

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:

**Taotao USA, Inc.,
Taotao Group Co., Ltd., and
Jinyun County Xiangyuan Industry
Co., Ltd.,**

Respondents.

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**Docket No.
CAA-HQ-2015-8065**

RESPONDENTS' MOTION FOR CONTINUANCE OF THE HEARING

Pursuant to 40 C.F.R. § 22.12, Respondents' Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd. respectfully file this Motion for Continuance of the hearing currently scheduled for Tuesday, July 18, 2017, and in support thereof show as follows:

I.

On November 28, 2016, Respondents filed a Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss") and a Motion for Accelerated Decision ("Respondents' AD Motion"). The same day, the Agency filed its First Motion to Supplement the Prehearing Exchange ("First Motion") and a Motion for Partial Accelerated Decision ("Agency's AD Motion"). Around the same time, Complainant also sent Respondents a request for information on economic benefit dated November 21, 2017.

When Respondents and Complainant filed their dispositive motions, the time for discovery had closed as both parties had submitted their prehearing exchanges. *See* 40 C.F.R. § 22.19(a). However, the Presiding Officer granted Agency's AD Motions relying on evidence

submitted not only after discovery was closed but even after the deadline for Respondents to respond to the Agency's AD Motion had passed.¹

Complainant's First Motion to Supplement the Prehearing Exchange included, among other documents, an expert opinion by a previously designated expert witness, pertaining to catalytic converters, precious metals, and validity of emission tests. *See* Exhibit CX176, "Declaration of Ronald M. Heck." Ironically, Complainant's claimed in the First Motion that Respondents would not be prejudiced by the additional documents because a hearing had not yet been set on the matter, but then attempted to use the document to support its Motion for Partial Accelerated Decision, which if granted would eliminate the issue of liability in its entirety, which the expert opinion was focused upon, from the hearing. *See* First Motion at 4.

Respondents objected to the First Motion arguing that allowing the supplement will prejudice Respondents because of a of lack of opportunity to effectively incorporate, or respond to, or challenge the new Exhibits and discovery for purposes of disputing the agency's claims. *See* Respondents' Response to Complainant's First Motion to Supplement the Prehearing Exchange ("Response") at 1. Respondents further argued that inclusion of the expert opinion would unduly burden Respondents in having to analyze an expert witnesses' background, experience, education, and associated legal theories. Response at 4.

Before a decision was made on the First Motion, and once again after Respondents had already filed their response to the Agency's AD Decision, on January 3, 2017, Complainant filed a motion titled Complainant's Second Motion to Supplement the Prehearing Exchange and

¹ Complainant submitted its Rebuttal Prehearing Exchange on October 13, 2016. *See* Complainant's Rebuttal Prehearing Exchange at 12. The deadline for all dispositive motions was November 28, 2016. *See* Order on Complainant's Motion to Extend Prehearing Deadline for Dispositive Motions (Nov. 10, 2016). The deadline for filing responses to the opposing party's dispositive motions was January 3, 2017. *See* Order on Respondents' Motion to Extend Deadlines (Dec. 16, 2016).

Combined Response Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision ("Second Motion"). Again, Complainant's attempted to include two declarations by expert witnesses claiming that

“[s]upplementing the record will not cause Respondents undue surprise or prejudice because both Mr. Warren and Ms. Isin are witnesses identified in Complainant's Initial Prehearing Exchange. Their declarations were prepared in response to Respondents' two Motions and pertain to matters that would be subject of each witness's testimony should this matter advance to hearing.”

See Second Motion at 2. Once again Complainant failed to mention that both declarations pertained to the issue of liability, and if the declarations were successful in convincing the presiding officer that Respondents are liable for 109,964 violations, there would be no need for the witnesses to testify at the hearing. Therefore, Complainant was incorrect in its statement that witness declarations would be subject of witness testimony at the hearing. Finally, the reports did come as a surprise to Respondents because (1) Respondent could not have anticipated witness declarations to be submitted after all dispositive motions were filed and after Respondents had already responded to the Agency's AD Motion. Designating expert witnesses who may testify at the hearing is not the same thing as relying on the designated witness declarations, not included in the prehearing exchange, before the hearing.

