UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. Securities and Exchange Commission,	)	
	)	
Petitioner,	)	
	)	
-v.-	)	11 Misc. 512 GK/DAR
	)	
Deloitte Touche Tohmatsu CPA Ltd.,	)	
	)	
Respondent.	)	
	)	

SECURITIES AND EXCHANGE COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS APPLICATION FOR ORDER REQUIRING COMPLIANCE WITH SUBPOENA

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The U.S. Securities and Exchange Commission ("SEC" or "Commission") respectfully submits this reply memorandum of law in further support of its refiled Application for an Order Requiring Compliance with a Subpoena (the "Application") and in response to the Statement of Points and Authorities Opposing the SEC's Application ("DTTC Mem.") filed by Deloitte Touche Tohmatsu CPA Ltd ("DTTC" or the "Respondent") on April 11, 2012 (Dkt. No. 23).

INTRODUCTION

The SEC filed this action on September 8, 2011, seeking to enforce an administrative subpoena (the "Subpoena") that it served in the U.S. on DTTC on May 27, 2011. The Subpoena was issued in an investigation (SEC File No. HO-11698) into possible violations of the federal securities laws in connection with Longtop Financial Technologies Limited ("Longtop"), a foreign private issuer the securities of which were registered with the Commission and traded on U.S. markets. The SEC's investigation began after DTTC, Longtop's auditor for several years, disclosed that it had uncovered numerous indicia of financial fraud at Longtop and further indicated that DTTC's prior audit reports for Longtop, which it had filed with the SEC, could no longer be relied upon by investors. At the time, Longtop had a market capitalization of over $1 billion. The Subpoena called for DTTC to produce, among other things, audit workpapers it had prepared while auditing the financial statements of Longtop. It has not done so.

On January 4, 2012, this Court issued an Order to Show Cause directing DTTC to show cause why it should not be ordered to comply with the Subpoena, and further ordered that the SEC could serve the Order to Show Cause on DTTC's counsel. On April 11, 2012, DTTC filed its brief opposing the SEC's Application ("DTTC Mem."), together with supporting declarations and a Protective Motion to Quash the Order to Show Cause.

On May 18, 2012, this Court granted a 60-day extension of the time the SEC had to reply to DTTC's arguments, and on August 7, 2012, this Court granted a six-month stay of this action, in both instances because of ongoing negotiations between the SEC and the China Securities Regulatory Commission ("CSRC"). The SEC sought these delays in hopes that, through negotiations with the CSRC, the SEC would be able to obtain the documents it sought from DTTC by the Subpoena. However, as explained further below and in the accompanying declaration of Alberto Arevalo, an Assistant Director in the SEC's Office of International Affairs ("OIA") ("Arevalo Decl."), those negotiations have now ended unsuccessfully. Indeed, there is no valid reason not to force DTTC to comply with the Subpoena.

DTTC has argued that it should not be required to comply with the Subpoena, which it concedes was validly issued in furtherance of a legitimate SEC investigation, for three independent reasons: (1) Despite the fact that DTTC's prior U.S. counsel accepted service of the Subpoena on DTTC's behalf, DTTC now claims that the Subpoena seeks documents beyond the SEC's jurisdictional reach (DTTC Mem. 15-22); (2) DTTC contends that compliance with the Subpoena would violate the laws of the Peoples' Republic of China (the "PRC" or "China"), resulting in potential sanctions on DTTC, and it argues that these potential burdens and the sovereign interests of China outweigh the interests of the U.S. in this matter (DTTC Mem. 23-39); and (3) DTTC contends that, despite this Court's prior order authorizing the SEC to serve the Order to Show Cause on DTTC's counsel, such service was improper because, it argues, the SEC was required to serve DTTC through the Hague Convention instead (DTTC Mem. 39-44). None of these arguments has merit.

First, the Subpoena is enforceable notwithstanding the fact that it calls for production of documents located abroad. Indeed, the physical location of the requested documents is of no

moment. The relevant question is whether the subpoena was *served* in the U.S. Courts have long held that the SEC has the administrative power to issue such subpoenas and that, when properly served in the U.S., they are enforceable. DTTC fails to accept the significance of the fact that the firm, through its prior U.S. counsel acting as its agent, accepted service in the U.S. That fact wholly distinguishes this case from those cited by DTTC, and makes the subpoena enforceable even though the documents are physically located abroad.

Second, the potential burdens on DTTC of complying with the Subpoena do not provide a reason not to order compliance. The SEC does not contend – particularly in light of statements by the CSRC since the filing of this action – that DTTC bears no risk in complying with the Subpoena. But that fact only highlights that there is a conflict of laws here between DTTC's obligation to comply with U.S. laws and its obligation to comply with Chinese laws. Accordingly, this Court must weigh a series of factors in deciding which law will control this subpoena-enforcement action. DTTC chose to expose itself to U.S. law by registering with the Public Company Audit Oversight Board ("PCAOB") and conducting audits of an issuer of securities registered with the SEC and traded on U.S. securities exchanges. DTTC financially benefited when it helped that issuer raise hundreds of millions of dollars from U.S. investors. Thus, DTTC knowingly took the risk that, if the SEC ever asked DTTC to produce documents, compliance with that request might subject the firm to sanction under Chinese law. The party that should bear the consequences of that decision is the audit firm, not the SEC and not U.S. investors who may have fallen victim to a fraud conducted by a U.S.-listed company that DTTC audited.

The competing interests at stake here are the United States' targeted and compelling interest in protecting its financial markets on the one hand, and China's general interest in

precluding the dissemination of documents outside its borders on the other hand. As between the two, the United States' interest is the one that should guide this Court's decision, even though it may mean forcing DTTC to violate Chinese law. Much as the SEC might wish there were a viable alternative means of obtaining these documents (such as by obtaining them through cooperative channels with the CSRC), at present, there simply is not. Accordingly, the SEC respectfully submits that DTTC should be directed to comply with its U.S. legal obligations and provide the documents sought by the SEC.

Third, DTTC is wrong to contend that the Subpoena should not be enforced on the grounds that this Court allowed the SEC to serve the Order to Show Cause on counsel rather than through the Hague Convention. This Court's prior order directing such service was consistent with Rule 4(f)(3) of the Federal Rules of Civil Procedure. It was also consistent with common sense. As we have explained in prior briefing, and as this Court has already ruled, there was no reason to require service of the Order to Show Cause through the Hague Convention, which would inevitably delay the SEC's investigation into a massive fraud, where both DTTC and its counsel were already well aware of the case and had been in negotiations with the SEC about its willingness to comply with the Subpoena. "[T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." *Henderson v. United States*, 517 U.S. 654, 672 (1996). That goal has plainly been effected here, consistent with the Federal Rules of Civil Procedure.

