



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 LEAVE TO FILE AMENDED ANSWERS

On October 2, 2017, Respondents filed a Motion for Leave to File Amended Answers ("Motion"). The Motion seeks permission to file an Amended Answer out of time, i.e., after the deadline for filing motions expired.1 Mot. at 1. It further asks to amend Respondents' Answers to the Amended Complaint to correct "unintentional mistakes or errors made therein" and add "new affirmative defenses [which] have been part of Respondents' arguments and defenses throughout settlement negotiations." Mot. at 1.

Specifically, Respondents desire to change their answers to paragraphs 4, 12 and 13 of the Amended Complaint which they claim they "unknowingly and inadvertently admitted" and that "[d]iscovery and further investigations have revealed . . . may not be accurate." Mot. at 1. Additionally, Respondents indicate they want to assert additional defenses of "mistake, violation of Respondents' civil rights and right to equal protection, waiver and estoppel." Mot. at 1.

The Motion states that the Agency, which has not yet filed a written response, opposes the relief sought. Mot. at 1. Given the Motion's lack of merit and the impending hearing, scheduled to begin October 17, 2017, no response is necessary.

DISCUSSION

This action was initiated on November 12, 2015 with the filing of a Complaint alleging, in eight counts, 64,377 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. Part 86, Subpart E

1 This Tribunal established a deadline of September 22, 2017, for the filing of all prehearing motions in this case. See Order on Respondents' Motion for Continuance of the Hearing at 3 (June 27, 2017).

and 40 C.F.R. §§ 1051, 1068. Respondents filed their answers to the Complaint on January 19, 2016, and February 9, 2016, respectively.

In July 2016, I granted the Agency permission to file an Amended Complaint. *See* Order on Motion for Leave to Amend Complaint and to Extend Prehearing Deadlines (Jul. 5, 2016). The Amended Complaint added two more counts and allegations of additional wrongdoing under sections 203 and 213 of the CAA, 42 U.S.C. §§ 7522, 7547, raising the total number of violations to 109,964. Am. Compl., ¶ 38.

The three Respondents each filed Answers to the Amended Complaint on August 17, 2016. In those Answers, Respondents admitted the truth of paragraphs 4, 12, and 13 of the Amended Complaint, which state as follows:

4. Taotao USA is a corporation organized under the laws of Texas with an office at 2201 Luna Road, Carrollton, Texas 75006.
12. Matao Cao is the president of Taotao USA.
13. Matao Cao is the registered agent of Taotao USA; his registered business address is 659 East Royal Lane, No. 3043, Irving, Texas 75039.<sup>2</sup>

Am. Compl. at 2.

Respondents also raised in their Answers to the Amended Complaint myriad affirmative defenses including that “process and service of process” of the Complaint upon the “Taotao Group was improper;” that they were not subject to the Clean Air Act as alleged; that no emission standards were exceeded; that the violations were *de minimus*; that the regulations being enforced were unconstitutional; that EPA lacks subject matter jurisdiction over the matter; and that “[t]he claims asserted by Complainant may be barred by any or all of the affirmative defenses contemplated by Federal Rules of Civil Procedure.” Am. Answers at 16-20.

Subsequently, the parties each moved for accelerated decision, in whole or in part.<sup>3</sup> On May 3, 2017, this Tribunal granted Complainant’s Motion for Partial Accelerated Decision

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<sup>2</sup> The allegations in the Amended Complaint differed significantly from those in the original Complaint. *See* Compl., ¶ 4 (“Taotao USA is a corporation organized under the laws of Texas with an office at Suite 100, 2425 Camp Avenue, Carrollton, Texas 75006.”); ¶ 12 (“Matao Cao is the registered agent of Taotao USA; his registered business address is 659 East Royal Lane, No. 3043, Irving, Texas 75039.”); ¶ 13 (“Taotao Group has authorized Taotao USA to receive service of process from the EPA on its behalf.”). Taotao USA admitted the allegations of paragraphs 4 and 12 in its Answer to the original Complaint, and denied the truth of paragraph 13. *See* Respondent Taotao USA, Inc.’s Original Answer and Request for Hearing at 1-2 (Jan. 19, 2016)

<sup>3</sup> Both parties have actively and aggressively litigated this case, including undertaking extensive discovery and filing dispositive motions.

finding Respondents liable for the violations as alleged. In reaching that conclusion the Tribunal relied upon, and found as true, the facts as set forth in paragraphs 4, 12, and 13 as admitted by Respondents in their Answers. *See* Order on Partial Accelerated Decision and Related Motions (“AD Order”) at 7 n.7, 21. It also addressed the affirmative defenses raised by Respondents in opposition to the Complainant’s motion for accelerated decision and found they did not bar the entry of liability. AD Order at 21-31.

