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.	)	

COMPLAINANT'S REPLY POST-HEARING BRIEF

Complainant files this Reply Post-Hearing Brief (the "Reply") in response to Respondents' Initial Post-Hearing Brief ("Respondents' Brief" or "Rs' Br.").

I. The Proposed Penalty is Consistent with the Determination to Waive the Limit on Administrative Penalty Amounts in 42 U.S.C. § 7524(c)(1).

Respondents argue that the June 2, 2016 letter from the Attorney General's delegatee within the Department of Justice ("DOJ"), which concurred in EPA's determination under 42 U.S.C. § 7524(c)(1) that it was appropriate to waive the statutory administrative penalty cap in this matter, imposes strict limits on what the Tribunal may consider when determining an appropriate penalty. *Id.* at 1–3, 6–7, 9–10, 11–12. Specifically, Respondents claim that the language of the letter precludes the Tribunal from considering the violations' potential to "harm to the environment," or whether the violations resulted from negligent or willful behavior. *Id.* at 1–3, 7. Respondents contend that Complainant's proposed penalty, and the Mobile Source Civil Penalty Policy's ("Penalty Policy") method for calculating penalties, account for "actual or potential harm to the environment" and "willfulness and negligence," and the proposed penalty therefore "violates the express conditions of the DOJ's waiver" and exceeds "the CAA's jurisdictional limitations." *Id.* at 2–3, 6–8, 9–10. Thus, Respondents argue the Penalty Policy provides no guidance in this matter, its application is inappropriate, and Complainant is "barred

from recovering the proposed penalty, or any penalty in this action." *Id.* at 3, 9–10, 11–12. Alternately, Respondents argue that if the Penalty Policy applies, the DOJ letter prevents the violations from being characterized as anything other than "minor." *Id.* at 10, 12.

Respondents misread the DOJ's letter and overstate its impact. The letter does not restrict what facts this Tribunal may consider in determining an appropriate penalty. The letter documents the DOJ's concurrence in EPA's determination that it is appropriate for Complainant to seek, and the EPA to assess, an administrative penalty in excess of $320,000 for the violations identified in the Complaint and Amended Complaint. The joint determination having been made, (*see* Order Denying Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction, at 8–9, 19 (Oct. 10, 2017)), the Tribunal should consider all the evidence in the record and apply the statutory and regulatory penalty factors. *See* 42 U.S.C. § 7524(c)(2) (identifying factors the Administrator "shall take into account" when determining amount of civil penalty); 40 C.F.R. § 22.27(b) ("the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act," and "shall consider any civil penalty guidelines issued under the Act"); *John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 782–83 ("the ALJ must have the authority and discretion to examine and weigh the evidence").

However, the Tribunal does not need to decide what effect, if any, the DOJ letter has on the Tribunal's authority, because the proposed penalty is squarely within any possible limits set by the letter. The letter describes the violations as ones that "harm the regulatory scheme, but . . . do not cause excess emissions;" that are "of provisions on certification . . . ;" and are not "willful, knowing, or otherwise potentially criminal." CX028 at EPA-000546. Complainant does not argue that evidence shows the violations caused excess emissions, and the proposed penalty

calculation does not assume the violations caused excess emissions. *See* Complainant's Init. Post-Hrg. Br. at 10–11 & n.1 (penalty calculation). There is no question that the violations described in the Amended Complaint are for civil penalties with respect to the Clean Air Act's ("CAA" or the "Act") certification provisions, (*see* Amd. Compl. ¶¶ 25–26, 38). Complainant does not allege that "potentially criminal" violations involving efforts to knowingly make a material false statement, representation or certification, or omit or conceal information, occurred in this matter. *See* 42 U.S.C. § 7413(c)(2) (CAA criminal provision). Nor does Complainant allege a willful and knowing effort to deceive EPA occurred in this matter. *See* 18 U.S.C. § 1001 (making it a criminal offense to "knowingly and willfully" make false statements "in any matter within the jurisdiction of the executive, legislative, or judicial branch").

