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 RESPONDENTS' MOTION TO TAKE DEPOSITIONS

In May, this Tribunal ordered the parties to submit all non-dispositive prehearing motions on or before June 23, 2017. *See* Hearing Notice and Order at 2 (May 9, 2017). Subsequently, Respondents filed a timely motion seeking additional discovery through depositions of all of the Agency's witnesses. *See* Respondents' Motion to Take Depositions (June 17, 2017) ("Motion"). The Agency opposes the Motion. *See* Complainant's Response to Respondents' Motion to Take Depositions (July 3, 2017) ("Response").

A party may move for additional discovery following the prehearing exchange. 40 C.F.R. § 22.19(e)(1). "The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought . . . . The Presiding Officer may order such other discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

Id. The Rules are further restrictive with respect to depositions, providing that I may order them only if I also find that "(i) [t]he information sought cannot reasonably be obtained by alternative methods of discovery; or (ii) [t]here is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing." 40 C.F.R. § 22.19(e)(3). But notably, despite the Rules' general bias toward more streamlined adjudication that involves less discovery, I have "'broad discretion to determine how to conduct the proceedings under the Rules of Practice.'" *Nicor Gas*, Docket No. TSCA-HQ-2015-5017, 2016 EPA ALJ LEXIS 107, at *3 (ALJ, Nov. 22, 2016) (quoting *Chem-Solv, Inc.*, Docket No. RCRA-03-2011-0068, 2012 EPA ALJ LEXIS 4, at *3-4 (ALJ, Feb. 29, 2012).

Proposed Depositions

a. Amelie Isin

Amelie Isin is an environmental engineer who served as the Agency's lead investigator in this matter. According to the Agency, Ms. Isin may testify concerning the vehicle inspections she performed; inspections by other Agency or federal employees and contractors she coordinated and oversaw; and the calculation of the proposed penalty. Complainant's Initial Prehearing Exchange at 4 (Aug. 25, 2016). More specifically, Ms. Isin's penalty testimony may include information the Agency considered when evaluating the gravity of the violation, the economic benefit resulting from the violation, Respondents' financial condition, history of compliance, degree of cooperation, and willfulness and negligence. Complainant's Third Motion to Supplement the Prehearing Exchange at 3 (June 16, 2017). The Agency may also qualify her as an expert in its mobile source enforcement program; penalty calculation under the Agency's Clean Air Act Mobile Source Civil Penalty Policy; and catalytic converter analysis. Complainant's Initial Prehearing Exchange at 4.

Respondents contend Ms. Isin "will likely have pertinent knowledge on vehicle examinations conducted on subject vehicles, removal and subsequent delivery of catalytic converters for testing, and Complainant's communications with Respondent Taotao USA, Inc." Mot. at 2. They further argue she "has additional information regarding Complainant's claim of 'fair notice' and Respondents' cooperation," which "is crucial to proper penalty calculation and Respondents' position that the proposed penalty is inappropriate and fails to account for all necessary penalty factors." Mot. at 2. As to her expert opinion, Respondents state they seek additional information on topics related to her expertise, "such as [ ] the sampling method employed in this matter so that Respondents have an opportunity to retain experts or collect additional evidence to challenge the methods." Mot. at 2.

The Agency outright opposes any questioning of Ms. Isin about topics related to liability, "which ha[ve] already been resolved in this matter." Response at 11. The Agency further states that the issue of "fair notice" has also previously been decided against Respondents. Response at 11. Finally, the Agency claims it has provided "a robust explanation" of the penalty calculation through its prehearing exchange materials, and "Respondents have not explained why the information provided to date is not sufficient to allow them to prepare their defense, or identified with particularity what additional information they hope to obtain through Ms. Isin's deposition." Response at 11-12.