Now, almost two years into this proceeding, after the parties have completed discovery, after accelerated decision on liability has been granted, and after the motions deadline has passed, on essentially the eve of hearing, in yet another attempt to challenge the Tribunal’s finding on liability,<sup>4</sup> Respondents wish to retract their admissions of fact and raise a series of new affirmative defenses. Although the rules allow Answers to be amended and leave to amend may be liberally granted, this does not mean “that leave to amend should be granted freely.” *Webb v. Teco Barge Line, Inc.*, No. 07-514-DRH, 2012 U.S. Dist. LEXIS 30338, at \*17-18 (S.D. Ill. Mar. 7, 2012) (citing *Thompson v. Ill. Dep’t of Prof’l Regulation*, 300 F.3d 750, 759 (7th Cir. 2002)). Indeed, leave to amend may be denied on grounds of “undue delay, bad faith, dilatory motive, prejudice, or futility.” *Id.* (quoting *Guise v. BWM Mortg., LLC*, 377 F.3d 795, 801 (7th Cir. 2004)). “The degree of prejudice to the opposing party is a significant factor in determining whether the lateness of the request ought to bar the filing.” *Id.* (quoting *Doherty v. Davy Songer, Inc.*, 195 F.3d 919, 928 (7th Cir. 1999)). Moreover, the decision to grant or deny a motion for leave to file an amended pleading is “a matter purely within the sound discretion” of this Tribunal. *See id.* (quoting *Guise*, 377 F.3d at 801). *See also Isochem N. Am., LLC*, 2007 EPA ALJ LEXIS 37, \*32-33 (EAB, Dec. 27, 2007) (noting injustice resulting to the opposing party which weighs against granting a motion to amend may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs and burdens to the opposing party); *Carroll Oil Co.*, 2002 EPA App. LEXIS 14, \*42 (EAB, July 31, 2002) (“Parties to litigation have an interest in the speedy resolution of their disputes without undue expense. Substantive amendments just before trial are not to be countenanced.”).

The alleged errors Respondents now seek to correct all involve facts as to which Taotao USA, Inc. should at all times have been intimately familiar, as they pertain to its own corporate status, president, and registered agent. Respondents fail in their Motion to proffer any good faith explanation of why Taotao USA, Inc. was not aware of these facts so as to have not erroneously made the admissions in the first place or corrected them sooner. Similarly, they have not explained why they waited until this point in the litigation to attempt to formally add their new affirmative defenses when they assert they were raising them informally all along in settlement discussions.

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<sup>4</sup> Respondents have repeatedly attempted to directly and indirectly attack and obtain reconsideration of this Tribunal’s Order on Partial Accelerated Decision. *See* Order on Respondents’ Motion for Reconsideration or Interlocutory Appeal (Jun. 15, 2017); Order Granting Respondents’ Motion for Leave to Respond and Complainant’s Motion Requesting Official Notice (Aug. 18, 2017); Order Denying Respondents’ Motion for Reconsideration of the Orders on Respondents’ Motion in Limine and Respondents’ Motion to Take Depositions at 8 (Sep. 8, 2017).

Moreover, allowing Respondents to amend their Answers at this point in the way they request would significantly prejudice the Agency in that it would undoubtedly require additional discovery, reconsideration of various past orders, and a postponement of the upcoming hearing. In essence, it would essentially start this two-year-old proceeding anew, and I cannot allow that. See 40 C.F.R. § 22.4(c)(10) (Presiding officer tasked with taking all “acts” and “measures necessary for the maintenance of order and for the efficient fair and impartial adjudication of issues arising in proceedings.”). As such, this Tribunal finds it inappropriate to grant Respondents’ Motion. See *McNett v. Hardin Cmty. Fed. Credit Union*, No. 3:02 CV 7576, 2006 U.S. Dist. LEXIS 60144, at \*3-4 (N.D. Ohio Aug. 24, 2006) (denying as untimely defendants’ request to raise a new affirmative defense 16 months after remand and 10 days before trial); *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159, 161-162 (S.D.N.Y. 2005) (denying leave to amend answer on eve of trial to add affirmative defense of after-acquired evidence due to unexplained 22 month delay); *Webb v. Teco Barge Line, Inc.*, No. 07-514-DRH, 2012 U.S. Dist. LEXIS 30338, at \*18-20 (S.D. Ill. Mar. 7, 2012) (denying request to amend answer to add “inadvertently omitted” setoff claim on the eve of trial as plaintiff had no opportunity to conduct discovery.).

### **CONCLUSION**

Based upon the foregoing, Respondents’ Motion for Leave to File Amended Answers is **DENIED**.

**SO ORDERED.**



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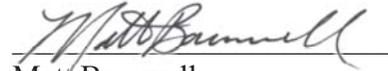
Susan L. Biro  
Chief Administrative Law Judge

Dated: October 4, 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 certify that the foregoing **Order Denying Respondents' Motion for Leave to File Amended Answers**, dated October 4, 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: October 4, 2017  
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