UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Taotao USA, Inc.,	)	**Docket No. CAA-HQ-2015-8065**
Taotao Group Co., Ltd., and	)	
Jinyun County Xiangyuan Industry	)	
Co., Ltd.	)	
	)	
Respondents.	)	

ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION OF THE ORDERS ON RESPONDENTS' MOTION IN LIMINE AND RESPONDENTS' MOTION TO TAKE DEPOSITIONS

I. Relevant Background[1]

This action was initiated on November 12, 2015. The ten count Complaint, as amended, alleges that Respondents committed a total of 109,964 violations of sections 203 and 213 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7522, 7547, and implementing regulations codified at 40 C.F.R. Parts 86, 1051, and 1068. The violations allegedly arose from Respondents' manufacture and import into the United States of motorcycles and recreational vehicles with catalytic converters not designed or built in accordance with their Certificates of Conformity ("COC"). Specifically, Complainant claims that the vehicles did not contain the precious metal content/ratios in their catalytic converters as Respondents represented they would in their COC applications.

On November 28, 2016, more than a year after this case was instituted, and after the parties had completed their initial prehearing exchanges of evidence, both parties filed motions seeking accelerated decision in their favor. *See* Complainant's Motion for Partial Accelerated Decision ("PAD Motion"); Respondents' Motion for Accelerated Decision ("AD Motion"). The parties each filed responses and replies in opposition to the other's motion and in support of their own, in addition to engaging in other motions practice.[2] Notably, Complainant filed in support

[1] This section contains only a sliver of the procedural history of this case. A total of 120 pleadings and orders have been filed in the case to date.

[2] On November 28, 2016, Complainant filed its First Motion to Supplement the Prehearing Exchange with its PAD Motion, and Respondents filed a Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss") with their AD Motion. At the request of Respondents, the deadlines for the parties' responses to the pending motions was subsequently extended. *See* Order on Respondents' Motion to Extend Deadlines (Dec. 16, 2016). On January 3, 2017, Complainant filed a Second Motion to Supplement the Prehearing Exchange and Combined Response

of its pleadings related to the PAD and AD Motions, *inter alia*, the declarations of two of its expert witnesses, Dr. Ronald Heck and Dr. John Warren.[3]

On May 3, 2017, this Tribunal ruled on the parties' cross motions for accelerated decision and on the various other motions then pending. *See* Order on Partial Accelerated Decision and Related Motions (May 3, 2017) ("PAD Order"). In particular, the PAD Order denied Respondents' AD Motion and granted Complainant's PAD Motion, finding the material facts establishing Respondents' liability for the alleged violations not to be in dispute.[4] In rendering those rulings, the PAD Order cited certain documents in the record in support, including Respondents' COC applications, dozens of laboratory test results of Respondents' catalytic converters, and the expert opinions of Drs. Heck and Warren. *See* PAD Order at 8, n.8, 9-15, 24, and 31.

On May 15, 2017, Respondents filed a Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal of the PAD Order ("Motion for Reconsideration or Interlocutory Review"), to which Complainant filed a response and Respondents filed a reply. On June 15, 2017, the Motion for Reconsideration or Interlocutory Review was denied, primarily on the basis that it raised the same legal argument – namely, that that the precious metal ratios of catalytic converters were not "specifications" under the Agency's definition of that term – that Respondents had raised in their AD Motion and in opposition to Complainant's PAD Motion, and failed to show any error in the prior adverse ruling on that issue. *See* Order on Respondents' Motion for Reconsideration or Interlocutory Review (June 15, 2017).