Respondents' argument centers on the DOJ letter's description of the violations as ones that "harm the regulatory scheme, but that do not cause excess emissions." Respondents interpret this to mean that the Tribunal may not consider any facts concerning potential harm or actual harm to the environment resulting from the violations when assessing a penalty in this matter. Rs' Br. at 3, 6–7. Complainant does not allege that evidence shows the violations in this matter caused actual emissions above CAA standards, so the question is whether Respondents' assertion that the Tribunal cannot consider "potential harm to the environment" is correct. *Id.* at 3. The letter itself makes no reference to "potential" harm or emissions, and instead limits its reference to actual excess emissions. *See* Tr. 138 (discussing letter). Respondents' attempt to exclude "potential harm" or "potential emissions" is thus contrary to the letter's plain language.

Respondents' interpretation also defies reason and leads to absurd results. Though the concepts of harm to the "regulatory scheme" and harm in the form of actual or potential excess emissions are described separately in the Penalty Policy, see CX022 at EPA-000465 and 469, in

actuality harm to the regulatory program leads to potential harm to the environment. The Penalty Policy explains that one factor in assessing the gravity component of a penalty is the violated requirement's "importance to the regulatory scheme," meaning "the importance of the requirement to achieving the goals of the [Act] and its implementing regulations." *Id.* The goals of the Act and its implementing regulations are to protect human health and the environment by preventing air pollution and protecting air quality. 42 U.S.C. § 7401; Tr. 44. The Act accomplishes these goals in part by establishing pollutant emission standards for vehicles and engines, and enforcing those standards through the preventative pre-importation, pre-sale certification program implemented by EPA. 42 U.S.C. §§ 7521(a)(1), 7525(a)(1); Tr. 44–46. When the regulatory scheme is harmed, there is an inherent risk that harm to human health and the environment will follow in the form of excess emissions. *See Carroll Oil Co.*, 10 E.A.D. 635, 658–59 (EAB 2002) (failure to comply with regulatory scheme over time increases risk of potential environmental harm and impairs broader objective of preventing contamination); *Everwood Treatment Co., Inc.*, 6 E.A.D. 589, 602–03 (EAB 1996) (adverse effect on program created potential for environmental harm resulting in major violation). "[I]t is the potential in each situation that is important, not solely whether harm has actually occurred." *Euclid of Virginia, Inc.*, 13 E.A.D. 616, 694 (EAB 2008) (deviation from regulatory requirements creates potential for harm to the environment).

This is consistent with the plain language and context of the letter. The letter documents DOJ's concurrence that this matter is appropriate for administrative resolution, meaning resolution through a process in which injunctive relief, additional discovery, and criminal sanctions are not available. The limiting language in the letter identifies types of violations that may not be appropriate for administrative resolution, i.e., violations that demonstrably "cause

excess emissions" and therefore require injunctive relief to remedy; violations that are or might be criminal; or violations of a number or nature requiring additional discovery and process only available in district court. *See* CX028 at EPA-000546–47. As stated above, the letter itself makes no reference to violations that may carry the potential for excess emissions. *Id.* There is nothing in the letter to suggest arbitrary limits have been imposed on the administrative Tribunal's power to assess a penalty for the violations in this waived matter. Indeed, any such attempt would be contrary to the purpose of waiving the penalty cap in the first instance.

The Penalty Policy encompasses both "actual or potential harm" to the environment and harm "to the regulatory scheme" in a single penalty calculation method. CX022 at EPA-000470–76. Indeed, the method demonstrates that potential environmental harm and harm to the regulatory scheme are both considered when calculating a penalty for *all* types of violations. Base per-vehicle gravity is always initially calculated by reference to a vehicle or engine's horsepower,[1] without regard to whether the penalty is for a certification violation under 42 U.S.C. § 7522(a)(1), or a labeling violation under 42 U.S.C. § 7522(a)(4).[2] *Id.*at EPA-000470. Certification violations are then deemed to be of Major egregiousness if excess emissions are present or if there is no information about potential emission consequences, or Moderate egregiousness if emissions from the uncertified vehicles are likely to be similar or identical to emissions from certified vehicles. *Id.* at EPA-000467. Labeling violations are Moderate if labels are missing or certification status cannot be determined, or Minor if the deficient label