ARGUMENT

I. THIS COURT CAN AND SHOULD ENFORCE THE SUBPOENA EVEN THOUGH IT SEEKS DOCUMENTS LOCATED ABROAD

DTTC argues that this Court should not enforce the Subpoena because it seeks documents located abroad. (DTTC Mem. 15). This argument, which DTTC claims is based on a literal reading of the Securities Act of 1933 and the Exchange Act of 1934, is meritless. Both common sense and case law confirm that the SEC can subpoena documents located abroad when a subpoena is properly served within the U.S. on an agent of the party with the documents. In this case, by confirming that it was authorized to accept service of the Subpoena on DTTC's behalf, and in accepting such service, DTTC's U.S. counsel, acting as its agent, made the Subpoena enforceable against DTTC notwithstanding the fact that it calls for production of documents located abroad.

Section 19(c) of the Securities Act and Section 21(c) of the Exchange Act state that the production of any records deemed relevant or material "may be required from any place in the United States." 15 U.S.C. §§ 77s(c); 78u(c). In other words, it is the *requirement of production* that must be made from a place in the U.S. Such a requirement for production is made when the subpoena is served in the U.S. Nothing in the relevant statutory language requires that the demanded documents be located in the U.S. This reading of Sections 19(c) and 21(c) is consistent with what DTTC acknowledges is the SEC's long-standing use of border watches to serve subpoenas on agents of foreign entities who enter the U.S.

DTTC argues that because "DTTC is not located in the U.S., and none of the subpoenaed documents in DTTC's possession is located in the U.S. . . . neither the [Securities Act] nor the [Exchange Act] empower the SEC to enforce its Subpoena against DTTC." (DTTC Mem. 15). This analysis ignores the fact that if someone inside the U.S. has control

over the documents located abroad, those documents may be subject to subpoena under the Securities Act and Exchange Act because the SEC is requiring production from within 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).

DTTC acknowledges that numerous courts have held that the SEC can enforce subpoenas calling for documents located abroad when served on the individuals or entities located in the U.S. (DTTC Mem. 21-22), but suggests that these cases are wrongly decided because a hyper-literal reading of the securities statutes do not expressly address such a situation. But DTTC, as discussed above, misreads the statutory language. What is more, if DTTC were correct that the SEC could never subpoena documents located abroad, it would create wildly perverse incentives for individuals and entities engaged in the U.S. securities markets. It would incentivize every such party to maintain its documents abroad, placing them beyond the SEC's subpoena power even where it has full control and access to the documents. Fortunately, that is not the law.

In 1945, the Ninth Circuit considered this very issue in *Minas de Artemisa*, 150 F.2d 215. In that case, the SEC personally served a subpoena on an individual in Arizona, seeking production of documents from a Mexican company controlled by the Arizona resident. The company from which the documents were sought (Minas de Artemisa, S.A.) objected, contending that because the documents were physically located in Mexico, the documents were beyond the SEC's subpoena power under the Securities Act. The SEC then filed an application for an order enforcing a subpoena. After the district court dismissed the SEC's application, the Ninth Circuit reversed and ordered Minas de Artemisa to comply with the subpoena. The court observed:

> Courts have frequently required persons within their jurisdiction to produce books and papers which were beyond the territorial limits of the court, even in cases where the documents were located in a foreign county. . . .
>
> Assuming the absence of conflict with Mexican law, the Commission is thus entitled to an order enforcing its subpoena unless the general rule mentioned has been restricted by Congress in the Securities Act itself. The court below appears to have thought that Sec. 19(b) of the Act contains such a restriction. The section provides that in the conduct of its investigations the Commission may require the attendance of witnesses and the production of documentary evidence "from any place in the United States or any Territory at any designated place of hearing."
>
> The provision is ambiguously worded but we think it was not intended to circumscribe the Commission's inquisitorial powers. It appears to be designed to override territorial restrictions which would obtain had Congress prescribed for the Commission the limitations contained in 28 U.S.C.A. § 654, relating to court subpoenas. The latter statute, in general, limits the effective service area of a subpoena to (1) the judicial district, or (2) without the district but within a distance of 100 miles of the place where the subpoena is returnable. Of course, even under a statute so limited the court would possess power to enforce the Commission's subpoena in this instance. We are satisfied that Sec. 19(b) was intended broadly to empower the Commission to require the attendance of witnesses or the production of documentary evidence at any designated place of hearing, *provided only that service of the subpoena is made within the territorial limits of the United States*. The obligation to respond applies even though the person served may find it necessary to go to some other place within or without the United States in order to obtain the documents required to be produced. Congress having clothed the Commission with broad investigatory powers, we should be slow to impute to it the purpose of creating a loophole for companies incorporated abroad but which, like appellee, are actively doing business and peddling their securities in the United States.

150 F.2d at 217-18 (emphasis added).

Twenty-one years later, in *DeSmedt*, Judge Friendly similarly analyzed whether an analogous statute creating subpoena power should be construed to preclude the Federal Maritime Commission from obtaining documents physically located abroad. The respondents in that case urged, like DTTC does here, that the statute "has such a plain meaning [limiting the scope of the subpoena power to documents physically located within the U.S.] that we must perforce attribute to Congress a deep-seated intention to reach this irrational result." 366 F.2d

at 469. Citing *Minas de Artemisa*, Judge Friendly sensibly rejected that reading of the statute, noting that it "requires rather strong evidence to show that Congress wished to render an agency responsible for regulating an important segment of the foreign commerce of the United States powerless to require by subpoena that residents of this country and nonresidents doing business here should produce relevant documents simply because these are kept outside our borders." *Id.*

Minas de Artemisa and *DeSmedt* unambiguously establish that it was within the SEC's power to subpoena documents from DTTC that are located in China. DTTC contends that Judge Friendly's statutory interpretation was wrong because it "elevate[d] policy considerations over plain text" (DTTC Mem. 20). But in the nearly 50 years since his opinion in *DeSmedt*, and in the nearly 70 years since the prior decision in *Minas de Artemis*, we are aware of no court that has disagreed with their core holdings, and Congress has never sought to amend the relevant statutes. That is because they stand for a correct proposition of the law: The SEC (and other agencies with similar grants of subpoena power) can require production of documents located abroad if the subpoena is properly served within the U.S.