On June 17, 2017, Respondents filed a Motion to Take Depositions, seeking to depose Drs. Heck and Warren, among other witnesses proposed by Complainant. Following the filing of Complainant's Response to Respondents' Motion to Take Depositions, this Tribunal ruled upon the Motion to Take Depositions by Order dated July 7, 2017. *See* Order on Respondents' Motion to Take Depositions (July 7, 2017) ("Deposition Order"). The Deposition Order, *inter alia*, denied Respondents' request to depose Drs. Heck and Warren on the bases that (1) their

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Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision, and Respondents filed responses to Complainant's First Motion to Supplement the Prehearing Exchange and PAD Motion. On January 12, 2017, Respondents moved to stay the proceedings, due to the change of administrations, which was denied by Order dated January 27, 2017. On January 13, 2017, Complainant filed both its replies in support of its PAD Motion and First Motion to Supplement the Prehearing Exchange, and Respondents filed a Reply to Complainant's Combined Response to Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision.

[3] Dr. Heck's first Declaration (CX 176), dated November 25, 2016, was submitted as part of Complainant's First Motion to Supplement the Prehearing Exchange on November 28, 2016, simultaneous with the filing of Complainant's PAD Motion. Complainant submitted Dr. Warren's Declaration (CX 179), dated December 8, 2016, with its Second Motion to Supplement the Prehearing Exchange and Combined Response Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision on January 3, 2017. Dr. Heck's "Second Declaration," dated January 12, 2017, was submitted on January 13, 2017, as "Attachment A" to Complainant's Reply in Support of Complainant's Motion for Partial Accelerated Decision.

[4] The PAD Order also denied Respondents' Motion to Dismiss filed on November 28, 2016, and granted Complainant's First and Second Motions to Supplement the Prehearing Exchange filed respectively on November 28, 2016 (with its AD Motion) and January 3, 2016 (with its combined response to Respondents' Motion to Dismiss and AD Motion).

expected testimony related solely to the issue of Respondents' liability, a matter no longer in dispute because it had been ruled upon in the PAD Order; and (2) Complainant had indicated that it no longer intended to call these witnesses at hearing.[5] *See* Complainant's Response to Respondents' Motion to Take Depositions (July 3, 2017).

On June 23, 2017, Respondents filed a Motion in Limine to Exclude Testimony and Evidence of Ronald M. Heck, John Warren, Amelie Isin, and Dr. James J. Carroll, which Complainant opposed in its Response to Respondents' Motion in Limine filed on July 10, 2017. By Order dated July 18, 2017, Respondents' request to exclude the testimony of Drs. Heck and Warren was denied as "moot," based upon Complainant's decision to no longer call them as witnesses at hearing.[6] *See* Order on Respondents' Motion in Limine (July 18, 2017) ("Limine Order").

Before the Tribunal now is Respondents' Motion for Reconsideration of the Orders on Respondents' Motion in Limine and Respondents' Motion to Take Depositions ("Motion") filed on July 29, 2017. Complainant filed its response to the Motion on August 14, 2017 ("Response").

II. Respondents' Motion

Respondents' Motion requests reconsideration of the Deposition and Limine Orders, seeking as relief leave to take the depositions of Drs. Heck and Warren or, alternatively, exclusion of their declarations from evidence, thereby setting aside of the PAD Order and allowing the issue of liability to be tried at hearing. Mot. at 1, 9-10. In support of such relief, Respondents make a number of arguments.

First, Respondents challenge the timing of Complainant's submission of its proposed experts' reports. Respondents acknowledge that Complainant identified in its Initial Prehearing Exchange filed on August 25, 2016, both Drs. Heck and Warren, along with others, as expert witnesses expected to be called at hearing, and also simultaneously submitted as evidence copies of certain catalytic converter laboratory test results. Mot. at 2 (citing Complainant's Initial Prehearing Exchange at 4-6). However, they assert, at that point "Complainant did not submit anything proving the reliability of said scientific evidence, nor did they propose an expert witness who would attest to the reliability of the catalytic converter testing methods and test results." *Id*. at 2-3 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)). Nor were any reports from Drs. Heck and Warren included in Complainant's Initial Prehearing Exchange, Respondents assert. Mot. at 2.