[1] Respondents correctly note that Complainant's witness, Ms. Amelie Isin, misspoke when testifying about how the proposed penalty was calculated in this matter. Rs' Br. at 11. Table 1 of the Penalty Policy calculates the base gravity by multiplying $80 times the first ten horsepower of an engine, not $15 as stated by Ms. Isin. CX022 at EPA-000470; Tr. 558–59.

[2] The base per-vehicle or engine penalty amount is for violations of emissions label requirements is determined first by reference to engine size, but is capped at $500.

nonetheless shows the vehicle's certification status. *Id.* at EPA-000467–68. The calculation method set forth in the Penalty Policy thus applies to all violations within its scope, regardless of the type and degree of harm they cause. *See id.* at EPA-000455–56 (scope).

To avoid a plain, straightforward application of the Penalty Policy, Respondents contort logic by arguing that no gravity penalty should be assessed in this matter, Rs' Br. at 3, that the Penalty Policy provides no method for calculating a penalty, Rs' Br. at 9–10, and that the violations should be Minor. Rs' Br. at 12. Respondents' arguments thwart the objective of the Act, are contradicted by the plain language of the letter and the Penalty Policy, and should be rejected. The Tribunal should instead apply the Penalty Policy as described in Complainant's Initial Post-Hearing Brief, which is fully consistent with the language of the letter.

II. Respondents' Violations Harmed the Regulatory Scheme

Respondents argue their violations did not harm the regulatory scheme because the catalytic converters on the vehicles identified in the Amended Complaint were identical to the catalytic converters on the emission data vehicles ("EDVs") tested for certification. Rs' Br. at 8–9. Respondents conclude that accurate full useful life tests are available for the production vehicles, and consequently there has been no harm to the regulatory program. *Id.* at 9.

Respondents cite no evidence to support their factual claims. Instead, Respondents argue that if the catalytic converters on the production vehicles in each engine family have been found to be nonconforming, then the catalytic converters on the EDVs should be similarly nonconforming. *Id.* at 8. The record does not support this inference because all of the engine families named in the Amended Complaint relied on an EDV from a previous model year for certification, meaning the EDVs were not manufactured at the same time as the production vehicles. *See* CX001 at EPA-000001, 29 (2012 EDV for 2014 engine family); CX002 at EPA-

000037, 69 (2012 EDV for 2013 engine family); CX003 at EPA-000080, 108 (2012 EDV for 2013 engine family); CX004 at EPA-000116, 140 (2011 EDV for 2012 engine family); CX005 at EPA-000151, 181 (2010 EDV for 2014 engine family); CX006 at EPA-000187, 217 (2010 EDV for 2013 engine family); CX007 at EPA 000220, 249 (2009 EDV for 2013 engine family); CX008 at EPA000252, 282 (2010 EDV for 2013 engine family); CX009 at EPA-000288, 318 (2010 EDV for 2015 engine family); CX010 at EPA-000321, 351 (2010 EDV for 2016 engine family). The record therefore does not support an inference that the certification EDVs had the same nonconforming catalytic converters as the vehicles identified in the Amended Complaint.