As DTTC acknowledges, the D.C. Circuit cited the *DeSmedt* decision with approval in enforcing an administrative subpoena seeking documents abroad. *See Civil Aero. Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 953 (D.C. Cir. 1979) ("We are in accord with the view expressed in a similar context by Judge Friendly in [*DeSmedt*], that the pertinent statutory provision, 49 U.S.C. § 1484(c) (1970), was not intended as a limitation on agency subpoena authority"). DTTC suggests that this citation was "without analysis" (DTTC Mem. 20). But even the subsequent D.C. Circuit case that DTTC argues "criticized" the analysis of *DeSmedt* did not question its central holding. *See FTC v. Compaignie de Saint-Gobain-Pont-*

à-Mousson, 636 F.2d 1300 (D.C. Cir. 1980). "The sole issue" that was resolved in *Saint-Gobain* was "the propriety of the technique employed by the [Federal Trade Commission] to serve its subpoena abroad namely, registered mailing to a foreign citizen on foreign soil." 636 F.2d at 1306. The court was not faced with whether the subpoena could be enforced if served in the U.S. and said nothing to call into question the core holdings of *Minas de Artemisa* and *DeSmedt*. Thus, it is not surprising that courts since have repeatedly enforced administrative subpoenas calling for production of documents located abroad. *See, e.g., SEC v. Lines Overseas Mgt., Ltd.*, No. 04-302, 2007 WL 581909, at *2 (D.D.C. Feb. 21, 2007) (enforcing SEC subpoenas calling for production of documents from Bermuda); *Application to Enforce Admin. Subpoenas of the SEC v. Knowles*, 87 F.3d 413 (10th Cir. 1996) (upholding order to enforce SEC subpoenas calling for production of documents from Bahamas).

CFTC v. Nahas, 738 F.2d 487 (D.C. Cir. 1984), on which DTTC heavily relies for its textual argument that the SEC cannot subpoena documents located abroad (DTTC Mem. 15-16), is wholly distinguishable. In that case, the issue was whether the court could enforce a subpoena that sought documents located abroad *and which had been served abroad.* Specifically, the subpoena at issue in *Nahas* had been served on an individual in Brazil and sought documents located in Brazil; thus, there was nothing to bring it within the textual authority of the U.S. Commodity Futures Trading Commission's empowering statute. Here, by contrast, service of the Subpoena was accepted *in the United States* by DTTC's U.S. counsel, acting as its agent, who confirmed that he was authorized to accept such service.

Also of no moment is the fact that Congress passed Section 106 of the Sarbanes-Oxley Act [15 U.S.C. § 7216] in 2002. DTTC argues that, because Congress passed Section 106 to provide an additional mechanism by which the SEC can compel production of audit

workpapers from foreign audit firms, it must be that the SEC lacked the ability to obtain such documents before its passage via subpoena. (DTTC Mem. 16-17). That result does not follow. Section 106 was passed because, prior to its passage, the SEC often had difficulty obtaining access to workpapers of foreign auditors and was *generally* reliant on cooperation from foreign regulators in seeking such documents. But that is because of the practical reality that, as DTTC itself observes, it is often difficult for the SEC to serve subpoenas within the U.S. on foreign audit firms; the SEC typically must resort to such mechanisms as border watches to effectively serve foreign firms. (DTTC Mem. 22).[1] Here, again, the practical difficulty that often exists was removed when DTTC's U.S. counsel accepted service of the Subpoena on DTTC's behalf.[2]

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[1] DTTC similarly overstates the significance of Section 106(f), suggesting that it provides the only mechanism by which the SEC may seek audit workpapers from foreign accounting firms. Section 106(f) of the Sarbanes-Oxley Act states: "Notwithstanding any other provisions of this section, the staff of the Commission or the [PCAOB] may allow a foreign public accounting firm that is subject to this section to meet production obligations under this section through alternate means, such as through foreign counterparts of the Commission or the [PCAOB]." DTTC claims that "[b]y 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." (DTTC Mem. 17). But what DTTC fails to acknowledge is that, under Section 106(f), Congress explicitly gave *the SEC and the PCAOB* the discretion of when to allow foreign audit firms to meet its production obligations through "alternate means." Congress did *not* mandate, as DTTC would apparently have this Court believe, that any time there is a conflict of law, the SEC must defer to foreign law and seek audit workpapers only through regulator-to-regulator cooperation.

[2] In any event, Section 106 is of little relevance here given that DTTC has refused a separate request from the SEC, issued pursuant to Section 106, to produce its audit workpapers for its audits of Longtop. Indeed, while DTTC is correct that the SEC has "disclaimed reliance on Section 106 in this case" (DTTC Mem. 17), that is solely because the SEC is seeking to keep the analytical issues separate. As a practical matter, just as DTTC has unequivocally refused to comply with the Subpoena, so too has it refused to comply with the SEC's Section 106 request. Instead of producing documents to the SEC, DTTC has only indicated a willingness to produce documents to the CSRC. As discussed above, that not only falls far short of DTTC's obligations under U.S. law, *see supra n. 1*; because of the CSRC's unwillingness and/or

While DTTC may try to down-play the significance of the fact that its U.S. counsel accepted service of the Subpoena, that fact is dispositive here. DTTC's counsel, as its agent, voluntarily accepted service of the Subpoena in the U.S. DTTC argues that is irrelevant because "[s]ervice 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 authority. . . . 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." (DTTC Mem. 22). But this is not a situation where the SEC simply served the Subpoena on DTTC's U.S. counsel and is arguing that by virtue of counsel's role that service is sufficient. Indeed, the SEC readily acknowledges that simply serving the Subpoena on U.S. counsel would not have been sufficient if counsel had stated that it was not authorized to accept the Subpoena or had otherwise objected.[3] In that case, as DTTC argues, *see* DTTC Mem. 22, the SEC would have sought to attempt service of the Subpoena on a partner of DTTC while he or she traveled to the U.S. But here, the SEC explicitly confirmed in advance that U.S. counsel had authorization to accept service of the Subpoena on DTTC's behalf. Thus, DTTC has been served in the U.S. through an authorized agent. DTTC should not be permitted to now back away from that. *Cf. Rosales v. The Placers, Ltd*., No. 09 C 1706, 2011 WL 846082 (N.D. Ill. Mar. 8, 2011) (holding that where lawyer affirmatively agreed to accept service of Rule 45 subpoenas, notwithstanding fact that they

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inability to cooperate with the SEC's enforcement goals in any meaningful way, *see infra* Part II, it also provides the SEC with no practical ability to obtain documents that are critical for its investigation.

[3] We also note that, until its opposition brief in this case, counsel for DTTC had not argued that the Subpoena was unenforceable because of improper service; at most, it had argued that the Subpoena could only be enforced to the extent it sought audit workpapers obtainable by the SEC pursuant to Section 106 of the Sarbanes-Oxley Act. (DDTC Mem. 19 n.12; Ltr. From M. Warden to L. Deitch (July 8, 2011) (Warden Decl. Exh. 17)). Indeed, while DTTC has refused

were served beyond territorial limits of Rule 45, clients could not later quash subpoenas for lack of compliance with Rule 45(b)(2)).

