UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Taotao USA, Inc.,	)	
Taotao Group Co., Ltd., and	)	**Docket No.**
Jinyun County Xiangyuan Industry	)	**CAA-HQ-2015-8065**
Co., Ltd.,	)	
	)	
Respondents.	)	

Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction

Comes Now, Respondents, TaoTao USA, Inc., TaoTao Group Co. Ltd., and Jinyun County Xiangyuan Industry Co., LTD., (hereafter "Respondents"), and pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a), file this Motion requesting that the Honorable Presiding Officer issue an Order dismissing this action because Complainant has failed to demonstrate that the Environmental Protection Agency ("EPA") has jurisdiction to initiate the penalty proceeding. Specifically, Complainant has failed to establish the existence of a valid EPA-Department of Justice ("DOJ") joint determination to waive the time/amount limitation prior to initiating this penalty action against Respondents, as required by the Clean Air Act ("CAA" or "Act").

INTRODUCTION

A. 12(b)(1) Motions

The Consolidated Rules of Practice provide that "[t]he Presiding Officer, upon motion of respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or **other grounds** which show no right to relief on the part of complainant." 40 C.F.R. § 22.20(a) (emphasis added). The "other grounds" include a motion to dismiss for lack of jurisdiction over the subject matter under Federal Rules of Civil Procedure 12(b)(1). *In the Matter of Strong Steel*

Prods., LLC, 2004 EPA ALJ LEXIS 144, *17 (ALJ Nov. 22, 2004). When such a motion is filed, the court has a duty to weigh the evidence and resolve any factual disputes. *Scarfo v. Ginsburg*, 175 F.3d 957, 961 (11th Cir. 1999); *Robinson v. Government of Malay*, 269 F.3d 133, 141 (2nd Cir. 2001) ("A district court 'may' consult evidence to decide a 12(b)(1) motion . . . it 'must' do so if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction"). The plaintiff has the burden to support allegations of jurisdictional facts by competent proof. *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 and n. 4 (7th Cir. 1979); *Sapperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999).

B. Procedural/Factual Background

Complainant initiated this administrative action by filing a Complaint in November 2015, alleging 64,377 violations. *See* Motion for Leave to Amend the Complaint and Extend Prehearing Deadline at 2. Complainant later amended the Complaint to add 45,587 additional violations. *Id.* at 2-3. In its Initial Prehearing Exchange, Complainant submitted the following exhibits in its attempt to establish jurisdiction: (1) a letter purportedly signed by Karen S. Dworkin, Assistant Section Chief of the Environmental Enforcement Section in the Environmental and Natural Resources Division of the DOJ, dated March 17, 2015, addressed to Phillip A. Brooks, Director of AED in OECA; and (2) a similar letter dated June 2, 2016 regarding the additional violations to be included in the Amended Complaint. *See* Complainant's Initial Prehearing Exchange, Complainant's Exhibits CX026 and CX028. There is no other signed waiver.

ARGUMENT

A. To initiate this action, Complainant must first obtain an EPA-DOJ joint determination to waive the limitations.

Although the CAA, among other things, authorizes EPA to seek administrative penalties for violations of the regulations promulgated pursuant to section 202 of the Act, EPA's power to pursue such actions is not bound-less. *See* CAA § 205(c)(1), 42 U.S.C. § 7524. The Act imposes limitations on EPA's authority, including the following jurisdictional limitation:

> In lieu of commencing a civil action under subsection (b) of this section, the Administrator may assess any civil penalty prescribed in subsection (a) of this section…, except that the maximum amount of penalty sought against each violator in a penalty assessment proceeding shall not exceed $200,000, unless the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment.

CAA § 205(c)(1), 42 U.S.C. 7524(c)(1). The Environmental Appeals Board (the "Board") has interpreted the waiver requirement on several occasions. *See In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. 498, 522*,* (EAB 2004) (holding that the Director of the Air Enforcement Division (AED) in the Office of Enforcement and Compliance Assurance (OECA) did not have authority to make a waiver determination); *see also In re Lyon County Landfill*, 8 E.A.D. 559, 568 (EAB 1999).[1] in order to demonstrate that there has been a valid determination

[1] Although the Board's decisions in these cases assessed the limitations on EPA's authority to bring administrative actions pursuant of CAA section 113(d), which places a time limit in addition to the maximum penalty limitation, both section 113(d) and section 205(c) of the Act mandate the same EPA-DOJ joint waiver determination. There is, therefore, no reason

by EPA, Region IV must show that the appropriate person, or persons, within EPA made the requisite statutory determination.