Alternately, Respondents argue that during low-hour testing, vehicles from Counts 1 through 8 performed comparably to their corresponding EDVs at the low-hour point, so the Tribunal should infer that the full useful life tests on the EDVs represent the production vehicles. Rs' Br. at 9. The example cited by Respondents illustrates the flaw in their argument. For engine family DTAOC.049MC2, Respondents compare the EDV's CO emissions of 6.144g/km at the low-hour point to a production vehicle's CO emissions of 6.621g/km at the low-hour point, and conclude the EDV must be identical to the production vehicles. *Id.* Respondents neglect to mention that the two other production vehicles tested from this family emitted 7.453g/km and 9.285g/km of CO at the low-hour point, amounts which are significantly different from the EDV's reported emissions. CX118 at EPA-001643; CX120 at EPA-001679. Respondents also note that the EDV's CO emissions changed during the mileage accumulation, increasing to 9.942g/km before dropping dramatically to 2.098 g/km. CX003 at EPA-000106. This illustrates that a vehicle's emissions change over time. Hence, certification requires emissions testing over the useful life of the vehicle to capture those changes. *See* 40 C.F.R. §§ 86.427-78, 1051.240(a), 1051.243 (deteriorated emissions testing required for certification); Tr. 61–63 (describing

required testing). Because we do not know if the EDVs and the production vehicles were equipped with comparable catalytic converters, tests showing production vehicles having similar emissions to EDVs at a low-hour point do not prove the production vehicles will have similar emissions after service accumulation. *See* Tr. 75–78, 115, 122, 134–36, 140–41 (describing limits of low-hour tests and deterioration factors, and describing specific concerns about the deterioration of palladium catalytic converters). In any event, Complainant agrees that emissions from vehicles in Counts 1 through 8 are likely similar to emissions from certified vehicles based upon the low-hour tests, and gave Respondents the benefit of those tests in characterizing those violations as being of Moderate egregiousness. Tr. 587–88.

Respondents' argument misses the larger point. The Act's program for regulating vehicle and engine emissions consists of more than emissions tests. Mr. Cleophas Jackson, Director of the EPA's Center for Gasoline Engine Compliance Center, explained at length how the program takes a multifaceted approach to ensuring the compliance of vehicles and engines certified for sale in the United States. Tr. 44. Before and during the certification process, program staff engage with manufacturers to help them implement the Act's requirements. Tr. 44–48, 54–55, 225–27. The certification process itself consists of a "significant review" of the technical and design information provided in certification applications "to ensure that the technology . . . is consistent with meeting the performance standards anticipated by the regulations." Tr. 44–45, 56, 65, 75, 114–16. Based on that review the program decides whether to certify the design described in the application, or to request additional information or testing before making a determination. Tr. 45–47, 65, 114–16. After certification, the program may conduct inspections, audits, and tests to ensure the vehicles produced are identical to what was certified and are conforming to the Act's requirements. Tr. 45–46, 56–57, 75–78. The fundamental assumption

within the program is that manufacturers provide the Agency with truthful, accurate information. Tr. 65, 109, 116–17. When the design information in an application is inaccurate, the program's certification determination is, unbeknownst to the program, rendered invalid because the product being assessed is different from the product being tested or produced. Tr. 75–78, 134, 140–41. Post-certification compliance efforts are also compromised. Tr. 75–78, 134, 141.

From the available evidence, neither Complainant nor Respondents know whether the EDVs accurately represent the production vehicles identified in the Amended Complaint. The certification program cannot function when the accuracy of the manufacturers' information is in doubt. The uncertainty about Respondents' EDVs is emblematic of the harm Respondents caused to the program. By providing inaccurate information that became the basis for certification, Respondents circumvented the review process, rendering the program unable to perform its function of protecting human health and the environment. As a consequence, 109,964 vehicles with untested useful life emissions were sold into the United States. Thus, Respondents caused significant harm to the regulatory scheme in failing to provide accurate information to allow a full review of the potential environmental impact of the vehicles in the certification process.

III. Respondents' Contradict Their Own Evidence Regarding Economic Benefit

Respondents claim that the vehicles identified in the Amended Complaint would be covered by certificates of conformity if Respondents had provided accurate catalytic converter specifications, and so the economic benefit component should be $0. Rs' Br. at 5. Respondents cite their financial expert, Mr. Jonathan Shefftz, for support. *Id.* Mr. Shefftz is not an expert in the EPA's certification program, and is not qualified to opine on whether Respondents' vehicles would have been certified as built. Given the lack of accurate useful life testing on the vehicles, the comprehensive nature of the program's review process, and concerns Mr. Jackson expressed

about palladium-only catalytic converters, it is pure speculation to say that Respondents' could have avoided the violations by merely "writing down numbers." Tr. 867. However, even if this were the case, Respondents' financial expert testified that it "is not something that could have been done costlessly." *Id.* Mr. Shefftz estimated that the minimum cost to Respondents in that scenario, identified as "scenario 1," would be $104,961. Tr. 867–69; RX001 at 14, 21.