II. THE RISK OF VIOLATING CHINESE LAW DOES NOT EXCUSE DTTC'S NON-COMPLIANCE WITH THE SUBPOENA

DTTC's second argument is also unavailing. DTTC contends that this Court should deny the SEC's Application and refuse to order compliance with the Subpoena because doing so may result in PRC sanctions on DTTC. Although the SEC does not contend that DTTC bears no risk in complying with the Subpoena, that is only the beginning of the inquiry; the potential risk to DTTC from complying with the Subpoena must be balanced against U.S. interests in enforcing its laws and the burden on the SEC and U.S. investors created by DTTC's refusal to comply. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir. 1992) ("The PRC's admitted interest in secrecy must be balanced against the interests of the United States and the plaintiffs in obtaining the information."); *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n.29 (1987) (discussing need to balance interests of sovereigns where enforcing U.S. law on discovery matters would lead to a conflict with a foreign law); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-206 (1958); *Wultz v. Bank of China*, No. 11cv1266-SAS, 2012 WL 5378961, at *3-8 (S.D.N.Y. Oct. 29, 2012) (comity analysis supported requiring China bank to produce documents despite possible civil and criminal liability under China's bank secrecy laws).

Permitting DTTC to flout its U.S. legal obligations by refusing to produce critical documents to the SEC hurts not only the SEC, but also the investors it seeks to protect. DTTC

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to provide audit workpapers, it has produced certain other documents responsive to the Subpoena, thereby confirming the validity of the subpoena.

does not dispute that the SEC has a legitimate investigative interest in the Longtop documents. Instead, DTTC contends that this Court should not enforce the Subpoena because the SEC instead should pursue these documents through regulator-to-regulator channels. In fact, we have done so. But the unfortunate reality is that meaningful information-sharing between the SEC and the CSRC on cross-border investigations does not currently exist. Accordingly, requiring the SEC to seek China-based documents exclusively from the CSRC, instead of directly from Chinese entities that engage in the U.S. financial markets, would thwart the SEC's ability to obtain documents highly relevant to financial frauds in China.

Despite public statements of optimism and the SEC's repeated attempts to negotiate with the CSRC, the CSRC is not a viable conduit to obtaining audit workpapers and other documents from China. As explained further below and in the attached declarations of Ethiopis Tafara, Director of the SEC's OIA ("Tafara Decl."), and Alberto Arevalo, time and again over the last four years, the CSRC has been unable and/or unwilling to provide tangible help in the face of specific requests for assistance from the SEC.[4] In particular, the CSRC has failed to produce *any* requested audit workpapers that it has long had in its possession, and it has insisted that any workpapers it might produce not be used in enforcement litigation (the very purpose for obtaining the documents) without the CSRC's advance written authorization. *See* Arevalo Decl. ¶¶33-35, 37, 56, 62. And although the SEC has asked for the CSRC's

[4] Although discovery in subpoena enforcement proceedings is disfavored, *see SEC v. Lavin*, 111 F.3d 921, 926 (D.C. Cir. 1997); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1388 (D.C. Cir. 1980), DTTC purports to identify topics on which discovery is allegedly needed here. In light of the facts set forth in these declarations, we respectfully submit that DTTC's discovery requests are, for the most part, moot. However, to the extent DTTC has specific requests for further information, the SEC will make good-faith efforts to consider them in advance of any hearing ordered by the Court on the present briefs.

assistance in this very case, the CSRC has failed to produce any DTTC workpapers or other documents relating to Longtop. *See id.* ¶54-56, 62.

There is no reason to think that further negotiations will change the CSRC's hardline stance. The SEC should not have to continue the futile exercise of trying to convince the CSRC to provide assistance when the CSRC has clearly and repeatedly indicated (through both actions and words) that it is unable or unwilling to do so. Rather, this Court should recognize that the SEC interests at stake are serious, should recognize that DTTC has certain obligations having elected to engage in the U.S. financial markets, and should require DTTC to comply with the Subpoena.

A. The Balance of Sovereign Interests Favors Enforcing the Subpoena

DTTC argues that because the Chinese government has repeatedly pronounced the importance it places on state secrecy and state sovereignty, the interests of China must outweigh those of the U.S. in this matter. In essence, DTTC is arguing that because the Chinese government aggressively protects documents within its borders, while the U.S. government generally seeks to cooperate with foreign governments, the SEC must now bow to the CSRC. Nothing could be further from the truth. If this Court looks behind the interests at stake, as it must,[5] it will see that the SEC's interests in enforcing the Subpoena are far more significant than those of the Chinese government in precluding production.

As an initial matter, production of audit workpapers by DTTC is not such a clear violation of Chinese law as DTTC suggests. The crux of DTTC's argument is that, at least

[5] DTTC argues that "this Court has no occasion to evaluate the sovereign choice that the PRC government has made." (DTTC Mem. 34). That is not correct, precisely because the nature of the interests must be balanced against each other. *See Société Nationale Industrielle Aérospatiale*, 482 U.S. 522. This Court can and should consider the reasons behind a foreign sovereign's choices when deciding whether to defer to them or enforce federal law.

since the issuance of Regulation 29 in October 2009, the CSRC and the Chinese Ministry of Finance ("MOF") have staked out a clear position that direct production of audit workpapers overseas would be a violation of law. In fact, Regulation 29 is not nearly so clear. As explained in the attached declaration of Professor Donald Clarke, Regulation 29 did *not* create an unambiguous obligation upon Chinese accounting firms to obtain pre-clearance from the CSRC and the MOF prior to producing workpapers abroad. *See* Declaration of Donald Clarke, ¶¶ 8, 12-23. Indeed, it was DTTC's choice, and not its obligation, to seek pre-clearance from the CSRC prior to responding to the SEC's Subpoena. *Id.* Moreover, to the extent DTTC claims that the audit workpapers *may* or even *likely* contain documents later deemed state secrets by the Chinese government, *see* Tang Decl. ¶ 43, that only highlights how ambiguous and malleable the law on state secrets is in China. *See* Clarke Decl. ¶ 24.[6] Nevertheless, the CSRC may now take the position that direct production of workpapers by DTTC to the SEC would contravene the CSRC's instruction to DTTC, after DTTC voluntarily consulted with the CSRC regarding its obligations under the Subpoena.[7] Thus, we do not dispute that the CSRC

[6] Professor Clarke acknowledges that where requested documents implicate state secrets or archives matters, Chinese law requires that the respective authorities – namely the State Secrets Bureau ("SSB") and the State Archives Administration ("SAA") – be notified and their approval sought. *See* Clarke Decl. ¶ 24. However, this does not mean that DTTC was required to notify and receive pre-approval from the CSRC or MOF. Professor Clarke's professional opinion is that DTTC was not so required. *See id.* ¶¶ 8, 12-23. Nor does it mean that DTTC necessarily had to consult with the SSB and SAA about all responsive documents. *See id.* ¶ 16.

