34 Act empower the SEC to enforce its Subpoena against DTTC. This Court need go no further.

D.C. Circuit precedent confirms this result. In *U.S. Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984), the Court of Appeals addressed a subpoena issued by the Commodities Futures Trading Commission ("CFTC") and served on a Brazilian citizen in Brazil. The text of the CFTC statute at issue was nearly identical to Section

19(c) of the ’33 Act and Section 21(b) of the ’34 Act, providing that the CFTC could subpoena documents and testimony “‘*from any place in the United States or any State.*’” *Id.* at 492 (quoting 7 U.S.C. § 15 (emphasis in original)). The D.C. Circuit interpreted “[t]he plain language” of this statute to limit the persons from whom the CFTC could subpoena testimony to “‘*witnesses . . . from any place in the United States or any State*.” *Id.* (emphasis in original). Because the CFTC subpoena sought to compel testimony from a Brazilian citizen served in Brazil, the D.C. Circuit held that the subpoena exceeded the CFTC’s authority and was therefore void. *Id.*

Section 106’s enactment in 2002 is perhaps the best evidence that the SEC did not enjoy subpoena authority over a foreign firm’s audit workpapers prior to the adoption of Sarbanes-Oxley. As described below, Congress passed Section 106 precisely to provide the SEC with the authority to secure documents abroad and did so because the Commission’s then-existing statutory authority, including Sections 19(c) and 21(b), was inadequate. In 2000, the SEC solicited guidance from the accounting profession on “ways to assure access to foreign working papers and testimony from auditors who are located outside the United States.” SEC Concept Release Nos. 33-7801, 34-42430, 65 Fed. Reg. 8896, 8904 (Feb. 23, 2000). The SEC explained that it lacked authority to guarantee access to such information and was forced to rely on “the voluntary cooperation of the company or its foreign auditors” or “domestic compulsory mechanisms or enforcement tools such as memoranda of understanding and other arrangements with non-U.S. regulators.” *Id.* The Director of the SEC’s Division of Enforcement echoed this view in a speech in 2000, in which he declared: “To effectively carry out the Commission’s mission of investor protection, it is critical that the Commission’s staff have ready access to audit workpapers, regardless of where they are located. *Unfortunately, this generally has not been the case*.” Richard H. Walker, Dir. of SEC Div. of Enforcement, *Remarks Before the AICPA*

National Conference on Current SEC Developments (Dec. 5, 2000), http://www.sec.gov/news/speech/spch447.htm (emphasis added).[11]

In response to these concerns, through the enactment of Sarbanes-Oxley, Congress for the first time authorized the SEC to seek, in a limited set of circumstances, audit workpapers and other documents from "foreign public accounting firms," such as DTTC. 15 U.S.C. § 7216. In Dodd-Frank, Congress subsequently expanded the range of foreign workpapers the SEC could seek under Section 106. But Congress *also* recognized that imposing an unqualified duty on foreign firms to produce workpapers in the U.S. could create international conflicts of law. Accordingly, Congress included a safe harbor in Section 106(f) to facilitate foreign subpoena respondents' use of "alternate means" of production—a production to their home regulators—where direct production to the SEC would violate a foreign country's laws. *Id.* § 7216(f). By adopting Section 106(f), Congress recognized that although providing the SEC with access to foreign accounting firms workpapers serves an important goal, imposing an unqualified duty on such firms to produce documents in the U.S. would place those firms in an untenable position where, as here, such a production would violate their home country's laws. Section 106(f) creates a safety valve for these cases, anticipating that the SEC will work with the foreign government in question to secure the documents. The SEC has unequivocally disclaimed reliance on Section 106 in this case. *See* SEC Mem. at 11-12.

The territorial limits of Section 19(c) of the '33 Act and Section 21(b) of the '34 Act are further compelled by the principle that subpoenas cannot be enforced extraterritorially absent an

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[11] *Accord* Charles D. Niemeier, PCAOB Board Member, *Keynote Address on Recent International Initiatives* (Sept. 10, 2008), http://pcaobus.org/News/Speech/Pages/09102008_NiemeierNYSSCPAFAEConference.aspx ("By 2000, the need for better access to foreign auditors and their work papers had reached the point of materially impeding the SEC's effectiveness at enforcing applicable accounting and auditing requirements.").

explicit Congressional indication to that effect. *Nahas*, 738 F.2d at 496; *see also Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.") (internal quotation marks omitted). For example, federal statutes authorize the Department of Justice in antitrust investigations to serve civil investigative demands and the Federal Trade Commission to serve subpoenas on foreign citizens located abroad. 15 U.S.C. § 1312(d)(2) (DOJ); *id.* § 57b-1(c)(6)(B) (FTC). In fact, in Dodd-Frank, Congress explicitly granted the SEC extraterritorial power in an unrelated setting. Section 929P of Dodd-Frank grants the SEC "extraterritorial jurisdiction" to bring securities fraud actions under the '33 Act or '34 Act against foreign defendants based on foreign investors' purchases of securities that occur abroad. *Id.* § 77v(c) ('33 Act); *id.* § 78aa(b) ('34 Act). Set against the backdrop of these statutes, the absence of such language in Section 19(c) of the '33 Act and 21(b) of the '34 Act is decisive. But Congress has done much more than remain silent on whether Sections 19(c) and 21(b) have extraterritorial reach; both statutes *expressly* reject it. The SEC does not have the authority it seeks to exercise here.

B. Service On DTTC's Then-U.S. Counsel Does Not Bring DTTC's Longtop Workpapers Within The Territorial Reach Of The SEC's Subpoena Authority.

The SEC devotes an extraordinary amount of effort to the fact that experienced SEC defense counsel that previously represented DTTC accepted service of the Subpoena rather than requiring the Staff to attempt to serve it on DTTC in China or through Section 106, apparently premised on the notion that acceptance of service by counsel in the U.S. sweeps within the SEC's subpoena power all of DTTC's Longtop documents located in China that are otherwise outside its scope. Thus, according to the SEC's theory, service on DTTC's U.S. counsel

obliterated the territorial limits in the '33 and '34 Acts and the carefully-crafted provisions in Section 106 that authorize access to workpapers of foreign firms. This argument is wrong.

The manner in which the SEC accomplished service does not—and cannot—expand territorial scope of the SEC's subpoena authority under the '33 and '34 Acts.[12] The text of those statutes is clear—the SEC's subpoena extends only to "witnesses and . . . records . . . *in the United States*." 15 U.S.C. § 78u(b) (emphasis added); *see* § 77s(c) ("witnesses and . . . documentary evidence … in the United States"). Those provisions do not vary the scope of the SEC's subpoena authority depending on where service of the subpoena occurs. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). That should end the debate.