Further, Respondents continue, although the deadline to submit its Rebuttal Prehearing Exchange was extended until October 14, 2016, Complainant only submitted Dr. Heck's initial declaration, stating "nothing about the reliability of the test results," as part of its First Motion to Supplement the Prehearing Exchange filed on November 28, 2016, the same day that it filed its

[5] Conversely, the Deposition Order granted Respondents' request to depose two other witnesses proposed by Complainant, Amelie Isin and James J. Carroll.

[6] Respondents' request to exclude the testimony of Ms. Isin and Mr. Carroll was denied without prejudice to resubmit at a later date, if appropriate. *See* Limine Order at 2.

PAD Motion. Mot. at 3-4. Additionally, Complainant did not submit Dr. Warren's declaration (or that of Ms. Isin) until it filed its Second Motion to Supplement the Prehearing Exchange on January 3, 2017, "the last day to submit responses" and "after Respondents had already filed their Response to Complainant's [P]AD Motion." *Id.* Finally, Complainant did not submit the Second Declaration of Dr. Heck until January 13, 2017, "the day all replies were due," and it still "said nothing regarding the reliability of the [catalytic converter] tests," notwithstanding the various challenges that Respondents purportedly raised regarding their validity. *Id.* at 6.

Respondents claim that they were "unduly surprised and prejudiced by the untimely declarations" because (1) while the witnesses were identified in Complainant's Initial Prehearing Exchange, after the PAD Order was issued, Complainant struck John Warren from its proposed witness list (and indicated that Ms. Isin would no longer be testifying as to sampling methods); (2) Complainant did not simply use the expert declarations for the "limited purpose of responding to 'Respondents' Two Motions,' but rather as evidence supporting Complainant's [P]AD Motion"; and (3) "Complainant now not only claims that the experts will no longer testify to the matters contained in the declarations, but states that the declarations cannot be assessed for reliability because they are no longer in evidence." Mot. at 4-5 (citing Complainant's Third Motion to Supplement the Prehearing Exchange at 2-4; Complainant's Response to Respondents' Motion in Limine). Respondents conclude:

> Complainant not only submitted untimely expert materials in the absence of expert testimony, thereby depriving Respondents' from [sic] an opportunity to attack the credibility of said materials, it also opposed Respondents' motion to take depositions of those experts at their own expense. To make matters worse, Complainant and [sic] is now seeking to exclude any testimony from Respondents' own witnesses that could potentially invalidate said materials.

Id. at 5 (citing Complainant's Motion in Limine at 2-3; Complainant's Reply in Support of Motion in Limine to Exclude Evidence and Testimony at 3-6).

Respondents decry such purported tactics, arguing that "[j]ustice is not served by allowing a moving party to unfairly surprise and prejudice the nonmovant by producing evidence of new, substantive facts at the last minute when there is no opportunity for the non-movant to respond." Mot. at 6 (citing *Tishcon Corp. v. Soundview Commc'ns., Inc.*, 2006 U.S. Dist. LEXIS 97309 (N.D. Ga. Feb. 14, 2006); *Gametech Int'l, Inc. v. Trend Gaming Sys., L.L.C.*, 380 F. Supp. 2d 1084, 1092 (D. Ariz. 2005); *Republic Bank Dallas, N.A. v. First Wis. Nat'l Bank of Milwaukee*, 636 F. Supp. 1470, 1472 (E.D. Wis. 1986)). Respondents further rely on *Viero v. Bufano*, 925 F. Supp. 1374 (N.D. Ill. 1996), for the proposition that "[t]rial by ambush" "has no place in a court of law, and particularly not in the well-ordered world of summary judgment motions." Mot. at 7 (quoting *Viero*, 925 F. Supp. at 1380).