[7] Although DTTC apparently contends that the CSRC through a letter barred it from producing Longtop workpapers directly to the SEC, DTTC Mem. at 8; Warden Decl. Exh. 20, that letter (dated October 11, 2011) does not expressly require *CSRC approval* before such production can be made. Nevertheless, for purposes of this subpoena-enforcement action, the SEC assumes the truth of DTTC's assertion that having been notified, the CSRC now insists that its approval is required before DTTC may comply with the Subpoena.

or other arms of the Chinese government could take some form of punitive action against DTTC if it chose to comply with the Subpoena.[8]

At the same time, the fact that the Chinese government may take action against DTTC for complying with the Subpoena says little about the legitimacy of the Chinese interests in this case. DTTC still has not explained how production of its audit workpapers for Longtop, a Cayman Islands company, would actually harm China's economic interests that its secrecy laws are purportedly designed to protect. DTTC's lack of showing in this regard is unsurprising because here, as in *Richmark*, there is "no indication that [DTTC or the customers of Longtop], much less the economy of the PRC as a whole, will be adversely affected at all by the disclosure of this information." 959 F.2d at 1477.[9] Instead, it appears that China's interests in precluding production by DTTC are, most fundamentally, sovereignty for sovereignty's sake. That is not, according to the Supreme Court, a legitimate interest. *See Société Nationale*, 482 U.S. at 544 n.29 (holding that a nation's statutes requiring

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[8] We do note, however, that the instances cited by DTTC where individuals have been incarcerated in China for violations of state secret laws are all far afield from this case, where DTTC would be responding to a valid court order and would not be providing documents in any way related to national security. Moreover, separate criminal liability under the Archives law is unlikely in this case, because the documents at issue appear not to have involved state-owned archives. *See* Clarke Decl. ¶ 25. Accordingly, while we do not dispute that some sanctions could be imposed upon DTTC, it remains extremely speculative to predict what those sanctions might be.

[9] In *Richmark*, the district court imposed discovery sanctions and held Beijing Ever Bright Industrial Co. ("Beijing"), a corporation organized under PRC laws and an arm of the PRC government, in contempt for refusing to comply with a discovery order, notwithstanding the fact that complying with the discovery order would constitute a violation of Chinese state secrecy laws. The Ninth Circuit affirmed, and noted that "the State Secrecy Bureau did not express interest in the confidentiality of this information prior to the litigation in question. Indeed, Beijing routinely disclosed information regarding its assets, inventory, bank accounts, and corporate structure to the general public, for example, through a trade brochure and to companies with whom it did business. The State Secrecy Bureau did not object to the *voluntary* disclosure of any of this information. It is only now, when disclosure will have

confidentiality are "relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material."). Yet that is the crux of DTTC's argument, as DTTC claims China's interests in precluding direct production by DTTC should be respected simply because the CSRC has purportedly expressed the desire to "channel all foreign securities regulators' requests for documents in the PRC through the CSRC." (DTTC Mem. 29).

The SEC agrees that a foreign country may have valid sovereign interests in making sure that all production of documents passes through its regulators prior to production to the U.S. For example, DTTC notes that Germany and the United Kingdom take analogous positions to that of the CSRC with regard to direct production of certain documents abroad. (DTTC Mem. 31). And we agree that, in that case, Germany's and the United Kingdom's sovereign interests are valid and, generally speaking, should be respected.[10] But the crucial

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adverse consequences for Beijing, that the PSR has asserted its interest in confidentiality." *Id.* at 1476.

[10] Even in such cases, though, there are of course limits to when the foreign jurisdiction's law should take precedence over U.S. law. That is precisely the issue the Supreme Court faced in *Société Nationale Industrielle Aérospatiale*, 482 U.S. 522. In that case, the Court wrote:

> The French 'blocking statute' does not alter our conclusion. It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. Nor can the enactment of such a statute by a foreign nation require American courts to engraft a rule of first resort onto the Hague Convention, or otherwise to provide the nationals of such a country with a preferred status in our courts. It is clear that American courts are not required to adhere blindly to the directives of such a statute. Indeed, the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge, forbidding him or her to order any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge. . . . The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign. The blocking statute thus is relevant to the court's particularized comity analysis only

difference is that German and British regulators have historically been willing to work with the SEC to create a viable and expeditious framework within which the SEC's investigative needs can be met while still respecting foreign law. The CSRC's stated interest in controlling the dissemination of documents here rings hollow given, in the past four years, it has not provided the SEC with any meaningful assistance on cross-border investigations, notwithstanding its obligations under the International Organization of Securities Commissions ("IOSCO") Memorandum of Understanding ("MMOU") that it has signed. *See* Tafara Decl. ¶¶ 7-22; Arevalo Decl. ¶¶4-26, 33-42, 45, 54-64. Given the CSRC's failure to cooperate meaningfully with the SEC, China's claimed interest in precluding direct production of documents in favor of regulator-to-regulator production must be viewed with considerable skepticism.

The SEC's interest in obtaining the subpoenaed documents, on the other hand, is based on the legitimate national need to enforce the securities laws. *See, e.g., Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.NY 1993) ("[t]he United States has a strong national interest in the enforcement of its securities fraud laws"). The SEC is conducting an active investigation into an apparently massive fraud at Longtop, and DTTC's audit workpapers would be critical evidence to understanding how such a fraud could have taken place and how it could have gone undetected for so long. DTTC has not disputed the SEC's need to obtain the subpoenaed documents. But it argues that the United States' interest in promoting international cooperation far exceeds its interest in enforcing the securities laws, and counsels against this Court's ordering compliance with the Subpoena. (DTTC Mem. 35-36). The problem with that argument, as set forth further below, is that the United States' desire to cooperate with its

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> to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.

Id. at 544 n.29 (internal citations omitted).

international partners in this arena is premised on having a joint interest in ensuring the compliance with and enforcement of the securities laws. The CSRC, however, has for years failed to provide meaningful cooperation to the SEC on such goals. Thus, developing a cooperative framework with the CSRC is not a realistic possibility in the foreseeable future. Given this stark reality, the United States' interest in enforcing its own laws through direct production demands takes precedence.