Notwithstanding this plain language, a handful of courts have interpreted statutory text that expressly limits administrative subpoena authority to the territorial U.S. to grant agencies subpoena power over foreign documents in circumstances where a person with actual control of the documents is properly served in the U.S. *See Fed. Maritime Comm'n v. DeSmedt*, 366 F.2d 464 (2d Cir. 1966); *SEC v. Minas de Artemisa*, 150 F.2d 215 (9th Cir. 1945). Those cases are

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[12] The SEC's contention that DTTC has not objected to the "validity" of the subpoena is factually mistaken and legally irrelevant. *See* SEC Mem. at 7. On the day DTTC's response to the Subpoena was due, DTTC objected to the Subpoena in writing to the extent it claimed broader authority over DTTC than DTTC's limited Section 106 consent provides. *See* Ltr. from M. Warden to L. Deitch (July 8, 2011) (Warden Decl. Exh. 17). Thus, critically, DTTC's waiver of service is nothing more than an acknowledgment that service could have been made through Section 106, with the limitations on the SEC's authority that such service entails. Gibson Dunn's acceptance of service does not waive any objections to substantive issues, even as to personal jurisdiction or venue. Fed. R. Civ. P. 4(d)(5). In addition, absent express statutory text to the contrary, the SEC cannot use a waiver argument "to strip federal courts of authority to determine whether the subpoena the agency seeks to enforce is lawful." *EEOC v. Lutheran Social Servs.*, 186 F.3d 959, 962 (D.C. Cir. 1999).

wrongly decided because they elevate policy considerations over plain text. In the leading example, a divided panel of the Second Circuit in *DeSmedt* refused to enforce express territorial limitations on the Federal Maritime Commission's subpoena authority set forth in Section 27 of the Shipping Act (which is nearly identical to Sections 19(c) and 21(b)), reasoning that "'plain meaning approach [to statutory interpretation] has long since ceased to have this court's adherence.'" 366 F.2d at 469. That tortured approach to statutory construction is flatly wrong. As the Supreme Court and this Circuit have subsequently made clear on countless occasions, where "'the language at issue has a plain and unambiguous meaning'. . . . our inquiry ends and we apply the statute's plain language." *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

The D.C. Circuit has not squarely addressed the proper interpretation of territorial limitations such as those in the '33 and '34 Acts and whether Congress should be taken at its word when it limits an agency's subpoena authority to the United States. In a *per curiam* opinion, the D.C. Circuit cited *DeSmedt* with approval in enforcing an administrative subpoena for documents abroad. *Civil Aero. Bd. v. Deutche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 953 (D.C. Cir. 1979). But just one year later, the Court of Appeals in *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), appropriately criticized the *per curiam* opinion as applying *DeSmedt* "virtually without analysis," *id.* at 1308. More significantly, the Court quoted the dissent in *DeSmedt* at length, which had admonished the *DeSmedt* majority for requiring "sixteen pages" of legislative history and policy arguments, *DeSmedt*, 366 F.2d at 474 (Moore, J., dissenting), to "'demonstrate that the "plain meaning" of "United States" is "world."'" 636 F.2d at 1309 n.34 (citing *DeSmedt*, 366 F.2d at 474 (Moore, J., dissenting)). The Court held that *DeSmedt* and *Civil Aeronautics Board* "by no means

suggested that Congress intended [an agency's] subpoena power to have no place or manner limits whatever." *Id.* at 1309.

The issue of the meaning of the plain language of such statutes that DTTC raises here was not presented in *Compagnie de Saint-Gobain* because the respondent "did not [argue] that documents located abroad were beyond the reach of the Commission's subpoena authority." *FTC v. Compaignie de Saint-Gobain-Pont-à-Mousson*, No. 78-2160, 1979 WL 4865, at *1 (D.C. Nov. 26, 1979) (per curiam). Accordingly, although the D.C. Circuit expressly questioned the *DeSmedt* result, it had no opportunity to rule on the proper interpretation of the territorial limitations that appear in statutes like Sections 19(c) and 21(b). DTTC makes that argument here. The plain text of these statutes precludes their extraterritorial application, and the muddy interpretation of similar territorial limitations in administrative statutes imposes no barrier to that conclusion.

In any event, even if *DeSmedt* and similar cases properly ruled that "United States" means "world," they do not apply here. Courts that have allowed federal agencies to exercise administrative subpoena authority over foreign firms based on service in the U.S. have done so only when service of a subpoena to an entity is made on a party that *actually controls* the entity's documents to be produced.[13] *DeSmedt*, 366 F.2d at 464 (service on officers or agents of foreign flag shipping companies maintaining offices and doing business in the United States, *see Ludlow Corp. v. DeSmedt*, 249 F. Supp. 496 (S.D.N.Y. 1966)); *Minas de Artemisa*, 150 F.2d at 217 (service on president and ultimate controlling shareholder of Mexican mining corporation); *Compagnie de Saint-Gobain*, 636 F.2d at 1324 (stating that if the FTC could "obtain personal

[13] The SEC relies on the tautology that "it has always been the law that foreign public accounting firms . . . can be subject to properly issued subpoenas." SEC Mem. at 12. But this just begs the question. The subpoenas in the cases cited above were issued and served in the U.S. on persons with control over a foreign firm's documents. The Subpoena in this case was not.

service upon the president, an officer, or a director of SGPM within the territorial boundaries of the United States, it could validly obtain a judicial enforcement order for that subpoena").

Service on DTTC's then-U.S. counsel cannot reasonably be analogized to service on a person with actual control over DTTC's documents because counsel had no such authority. "Control" is defined "as the legal right, authority, or ability to obtain documents on demand." *U.S. ITC v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005). DTTC's outside counsel had neither the practical ability nor the legal right to demand DTTC's documents from the firm and, thus, had no such control. *See United States v. IBM Corp.*, 477 F. Supp. 698, 698–99 (S.D.N.Y. 1979) (holding that a party that is "neither an officer or director" or principal of a firm can "have possession and control only over documents maintained in his own files," not all records of the firm as a whole).

The SEC's pattern of enforcing the '33 and '34 Acts confirms this point. Prior to the enactment of Section 106, with only the '33 and '34 Acts at its disposal, the SEC sought to subpoena foreign documents from foreign firms through the laborious and time-consuming effort of "establish[ing] border watches" and attempting to serve a subpoena on a partner of the firm while he or she traveled to the U.S. D. Stuart & C. Wright, *The Sarbanes-Oxley Act: Advancing the SEC's Ability to Obtain Foreign Audit Documentation in Accounting Fraud Investigations*, 2002 Colum. Bus. L. Rev. 749, 767-69. This practice demonstrates that the SEC long believed that the only way it could potentially exercise subpoena authority over a foreign firm's documents abroad was to achieve personal U.S.-based service on a principal of a foreign firm, and hope a court would follow *DeSmedt* and enforce the subpoena.

II. The Subpoena Seeks To Impose An Extraordinary, Undue Burden On DTTC, And The Court Should Not Use Its Judicial Power To Enforce It.