Federal Rules of Civil Procedure require disclosure of expert witness reports, and rule 26(e) requires a party to supplement disclosures in a *timely* manner (emphasis added). F. R. Civ. P. 26(a)(2)(B), (e). In the present case, Complainant disclosed the expert witnesses on August 25, 2016, obtained the witness reports of Mr. Warren on or about December 8, 2016 but did not supplement the report until January 3, 2017, the last day for Respondents to respond to Agency's

AD Motion. The untimely supplementing of this report caused Respondents to lose their right to effectively challenge the witness because the report was relied upon in granting Agency's AD Motion on the issue of liability and Respondents could not longer benefit from challenging the witnesses at the hearing, just like they were prevented from challenging the witness reports in their response to Agency's AD Motion.

According to Federal Rule of Civil Procedure 37(c)(1) provides: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a **motion** (emphasis added), at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P 37(c)(1). Although, Complainant claimed that the declarations were provided in an attempt to supplement incomplete information, Complainant could not rely on the evidence for its motion, or to oppose Respondents' motions until the motion to supplement the prehearing exchange was granted. *See Net 2 Press, Inc. v. 58 Dix Ave. Corp.*, 266 F. Supp. 2d 146, 161 (D. Me. 2003) ("It makes no sense . . . to allow the plaintiff to avoid summary judgment by placing the necessary information in an affidavit submitted in opposition to the defendants' motion for summary judgment."). If newly discovered evidence is offered at trial or at summary judgment, a party may seek to exclude the evidence on the grounds that the proponent had a duty to supplement its discovery responses and that its failure to do so resulted in prejudice. See, e.g., *Id.* ("While supplementation of interrogatory answers may be allowed under some circumstances, it should not be allowed after the filing of dispositive motions and on the eve of trial.")

Here instead of supplementing the exchange any time prior to the dispositive motions or at least prior to the deadline for Respondents to respond to Agency's AD Motion, Complainant supplemented the exhibits after filing its own dispositive motion and after the time Respondent

had to respond to any said exhibits, particularly the declarations of Mr. Warren and Ms. Isin. Respondents in their AD Motion raised the argument that by testing 35 vehicles belonging to ten different engine families Complainant had not shown that all 109,964 vehicles belonging to those engine families were uncertified. *See* Respondents' AD Motion at 5. Instead of supplementing the exhibits, and providing Respondents with said exhibits, at any time from November 28, 2016 to a reasonable time before January 3, 2017, Complainant waited till the last day responses to all dispositive motions were due to file its Second Motion, and mailed the motion with exhibits that same day so that Respondents would not have an opportunity to even review the exhibits prior to responding to the Agency's AD Motion.

Instead of reaching a decision on the motions to supplement the prehearing exchange and then allowing Respondent additional time to review and challenge the declarations before reaching a decision on the issue of liability, the Presiding Officer granted those motions at the same time she granted the Agency's AD Motion. *See* Order on Partial Accelerated Decision and Related Motions ("Order") at 2-3. What's worse was that the Order not only allowed Complainant to supplement its prehearing exchange with the additional exhibits, the Presiding Officer relied on those exhibits in ruling that Complainant had proven without any reasonable doubt that Respondents were liable for all 109,964 violations. *See* Order at 31. Thereby, Respondents were not only divested from any opportunity to challenge the supplementary exhibits in the dispositive motion phase, but were also prevented from challenging the witnesses and declarations at the hearing. Had the Presiding Officer first issued an Order on Complainant's motions to supplement the prehearing exchange before reaching a decision on the dispositive motions, Respondents would have had an opportunity to review the additional documents, proposed witnesses, and related legal theories.

The Order states that “Respondents’ claim of prejudice is unwarranted because no hearing has yet been scheduled in this case. There is plenty of opportunity for [Respondents] to review the additional documents, proposed witnesses, and related legal theories.” *Id.* at 3. The Presiding Officer is incorrect in its foregoing conclusion because the proposed witness statements were submitted on the issue of liability, either after Respondents had already submitted their dispositive motions or after Respondents had filed their response to the Agency’s AD Motion, leaving them with no time to challenge the legal theories and the witnesses on the issue of liability.

The Order further stated that “Respondents have not made any request in all of this time to test through additional discovery the expert witnesses they complain about.” *Id.* Again, testing the expert witnesses through discovery during the time the First Motion and Second Motion were pending would not benefit Respondents because if the motions were granted, Respondents would have challenged the declarations themselves through other evidence, such as contradicting expert opinions, but doing so would have been fruitless had the Presiding Officer denied the motions.