Because it is entirely speculative whether Mr. Shefftz's scenario 1 would enable Respondents to achieve compliance, it should be rejected. Instead, for the reasons articulated in pages 6 and 7 of Complainant's Initial Post-Hearing Brief, Mr. Shefftz's scenario 4 is the most appropriate measure of Respondents' economic benefit in this matter.

IV. Scaling and Adjustments Under the Penalty Policy

The record provides a reasonable basis for scaling the violations in Counts 9 and 10 separately from those in Counts 1 through 8. As Respondents note and Ms. Isin testified, the violations in Counts 9 and 10 were discovered after Complainant filed the Complaint in this matter. Rs' Br. at 13 (quoting Tr. 586). Respondents contend the "only plausible justification" for scaling Counts 9 and 10 separately "would be that Respondents had knowledge of the violation but failed to correct it." Rs' Br. at 14. Respondents' claim they had no knowledge of the violations in this matter until the notice of violation was issued on December 24, 2013. *Id.* at 14; *see* CXCX092 at EPA-001112–15 (notice of violation). The certification applications for the engine families in Counts 9 and 10 were submitted in June 2014 and June 2015, several months after the notice of violation was issued. Respondents therefore knew of the violations before they prepared those applications and manufactured the vehicles in those engine families, and failed to correct the problem. *See* Tr. 56 (manufacturer receives certificate and then begins production). Respondents thus appear to concede that scaling Counts 9 and 10 separately is justified.

Scaling Counts 9 and 10 separately does not lead to an unreasonable penalty. The total proposed penalty in this matter is $1,601,149, or approximately $14.56 per violation. Respondents have not provided any analysis or identified any facts showing that the proposed penalty is grossly disproportionate to the violations at issue. *See Woodcrest Mfrg., Inc.*, 7 E.A.D. 757, 782 (EAB 1998) (describing standard for showing violation of the Eighth Amendment).

The proposed upward penalty adjustment of 20% due to Respondents' negligence is justified by the record, as described in pages 13 through 15 of Complainant's Initial Post-Hearing Brief. Respondents claim they could not have foreseen the violations, and made reasonable efforts to avoid the violations. Rs' Br. at 16–17. This is false. Respondents could have performed the mandatory pre-importation testing required by the Administrative Settlement Agreement Taotao USA, Inc. ("Taotao USA") signed in 2010, and thereby discovered and prevented the violations, including those identified in Count 4. *See* Complainant's Init. Post-Hrg. Br. at 13–15 (describing negligence). Respondents also claim that they were unaware of the legal requirement violated, and this is also false. Through the plain language of the statute and regulations, through readily available guidance, and through the ASA and compliance plan, Respondents had constructive and actual knowledge that their vehicles must be identical in all material respects to the certification application. *See, e.g.* CX012 at EPA-000369, 376–77, 381 (guidance explaining that vehicles must match certified design); CX067 at EPA-000811–12, 829–30 (ASA and compliance plan stating that vehicles and specifically catalytic converters must conform to design in application); Order on Part. Accel. Dec. and Related Mots. at 25–26 (May 3, 2017) (concluding that the meaning of the statute and regulations is plain).

No downward adjustment of the penalty is warranted for cooperation. The incidents of alleged cooperation Respondents cite are all actions that Respondents were legally obligated to

undertake. Rs' Br. at 17–18; *see* CX074 at EPA-000888–89 (letter settling claims for stipulated penalties). Respondents should not receive a credit for attempting to meet their basic obligations.