The Court should deny the SEC's Application for another, independent reason: compliance with the Subpoena would impose the highest conceivable burden on DTTC—possible dissolution of DTTC as a firm and imprisonment or other sanction of the involved DTTC personnel.

It is well-settled that the court's judicial power should not be used to enforce an administrative subpoena "if the demand is unduly burdensome" or "unreasonable." *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977) (en banc) (citing *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946)); *Administrative Procedure Act: Legislative History, 79th Congress* 206 (Pat McCarran, ed. 1946) (S. Rep. No. 79-752 (1945)) (discussing statutory limitations in the APA designed to "prevent the issuance of improvident subpenas or actions by the agency requiring a detailed, unnecessary or burdensome showing of evidence"). This inquiry is entirely separate from the question of relevance. Even if an administrative subpoena seeks documents that are relevant to the agency's investigation, the subpoena will not be enforced if the burden imposed would be unreasonable. *See United States v. Legal Servs. for N.Y. City*, 249 F.3d 1077, 1084 (D.C. Cir. 2001) (analyzing "burden and relevance separately because subpoenas might be relevant but still unduly burdensome").

Because all subpoenas impose some level of burden on the respondent, the bar for demonstrating that a subpoena is "unduly" burdensome is admittedly high. This case, however, represents the rare occasion when that standard is indisputably met. As the D.C. Circuit has recognized, an administrative subpoena is unduly burdensome when it "threatens to unduly disrupt or seriously hinder normal operations of a business." *Texaco, Inc.*, 555 F.2d at 882; *see U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Cos.*, 390 F. Supp. 2d 27, 35 (D.D.C.

2005) (modifying administrative subpoena as unduly burdensome). Here, compliance with the Subpoena would do far more than "hinder" DTTC's operations. The China government has made explicit that if DTTC were to produce the subpoenaed workpapers to the SEC, such an act would violate PRC law, subjecting DTTC to possible *dissolution* and its personnel involved in the production to possible *imprisonment*. In this respect, the SEC Subpoena "go[es] to the jugular," of DTTC, which it cannot do. *United States v. Firestone Tire & Rubber*, 455 F. Supp. 1072, 1084 (D.D.C. 1978) (internal quotation marks omitted).

The CSRC, in consultation with the MOF, has made the express determination in its October 2011 letter that DTTC's production of documents in response to the Subpoena would violate China laws. Ltr. from CSRC to DTTC (Oct. 11, 2011) (Warden Decl. Exh. 20). The CSRC Letter directly refutes the SEC's contention that it was only "possible" that China law "*may* prohibit [DTTC] from disclosing responsive documents to the Commission," and that this Court should enforce the Subpoena in the absence of certain violation of China law. *See* SEC Mem. at 14 (emphasis in original). The CSRC letter, issued in direct response to this very Subpoena, fully distinguishes this case from others in which foreign subpoena respondents made only "'[i]llusory references to foreign secrecy without any specifics,'" *id.* (quoting *SEC v. Euro Sec. Fund*, No. 98-civ. 7347, 1999 WL 182598, at *3 (S.D.N.Y. Apr. 2, 1999)).

The CSRC's directive comes from a clear line of established China law. Regulation 29 declares that certain material, *including audit workpapers*, "shall not be carried or shipped overseas, or delivered to overseas institutions or individuals" without express approvals from PRC authorities. PRC Reg. 29, Art. 6 (Tang Decl. Exh. 2, Item 19); Tang Decl. ¶¶ 17-18, 35. This approval requirement is the natural consequence of a broader framework of China law imposing strict controls on the disclosure of sensitive material, and not just to foreign regulators. As Professor Tang elaborates in his declaration:

- Article 25 of the State Secrets Law prohibits any "organization or individual . . . [from] carrying or transmitting "State secrets out of China without the approval of relevant regulatory authorities. Tang Decl. ¶ 37.

- Articles 1, 5, and 6 of the PRC Supreme People's Court's Interpretation on Certain Issues Regarding Application of Law in Deciding Cases Involving Stealing, Spying into, Buying or Unlawfully Providing State Secrets or Intelligence Overseas and Article 111 of the PRC Criminal Law prohibit the overseas transmission of State secrets as well as "Intelligence and Other Items" that, while not rising to the level of a State secret, nonetheless concerns State security and interests. *Id.* ¶¶ 16, 38.

- Audit workpapers are "archives" and thus are prohibited by the PRC Archives Law from being transferred overseas without permission. *Id.* ¶¶ 42-43.

- PRC laws for CPAs impose a special "obligation" on accountants "to keep confidential their clients' trade secrets that they come to know in carrying out their business." PRC CPA Law, art. 19 (Tang Decl. Exh. 2, Item 8); Tang Decl. ¶¶ 44-47.

- Article 253(A) of the PRC Criminal Law prohibits employees of any China entities from "illegally providing citizens' personal information obtained during the course of performing duties or providing services." PRC Criminal Law, art. 253(A) (Tang Decl. Exh. 2, Item 4); Tang Decl. ¶ 49.

Sanctions for violating these laws are severe, including suspension and dissolution of accounting firms that violate the law, and imprisonment of individual violators. Tang Decl. ¶¶ 51-59. Enforcement of the SEC's Subpoena and production directly to the SEC would imperil DTTC's very existence and the physical liberty of those employees involved.

The burden that the Subpoena would impose upon DTTC is all the more unreasonable because the SEC has readily available alternative means of seeking the information (*i.e.*, a direct request to the CSRC, including via a Section 106 request or a negotiated regulator-to-regulator resolution). Thus, there is no justifiable basis for imposing on DTTC the ultimate burden of disobeying its primary regulator and violating its home country's laws.

III. Established Principles Of International Comity Bar Enforcement Of The Subpoena.

Well-established, judicially-enforceable principles of international comity impose an independent bar against the extraterritorial enforcement of the SEC's Subpoena. Where, as here, a court is asked to enforce against a foreign entity a subpoena that would require the entity to violate its home country's laws, federal courts consider whether the federal law should be enforced or the foreign sovereign's laws should be respected. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 164 (1895). This is especially so when the subpoena is to be enforced against an entity domiciled in the foreign nation and seeks information contained within the foreign nation's borders. As the D.C. Circuit has explained, federal courts take the risk of a foreign law violation seriously because "it causes . . . considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question." *In re Sealed Case*, 825 F.2d at 498.

Federal courts apply a multi-factor test to resolve a federal agency's demand that a subpoena recipient violate another nation's laws.[14] Factors include the citizenship of the respondent; "whether the information originated in the United States"; and whether the agency attempting to enforce the subpoena has available "alternative means of securing the information." Restatement (Third) of Foreign Relations Law § 442(1)(c) (1986). The two factors typically given greatest weight are "(1) the competing interests of the nations whose laws are in conflict, [and] (2) the hardship of compliance on the party or witness from whom discovery is sought." *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523

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[14] In this case, the present record clearly establishes that no statutory authority exists to enforce the Subpoena and that it otherwise would be improper to enforce the Subpoena. Even so, it may not be possible to apply the comity test with full "'deliberation and precision'" without first allowing the parties to conduct limited discovery of several key issues addressed herein. *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997).