The Motion is not an attempt "to merely 'take a third bite at the apple to challenge liability,'" Respondents aver. Mot. at 1. Rather, they insist, they simply are requesting "the opportunity to show that Complainant's [P]AD Motion relied on unreliable and inadmissible evidence," asserting that "Respondents did not have an opportunity to challenge Complainant's evidence on liability." *Id.* (citing Respondents' Motion for Continuance of the Hearing (June 9,

2017) at 1-7). They opine that the PAD Order makes no reference to the reliability of the laboratory test results, which they say they challenged; on which Complainant had the burden of proof; and as to which, being scientific evidence, this Tribunal was required to serve as gatekeeper to ensure both relevancy and reliability. *Id*. at 7 (citing Fed. R. Evid. 702; *Daubert*, 509 U.S. at 589). Respondents characterize Complainant's opposition to their "attempts to remediate Complainant's failure to prove the reliability of its scientific evidence" as "consistently interfering with Respondents' due process rights." *Id*. at 8 (citing *In re Digital Equip. Corp. Sec. Litig.*, 601 F. Supp. 311, 316-17 (D. Mass. 1984)).

Following on this point, Respondents argue that permitting them to take the depositions and possibly challenge the reliability of Complainant's scientific evidence and expert opinions at hearing will "help the parties save time and resources in the long run." Mot. at 9. They suggest that this Tribunal's findings in the PAD Order will not withstand legal scrutiny on appeal because Dr. Heck "never submitted any testimony regarding the reliability of the laboratory test results and neither has any other expert." *Id.* (citing *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000); *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003)). Similarly, Respondents state, the PAD Order "makes no reliability determination of Mr. Warren's declarations and whether it satisfies the *Daubert* standard." *Id.* In support of their argument, Respondents cite generally to law review articles on EPA and *Daubert*, and EPA environmental models.[7] *Id.*

III. Complainant's Response

In its Response, Complainant strongly opposes the relief sought in the Motion as follows.

First, Complainant argues that Respondents have not identified any "demonstrable error" in fact or law in either the Limine or Deposition Order, which is the legal standard for obtaining reconsideration. Res. at 2-3 (citing *Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5, at *73; *Pyramid Chem. Co.*, 2004 EPA App. LEXIS 50, at *2 (EAB) (Order Denying Motion for Reconsideration)). Further, Complainant notes, the Environmental Appeals Board has held that a motion for reconsideration does not provide an opportunity to reargue for the relief initially sought in a more convincing fashion, to introduce new evidence, or to tender a new legal theory. *Id*. at 2-3 (citing *Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5, at *73; *Pyramid Chem. Co.*, 2004 EPA App. LEXIS 50, at *3 (EAB) (Order Denying Motion for Reconsideration)).

Second, Complainant contends that Respondents' Motion as to the Deposition Order is untimely, as the Consolidated Rules of Practice governing this proceeding, set forth at 40 C.F.R. Part 22, require motions to reconsider an order to be filed within 10 days of service of the order upon which reconsideration is sought. Res. at 3 (citing 40 C.F.R. § 22.32). Complainant notes that the instant Motion was not filed until July 28, 2017, a full 21 days after the Deposition Order was served, and Respondents have not offered any good cause for filing late or requested leave to file out of time. *Id.*

[7] See Andrew Task, Comment, *Daubert and the EPA: An Evidentiary Approach to Reviewing Agency Determinations of Risk*, 1997 U. CHI. LEGAL F. 569 (1997), and Wendy E. Wagner et al., *Misunderstanding Models in Environmental and Public Health Regulation*, 18 N.Y.U. ENVTL. L.J. 293 (2010).