Nevertheless, in light of her central role in this case, Respondents may depose Ms. Isin on matters related to the calculation of the proposed penalty and the application of the Agency's penalty policy. Respondents may further depose Ms. Isin on matters related to which the Agency seeks to qualify her as an expert, including the bases of her opinions. Outside of these parameters, Respondents may not otherwise depose Ms. Isin on issues of liability that this Tribunal has already determined. "Allowing discovery of this information through deposition is 'reasonable' and 'satisfies the criteria for further discovery under Rule 19(e).'" *Nicor Gas*, 2016 EPA ALJ LEXIS 107, at *6 (quoting *Intermountain Farmers Association*, Docket No. FIFRA-8-99-58, 2000 EPA ALJ LEXIS 22, at *3 (ALJ, Mar. 24, 2000)). "Additionally, 'the purpose of the prehearing exchange is to afford the parties a meaningful opportunity to prepare for hearing . . . and such purpose can be achieved only if the prehearing exchange imparts sufficient

information concerning, among other things, the testimony of each proposed witness.'" *Id.* at *6-7 (quoting *Aylin, Inc., et al.*, Docket No. RCRA-03-2013-0039, 2016 EPA ALJ LEXIS 23 at *30 (ALJ, March 2, 2016)). In this instance, the prehearing exchange does not impart sufficient information to Respondents concerning Ms. Isin's penalty calculation or proposed expert testimony. Other forms of discovery cannot adequately provide this information, as "the give and take of an oral deposition enables Respondent[s] to obtain a more complete understanding of [Ms. Isin's] . . . reasoning than other forms of discovery would provide." *Id.* at 8. As the lead investigator, Ms. Isin is the most reasonable source of information that Respondents seek, and this information has significant probative value relevant to proposed penalty. Further, in light of the postponed hearing date, this deposition will not "unreasonably delay the proceeding nor unreasonably burden" the Agency.

Respondents must give to the Agency reasonable written notice of Ms. Isin's deposition, and Respondents shall file a copy of the deposition notice with this Tribunal. *See* Fed R. Civ. P. 30(b)(1). Before issuing the notice, Respondents shall confer with the Agency to determine a mutually agreeable time and place for Ms. Isin's deposition. Respondents must state in the notice the method for recording Ms. Isin's testimony. Testimony may be recorded by audio, audiovisual, or stenographic means, and Respondents shall bear the recording and transcription costs. Fed R. Civ. P. 30(b)(3)(A). If all parties agree, the deposition may be taken by telephone or videoconference. Fed R. Civ. P. 30(b)(4). The deposition shall be limited to one day of 7 hours unless otherwise altered or extended by agreement of the parties. *See* Fed. R. Civ. P. 30(d). To the extent that either party wishes to introduce any portion of the deposition into the record or at hearing, a certified written transcript of the deposition must be provided.

b. Emily Chen

Emily Chen is an environmental engineer at the Agency whose duties include reviewing applications for Certificates of Conformity ("COCs") submitted for gasoline-powered engines. She may testify as a fact witness about Respondents' COC applications and confirmatory test orders her office issued to Taotao USA. Complainant's Rebuttal Prehearing Exchange at 4 (Oct. 13, 2016). Respondents contend they need to depose her "to properly prepare their defense." Mot. at 2. However, they offer no explanation for why her testimony is required in advance of the hearing, and there is no apparent need for it. *See also* Response at 9. Moreover, it is not clear her testimony relates to penalty issues remaining for hearing. Consequently, Respondents may not depose Ms. Chen.

c. Cleophas Jackson

Cleophas Jackson directs the operations of the Agency office that receives and reviews COC applications submitted for gasoline-powered vehicles. He may testify as a fact witness about the Agency's Clean Air Act vehicle and engine regulatory program; COC applications; selective enforcement audits conducted; the application process; program harm caused by the type of violations identified in the Amended Complaint; annual production reports; and confirmatory test orders his office issued to Respondents. Complainant's Third Motion to Supplement the Prehearing Exchange at 3. He may also testify about communications he and his staff had with Respondents and closely-related entities; Respondents' relationship to other entities; and observations he and his staff made during a facility visit and audit of Respondents' manufacturing facility in China. Complainant's Third Motion to Supplement the Prehearing

Exchange at 3-4. Finally, Mr. Jackson may also be qualified to testify as an expert about the Agency's Clean Air Act vehicle and engine regulatory program and emissions testing. Complainant's Third Motion to Supplement the Prehearing Exchange at 4.