(S.D.N.Y. 1987); *see First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998) (citing *Minpeco* with approval).[15] The balance of all these factors weigh heavily against the Subpoena's enforcement, and principles of international comity preclude such enforcement.

A. Citizenship Of The Respondent And Location Of The Information.

International comity principles apply wherever there is a conflict of foreign and domestic law, but those principles especially require U.S. courts to stay their hand where the entity subject to that conflict is not a U.S. citizen and where the information at issue in the dispute is not located in the U.S. *See Compagnie Francaise D'assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 31 (S.D.N.Y. 1984). DTTC's citizenship and the location of the information plainly favors DTTC. DTTC is a foreign entity, which "militates against issuance of a production order" under the Restatement test.[16] *Id.* As the SEC concedes, all of the information it seeks from DTTC's possession—thousands of pages of workpapers and the information contained therein—was prepared and is located in the PRC. SEC Mem. at 19. This weighs strongly against enforcing the Subpoena. *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 152 (S.D.N.Y. 2011) (M.J.); *Gucci Am., Inc. v. Curveal Fashion*, No. 09-Civ.-8458, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (same).

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[15] Courts also sometimes consider "the degree of specificity of the request." Restatement (Third) of Foreign Relations Law § 442(1)(c). DTTC does not contend that the Subpoena is vague or unspecific, but that factor is far from dispositive.

[16] The Commission argues that, despite DTTC's Chinese citizenship, this Court should "minimize[e] any protection [DTTC] should get for being foreign" because DTTC "has also long benefited from its international connections." SEC Mem. at 20. This "international connection" theory is not found in the framework of comity arguments, even though every case involves the U.S. in some respect; otherwise a U.S. court would not be reaching comity concerns. In stark contrast to the instant case, the only authority the Commission cites for this claim, *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981), involved a foreign defendant that had a U.S. subsidiary and was itself the subject of the SEC's investigation of a securities fraud. Neither of those facts is true here. *See Deloitte & Touche*, 623 F. Supp. 2d at 41 (holding that member firms in the Deloitte network are separate and independent legal entities).

B. Sovereign Interests.

The relative strengths of the respective sovereign interests of the PRC and the U.S. prohibit enforcement of the Subpoena, as well. The PRC consistently has asserted a strong interest in protecting its sovereignty from foreign government intrusions and in enforcing its State secrets and archives laws, which expressly apply to audit workpapers, and has exercised its sovereign right to channel all such information requests from foreign governments through its principal securities regulator, just as many other foreign governments have done. Tang Decl. ¶ 62. By unilaterally issuing the Subpoena to DTTC and commencing this litigation without first seeking the assistance of the CSRC, the SEC seeks to intrude on China's sovereign interests and require the production of documents irrespective of China's State secrets and archives laws and in contravention of an express determination by the China government.

DTTC recognizes that the SEC has an interest in obtaining documents to carry out its investigative function. The U.S.'s interest in this subpoena enforcement action, however, is much more circumscribed. Because the SEC has available statutorily prescribed, alternate means of seeking these documents that the SEC has not pursued, and because the SEC may well obtain the documents simply by continuing in good faith the diplomatic discussions it had previously commenced, the only U.S. interest at issue here is the SEC's ability to seek documents from a foreign public accounting firm by bypassing the procedures recently established by Congress for obtaining such documents in Sarbanes-Oxley and Dodd-Frank. That interest is exceedingly weak, and far outweighed by the other sovereign interests at issue—both of the PRC and the U.S. as a whole.

1. China's Interests In Maintaining The Integrity Of Its Laws Respecting State Secrets, Archives, And Privacy.

China has a strong sovereign interest in preventing other states from exercising governmental functions inside its borders without the China government's consent. *See* Feinerman Decl. ¶¶15-17. China understandably views an overseas regulator's inspection of workpapers prepared in the PRC as an intrusion on that territorial sovereignty. *Id.* The PRC thus has chosen to channel all foreign securities regulators' requests for documents in the PRC through the CSRC. *Id.* ¶ 45. The SEC deliberately has bypassed that structure. That unexplained affront to China's sovereignty alone should halt enforcement of the Subpoena. In addition, the China laws that prevent DTTC from making a direct production to the SEC are hardly an aberration in the international community. China is a developing civil law system that follows traditional European and Asian legal regimes in taking a territorial approach to sovereignty that resists intrusions into matters within its sovereign borders. *Id.* ¶¶ 10, 15-17. In the field of securities law, China is committed to establishing a regulatory regime investors can rely upon, and views its regulation of sensitive economic and commercial information as critically important to furthering that aim. *Id. ¶¶* 6, 27-28.

In China, the question whether a particular document is a protected "State secret" or "archive" is the sole province of the PRC government. *Id.* ¶ 39. China law entrusts regulators such as the CSRC to analyze documents to determine whether they are protected. This is a particularly important government function in the PRC because the State participates in the investment and control of numerous China companies (including many of Longtop's customers, whose information is contained in DTTC's audit workpapers). *Id.* ¶ 38. As a result, matters relating to the "national economic and social development" can be, and are, deemed State secrets. *See, e.g.*, PRC State Secrets Law, arts. 2, 9 (Tang Decl. Exh. 2, Item 9); Feinerman

Decl. ¶¶ 37-38. Indeed, even information considered to be "basic economic data" or "ordinary business information" in the U.S. can be a "potential state secret" in China. *China's Information Control Practices and the Implications for the United States: Hearing Before U.S.-China Econ. & Sec. Review Comm'n*, 111th Cong. 38 (2010). Commercially sensitive information routinely found in audit workpapers readily meets this definition. Moreover, the CSRC has expressly and publicly advised the SEC that it is "strongly opposed" to "inspection on any Chinese accounting firm before any consensus has been reached between China and the US" pursuant to the MOUs the CSRC and SEC have adopted under "principles of . . . mutual sovereignty." Ltr. from CSRC to SEC re: Release No. 34-59792; File No. PCAOB 2008-06 (May 15, 2009) (Warden Decl. Exh. 7).

The SEC compares the PRC laws at issue here to "blocking statutes" enacted by France and other foreign nations. SEC Mem. at 15. But that analogy is wrong. Blocking statutes are designed for the express purpose of protecting a foreign nation's citizens from broad discovery rules in the U.S. By contrast, the PRC laws prohibit disclosure of protected information to anyone, inside or outside China, not just to overseas regulators; the CSRC's October directive and Regulation 29 are merely the specific laws relating to accounting firms that fall within these more general prohibitions. Tang Decl. ¶ 10; *Tiffany*, 276 F.R.D. at 157 (finding that China regulations "meant to foster a greater trust in the Chinese banking system" are "not comparable" to France's blocking statute).