DTTC tries unsuccessfully to suggest that the SEC's interest in obtaining documents directly from DTTC is a shift in priorities. Specifically, DTTC makes much of the fact that the PCAOB issued registration rules allowing Chinese accounting firms, like DTTC, to register as foreign public accounting firms while noting "reservations" regarding their ability to produce documents to U.S. regulators. (DTTC Mem. 35). But by allowing DTTC to register, neither the PCAOB nor the SEC absolved DTTC of its production obligations; to the contrary, the PCAOB issued DTTC a letter, at the time of its registration, explicitly stating that DTTC was obligated to comply with its production obligations under U.S. law, regardless of any "reservations" it claimed.[11] Declaration of Susan J. Williams, Exh. A. Similarly, in guidance issued by the PCAOB on March 11, 2004, the PCAOB made clear that the fact that a foreign audit firm was permitted to register with the PCAOB while noting certain reservations as to its ability to produce documents did not absolve it of the legal obligation.[12] *Id.*, Exh. B. Although

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[11] Specifically, the PACOB wrote: "The Board's approval of Deloitte's registration application does not mean that the Board agrees with the legal conclusions described in the [Deloitte's] submission, and it does not estop the Board from contesting the invocation of any particular non-U.S. law that Deloitte might raise as an obstacle to complying with a Board demand or as a defense to a Board sanction for noncooperation." Williams Decl., Exh. A.

[12] Specifically, the PCAOB wrote:

> A registered firm's failure to cooperate with Board requests [for production of documents] in these contexts may subject the firm to disciplinary sanctions, including

DTTC does not acknowledge these documents, they make clear that this enforcement action is not "an after-the-fact attempt in litigation to rebalance and recharacterize" the SEC's interests in investigations on the one hand and in cooperating with foreign regulators on the other hand. (DTTC Mem. 35). The SEC has always been interested in pursuing both interests – and where possible, the SEC has and will continue to work collaboratively with foreign regulators to avoid conflicts of laws. But with respect to the CSRC and the Longtop audit workpapers, there is effectively no foreign partner with which to work at the present time.

B. The SEC Has No Alternative Means of Obtaining the Documents Sought by the Subpoena.

As noted above, the justification for enforcing the Subpoena is especially strong here because, contrary to DTTC's argument, the SEC does *not* have a "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)." (DTTC Mem. 25). DTTC claims that China "has chosen to channel all foreign securities regulators' requests for documents in the PRC through the CSRC," and that the "SEC deliberately has bypassed that

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> substantial civil money penalties and revocation of the firm's registration. In the staff's view, if a firm fails to cooperate with the Board, the fact that the firm has not obtained a client consent that might be necessary (under non-U.S. law) to allow the firm to cooperate is not a defense to a disciplinary action for failure to cooperate.
>
> As a practical matter, therefore, a firm must choose whether (1) to satisfy itself in advance that the non-U.S. client will provide any necessary consent if and when the Board demands documents or information concerning the client, (2) to proceed without such assurance and take a risk that it may later have to choose between providing information without the client's consent or facing a Board sanction for failing to provide the information, or (3) to decline the audit engagement. The Board has not attempted to dictate which of these choices a firm should make.

Williams Decl., Exh. B. DTTC chose to accept the audit engagement for Longtop and engage in the U.S. financial markets. It accepted precisely the risk the PCAOB warned of, and now must comply with U.S. law.

structure." (DTTC Mem. 29). To be sure, the SEC initially chose not to request assistance in this case from the CSRC; but that decision (later revisited after the SEC moved for a stay of this action, as discussed below) was only made because the CSRC had for some time failed to provide the SEC with any meaningful assistance in this arena. Indeed, despite the CSRC's public statements that it is willing to assist the SEC in its investigations, the CSRC's actions have proven precisely the opposite.

In the past four years, the SEC has sent 21 separate formal requests for assistance to the CSRC. (Arevalo Decl., ¶¶4-26, 54, 57 (describing requests for assistance)). *None* of these requests has led to meaningful assistance by the CSRC. *Id.* ¶¶4-27, 29-42, 45, 54-64. Indeed, with respect to those 17 (out of 21) requests seeking documents that relate to entities or individuals involved in potential financial frauds, *id.* ¶¶6-8, 10-21, 23, 26-27, 29-30, 32, 54, 57 (describing requests for business, corporate, financial, accounting, audit, or bank records), the CSRC has not provided any documents at all in response to 16 of them. *Id*. ¶¶6-8, 10-21, 23, 26-27, 33, 55-56.[13]

The SEC specifically sought audit workpapers of one or more China-based audit firms from the CSRC on two separate occasions in the two years prior to the initiation of this case. *Id.* ¶¶13-14, 26, 29-32.[14] In neither instance was the CSRC willing to provide the requested documents. In one case, although the SEC sent a request for assistance for audit workpapers on June 30, 2011, not only has the SEC received no workpapers, the CSRC has not even responded to acknowledge the SEC's request. *Id.* ¶26. In the other case, although the SEC

[13] As to the 17th request (which did not involve audit work papers) the CSRC provided only a very limited set of documents under terms that rendered them virtually useless for enforcement purposes. Arevalo Decl. ¶58.

sent its request for assistance in obtaining audit workpapers on June 7, 2010, the CSRC *still* has refused to produce them. *Id.* ¶¶13, 33, 56.[15] Indeed, the SEC initiated this subpoena-enforcement proceeding only after 15 months had passed since the June 2010 request, and only after the CSRC told the SEC that it would not produce responsive documents that the CSRC already had *in its possession*. *Id*. ¶¶13, 33-35.

The SEC's later attempts to negotiate the production of documents responsive to the June 2010 request were similarly to no avail. For example, in April 2012, the CSRC indicated that it would produce a few limited documents, but only on the condition (among others) that the SEC agree not to use them in any enforcement action without the CSRC's advance written authorization; and even then the CSRC was unwilling to produce the vast bulk of the requested documents apparently based on the *CSRC's* own conclusion that they are irrelevant. *Id.* ¶37. Such restrictions are not only inconsistent with the IOSCO MMOU to which both the SEC and CSRC are signatories, *id.* ¶40; Tafara Decl. ¶¶5, 10-14, 18-21; they are further indication that the CSRC is unwilling or unable to cooperate meaningfully. *See* Arevalo Decl. ¶ 33 (noting that over two-year period SEC sent or participated in over 30 communications with CSRC to try to obtain audit work papers responsive to June 2010 request). In short, before and during the early stages of this case, it appeared futile for the SEC to keep putting its investigations on hold while trying to obtain documents from China through the CSRC. *Id*. ¶45.

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[14] These requests did not seek audit workpapers from audits that DTTC performed for Longtop; they pertained to other entities whose financial disclosures are being investigated by the SEC. Arevalo Decl. ¶26.