For the reasons described in pages 12 to 13 of Complainant's Initial Post-Hearing Brief, the proposed upward adjustment of 20% to account for Taotao USA's prior violation is reasonable. Respondents object that the adjustment should not apply to Taotao Group Co., Ltd. ("Taotao Group"), or Jinyun County Xiangyuan Industry Co., Ltd. ("JCXI"). Rs' Br. at 18. Granting Respondents' request would be contrary to Respondents' interest, because it would require separately-calculated penalties for each Respondent, leading to a larger total penalty amount than is currently proposed. Further, Taotao USA's prior violation is appropriately imputed to Taotao Group and JCXI because the three Respondents essentially operate as a joint business enterprise; Yuejin Cao, president of Taotao Group and JCXI, actively discussed the implications of the prior enforcement action on the business enterprise with his son, Matao Cao, president of Taotao USA; and Taotao Group ordered few the pre-importation tests Respondents did conduct under the ASA. *See* Complainant's Init. Post-Hrg. Br. at 1–2, 4–5, 17–19; CX215 at 548, 572; CX216 at 129–30, 135. Respondents are jointly liable and may, in a separate action, seek to allocate the amount of penalty between them, avoiding any perceived unfairness.

V. Complainant Met Its Burden on Ability to Pay; Respondents Have Not Met Theirs

Respondents erroneously state that Complainant has the burden of proving that Respondents can pay the proposed penalty. *Id.* at 19. This is not the correct legal standard. Complainant has the initial burden of producing evidence that it considered Respondents' ability to pay a penalty, and "which can support the *inference* that the penalty assessment need not be reduced." *Chempace Corp.*, 9 E.A.D. 119, 132 (EAB 2000) (quoting *New Waterbury, Ltd.*, 5 E.A.D. 529, 542–43 (EAB 1994)). Complainant "need not present any *specific* evidence to show

that [Respondents] *can pay* or obtain funds to pay the assessed penalty." *Id.* Respondents have the burden of presenting "specific information that the proposed penalty assessment is excessive or incorrect," and if this burden is met, Complainant may rebut Respondents' evidence "through rigorous cross examination or through the introduction of additional information." *Id.* at 133.

Respondents' Brief makes no argument concerning Taotao Group and JCXI's ability to pay the proposed penalty. This may be because Respondents' financial expert testified that Taotao Group and JCXI could pay a penalty of $3.295 million, approximately twice the proposed penalty. Tr. 875–77, 903–04; CX218 at 62–63; Complainant's Init. Post-Hrg. Br. at 16–17; *Chippewa Haz. Waste Remediation & Energy, Inc.*, 2004 EPA ALJ LEXIS 17, at **83–84 (ALJ 2004) (preponderance of evidence shows ability to pay at least twice the proposed penalty). Complainant presented evidence showing it considered Taotao Group and JCXI's ability to pay and that their ability to pay could be inferred. Tr. 638–44; CX168 at EPA-02295–2303; CX191 at EPA-002520; Complainant's Init. Post-Hrg. Br. at 16–17. Respondents did not present specific evidence to support a claim that Taotao Group or JCXI could not pay a penalty. Instead their own expert ratified the inference that those companies could pay the penalty. Tr. 875–77, 903–04; CX218 at 62–63. Respondents have not met their burden regarding Taotao Group and JCXI.

Respondents also have not produced persuasive, specific evidence to support their claim that Taotao USA's ability to pay is limited to $700,000. Rs' Br. at 19. Respondents rely exclusively on a calculation made using the ABEL model, which their own expert characterized as a "limited" analysis based only on the financial information Respondents chose to provide him. RX001 at 2, 22; Tr. 899–900; CX218 at 10–11, 50–51, 53–54. Complainant has provided substantial evidence to rebut Respondents' ABEL analysis and support the inference that Taotao USA can pay the proposed penalty. Complainant's Init. Post-Hrg. Br. at 17–20.