Finally, the Order on one hand states that “permitting a supplement of the prehearing exchange does not equate to admission into evidence; Respondents will still have the ability at or prior to hearing to object to specific exhibits on admissibility grounds,” and on the other hand relies on the supplementary exhibits to grant Agency’s AD Motion, preventing Respondents from being able to object to the specific exhibits on admissibility grounds. *See* Order at 3. The Order further takes the position that to the extent the supplementary exhibits are relied on to grant the Agency accelerated decision, it is notable that Respondents had an equal opportunity to submit their own supplementary evidence to place the Agency’s submission in dispute. *Id.* How

could Respondents have had such an opportunity to submit supplementary evidence to place Agency's supplementary evidence on the Agency's AD Motion when:

- (1) the supplementary evidence containing Mr. Warren's and Ms. Isin's declarations (Exhibits CX179 and CX180), which the Presiding Order relied upon in holding that Respondents were liable for 109,964 violations, was submitted on January 3, 2017, i.e. after the deadline for all dispositive motions and the last day for each party to file responses to the other party's dispositive motion(s);² and
- (2) Complainant's motions to submit the supplementary evidence were approved at the same time, the Agency's AD Motion was approved?

For the foregoing reasons, Respondents reasonably believed that the Presiding Officer would first make a decision on Complainant's motions to supplement the prehearing exchange, allowing Respondents an opportunity, if the supplementary evidence was permitted, to adequately analyze and challenge said additional exhibits, particularly the expert declarations. Respondents had therefore been placing all their efforts on the liability issue and in reviewing the voluminous documents submitted by Complainant in its multiple prehearing exchanges. However, because the First Motion, the Second Motion, and Agency's AD Motion was granted on May 3, 2017 and the hearing was subsequently scheduled for July 18, 2017, Respondents need additional time to now divert their focus on the issue of penalties, which requires searching for and retaining expert witnesses on that issue, collecting any additional evidence on the economic benefit calculations and preparing the previously designated witnesses.

² The deadline for filing responses to the opposing party's dispositive motions was January 3, 2017. *See* Order on Respondents' Motion to Extend Deadlines (Dec. 16, 2016).

II.

Respondents have filed a Motion for Reconsideration, or in the alternative, request for an interlocutory appeal. The Motion is currently pending, and if granted would revive the issue on liability, allowing Respondents the opportunity to now challenge the supplementary exhibits which would require retaining expert witnesses to contradict the validity of said exhibits.

Because Complainant's motions to supplement evidence were granted on May 3, 2017, Respondents do not have sufficient to time to now depose the Complainant's expert witnesses on the contents of their declarations. Deposing said witnesses is necessary to Respondents defense, it will not unreasonably delay the proceedings, and will not unreasonably burden Complainant. *See* 40 C.F.R. § 22.19(e)(3). Also, now that the declarations have been admitted as supplementary disclosures, Respondents need time to review the declarations, retain rebuttal witnesses and sufficiently challenge the declarations.

Further, the matter is of a complicated nature and even though the Agency has had years to prepare its case, the Motion to file an Amended Complaint including an additional 45,587 claimed violations was filed on June 16, 2016 and was granted on July 5, 2016. Respondents have since then received 180 exhibits, the last of which was sent on January 3, 2017.

Finally, some of the witnesses Respondents have retained or intend to retain for the hearing are unavailable to testify at the upcoming hearing. Postponing the hearing would allow Respondents to ensure the presence of all necessary witnesses at the hearing.

For the foregoing reasons, Respondents request the Court to grant a ninety (90) day continuance and likewise continue all the deadlines specified on the May 9, 2017 Hearing Notice and Order. If continuance is not granted Respondents will suffer substantial harm or prejudice in

presenting their claims and defense. The motion for continuance is not sought for delay only, but rather so that justice may be done.

III.

WHEREFORE, Respondents request that the above-titled and numbered cause be removed from its present setting and reset the hearing as well as the deadlines on the hearing notice and order.

Respectfully Submitted,



William Chu
Texas State Bar No. 04241000
The Law Offices of William Chu
4455 LBJ Freeway, Suite 909
Dallas, Texas 75244
Telephone: (972) 392-9888
Facsimile: (972) 392-9889
wmchulaw@aol.com

CERTIFICATE OF CONFERENCE

Counsel for the Respondent has confirmed that Counsel for Complainant is opposed to the request for a continuance.

/s/David Paulson
David Paulson

CERTIFICATE OF SERVICE

This is to certify that on June 9, 2017, the foregoing Motion for Continuance in the Matter of Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System. I certify that a copy of the foregoing Motion was sent on June 9, 2017 via certified mail for service on Complainant's counsel as follow:

Ed Kulschinsky
Robert Klepp
Air Enforcement Division
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., NW
William J. Clinton Federal Building
Room 1142C, Mail Code 2242A
Washington, DC 20460



William Chu