Similar to Ms. Chen, Respondents argue they need to depose Mr. Jackson "to properly prepare their defense and evaluate his qualifications as a potential expert." Mot. at 3. However, unlike Ms. Chen, Mr. Jackson's proposed testimony appears to relate more closely to penalty issues. Thus, for many of the same reasons Respondents are permitted to depose Ms. Isin, they also may depose Mr. Jackson on matters related to the calculation of the proposed penalty and the application of the Agency's penalty policy. Respondents may further depose Mr. Jackson on matters related to which the Agency seeks to qualify him as an expert, including the bases of his opinions. Outside of these parameters, Respondents may not otherwise depose Mr. Jackson on issues of liability that this Tribunal has already determined.

Respondents must give to the Agency reasonable written notice of Mr. Jackson's deposition, and Respondents shall file a copy of the deposition notice with this Tribunal. *See* Fed R. Civ. P. 30(b)(1). Before issuing the notice, Respondents shall confer with the Agency to determine a mutually agreeable time and place for Mr. Jackson's deposition. Respondents must state in the notice the method for recording Mr. Jackson's testimony. Testimony may be recorded by audio, audiovisual, or stenographic means, and Respondents shall bear the recording and transcription costs. Fed R. Civ. P. 30(b)(3)(A). If all parties agree, the deposition may be taken by telephone or videoconference. Fed R. Civ. P. 30(b)(4). The deposition shall be limited to one day of 7 hours unless otherwise altered or extended by agreement of the parties. *See* Fed. R. Civ. P. 30(d). To the extent that either party wishes to introduce any portion of the deposition into the record or at hearing, a certified written transcript of the deposition must be provided.

d. John Warren

John Warren, Ph.D., is a senior statistician at the Agency. He provides statistical expertise to the Agency in environmental data collection and interpretation, including methodology and techniques used to support Agency standards, rules, and regulations. Dr. Warren may be qualified to testify as an expert on the results of precious metal analyses of catalytic converters taken from Respondents' vehicles and whether the catalytic converters analyzed may be representative of catalytic converters in vehicles across their respective engine families. Complainant's Initial Prehearing Exchange at 5-6.

Respondents seek to depose Dr. Warren for "additional information on [his] theories and opinion, his qualifications, and the appropriateness [sic] his chosen method of calculations." Mot. at 3. They additionally argue that it is "imperative" for them to obtain more information from Dr. Warren "to challenge his designation as an expert and his unfavorable written declaration." Mot. at 3.

The Agency responds that Dr. Warren has information pertaining only to the issue of liability, and because all questions of liability have been answered, it no longer intends to call

him to testify at the hearing.[1] Because the Agency no longer intends to present Dr. Warren as a witness, Respondents may not depose him.

e. Ronald Heck

Ronald Heck, Ph.D., is a chemical engineer in the field of catalyst technology. He may be qualified to testify as an expert on catalytic converter design and catalytic air pollution control technology, and to provide opinion testimony about how alterations in precious metal content may impact the efficacy and longevity of catalytic converters. Complainant's Initial Prehearing Exchange at 5.

Respondents seek to depose Dr. Heck on his theories and opinion related to his proposed testimony, as well as "the information he relied upon in making the determination that 'emissions data obtained from the low mileage tests performed by CEE are not indicative of how the catalytic converters would perform to reduce emissions at the end of the vehicles' useful life.'" Mot. at 3 (quoting CX 176). Respondents believe obtaining this information "will significantly reduce the proposed penalty, specifically, the gravity and egregiousness component." Mot. at 4.

The Agency responds that Dr. Heck has information pertaining only to the issue of liability, and because all questions of liability have been answered, it no longer intends to call him to testify at the hearing.[2] Because the Agency no longer intends to present Dr. Heck as a witness, Respondents may not depose him.

f. James Carroll

James Carroll is a Certified Public Accountant, Certified Management Accountant, Certified Fraud Examiner, Certified Financial Manager, a Chartered Global Management Accountant, and is Certified in Financial Forensics. The Agency intends to qualify him as an expert on matters concerning the Clean Air Act civil penalty factor, "the effect of the penalty on the violator's ability to continue in business." This will include testimony on financial evaluation; ratio analysis; Generally Accepted Accounting Principles (GAAP); hybrid accounting; Respondents' federal tax returns for years 2012 through 2015; appropriate financial sheet adjustments that stem from differences in the accounting conventions used by Taotao USA, Inc. for tax reporting from GAAP typically used by other companies with the same Business Activity/North American Industrial Classification System ("NAICS") code; and other matters concerning Respondents' finances and accounting.