[15] To the extent that DTTC cites the CSRC's annual report for the proposition that, in 2010, "the CSRC reported that it received 33 [requests for cross-border enforcement assistance from overseas regulators] and resolved 16 of them," (DTTC Mem. 37 n.21), we respectfully submit that this statistic is unreliable as to the SEC. It may be that the CSRC is labeling as "resolved" those requests from the SEC that were withdrawn after months of non-assistance from the

Notwithstanding the CSRC's dismal track record, as the Court is aware, the SEC tried yet again to enlist the CSRC's assistance in this case. The SEC sought and obtained from this Court a delay of the proceedings before the SEC Chairman traveled to China in early July 2012 in hopes that direct, face-to-face negotiations may spur a greater willingness by the CSRC to cooperate. While the trip led to additional negotiations, they were not fruitful. To accommodate any (baseless) concerns the CSRC had voiced about whether such documents could be produced under the MMOU, the SEC offered to enter into a new bi-lateral agreement under which the CSRC could produce documents to the SEC. *Id*. ¶50. However, the CSRC refused to enter such an agreement. *Id.* ¶53.

On August 6, 2012, the SEC formally requested the CSRC's assistance in obtaining DTTC's workpapers for Longtop. *Id*. ¶54. DTTC has represented in this case that it sent personnel to Shanghai over a year earlier (in June 2011) to prepare the workpapers for production and that it stands ready to produce the subpoenaed documents to the CSRC. *See* DTTC Mem. at 12; Warden Decl. ¶¶17-18. The CSRC nevertheless did not provide the documents by the SEC's requested date (October 1, 2012), nor did the CSRC commit to producing the documents in the future. Rather, the CSRC asked the SEC to narrow the categories of documents that it was seeking. Arevalo Decl. ¶55. Put simply, the CSRC is not a viable gateway for production of audit workpapers now, and there is no reason to expect it will become one in the foreseeable future. *Id.* ¶¶14, 59, 66.

CSRC. *See* Arevalo Decl. ¶ 27. In any event, suffice it to say that the SEC has not had any of its requests for assistance to the CSRC "resolved" with any meaningful assistance provided.

C. The Potential Hardship to DTTC Does Not Excuse Compliance

Finally, the fact that the Chinese government may sanction DTTC for complying with the Subpoena does not provide a sufficient basis for this Court not to order DTTC to produce the documents at issue. The possible hardship to DTTC remains speculative, and, to the extent it materializes, the fault would lie neither with the SEC nor with a U.S. court. Any such hardship would result from DTTC's profit-motivated decision to participate in the U.S. financial markets. Moreover, the possible hardship to DTTC for complying with the subpoena would be no more unjustified than the *actual* hardship that would befall the SEC and U.S. investors from allowing DTTC to hide behind Chinese law. DTTC chose – for compensation – to accept engagements as the auditor for Longtop, to assist Longtop in raising hundreds of millions of dollars from U.S. investors, and to file audit reports with the SEC that were relied upon by U.S. investors. It should not be permitted to willfully avail itself of the financial benefits of auditing financial statements of issuers with securities registered with the Commission and now claim hardship to avoid the U.S. legal requirements that come along with those benefits. *See Richmark*, 959 F.2d at 1477 ("[I]f the hardship is self-imposed, or if [the defendant] could have avoided it, the fact that it finds itself in an undesirable position will not work against disclosure of the requested information.").[16]

III. THE ORDER TO SHOW CAUSE WAS PROPERLY SERVED.

Finally, DTTC has contended in the alternative that this Court should not yet turn to the merits of the SEC's Application and should instead quash the Order to Show Cause because it

[16] Moreover, if this Court agrees with the SEC and orders DTTC to comply with the Subpoena, and if DTTC continues to refuse to do so because of its fear of sanction under Chinese law, this Court could again weigh the hardships in deciding what sanction is appropriate under U.S. law.

was not served through the Hague Convention.[17] DTTC makes this argument even though this Court has already considered the question of whether the SEC was required to serve the Order through the Hague Convention and has ruled that, pursuant to FRCP 4(f)(3), the SEC could serve the Order on DTTC's U.S. counsel. There is no merit to DTTC's argument.

A. Service of the Order to Show Cause on DTTC's Counsel Was Not Prohibited by International Agreement.

DTTC's argument is premised on the claim that "[s]ervice through the Hague Convention, where available, is not optional." (DTTC Mem. 40). But that is not correct. The Federal Rules of Civil Procedure expressly provide that "an individual . . . may be served at a place not within any judicial district of the United States . . . by other means not prohibited by international agreement, as the court orders." Fed. R. Civ. P. 4(f)(3). This Rule was "adopted in order to provide flexibility and discretion to the federal courts in dealing with questions of alternative methods of service of process in foreign countries." *Kaplan v. Hezbollah*, 715 F. Supp. 2d 165, 166 (D.D.C. 2010) (quotations omitted). Here, service of the Order to Show Cause on DTTC's counsel was appropriate because (1) it was not prohibited by international agreement and (2) it was expressly authorized in advance by this Court.

Service of the Order to Show Cause on DTTC's counsel was not prohibited by international agreement because the SEC is not "transmit[ting] a judicial or extrajudicial

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[17] On April 11, 2012, DTTC filed a separate Protective Motion to Quash the Order to Show Cause (Dkt. No. 24), but supplied the grounds for such a motion in its Memorandum opposing the SEC's Application (Dkt. No. 23). On August 9, 2012, the Court entered an order denying without prejudice DTTC's Protective Motion to Quash (Dkt. Nos. 32, 33). To the extent this Court separately considers the arguments in DTTC's Protective Motion to Quash, this portion of the SEC's Reply brief should be considered an opposition to that motion. *See* SEC's Protective Memorandum of Points and Authorities in Opposition to Respondent's Protective Motion to Quash the Order to Show Cause (Dkt. No. 26) (indicating that, with the consent of DTTC, the SEC would supply its substantive opposition to DTTC's Protective Motion to Quash as part of this reply brief).

document for service abroad." Hague Convention, art. 1. Rather, pursuant to an Order of this Court, the SEC transmitted the Order to Show Cause for service to counsel *in the United States*. That does not run afoul of the Hague Convention. While the Hague Convention provides that service *in China* must be done in accordance with the Convention, the Convention says nothing about how service must be made in the U.S., as occurred here.

DTTC argues that this analysis must be incorrect 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." (DTTC Mem. 43 n.33). But the SEC is not arguing that service on foreign nationals may, as a general matter, be made by serving documents on their U.S. counsel. Indeed, without prior authorization from a court pursuant to Rule 4(f)(3) or an acknowledgment that counsel is authorized to accept such service, service in this manner would be ineffective. But that is a different matter entirely from whether such an attempt at service is "prohibited by international agreement." Fed. R. Civ. P. 4(f)(3).