Ultimately, the SEC refuses to respect China's interests in its commercial secrecy laws at all, claiming it is "entirely unclear what national interests of China are truly at stake." SEC Mem. at 17. What possibly could be unclear? DTTC is not arguing that China *might* have interests against producing the documents. China itself has said so in numerous, duly-enacted PRC laws and in a letter written in response to this very Subpoena. Indeed, the SEC even

suggests that "one might naturally conclude that it is in China's interest to have documents produced." *Id.* But the only "one" who can "naturally" speak for China is China, and China has clearly spoken.

China is not alone. Other nations also restrict disclosure of information contained in audit workpapers to U.S. regulators and require production requests to be channeled through the country's securities regulator. For example, in 2003 the German securities regulator Institut der Wirtschaftsprüfer (German Institute of Public Auditors) ("IDW") informed the PCAOB of the numerous and significant legal barriers to permitting inspection of and document production from German auditing firms.[17] The PCAOB acknowledges that even today, nearly nine years later, German and numerous other EU national regulators continue to deny the PCAOB access to inspect audit firms organized within their respective jurisdictions. *See* PCAOB, *List of Issuer Audit Clients of Non-U.S. Registered Firms in Jurisdictions Where the PCAOB Is Denied Access to Conduct Inspections by Jurisdiction and Firm*, http://pcaobus.org/International/Inspections/Pages/ IssuerClientsWithoutAccessListGrouped.aspx (last visited Apr. 11, 2012).

Even fellow common law countries require production requests be channeled through the country's securities regulator and reserve the right to refuse such requests based on sovereignty concerns. After the Dodd-Frank amendments enhanced the PCAOB's ability to extend

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[17] The IDW stated that "the German legal system differs so significantly from that of the U.S." that proposed rules relating to PCAOB "inspection, investigation and adjudications would be legally impossible and implementation of others would place extremely onerous burdens on German public accounting firms." IDW Comment Letter on PCAOB Rulemaking Docket Matters Nos. 005, 006, and 007 at 2 (Aug. 18, 2003) (Warden Decl. Exh. 2). The IDW explained that German auditors—like their Chinese counterparts—are "subject to professional confidentiality obligations," the violation of which constitutes a criminal offense. *Id.* German legislation implementing the EU Directive 95/46/EC on data privacy presented another barrier to production of documents from German auditing firms, *id.* at 4, a fact that the European Commission reaffirmed in a separate letter to the PCAOB. European Commission Internal Market DG Comment Letter on PCAOB Rulemaking Docket No. 001 at 2 (Mar. 28, 2003) (Warden Decl. Exh. 1).

reciprocal treatment to foreign regulators in 2010, the PCAOB concluded its first cooperation protocol under its expanded authority with the United Kingdom's securities regulator, the Professional Oversight Board ("POB") on January 10, 2011. Press Release, PCAOB, PCAOB Enters into Cooperative Agreement with United Kingdom Audit Regulator (Jan. 10, 2011), http://pcaobus.org/News/Releases/Pages/01102011_UK.aspx. Even this much-touted resolution to the legal impediments to audit firm inspections did not grant the PCAOB permission to issue the sort of unilateral, coercive demands for the direct production of documents that the SEC seeks to enforce in this case. Instead, the PCAOB-POB cooperation protocol makes clear "that audit working papers and other documents requested by the PCAOB can only be transferred to the PCAOB (i) by the POB; (ii) by the firm with the clear agreement of the POB; or (iii) in exceptional cases, directly to the PCAOB by the firm" subject to several pre-conditions not applicable in this case. *Statement of Protocol between the Public Company Accounting Oversight Board of the United States and the Professional Oversight Board of the United Kingdom on Cooperation and the Exchange of Information Related to the Oversight of Auditors*, art. III(B)(4), n.3 (Jan. 10, 2011) (Warden Decl. Exh. 10). Moreover, the POB expressly reserved the right to "refuse to act on a request from the PCAOB, or direct that a firm refuse to act on such a request where . . . it concludes that the provision of information would *adversely affect the sovereignty, security or public order* of the European Union or of the United Kingdom." *Id.* art. III(B)(5), n.4 (emphasis added).

Thus, the CSRC's approach to controlling access to auditor workpapers is not an outlier in the international community. Feinerman Decl. ¶ 6. Far from it. Indeed, there appears to be scant daylight between the CSRC's requirements for production of audit workpapers from audit

firms organized under its laws to a foreign regulator and those imposed by the United States' closest allies.[18]

In fact, there are any number of ways in which the U.S. government restricts the disclosure of information to China. For example, U.S. law imposes remarkably complex and stringent export controls that require advance U.S. government approval in the form of export licenses to export a broad range of U.S.-origin goods, information, technical data, or other assistance that the U.S. government has determined have both commercial and military uses. *See generally* Export Administration Regulations, 15 C.F.R. pt. 730. These controls are country-specific, and with regard to China, apply to a range of seemingly harmless and widely available items or technology. *See id.* pt. 774 (Supp. 1) (Commerce Control List); *id.* pt. 738 (Supp. 1) (Commerce Country Chart, Entry for "China"); *see also* Alex Capri, *Growing U.S.-China Trade Highlights Cumbersome Export Controls*, Forbes.com (June 21, 2011), http://www.forbes.com/2011/06/21/china-export-controls-opinions-contributors-kpmg.html (noting that "something as innocuous . . . as the ubiquitous SIM card, which can be found in everything from mobile phones to smart cards and even some electric toys" can require a special license to export to China). To be sure, the PRC government and the U.S. government draw the lines differently with respect to what information they deem to be sensitive or secret and whether and how that information can be disclosed to or provided to the other country based on its own assessment of its own national interest. And, for that matter, the respective governments might disagree with where the other draws the line. But the fact that the U.S. might disagree with or make different judgments

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[18] To the extent the SEC disputes this, DTTC seeks discovery from the SEC information regarding which foreign regulators require SEC requests for audit workpapers to be made through the foreign regulator, which require permission from the foreign regulator for a direct production to the SEC, and which, if any, allow a direct production to the SEC without any foreign regulator involvement.

regarding what information is sensitive or secret in no way diminishes the importance of the Chinese national interests, particularly where, as here, they have been expressly articulated by the PRC government.

U.S. courts "have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own." *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962). Every sovereign must itself strike a balance between the competing interests of privacy and transparency. And it is well established that, especially in the context of "securities exchanges and securities transactions," the "regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, . . . [and] what discovery is available in litigation." *Morrison*, 130 S. Ct. at 2885. Thus, it is not unique or unusual for U.S. courts to decline to enforce subpoenas out of deference to foreign laws that restrict the disclosure of sensitive commercial information. *See, e.g., United States v. First Nat'l Bank of Chi.*, 699 F.2d 341, 346 (7th Cir. 1983) (Greek Bank Secrecy Act); *Linde v. Arab Bank, PLC*, 262 F.R.D. 136, 149-51 (E.D.N.Y. 2009) (Israeli bank confidentiality laws); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 118 F.R.D. 331, 332 (S.D.N.Y. 1988) ("*Minpeco II*") (Swiss bank secrecy laws).