Third, Complainant argues that the Motion is "grossly improper" in that it represents an "unjustified effort to request reconsideration of the May 3, 2017 Order on Partial Accelerated Decision and Related Motions." Res. at 1, 4. It notes the PAD Order has already been the subject of an order denying reconsideration issued on June 15, 2017, well over a month before the instant Motion was filed. *Id.* at 4. Further, as to the claim that the Tribunal erred in granting partial accelerated decision in the PAD Order because Respondents were denied a fair opportunity to respond to the evidence offered by Complainant in support, Complainant argues that the claim is hollow, as the record shows that Respondents in fact "had a full and fair opportunity to challenge the evidence against them." *Id*. Lastly, Complainant protests that Respondents are prejudicing the "orderly adjudication of this matter" by persistently attempting to offer new arguments in an attempt to revisit the settled issue of liability "until they are satisfied with the outcome." *Id*. at 8 (citing *Pyramid Chem. Co.*, 2004 EPA App. LEXIS 50, at *2 (EAB) (Order Denying Motion for Reconsideration)).

IV. Discussion

Upon consideration, I find no merit to Respondents' Motion.

The timing of the submission of the declarations at issue in connection with Complainant's PAD Motion or in opposition to Respondents' AD Motion was not improper. The Consolidated Rules of Practice specifically provide in Rule 22.16 that all motions and responses and replies thereto "shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon." 40 C.F.R. § 22.16(a), (b). Further, Rule 22.20, which addresses motions for accelerated decision specifically, authorizes the Presiding Officer to grant accelerated decision "without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists . . . ." 40 C.F.R. § 22.20(a). Submission of affidavits and declarations with motions for accelerated decision, and in response thereto, is in fact common practice, and it is not inappropriate for a tribunal to consider them in ruling on the motions. *See Strong Steel Prods., LLC.*, 2005 EPA ALJ LEXIS 6, at *12-13 (Order on Respondent's Motions for Administrative Subpoenas to Compel Testimony) (stating that the scope of supporting documents which may be relied upon in regard to accelerated decision is broad) (citing *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2722 (noting that affidavits supporting summary judgment are, by their nature, ex parte and not subject to cross-examination)). The reason for this is simple – unless and until Complainant decided to move for accelerated decision, or responded to issues raised in Respondents' AD Motion, Complainant had no reason to acquire declarations from its experts, and no obligation to provide such declarations to Respondents. Respondents' suggestion otherwise is simply erroneous.

Moreover, Respondents' claim of being "surprised" by the filing of the declarations is stupefying and made more so by their own admissions – specifically, the acknowledgement that Complainant identified both Drs. Warren and Heck as proposed expert witnesses in its Initial Prehearing Exchange, filed on August 25, 2016, three months prior to moving for accelerated decision. Moreover, in its Initial Prehearing Exchange, the Complainant summarized the expected testimony of Drs. Warren and Heck and provided copies of their resumes as CX157 and CX158, respectively. Respondent has not asserted, and there is no evidence to show, that the declarations of those proposed expert witnesses was not within the reasonable scope of the

anticipated testimony for them set forth in Complainant's Initial Prehearing Exchange. *See* CX 176; CX 179; Attachment A to Complainant's Reply in Support of the Complainant's Motion for Partial Accelerated Decision.

Similarly unconvincing is Respondents' claim of prejudice caused by the "surprise" of "untimely" filed declarations. As noted above, Respondents were aware of these proposed expert witnesses for three months before Complainant's PAD Motion was filed, and in all that time did not to attempt to secure their depositions. Nor did they request leave to take the proposed expert witnesses' depositions after the declarations were filed in order to be better able to respond to the PAD Motion. Respondents certainly could have sought leave to take such depositions as part of their responses, such as they were, to Complainant's First and Second Motions to Supplement the Prehearing Exchange, or separately therefrom, before the Tribunal ruled on the PAD Motion, as such ruling was not issued until five months *after* the PAD Motion was filed. Respondents are well aware that this Tribunal has granted many extensions of time in this action to allow both parties a full and fair opportunity to respond to filings. Contrary to Respondents' claims, Complainant's actions here do not represent in any way a "trial by ambush."