None of the cases that DTTC cites stands for the proposition that the Hague Convention *prohibits* courts from authorizing service by alternative means that do not include sending documents abroad. This very issue was considered in *In re LDK Solar Securities Litigation*, No. C 07–05182 WHA, 2008 WL 2415186 (N.D. Cal. June 12, 2008). In that case, plaintiffs sought court authorization to serve various individual residents of China, pursuant to Rule 4(f)(3), by providing a copy of a summons and complaint on the California office of those individuals' employer. The plaintiff sought this authorization notwithstanding the fact that they had not yet sought to serve the individual defendants through the Hague Convention. The court correctly ruled that "nothing in the Convention bars the requested means of service" because "plaintiffs do not request to effect service in China via mail; rather, they request to

serve the remaining six unserved defendants through [their employer]'s California office." *Id.* at *3. Apparently recognizing that such a form of service does not risk the same form of an affront to sovereignty as service in the foreign country, and that it would effectively provide the defendants with notice of the litigation, the court approved the requested means of alternative service. *Id.*

Moreover, as the court recognized in *LDK Solar*, there is nothing in Rule 4(f)(3) that requires the SEC first to attempt service through the Hague Convention before seeking authorization to employ an alternative means of service. As the Ninth Circuit explained in *Rio Properties v. Rio Int'l Interlink*:

> [C]ourt-directed service under Rule 4(f)(3) is as favored as service available under Rule 4(f)(1) or Rule 4(f)(2). Indeed, Rule 4(f)(3) is one of three separately numbered subsections in Rule 4(f), and each subsection is separated from the one previous merely by the simple conjunction "or." Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections; it stands independently, on equal footing. Moreover, no language in Rules 4(f)(1) or 4(f)(2) indicates their primacy, and certainly Rule 4(f)(3) includes no qualifiers or limitations which indicate its availability only after attempting service by other means.

284 F.3d 1007, 1015 (9th Cir. 2002) (footnote and internal citation omitted); *accord Nanya Tech. Corp. v. Fujitsu Ltd.*, 06-cv-25, 2007 WL 269087, *5 (D. Guam Jan. 26, 2007) (upholding Magistrate Judge's order permitting service under Rule 4(f)(3) even where plaintiff had not exhausted Hague Convention or other possible means of service); *Studio A Entm't, Inc. v. Active Distribs., Inc.*, No. 06-cv-2496, 2008 WL 162785, *3-4 (N.D. Ohio Jan. 15, 2008) (authorizing service by fax on foreign person, pursuant to Rule 4(f)(3), and noting that plaintiff need not first exhaust possible means of service under Rules 4(f)(1) and 4(f)(2)); *FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005) (explaining that Rule 4(f) "does not denote any hierarchy or preference of one method of service over another." (citing *Rio*

Properties, 284 F.3d at 1015)); *SEC v. Anticevic*, Case No. 05-cv-6991 (KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009) (holding that a plaintiff is not required to attempt service through the other provisions of Rule 4(f) before the court can order service pursuant to Rule 4(f)(3)); *cf. Levin v. Ruby Trading Corp.*, 248 F. Supp. 537, 540 (S.D.N.Y. 1965) (Weinfeld, J.) (discussing predecessor version of Rule 4(f)(3) and noting that "the necessary safeguards are determined by the court[,] which to assure adequacy of notice, may tailor the manner of service to fit the necessities of a particular case" (internal quotations omitted)).

While DTTC tries to distinguish the Ninth Circuit's opinion in *Rio* on the grounds that the country at issue there was not a signatory to the Hague Convention, that fact is not relevant to the court's statutory analysis. *See LDK Solar*, 2008 WL 2415186, at *3 ("It is true that *Rio* involved a non-signatory country. Nonetheless, the Ninth Circuit's reasoning in the *Rio* decision is still applicable—as long as the service is 'court-directed and not prohibited by an international agreement,' service can be effected pursuant to FRCP 4(f)(3)."). Indeed, "Rule 4(f)(3) may allow the district court to order a 'special method of service,' even if other methods of service remain incomplete or unattempted," whatever those means of service may be and regardless of whether they may be futile. *Rio Properties*, 284 F.3d at 1015; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2010 WL 2198240, at *2-3 (N.D. Cal. May 28, 2010) (authorizing plaintiffs to serve foreign defendants through their U.S. counsel and noting that requiring plaintiffs to serve defendants by letters rogatory, where defendants and their counsel already had notice of the litigation, would be unnecessarily expensive, time-consuming, and burdensome).

In sum, "service of process under Rule 4(f)(3) is neither a 'last resort' nor 'extraordinary relief.'" *Rio Properties*, 284 F.3d at 1015; *see also* 4B Wright & Miller,

Federal Practice & Procedure: Civil § 1134 (3d ed. 2011) ("The use of a court-directed means for service of process under Rule 4(f)(3) is not a disfavored process and should not be considered extraordinary relief."). Ultimately, the decision of whether to authorize a party to serve pleadings on a foreign respondent through its U.S. counsel (or through any other means) is committed to the sound discretion of the district court and should be evaluated upon the facts of a given case.

B. This Court's Order Authorizing the SEC to Serve the Order to Show Cause on Counsel Was Within This Court's Discretion

In this case, the decision to authorize the SEC to serve the Order to Show Cause on DTTC's U.S. counsel was a sound use of this Court's discretion. While DTTC makes much of the fact that the SEC did not first attempt to serve it through the Hague Convention, what it never once mentions is the core purpose service is meant to effect.

"[T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." *Henderson v. United States*, 517 U.S. 654, 672 (1996); *see also Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 176 (2d Cir. 1979) ("The Supreme Court has long recognized that no one form of substitute service is favored over any other so long as the method chosen is reasonably calculated, under the circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit and an opportunity to present his defense."). That goal has been well served here, as DTTC has not only appeared through counsel – it has filed a lengthy opposition to the SEC's Application (including a declaration of one of DTTC's partners) presenting all of its defenses and objections. There is thus no reason to unwind this Court's decision to authorize service in the manner it did.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court grant the Commission's Application and issue an Order, in the form provided, setting this case for a hearing at which DTTC should be ordered to comply with the Subpoena by immediately producing all responsive documents.

Dated: Washington, D.C.
December 3, 2012

Respectfully submitted,

/s/ David Mendel

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2012, I served, via email, a copy of the foregoing Securities and Exchange Commission's Reply Memorandum in Support of its Application for Order Requiring Compliance with Subpoena, together with the supporting declarations of Ethiopis Tafara, Alberto Arevalo, Donald Clarke, and Sarah Williams, and exhibits thereto, on counsel for the Respondent:

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