



**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 ON AGENCY’S MOTION IN LIMINE**

On June 23, 2017, the Agency filed a Motion in Limine (“Motion”) seeking to exclude evidence and testimony of various witnesses Respondents may call to testify at hearing. The Motion targets Respondents’ proposed exhibits RX 1, RX 18, and RX 19, and Respondents’ proposed witnesses Larry Doucet, Clark Gao, Joseph L. Gatsworth, Granta Nakayama, Jacqueline Robles Werner, and “the primary author of the Penalty Policy.” Mot. at 2-4. On the same day it was filed, the Agency served the Motion on Respondents by email.

Respondents filed a response in opposition (“Response”) to the Motion on July 17, 2017, 24 days after the Motion was served. This filing was not timely. As the governing procedural rules provide, “[a] party’s response to any written motion must be filed within 15 days after service of such motion . . . . Any party who fails to respond within the designated period waives any objection to the granting of the motion.” 40 C.F.R. § 22.16(b). Respondents did not seek leave to file their Response out of time or offer any explanation for the tardiness of their filing. Because the Response is untimely, Respondents have waived any objection to the Motion, and I will not consider their Response.

On July 27, 2017, the Agency filed a reply brief (“Reply”) objecting to the tardiness of the Response and to the substance of Respondents’ arguments.

With respect to the admission of evidence, “[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . .” 40 C.F.R. § 22.22(a)(1). As this Tribunal has previously observed, motions in limine “should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose. Motions in limine are generally disfavored. If evidence is not clearly inadmissible, evidentiary rulings may be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context.” *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 21, at \*11 (ALJ, April 24, 2006)). *See also Aylin, Inc.*, EPA Docket No. RCRA-03-2013-0039, 2016 EPA ALJ LEXIS 49, at \*6 (ALJ, April 4, 2016) (quoting *Zaclon*).

The Agency first asks to exclude Respondents' exhibit RX 1. Mot. at 2. This exhibit is titled "Confirmatory Testing and Correspondence" and relates to one of the engine families at issue. Respondents' Prehearing Exchange at 00001-00032 (Nov. 3, 2016). The documents appear to contain appended commentary by Respondents or their counsel and are possibly removed from their original context. Thus, the Agency contends that RX 1 "was self-evidently prepared for the purpose of this proceeding, and appears to be attorney work product. It is inherently argumentative, and 'argument is not evidence.'" Mot. at 2 (citing *United States v. Alvarez*, 451 F.3d 320, 336 (5th Cir. 2006)). The Agency concludes RX 1 is therefore unreliable, and the Agency is perhaps correct: RX 1, in its current form, is of questionable admissibility because the added commentary and lack of context suggests that the exhibit as a whole may not be reliable. However, the *substance* of RX 1 is not clearly inadmissible. Consequently, I will not at this time exclude RX 1. Respondents may offer a revised/redacted version of RX 1 at hearing or provide persuasive argument and a suitable foundation for admitting RX 1 in its current form.

Next, the Agency asks to exclude Respondents' exhibits RX 18 and RX 19. Mot. at 2. These exhibits are titled, respectively, "Approved COCs for similar vehicles without catalytic converters" and "COC applications for similar vehicles without catalytic converters." Respondents' First Motion to Supplement the Prehearing Exchange at 00257-00445 (June 19, 2017). They do not appear to relate to the vehicles or engines in this case. As the Agency notes, the exhibits "are simply not relevant, material, or probative in this matter." Mot. at 2. Although I will not exclude them at this time, unless Respondents come forward with some persuasive showing of relevance at the hearing, these exhibits will not be admitted.

As for Respondents' proposed witnesses, the Agency seeks to exclude Larry Doucet, an environmental engineer who "may be qualified to testify as an expert on the reliability of different catalytic converter testing methods and the degree of 'crucial' importance, of precious metal concentrations in catalytic converters with respect to pollutant emission reductions, performance and efficiencies." Respondents' First Motion to Supplement at 3. The Agency contends that this proposed testimony relates to the issue of liability, on which this Tribunal has already ruled. Mot. at 2. The Agency again is mostly correct. This Tribunal has already addressed the issues about which Mr. Doucet would purportedly testify and found that Respondents violated the law. *See* Order on Partial Accelerated Decision and Related Motions (May 3, 2017). As Respondents describe it, Mr. Doucet's testimony appears to focus on issues of liability. However, his testimony could conceivably address whether and to what extent Respondents' catalytic converters resulted in or were likely to result in emission of pollutants outside of allowable parameters, i.e., the gravity of their violations. Therefore, he will be permitted to testify but only insofar as his testimony addresses penalty issues. Any testimony that relates to liability shall be excluded.

The Agency also asks to block the testimony of "Clark Gao and/or Joseph L. Gatsworth." Mot. at 2-3. Respondents indicate that "Mr. Guo may be qualified as an expert on statistical analyses of the results of precious metal analyses conducted on catalytic converters taken from Respondents' vehicles, and whether the catalytic converters analyzed may be representative of catalytic converters in vehicles across respective engine families relevant to this matter." Respondents' First Motion to Supplement at 3. Similarly, Respondents state that "Mr.