Also unpersuasive is Respondents' claimed "surprise" that Complainant relied upon the declarations in support of their PAD Motion, rather than just in opposition to Respondents' AD Motion. In its First Motion to Supplement the Prehearing Exchange, to which Dr. Heck's initial declaration was attached, Complainant explicitly said that it was submitting the declaration, and three other documents related thereto, "[in]to the record in conjunction with Complainant's Motion for Partial Accelerated Decision." Complainant's First Motion to Supplement the Prehearing Exchange at 3. Moreover, Complainant's Second Motion to Supplement the Prehearing Exchange with Dr. Warren's Declaration was literally incorporated into Complainant's response opposing Respondents' AD Motion, and Dr. Heck's Second Declaration was "Attachment A" to Complainant's Reply in Support of Complainant's Motion for Partial Accelerated Decision. *See* Complainant's Second Motion to Supplement the Prehearing Exchange and Combined Response Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision at 1-2. Further, the general rule is that when considering accelerated decision, the Presiding Officer may take into account *all* the evidence then in the record, regardless of the party that initially proffered the evidence. *Minnesota Metal Finishing, Inc*., 2007 EPA ALJ LEXIS 1, *6-8 (in considering summary judgment under Fed. R. Civ. Pro. 56(c), "a court may take into account any material that would be admissible or usable at trial," including affidavits and material produced in discovery) (citing *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993) (citing 10A CHARLES A. WRIGHT, ARTHUR R. MILLER AND MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2721 at 40 (2d ed. 1983); *Pollack v Newark*, 147 F. Supp. 35 (D.N.J. 1956) (in considering a motion for summary judgment, a tribunal is entitled to consider exhibits and other papers that have been identified by affidavi**t**, or otherwise made admissible in evidence), *aff'd*, 248 F.2d 543 (3rd Cir. 1957), *cert. denied*, 355 U.S. 964 (1958); *Hoffman v. Applicators Sales & Service, Inc*., 439 F.3d 9, 15 (1st Cir. 2006) (citing 11 JAMES M. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.10 (Matthew Bender 3rd ed.) (courts generally accept use of documents produced in discovery as proper summary judgment material)).

It also should not have come as a surprise to Respondents that, having prevailed on liability though accelerated decision, Complainant would no longer plan to call witnesses to testify in order to establish Respondents' liability. Time at hearing is limited and the evidence to

be admitted at this point is on disputed factual issues. If Respondents wished to challenge the testimony of the experts on liability, they should have sought to take their depositions or introduce counter expert evidence before or during the pendency of the parties' motions for accelerated decision.

Finally, ringing most hollow is Respondents' claim that they are not seeking further reconsideration of the PAD Order, particularly given that the relief sought in the Motion, directly or indirectly, is to undo the ruling in the PAD Order as to their liability so as to have a hearing thereon. Moreover, to the extent that Respondents ground their request for such relief on either Federal Rule of Evidence 702 and/or *Daubert* factors, such authorities are of no assistance, because the Environmental Appeals Board has held that neither are "controlling principles" in administrative cases. *Solutia Inc*., 10 E.A.D. 193, 211 (EAB 2001); *see also Tiger Shipyard, Inc*., 1999 EPA RJO LEXIS 20, *78-79 (noting that the *Daubert* standard is based on Rule 702 of the Federal Rules of Evidence, and those rules do not apply to EPA administrative hearings; rather the applicable standard for admissibility of evidence is 40 C.F.R. § 22.22(a) ("Presiding Officer shall admit all evidence [that] is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value"), which allows for the admission of a broader range of evidence than under the Federal Rules of Evidence).