Complainant must establish jurisdiction by a preponderance of the evidence. *See Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003) (plaintiff must present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence); *Makarova v. United States*, 201 F.3d 110, 113 (2nd Cir. 2000); *McNutt v. General Motors Acceptance Corp*. 298 U.S. 178, 189 (1936). The First Circuit has stated, "determining whether a case belongs in federal court should be done quickly, without an extensive fact-finding inquiry. 'To make the "which court" decision expeditiously and cheaply,' a judge must simplify the inquiry." *Spielman v. Genzyme Corp.*, 251 F.3d 1, 4-5 (1st Cir. 2001), quoting *Pratt Central Park Ltd Partnership v. Dames* & Moore, 60 F.3d 350, 352 (7th Cir. 1995). An administrative tribunal may make the legal and/or factual findings necessary to assure itself that it has subject matter jurisdiction over the case before it. *See Lyon County Landfill*, 8 E.A.D.at 567-68.

Complainant has failed to prove, by a preponderance of the evidence, that the officials with delegated authority from the Attorney General and the EPA Administrator made the necessary waiver determination. *In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. at 508. Not only does the evidence fail to show that the waiver was made by the proper parties, the waiver documents submitted by Complainant only purport to waive the number of violations, not the penalty amount. CAA § 205(c) (requiring that the maximum penalty not exceed $200,000 unless the Administrator and the Attorney General jointly determine that a matter involving a larger ***penalty amount*** is appropriate for administrative penalty assessment) (emphasis added).

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why the waiver determination on the validity of the joint waiver of section 205 should not be similarly interpreted.

Furthermore, even if Complainant had obtained the necessary joint determination, jurisdiction is improper given the amount of the proposed penalty and the relaxed rules of an administrative proceeding, and embarks upon Respondents' rights to due process of the law.

B. The evidence fails to show that the EPA Administrator waived CAA limitations.

There is no evidence in the record that shows that the EPA Administrator, or someone with delegated authority waived the CAA § 205(c) limitations on the amount of penalties.

First, Complainant has wholly failed to present a signed waiver of limitations from anyone in the EPA. The evidence on jurisdiction presented by Complainant only includes letters from a DOJ personnel allegedly concurring to a letter sent to her by Mr. Brooks. *See* CX026 and CX028. The letter from Mr. Brooks is not in evidence and the statement that such a letter was sent is inadmissible. *In the Matter of Julie's Limousine & Coachworks. Inc.*, 2004 EPA ALJ LEXIS 134, *8 (ALJ. Aug. 26, 2004).

Second, it is well-established that the Director of the Air Enforcement Division (AED) in the Office of Enforcement and Compliance Assurance (OECA) does not have the authority to make a waiver determination. *See In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. at 522*,* (EAB 2004) (holding that the Director of AED in OECA did not have authority to make a waiver determination).

C. Complainant has failed to establish that the DOJ has waived the limitations.

First, Complainant has failed to present evidence to show that Ms. Dworkin has the requisite authority to make a waiver determination on behalf of the DOJ in this matter. *See In the Matter of Strong Steel Prods., LLC,* 2004 EPA ALJ LEXIS at 42*.

Second, even if Ms. Dworkin were the appropriate person to make a waiver determination in this matter, the evidence is insufficient to show that such a determination was in

fact made. *See* Complainant's Exhibits CX026 and CX028. Ms. Dworkin's March 2017 determination relies upon a certain letter from Mr. Brooks that is not in evidence. Without knowing what Mr. Brooks' letter stated regarding the necessity for waiving the limitations, it is impossible to know what facts Ms. Dworkin's determination relied upon. *See* CX026.[2] The second letter by Ms. Dworkin, again refers to a May 16, 2016, letter from Mr. Brooks that is not in evidence, and merely *concurs* with said May 2016 letter from Mr. Brooks. *See* CX028.

Third, the second letter by Ms. Dworkin dated June 2, 2016, only waives the addition of 1681 recreational vehicles and any potential violations that may occur in the future "as long as such violations are *substantially similar* to those covered under the waivers already issued to date…" *See* Complainant'CX028. However, the Amended Complaint included 45,587 violations, clearly exceeding the alleged 1681 existing violations the waiver covered. *See* Amended Complaint at 8. All the additional violations alleged in the Amended Complaint occurred before March 2016, the date of Ms. Dworkin's first waiver document, and before Mr. Brooks' alleged May 16, 2016 letter requesting waiver, which Ms. Dworkin refers to in her waiver determination. *See* Amended Complaint ¶ 33; *see also* Motion for Leave to Amend the Complaint and Extend Prehearing Deadline at 3. Therefore, the additional violations alleged in the Amended Complaint were not "future violations."[3] Additionally, the second waiver

[2] Ms. Dworkin's waiver document refers to Mr. Brook's request in a January 2015 letter to her. The waiver determination is based on the January request and includes the following statement: "I concur with your request for a waiver pursuant to Section 205(c) of the Clean Air Act (CAA), 42 U.S.C. § 7524(c), of the limitation on EPA's authority to assess administrative penalties, in order to pursue administrative action in this matter." There is no other reference to why the determination is made and what facts it relies upon.