In light of these principles, the SEC's attempts to question the "legitima[cy]" of China's interests in its particular form of disclosure are entirely unavailing. SEC Mem. at 18. The SEC provides no basis for this Court to second guess the judgments made by the PRC government (indeed, that the SEC seeks to use this Court's offices to influence its ongoing diplomatic negotiations is reason enough for this Court to decline to enforce the Subpoena). The CSRC has made its position clear in writing, and although the SEC may disagree with that position and might strike the balance between secrecy and disclosure differently, this Court has no occasion to evaluate the sovereign choice that the PRC government has made.

2. U.S. Investigative Interests.

DTTC does not dispute that the SEC has an interest in obtaining the subpoenaed documents in connection with its investigations. The question is whether the overall U.S. interest is sufficient to require the violation of the clearly articulated interests of the Chinese government. It is not.

Indeed, the overall U.S. interest—and the relative importance of the SEC's interest in compelling production of documents abroad in these circumstances—already has been determined by Congress and reinforced by SEC rulemaking, and that determination contradicts the SEC's position here. Congress's decision just two years ago to provide a safe harbor under Section 106(f) demonstrates that the U.S. interest here is to accommodate foreign legal processes and give appropriate deference to foreign regulators in situations just like this one—even where, everything else being equal, the SEC might want to secure the documents directly from parties located abroad. And the SEC itself has approved PCAOB registration rules allowing China accounting firms to register with reservations against producing documents. Thus, the SEC already has decided that these accounting firms *can* sign audit opinions to be used by SEC registrants *without* subjecting those firms to stringent production requirements that would violate China law. The SEC is engaging in an after-the-fact attempt in litigation to rebalance and recharacterize those interests, but the paramount U.S. interest, as articulated by Congress and, previously, the SEC itself, is to work with foreign regulators, not around them.

Moreover, the SEC does not address the long-established U.S. interest in and policy of negotiating disputes over the production of foreign documents through government-to-

government negotiations. The SEC's initiation of this lawsuit was a radical departure from that approach.[19]

Finally, the SEC's position that its investigative interests are so urgent as to "far outweigh" China's interests in maintaining its sovereign interest is supported neither by the facts nor the law. SEC Mem. at 16. As an initial matter, there is no urgency. The absence of an immediate production of the subpoenaed documents would pose no imminent danger to U.S. investors. DTTC blew the whistle on the fraud at Longtop, and the SEC has deregistered Longtop securities.

Moreover, the two cases cited by the SEC do not support enforcing the Subpoena over the clear and express objection of the PRC government here. In *SEC v. Euro Security Fund*, No. 98-CIV-7347, 1999 WL 182598 (S.D.N.Y. Apr. 2, 1999), the court enforced an SEC subpoena, but did not balance the competing sovereign's interest at all because the respondent had made only a "generic appeal to 'Swiss secrecy'" and failed to "identif[y] a single specific requirement of Swiss law that conflicts with the discovery sought by the SEC. *Id.* at *3-4. In *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981), the court enforced an SEC subpoena where the Swiss government had been "made expressly aware of" the subpoena and "expressed no opposition." *Id.* at 117. Here, DTTC has informed the Court of numerous PRC laws that prevent its production to the SEC, and the CSRC has been informed of the Subpoena and expressly instructed DTTC not to produce documents directly to the SEC.[20]

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[19] To the extent the SEC challenges this assertion, DTTC seeks discovery regarding the SEC's policies and practices in resolving similar conflicts with foreign regulators.

[20] *Banca Della Svizzera Italiana* is additionally inapposite because there the respondent was a target of an insider trading investigation who had "acted in bad faith" and "made deliberate use of Swiss nondisclosure law to evade . . . the strictures of American securities law against insider trading." 92 F.R.D. at 117.

In any event, the U.S. interest alone cannot compel production where so many other factors in the comity analysis point strongly against the SEC's position. *See, e.g., Tiffany*, 276 F.R.D. at 160 (refusing to enforce a subpoena on comity grounds even though the "importance of the information" favored the plaintiffs because "other factor[s] weigh[ed] in favor" of non-enforcement); *Minpeco II*, 118 F.R.D. at 332 (same).

C. Alternate Means Of Acquiring The Information.

Principles of international comity also indicate that the SEC's Subpoena should not be enforced because the SEC has available other means of obtaining the information it seeks, without putting DTTC and its personnel in the position of violating China law.

As SEC Enforcement Manual § 3.3.6.3 explains, the SEC "is able to obtain testimony from witnesses residing overseas through a variety of mechanisms," including "information sharing arrangements with foreign counterparts such as memoranda of understanding; mutual legal assistance treaties; letters rogatory; ad hoc arrangements; and voluntary cooperation." As set out above, the SEC has been pursuing just this course by negotiating with the CSRC on a bilateral basis to secure appropriate access to the information of all foreign public accounting firms. In addition, of course, the SEC has the statutory alternate means of production in Section 106(f) at its disposal. The SEC has not requested that the CSRC request Longtop workpapers from DTTC for potential production to the SEC, notwithstanding DTTC's efforts to facilitate coordination between the SEC and the CSRC, and, to the best of our knowledge, it has not invoked any of its existing MOUs with China or pursued an ad hoc arrangement.[21] The Court should not use its judicial power to compel a violation of China law when the SEC has bypassed

[21] This is particularly troubling where the CSRC has stated that it "provides cross-border enforcement assistance to overseas regulators" through "the framework of bilateral MOUs." CSRC Annual Report at 58. In fact, in 2010, the CSRC reported that it received 33 such requests and resolved 16 of them that year. *Id*.

these entirely appropriate alternate means to seek the documents at issue.[22] *See Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 251-52 (D.D.C. 2011) (holding, in accordance with the Statement of Interest filed by the U.S., that when "'comity concerns'" are present, a party seeking to compel discovery from a foreign litigant should first exhaust "all other reasonably available means [of] acquir[ing] such information").

D. Weighing Of Hardships.

Finally, consideration of hardship entirely favors DTTC. If DTTC produces documents directly to the SEC, it will violate PRC law and suffer consequences that would impose the intolerable hardships of (1) dissolution or suspension of DTTC and (2) prison sentences, including and up to life imprisonment, for DTTC partners and employees involved in any violation.

"[F]ear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Societe Internationale v. Rogers*,357 U.S. 197, 211 (1958); *see First Nat'l Bank of Chi.*, 699 F.2d at 345-46 ("'[A] state will be less likely to exercise jurisdiction, where there is a possibility that obedience to its command may put an alien in jeopardy under the criminal laws of his own country . . . .'"). The PRC vigorously guards its sovereign interests in State secrets, archives, and other protected information, and has a history of punishing individuals who have violated these requirements, including Chinese Americans.[23] Tang Decl. ¶¶ 39, 55-60.