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[1] In a footnote, the Agency adds the caveat that it may still call Dr. Warren as a rebuttal witness based on the disposition of other pending motions. Response at 6 n.4. However, as the Agency also observes, Dr. Warren would then be able to testify only within the scope of issues raised by Respondents' witnesses, and Respondents would have adequate opportunity to cross-examine him. Thus, even if he ultimately testifies, there is no need to depose Dr. Warren in advance.

[2] As with Dr. Warren, the Agency adds the caveat that it may still call Dr. Heck as a rebuttal witness. Response at 6 n.4. Likewise, the constraints this places on his testimony negates any need to depose him in advance.

Respondents ask to depose Mr. Carroll on his "determination that [they] have an ability to continue in business, the calculation models employed, and the information relied upon." Mot. at 4. Without deposing him, Respondents say, they "cannot successfully challenge [Mr. Carroll] and his proposed testimony . . . ." Mot. at 4.

The Agency notes it has filed a motion to supplement the prehearing exchange with an expert report prepared by Mr. Carroll, and this report "provides the information Respondents seek regarding [his] analysis and opinion." Response at 10; *see also* CX 192. Because Respondents will have the chance to examine Mr. Carroll at hearing, the Agency argues there is no need for them to depose him in advance. Response at 10.

For many of the same reasons Respondents are permitted to depose Ms. Isin and Mr. Jackson, they also may depose Mr. Carroll on matters related to the calculation of the proposed penalty and the application of the Agency's penalty policy. Respondents may further depose Mr. Carroll on matters related to which the Agency seeks to qualify him as an expert, including the bases of his opinions. Outside of these parameters, Respondents may not otherwise depose Mr. Carroll on issues of liability that this Tribunal has already determined.

Respondents must give to the Agency reasonable written notice of Mr. Carroll's deposition, and Respondents shall file a copy of the deposition notice with this Tribunal. *See* Fed R. Civ. P. 30(b)(1). Before issuing the notice, Respondents shall confer with the Agency to determine a mutually agreeable time and place for Mr. Carroll's deposition. Respondents must state in the notice the method for recording Mr. Carroll's testimony. Testimony may be recorded by audio, audiovisual, or stenographic means, and Respondents shall bear the recording and transcription costs. Fed R. Civ. P. 30(b)(3)(A). If all parties agree, the deposition may be taken by telephone or videoconference. Fed R. Civ. P. 30(b)(4). The deposition shall be limited to one day of 7 hours unless otherwise altered or extended by agreement of the parties. *See* Fed. R. Civ. P. 30(d). To the extent that either party wishes to introduce any portion of the deposition into the record or at hearing, a certified written transcript of the deposition must be provided.

g. Mario Jorquera

Mario Jorquera is a senior environmental engineer at the Agency. He coordinates with U.S. Customs and Border Protection to inspect imported goods at ports for Clean Air Act compliance, and he inspected Respondents' shipments at the Los Angeles/Long Beach Seaport. He may testify as a fact witness about the Agency's inspection program and inspections of Respondents' vehicles. Complainant's Initial Prehearing Exchange at 4.

According to Respondents, Mr. Jorquera "is the only person who can testify to the facts surrounding the inspections, i.e. why were the shipments inspected, what was found, how often does the Agency inspect similar shipments, etc." Mot. at 4. Nobody else "can shed light on these facts," Respondents claim. Mot. at 4.

The Agency responds that Mr. Jorquera has information pertaining only to the issue of liability, and because all questions of liability have been answered, it no longer intends to call him to testify at the hearing. Because the Agency no longer intends to present Mr. Jorquera as a witness, Respondents may not depose him.

h. Andy Loll, Colin Wang, Sam King, Brent Ruminski, and Cassidy Owen

The above individuals are employees of Eastern Research Group, Inc. ("ERG"), an Agency contractor that analyzed many of the catalytic converters in this case. They are expected to testify as fact witnesses about their analyses. Complainant's Initial Prehearing Exchange at 4-5.