In this case, as noted in the PAD Order, Complainant submitted copies of Respondents' COC applications for the 10 engine families at issue and close to three dozen catalytic converter precious metals testing and analysis reports on multiple engines from those families based on testing conducted by various entities at different times between 2013 and 2016. *See* PAD Motion at 24. Respondents contracted for some of this testing based upon a test plan they had developed with EPA providing for the tests to be conducted and analyzed by independent entities. *Id*. at 18. None of the catalytic converters tested and analyzed had precious metals concentrations/ratios as described in Respondents' relevant COC applications. *Id*. at 24, 28; Att. A & B to PAD Motion. In response, Respondents noted that different catalytic converter tests conducted at different laboratories on the same or similar vehicles yielded results with different active material concentrations, and suggested that "therefore the tests are not entirely reliable." Respondent's Response to Complainant's Motion for Partial Accelerated Decision at 7 (comparing catalytic converter test results from ERG (Attachment B of Complainant's PAD Motion) to catalytic converter test results from SGS (Complainant's PAD Motion at 20)). However, Respondents noted that the laboratories indicated that the variance in the results was "within the acceptable range." *Id*. They also speculated that the test results "could be caused by any number of reasons," such as the age, mileage, and useful life of the catalytic converters or their removal. *Id.* at 7, 17. At no point, however, did Respondents proffer any evidence supporting a finding that the laboratory tests conducted and the results thereof were not reliable or could have been influenced by the factors they cited.[8]

Complainant, nevertheless, responded to Respondents' questioning of the reliability of the tests, with argument as well as the Second Declaration of Dr. Heck explicitly controverting that any of the factors mentioned by Respondents would affect the ratio of precious metals in the washcoat of the catalytic converter tested. *See* Complainant's Reply in Support of Complainant's Motion for Partial Accelerated Decision at 3-4 (citing Att. A, Second Heck Decl.

[8] Respondents have never claimed that the general types of testing performed by the laboratories were not recognized as reliable in the field or industry for accurately determining the concentration/ratio of precious metals.

¶¶ 2-9). Complainant also included in their response to Respondents' AD Motion argument and evidence, including the statistical analysis set forth in the Declaration of Dr. Warren attached thereto, opposing Respondents' assertion that there is "no evidence" that *all* 109,964 vehicles identified in the Amended Complaint were equipped with catalytic converters different from those described in the relevant COC applications. *See* Complainant's Second Motion to Supplement the Prehearing Exchange and Combined Responses Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision at 17-20, and Att. 1 Warren Decl. (citing Respondents' AD Motion at 6–7). At no point did Respondent proffer any evidence to counter Dr. Warren's Declaration.

Thus, at the time this Tribunal rendered its ruling on the parties' motions for accelerated decision in May 2017, Complainant had proffered evidence of the reliability of its expert evidence, including the numerous test results consistently showing engines not in compliance with COCs and the impressive resumes and declarations of Drs. Heck and Warren. Respondents, on the other hand, had provided literally nothing of substance to this Tribunal to show that the various laboratory test results, Dr. Heck's opinions in regard thereto, and Dr. Warren's statistical analysis were to any extent unreliable. Even at this point, months later, Respondents have proffered nothing, nor do they even suggest with any certainty that they will be able to obtain such evidence if allowed to depose Drs. Heck and Warren. It is the obligation of this Tribunal to "[d]o all other acts and take all measures necessary . . . for the efficient, fair and impartial adjudication of issues arising in [this] proceeding[]." 40 C.F.R. § 22.4(c)(10). In furtherance thereof, this Tribunal denied and/or found moot Respondents' Motion in Limine and Motion to Take Depositions, which were submitted after the PAD Order was issued, with regard to Drs. Heck and Warren. Respondents have not demonstrated any error of fact or law in those denials. Accordingly, and for the other reasons stated above, Respondents' Motion for Reconsideration of the Orders on Respondents' Motion in Limine and Respondents' Motion to Take Depositions is hereby **DENIED**. Respondents shall file no further pre-hearing motions directly or indirectly challenging the finding as to their liability in this matter.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: September 8, 2017
Washington, D.C.

In the Matter of *Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd.,* Respondents. Docket No. CAA-HQ-2015-8065

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Respondents' Motion for Reconsideration of the Orders on Respondents' Motion in Limine and Respondents' Motion to Take Depositions,** dated September 8, 2017, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Dated: September 8, 2017
Washington, D.C.