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[22] To the extent the SEC contends that it does not have a viable "alternate means" of production in this case, whether through Section 106(f) or otherwise, DTTC seeks discovery regarding to what extent, if any, the SEC has sought the CSRC's cooperation or used Section 106(f), in this or any other matters. Such information would assist a fully informed application of the comity factors. It would be wholly unjustifiable to subject DTTC to criminal liability in its home country before the SEC has exhausted other avenues of securing the information it needs.

[23] *See China Jails US Geologist for Stealing State Secrets*, BBC News, July 5, 2010, http://www.bbc.co.uk/news/10505350 (American geologist sentenced to eight-year prison

Producing the subpoenaed documents in defiance of the CSRC's explicit instruction not to do so would put DTTC squarely in the cross-hairs of its primary regulator, which has the authority to permanently shutter the firm.[24] Tang Decl. ¶¶ 8, 12, 14. The substantial attention this matter has gained in the U.S. and the PRC only increases the likelihood that PRC would punish DTTC and its partners and employees who produced workpapers in violation of China law and the CSRC directives. Indeed, the CSRC Letter is a powerful reminder of this probability.

IV. This Court Cannot Enforce The Subpoena Because The SEC Failed Properly To Serve The Order To Show Cause Properly Under Federal Rule Of Civil Procedure 4(F) And The Hague Convention.

The Subpoena cannot be enforced for the separate and independent reason that the Order to Show Cause was not properly served upon DTTC.[25] Federal Rule of Civil Procedure 4(h) authorizes service on a foreign partnership outside the U.S. "in any manner prescribed by Rule 4(f)." Rule 4(f), in turn, governs international service of process on foreign nationals. That Rule provides three disjunctive methods for service abroad, only two of which are at issue here: "(1)

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sentence for violating State secrets laws by arranging for the sale of an "openly available database about China's largely state-controlled oil industry" to his U.S. consulting firm); John Lee, *The Uncurious Case of Xue Feng's Jail Sentence*, Forbes.com, July 7, 2010, http://www.forbes.com/2010/07/07/xue-feng-stern-hu-state-secrets-opinions-contributors-john-lee.html (Chinese-born American convicted for violating State secrets law for obtaining and using "information about the Chinese steel industry he apparently received while attending a conference"—"seemingly legitimate information . . . obtained from the normal course of business activities").

[24] The hardships that would befall DTTC and its personnel are particularly unjustified because it was DTTC that alerted the SEC and the investing public to potential fraud. When an agency demands that a foreign entity produce documents in violation of its home country's laws, that entity's role in the underlying investigation is a critical factor in determining whether such a demand should be enforced. *See In re Sealed Case*, 825 F.2d at 498 (D.C. Cir.) (holding that a contempt order should not have issued where the foreign entity from whom information was sought was "not itself the focus of the criminal investigation in th[e] case").

[25] Neither this Court's Scheduling Order, (*see* Docket No. 22), nor the applicable Federal Rules of Civil Procedure require DTTC to file a motion to quash the Order to Show Cause at this stage of the proceedings. Nonetheless, in an abundance of caution and to preserve all of its rights and objections, DTTC has filed a Protective Motion to Quash the Order to Show Cause contemporaneously with this Memorandum.

by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention," or "(3) by other means not prohibited by international agreement, as the court orders." Fed. R. Civ. P. 4(f).[26]

Service through the Hague Convention, where available, is not optional: by its own terms, the Hague Convention "shall apply in *all cases*, in civil or commercial matters, where there is *occasion to transmit a judicial or extrajudicial document for service abroad*." Hague Convention, art. 1 (emphases added); *see Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) ("compliance with the [Hague] Convention is mandatory in all cases to which it applies"); *Societe Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 534 n.15 (1987). The Hague Convention applies here because the SEC is attempting to transmit the show cause order, a "judicial or extrajudicial document for service," to China, and China is a Convention signatory.[27]

To read Rule 4(f) to make compliance with the Hague Convention optional would impermissibly render the commands of this international agreement a nullity. Where a treaty and a federal statute (or, here, a Federal Rule of Civil Procedure)[28] apply to the same subject, they must be interpreted, if at all possible, to avoid a conflict. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 169-70 (D.D.C. 2002) ("Without a clear expression of Congressional intent to abrogate [a treaty], a court must not read an ambiguous statute to so abrogate, and must interpret the statute

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[26] The service of process provisions in Section 106 have no bearing on how the Order to Show Cause may be served because the SEC has disclaimed reliance on Section 106 in this case and, in any event, the SEC did not attempt to effectuate service under Section 106. *Supra* at 11, 15, 17.

[27] Articles 260 and 261 of the PRC Civil Procedure Law along with other relevant PRC regulations specify the procedures of service of litigation documents upon China entities under the Hague Convention. Feinerman Decl. ¶ 52.

[28] The Federal Rules of Civil Procedure have the force and effect of a federal statute. 28 U.S.C. § 2072.

so as to avoid the conflict."). Thus, as numerous courts have held, the only reasonable interpretation is that "Rule 4(f)(1) *requires* that service on a defendant in a foreign country that is a signatory to the Hague Convention be *attempted* according to the terms of the Hague Convention." *United States v. Shehyn*, No. 04-Civ.-2003, 2008 WL 6150322, at *2 (S.D.N.Y. Nov. 26, 2008) (emphasis added).[29]

Indeed, within the last year alone, two federal courts have required an attempt at service of orders on China entities to proceed through the Hague Convention. *See In re Fuqi Int'l, Inc. Sec. Litig.*, No. 10-civ.-2515, Dkt. # 56 (S.D.N.Y. Mar. 9, 2011) (memo-endorsed order denying plaintiff's request to serve China-based company through its U.S. counsel and requiring plaintiff to "use Hague Convention process" instead); *Perry v. Duoyuan Printing, Inc.*, No. 10-civ-7235, Dkt. #44 (S.D.N.Y. July 8, 2011) (denying service on China defendants under Rule 4(f)(3) and requiring plaintiff to "first attempt service through the Hague Convention").[30] This is also the approach contemplated by the Advisory Committee Notes, which explain that Rule 4(f)(3) applies in cases where a party relies on the "special forms of service" the Hague Convention

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[29] *See also Robinson Eng'g v. George*, 223 F.3d 445 (7th Cir. 2000); *Day v. Corner Bank (Overseas) Ltd.*, 789 F. Supp. 2d 136, 144 (D.D.C. 2011) (same); *Krepps v. Reiner*, 414 F. Supp. 2d 403, 411 (S.D.N.Y. 2006) (same); *Gateways Overseas, Inc. v. Nishat (Chunian) Ltd.*, No. 05-CV-4260 (GBD), 2006 WL 2015188, at *3 (S.D.N.Y. July 13, 2006) (same).