Respondents contend they must depose these individuals because Respondents "cannot present their defense to the proposed penalty without obtaining all necessary facts regarding the handling of the converter, the testing methods employed, and the accuracy of these methods compared to test methods employed by other catalytic converter test labs." Mot. at 5. Respondents allege these witnesses can also provide information about common industry testing practices, the accuracy of test results, the frequency with which ERG tests catalytic converters for the Agency, and the differences between testing at ERG and testing at other laboratories. Mot. at 5.

The Agency responds that the ERG employees have information pertaining only to the issue of liability, and because all questions of liability have been answered, it no longer intends to call them to testify at the hearing. Because the Agency no longer intends to present these employees as witnesses, Respondents may not depose them.

i. Nathan Dancher and Peter Husby

Nathan Dancher is an environmental engineer in the Agency's Region 9 office who inspected Respondents' vehicles at the Los Angeles/Long Beach Seaport and will testify about these inspections. Peter Husby is the lab project manager in the Agency's Region 9 Laboratory who is slated to testify about the laboratory's analysis of some of the catalytic converters taken from Respondents' vehicles. Complainant's Initial Prehearing Exchange at 5.

Respondents argue that, like the ERG tests, "Respondents cannot present their defense to the proposed penalty without obtaining all necessary facts regarding the handling of the converter, the testing methods employed, and the accuracy of these methods compared to test methods employed by other catalytic converter test labs." Mot. at 5.

The Agency responds that the Region 9 employees have information pertaining only to the issue of liability, and because all questions of liability have been answered, it no longer intends to call them to testify at the hearing. Because the Agency no longer intends to present these employees as witnesses, Respondents may not depose them.

j. Jennifer Suggs and Benjamin Burns

Jennifer Suggs and Benjamin Burns are both chemists at the Agency's National Enforcement Investigations Center ("NEIC"). They are scheduled to testify as fact witnesses about the center's analyses of washcoat samples taken from catalytic converters in Respondents' vehicles. Complainant's Initial Prehearing Exchange at 5.

As with the laboratory witnesses above, Respondents claim they "cannot present their defense to the proposed penalty without obtaining all necessary facts regarding the handling of

the converter, testing methods employed, and the accuracy of these methods compared to test methods employed by other catalytic converter test labs." Mot. at 5.

The Agency responds that the NEIC employees have information pertaining only to the issue of liability, and because all questions of liability have been answered, it no longer intends to call them to testify at the hearing. Because the Agency no longer intends to present these employees as witnesses, Respondents may not depose them.

k. Stan Culross

Stan Culross was the emission lab manager at Lotus Engineering, Inc., which conducted emissions testing one of Respondents' vehicles. Mr. Culross is expected to testify as a fact witness about Lotus's emissions testing of the vehicle. Complainant's Initial Prehearing Exchange at 5.

Respondents speculate that "[b]ecause all other vehicles belonging to the engine family passed emissions at CEE and the only vehicle that allegedly exceeded emissions was tested by Lotus Engineering, Inc., . . . the test at Lotus was not properly conducted." Mot. at 6. Respondents believe Mr. Culross "is the only witness who can shed light" on the apparent testing discrepancy. Mot. at 6.

However, this justification is unsubstantiated and insufficient. Moreover, as the Agency notes, Mr. Culross is not an Agency employee, and "the burden a deposition would impose on [him] outweighs any benefit Respondents will gain from deposing him." Response at 7. Consequently, Respondents may not depose Mr. Culross.

Conclusion

For the foregoing reasons, Respondents' Motion is **GRANTED in part** and **DENIED in part**. Respondents may depose Amelie Isin, Cleophas Jackson, and James Carroll subject to the limitations outlined above. The rest of Respondents' deposition requests are denied.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: July 7, 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 Respondents' Motion to Take Depositions,** dated July 7, 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: July 7, 2017
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