[3] It is important to note that although Ms. Dworkin waives the limitations of up to 125,000 vehicles substantially similar vehicles, the waiver purports to covers only the 1681 current violations of recreational vehicles, and additional violations that may occur in the ***future.*** CX028 (emphasis added).

document clearly shows that vehicles covered by the alleged waiver only includes vehicles "that harm the regulatory scheme, but that do not cause excess emissions." CX028. Clearly the waiver was not intended to cover penalties for exceeding emissions, or potentially exceeding emissions. Complainant, therefore, cannot apply penalty factors that pertain to vehicles that exceed or potentially exceed emission standards. Because the additional violations alleged in the Amended Complaint has occurred prior to Ms. Dworkin's June 2, 2016, waiver document, they are not waived and the Tribunal lacks subject matter jurisdiction as to those violations.

Finally, the evidence fails to show a joint determination to waive limitations as to the amount of penalties, as is required by the Act. CAA § 205(c). The evidence fails to show that Ms. Dworkin made a determination on such facts, or had any knowledge, that the matter involved a proposed penalty exceeding three million dollars. Therefore, no joint determination, or any determination, waiving the monetary limitations of the Act were made prior to the initiation of this action.

D. Because the proposed penalty far exceeds the jurisdictional limit, a waiver in this matter is unconstitutional.

The proposed penalty in this matter exceeds $3.2 million. *See* CX160. Section 205(c) of the Act authorizes a waiver to EPA's limitations in initiating administrative actions. CAA § 205(c)(1). The limitation is that the EPA cannot initiate an administrative action where the penalties exceed $200,000. *Id.* Although the Act permits a waiver of the limitations where the Administrator and the DOJ make a joint determination that a matter involving a larger penalty amount is appropriate, it is highly unlikely that Congress contemplated that a "larger penalty amount" of over fifteen times the maximum penalty limit could ever be appropriate. Complainant is attempting to circumvent the statute, congressional purpose, and the constitution by initiating this administrative action and proposing a penalty of $3.2 million. If Congress had

intended for a $3.2 million penalty amount to be appropriate in an administrative proceeding, there would be no reason for CAA section 205(b) and 204(a). CAA §§ 205(b), 42 USC §7524(b) ("[a]ny action under this subsection may be brought in the district court of the United States…") and 204(a), 42 USC §7523(a) ("[t]he district courts of the United States shall have jurisdiction to restrain violations of section 7522 of this title."). Complainant is therefore attempting to render statutory provisions insignificant, while embarking upon Respondents' due process rights.

In *BMW of North America, Inc. v. Gore*, the United States Supreme Court ruled that exemplary damage awards that are "grossly excessive" violate the Due Process Clause of the Fourteenth Amendment. 517 U.S. 559, 575 (1996). The constitutional constraints on the amount of exemplary awards were again considered in *Cooper Indus. v. Leatherman Tool Grp., Inc.,* 532 U.S. 424, 434-35 (2001), wherein the Court ruled that state and federal appellate courts must conduct a *de novo* review of exemplary damage awards challenged as being grossly excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 433-434.

The relaxed rules of administrative proceedings do not provide the same constitutional protections as the Federal Rules of Civil Procedure applied in district courts, therefore, this action involving millions of dollars in proposed penalties should be dismissed.

CONCLUSION

Complainant has failed to show, by a preponderance of evidence: (1) that the EPA Administrator, or anyone with proper delegation has made a determination to waive limitations as to the violations alleged in the Original Complaint; (2) that the appropriate person from the DOJ has made a proper determination to waive the limitations; (3) that the EPA Administrator and/or the DOJ waived the limitations as to the additional violations, Complainant became aware

of in January and February 2016, alleged in the Amended Complaint; and (4) that a joint determination was made by the Administrator and the DOJ as to the amount of penalties in this matter, or that Ms. Dworkin's determination was made with knowledge of the fact that Complainant sought a penalty exceeding $3.2 million. Additionally, given the proposed penalty amount and the relaxed administrative rules of procedure, Respondents face a very large penalty without the due process protections afforded in district courts. Accordingly, Respondents' respectfully request that the Presiding Officer dismiss this action for lack of subject matter jurisdiction.

Respectfully Submitted,

08/02/17
Date

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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument 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 this day via electronic mail for service on Complainant's counsel.

08/02/17
Date

William Chu