Gatsworth may be qualified as an expert on statistical analyses of the results of precious metal analyses conducted on catalytic converters taken from Respondents' vehicles, and whether the catalytic converters analyzed may be representative of catalytic converters in vehicles across respective engine families relevant to this matter." Respondents' First Motion to Supplement at 4. As to both witnesses, the Agency notes that their testimony "is relevant solely to the question of Respondents' liability for the violations alleged in the Amended Complaint." Mot. at 3. And again, the Agency is correct. This Tribunal has found there to be sufficient evidence that Respondents' liability extends to all of the vehicles it imported that are cited in the Amended Complaint, not merely to the specific vehicles the Agency inspected. Respondents will not be permitted to relitigate this point. Consequently, Mr. Gao and Mr. Gatsworth may not testify about the foregoing subjects.

Finally, the Agency moves to exclude the testimony of Granta Nakayama and Jacqueline Robles Werner.<sup>1</sup> Mr. Nakayama, according to Respondents, "is one of the primary authors of the Clean Air Act Mobile Source Penalty Policy ('Penalty Policy), which Complainant has relied upon in calculating its proposed penalty assessment." Respondents' First Motion to Supplement at 4. Ms. Werner "either co-authored the Penalty Policy or substantially assisted in its development." Respondents' First Motion to Supplement at 4. This Tribunal previously considered their potential testimony in the context of Respondents' request for subpoenas. *See* Order on Respondents' Motion for Issuance of Subpoenas (July 18, 2017). As I determined then,

Respondents have failed to demonstrate the materiality and relevancy of the evidence to be adduced from these proposed witnesses in that there is no allegation of ambiguity in the Penalty Policy that would justify this Tribunal looking beyond the document itself for interpretation. Moreover, penalty policies are not regulations and are not binding upon an ALJ making penalty determinations. *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002) (penalty policies do not bind the ALJ because they have not been subject to rulemaking procedures of the Administrative Procedure Act and therefore lack the force of law).

Order on Respondents' Motion for Issuance of Subpoenas at 3 (citations omitted).

Consequently, Ms. Werner's testimony is unnecessary, duplicative, and riddled with potential conflicts given that she supervises counsel for the Agency in this case. *See* Order on Respondents' Motion for Issuance of Subpoenas at 1-4. As such, and for the same reasons a subpoena was inappropriate, she may not testify on Respondents' behalf. Mr. Nakayama, another former Agency employee, also faces many conflict-based barriers, although as also previously discussed by this Tribunal, he theoretically could offer opinion testimony about the

---

<sup>1</sup> The Agency also moves for the exclusion of "the primary author of the Penalty Policy," to whom Respondents refer as a proposed witness if Mr. Nakayama and Ms. Werner are not available. Respondents' First Motion to Supplement at 4 n.2. For the reasons stated above, any such individual fitting this description would likely be excluded from testifying.

Agency's application of the Penalty Policy if the context for doing so were appropriate. *See* Order on Respondents' Motion for Issuance of Subpoenas at 1-4. To that extent, at this stage of the proceeding I will not forbid his testimony. But Respondents will have an uphill battle at hearing to prove his suitability as a witness given the potential conflicts and general relevancy issues his participation in this matter would raise.

Consequently, the Agency's Motion in Limine is **GRANTED in part** and **DENIED in part** as outlined above.

**SO ORDERED.**



---

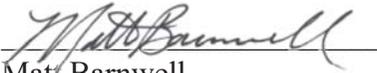
Susan L. Biro  
Chief Administrative Law Judge

Dated: September 19, 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 on Agency's Motion in Limine**, dated September 19, 2017, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

  
Matt Barnwell  
Attorney Advisor

**Original by Hand Delivery To:**

Mary Angeles  
Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Room M1200  
1300 Pennsylvania Avenue, N.W.  
Washington, DC 20004

**Copies by E-Mail To:**

Edward Kulschinsky, Esq.  
U.S. EPA, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
1200 Pennsylvania Ave., NW  
William J. Clinton Federal Building  
Room 1142C, Mail Code 2242A  
Washington, DC 20460  
Email: [kulschinsky.edward@epa.gov](mailto:kulschinsky.edward@epa.gov)  
*Attorney for Complainant*

Robert G. Klepp, Esq.  
U.S. EPA, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
1200 Pennsylvania Ave., NW  
Room 1111A, Mail Code 2242A  
Washington, DC 20460  
Email: [klepp.robert@epa.gov](mailto:klepp.robert@epa.gov)  
*Attorney for Complainant*

Mark J. Palermo, Esq.  
U.S. EPA, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
1200 Pennsylvania Ave., NW  
Room 3319C, Mail Code 2242A  
Washington, DC 20460  
Email: [palermo.mark@epa.gov](mailto:palermo.mark@epa.gov)  
*Attorney for Complainant*

William Chu, Esq.  
Salina Tariq, Esq.  
The Law Office of William Chu  
4455 LBJ Freeway, Suite 909  
Dallas, TX 75244  
Email: [wmchulaw@aol.com](mailto:wmchulaw@aol.com)  
Email: [stariq.wmchulaw@gmail.com](mailto:stariq.wmchulaw@gmail.com)  
*Attorneys for Respondents*

Dated: September 19, 2017  
Washington, D.C.