[30] The SEC does not allege, and there is no reason to believe, that China's Central Authority would be dilatory or refuse to comply with a proper request under the Convention. Indeed, as the U.S. Department of State presently reports to visitors, "[s]ervice can be effected in China under the [Hague] Convention through the Chinese Central Authority." Bureau of Consular Affairs, U.S. Dep't of State, *China Judicial Assistance*, http://travel.state.gov/law/judicial/judicial_694.html; *see also Herman Miller, Inc. v. Alphaville Design, Inc.*, No. C 08-03437 WHA, 2009 WL 3429739, at *2 (N.D. Cal. Oct. 22, 2009) (describing successful service in China through the Hague Convention); Feinerman Decl. ¶¶ 6, 50-53. China has established a clear procedure for processing the service of litigation documents from other signatory States and routinely cooperates and accommodates such requests. *See* Feinerman Decl. ¶¶ 58-59. This is another point on which discovery would inform the Court's analysis.

authorizes in "cases of urgency,"[31] or when a party attempts service consistent with the Hague Convention but there is a "failure of the foreign country's Central Authority to effect service within the six-month period provided by the Convention." Fed. R. Civ. P. 4(f), advisory committee's note (1993 amendments).

Even the cases cited in the SEC's own Service Memorandum support this conclusion. The SEC principally relies on *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007 (9th Cir. 2002), which the SEC describes as approving, "'[w]ithout hesitation,' a district court's order authorizing a litigant to serve a foreign respondent by serving its U.S. counsel." Service Mem. at 6 (quoting *Rio Props.*, 284 F.3d at 1017). But the SEC omits a dispositive fact that directly contradicts the SEC's position. *See id.* at 8. Service in that case was on a party in Costa Rica, which is not a signatory to the Hague Convention, and the *Rio Properties* explicitly stated that federal courts are "*prohibited* from issuing a Rule 4(f)(3) order in contravention of an international agreement, including the Hague Convention referenced in Rule 4(f)(1)." 284 F.3d at 1015 n.4 (emphasis added). China is a signatory and, under settled law, including *Rio Properties*, the Hague Convention controls.[32]

[31] To the extent that the SEC continues to contend that there is urgency here—notwithstanding the delisting of Longtop and the SEC's failure to seek service through the Hague Convention for more than 7 months—this Court should allow DTTC to obtain discovery from the SEC as to whether such expedited procedures are necessary here. The SEC asserts that if it is required to serve the Order to Show Cause through the Hague Convention, "leads . . . will dry up, witnesses will become harder to find," and "memories of those witnesses who can be found will undoubtedly fade." Service Mem. at 13. But proceeding through the Convention would delay litigation by a few months, at the most. *See* Feinerman Decl. ¶ 59 (noting that China reported that it processed 2,209 requests pursuant to the Hague Service Convention in 2007, and it had effected 74 percent of them within six months).

[32] The SEC repeats its error throughout its Service Memorandum. Advocating for immediate service under Rule 4(f)(3), the SEC cites numerous cases in which such service was permitted because the respondent resided in a country that was *not* a signatory to the Convention. *See Kaplan v. Hezbollah*, 715 F. Supp. 2d 165 (2010) (Lebanon); *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916 (11th Cir. 2003) (Austria); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 07-

As a last-ditch effort to justify service through e-mail, the SEC makes much of the fact that DTTC has retained U.S. counsel as a part of its investigation and that counsel has monitored proceedings in this Court. Service Mem. at 10-13. But surely the SEC cannot mean that if a foreign party hires counsel, the Hague convention no longer applies. Indeed, such a position would be contrary to the Federal Rules themselves, which allow parties to appear through counsel to object to service without waiving service. *See* Fed. R. Civ. P. 12(b)(5); *see also Robinson Eng'g v. George*, 223 F.3d 445, 446 (7th Cir. 2000) (sustaining objection raised by counsel to service not in compliance with Hague Convention); *Day v. Corner Bank (Overseas) Ltd.*, 789 F. Supp. 2d 136, 138 (D.D.C. 2011) (same); *Krepps v. Reiner*, 414 F. Supp. 2d 403, 405-06 (S.D.N.Y. 2006) (same).[33]

1827, 2010 WL 2198240 (N.D. Cal. May 28, 2010) (Taiwan); *SEC v. Anticevic*, No. 05-CV-6991, 2009 WL 361739 (S.D.N.Y. Feb. 13, 2009) (defendant's country of residence unknown). The SEC cites other cases in which service under Rule 4(f)(3) was allowed only *after* the plaintiff made a good-faith effort at service through the Convention. *FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005) (plaintiff had "earnestly tried to serve [defendant] and to perfect service in compliance with Rule 4(f)(1) and the Hague Convention"); *RSM Prod. Corp. v. Fridman*, No. 06-Civ-11512 (DLC), 2007 WL 83882, at *1, *6 (S.D.N.Y. Aug. 10, 2007) (same); *Marlabs Inc. v. Jakher*, No. 07-cv-04704, 2010 WL 1644041 (D.N.J. Apr. 22, 2010) (same); *Studio A. Entm't, Inc. v. Active Distribs., Inc.*, No. 1:06-CV-2496, 2008 WL 162785 (N.D. Ohio Jan. 15, 2008) (same). Other cases relied on by the SEC are even further afield. *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004), and *Nanya Technology Corp. v. Fujitsu Ltd.*, No. 06-00025, 2007 WL 269087 (D. Guam Jan. 26, 2007), authorized service pursuant to means approved by Article 10(a) of the Convention to which the recipient countries had not objected.

[33] The SEC also asserts that the Hague Convention does not apply to service by e-mail on DTTC's U.S. counsel because e-mail does not involve the transmission of documents abroad. Service Mem. at 11. That claim must be rejected because it would eviscerate the Convention entirely, allowing service on foreign nationals at any time so long as they hired a lawyer in the U.S. with an e-mail address. Such a rule would impose fewer constraints on service on foreign nationals than on domestic parties, a result altogether at odds with the U.S.' entry into the Hague Convention in the first place.

The plain terms of the Hague Convention control this case, and require the SEC to attempt service through its procedures before requesting service via any other means, including service via e-mail on DTTC's U.S. counsel under Rule 4(f)(3).

CONCLUSION

For all these reasons, the SEC's Application to enforce the Subpoena must be denied.

Dated: Washington, DC
April 11, 2012

Respectfully submitted,

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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.	)	

CERTIFICATE OF SERVICE

I certify that on April 11, 2012, I served, via email, Respondent Deloitte Touche Tohmatsu CPA Ltd.'s Statement of Points and Authorities Opposing the Securities and Exchange Commission's Application for Order to Show Cause and Order Requiring Compliance with a Subpoena, the accompanying Declaration of Michael D. Warden, the accompanying Declaration of Charles Lip, the accompanying Declaration of Xin Tang, and the accompanying Declaration of Professor James V. Feinerman, on:

Mark Lanpher
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Dated: Washington, DC Respectfully submitted,

April 11, 2012 ________/s/ Michael D. Warden_______

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