Respondents attempt to discredit Complainant's evidence. They criticize Complainant's expert, Dr. James Carroll, by claiming Dr. Carroll ignored the EPA's models, engaged in an arbitrary analysis, and did not consider the unique facts of this case. Rs' Br. at 20. Respondents' characterization is simply not consistent with the record. Dr. Carroll did consider EPA's guidance and models. Tr. 437–39; CX192 at EPA-002580. Dr. Carroll explained that, basaed on the unique facts of this case, the ABEL model was not an appropriate tool to analyze Taotao USA's financial condition because it limits its analysis to predicted future cash flows, and depends on the reliability of the financial data put into the model. Tr. at 410–11, 417–18, 437–39, 446–47. As described in Complainant's Initial Post-Hearing Brief, the record provides ample evidence that the financial data reported in Taotao USA's tax returns do not reliably represent Taotao USA's financial condition and ability to pay. Complainant's Init. Post-Hrg. Br. at 1–5, 17–20. Contrary to Respondents' claims, Taotao USA is a financially healthy, growing company, that can pay the proposed penalty either by obtaining financing, or by delaying payment to Taotao Group and JCXI to generate cash. *Id.*

Respondents also complain that Dr. Carroll did not consider "whether or not what's typical in the United States is typical in foreign corporations [or] domestic corporations run by foreign nationals." Rs' Br. at 20. Respondents have not offered any evidence about foreign accounting systems to explain this argument. And, Dr. Carroll's analysis comparing Taotao USA's finances to the finances of other privately-held United States companies in the same line of business was done precisely to correct for differences in accounting practices. *See* CX192 at EPA-002578 (explaining that financial health is evaluating through ratio comparison and analysis, and identifying accounting issues with Taotao USA's tax returns that needed correction to allow comparison). By recharacterizing Taotao USA's finances to bring them in line with

other similar businesses, Dr. Carroll corrected for any accounting idiosyncrasies to determine the company's true financial condition. *See* Tr. 409–14 (describing substance over form).

Respondents also complain that evidence of their relationships to companies not named in this action is irrelevant because Complainant has not shown that those companies have the ability to pay the proposed penalty. The EAB, however, has explained that EPA may look to the finances of other closely related companies. *New Waterbury Ltd.*, 5 E.A.D. 529, 546–50 (EAB 1994); *Carroll Oil Co.*, 10 E.A.D. 635, 665 (EAB 2002). Respondents are closely related to several entities with whom they engage in business. Complainant's Init. Post-Hrg. Br. at 1–5, 17–20. Complainant requested information about these entities from Respondents to allow for full evaluation of Respondents' ability to pay, but Respondents refused to provide the information. Tr. 653–54; CX169 at EPA-002265–68; CX170 at EPA-002271–86. Transactions between Taotao USA and the closely-related entities are relevant to a proper consideration of Respondents' ability to pay, and Respondents must bear the consequence of failing to provide the requested information. *Carroll Oil Co.*, 10 E.A.D. 635, 667–68 (EAB 2002). Thus, Respondents are not entitled to any reduction based on Taotao USA's ability to pay. Even if this Tribunal does accept that Taotao USA's ability to pay is limited to $700,000, Respondents Taotao Group and JCXI can pay the full amount. Considering Respondents as whole, Taotao USA's ABEL analysis provides no basis to reduce the penalty.

Conclusion

For the foregoing reasons, Complainant requests an order assessing joint and several civil penalties of $225,473 against Taotao USA and Taotao Group for Counts 1 to 4, and of $1,375,676 against Taotao USA and JCXI for Counts 5 through 10, for a total civil penalty of $1,601,149, approximately $14.56 per violation. Tr. 683.

Respectfully Submitted,

1/19/18
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CERTIFICATE OF SERVICE

I certify that the original and two copies of the foregoing Complainant's Reply Post-Hearing Brief ("Brief") 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 an electronic copy of the foregoing Brief was sent this day by e-mail to the following e-mail addresses for service on Respondents' counsel: William Chu at wmchulaw@aol.com; and Salina Tariq at stariq.wmchulaw@gmail.com.

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