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' SECOND MOTION IN LIMINE

On September 22, 2017, Respondents filed a Second Motion in Limine ("Motion") seeking to exclude certain testimony and documentary evidence the Agency may offer at hearing. Specifically, they request that this Tribunal exclude the testimony of Complainant's recently designated expert witness, Gail Coad, and certain related documents, as well as financial information related to all non-parties, including Daction Trading, Inc., Tao Motor, Inc., 2201 Luna Road, L.L.C., and EagleATVParts.com. Mot. at 1, 5. The Agency filed a Response to the Motion on September 27, 2017 ("Response").[1]

GAIL COAD

A. Respondents' Motion

In their Motion, Respondents state that Complainant recently identified its intent to call Ms. Coad to testify "as an expert on the financial condition of Taotao USA, Inc., and other related persons or entities, and about the impact of a penalty on Taotao USA, Inc.'s ability to continue in business . . ." and "on the economic benefit or savings resulting from the violations identified in the Amended Complaint." Mot. at 1 (quoting Complainant's Sixth Motion to Supplement the Prehearing Exchange (Sept. 15, 2017)). Respondents object to this on two interrelated grounds: first, they object to the late timing of Complainant's identification of Ms. Coad as a witness and the documents in support of her testimony, stating it causes them to suffer an "undue burden" and "unnecessary expense." Mot. at 1-5. Second, Respondents claim that the testimony is unduly repetitious and of little probative value. Mot. at 5.

[1] In light of the hearing scheduled to begin October 17, 2017, an Order was issued on September 26, 2017, shortening the time for response to motions and eliminating the opportunity for replies to be filed.

As to timing, Respondents advise that Ms. Coad and the documents in support of her testimony were first identified by the Agency just two weeks ago, on September 15, 2017, in its Sixth Motion to Supplement the Prehearing Exchange. Mot at 1. Complainant justified the late addition based upon what it described as newly discovered evidence regarding Respondents' relationship to third-party entities. Respondents advise, however, that Complainant had knowledge of the purported new information "for some time," in that most of the exhibits relating to the other entities were provided by Respondents to Complainant "either before, or shortly after, the initiation of this administrative action." Mot. at 2. As such, Respondents state Complainant should not be allowed to use this information to add an additional expert witness at this late stage, *i.e.*, on the last day to supplement the prehearing exchange and with only one month "left to the evidentiary hearing." Mot. at 2. Respondents assert this would be "unduly burdensome" to them. Id. at 5.

As to repetition and little probative value, Respondents note that from its Initial Prehearing Exchange (PHE) and repeatedly and expansively thereafter, Complainant has identified another expert, Dr. James Carroll, as its witness on "the same matters that Ms. Goad [sic] [is] now also expected to testify on." Mot. at 2 (citing Complainant's Initial Prehearing Exchange (PHE) at 6 (Aug. 25, 2016) (Dr. Carroll will testify 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, and other matters concerning Respondents' finances and accounting'"); Complainant's Third Motion to Supplement the PHE at 4 (Jun. 16, 2017) (Dr. Carroll will testify to "matters concerning the Clean Air Act civil penalty factor," "the effect of the penalty on the violator's ability to continue in business, including 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."); Complainant's Fourth Motion to Supplement the PHE at 2-3 (Jul. 31, 2017) (Providing a revised narrative summary of the expected testimony); Complainant's Fifth Motion to Supplement the PHE at 3 (Aug. 21, 2017) (further expanding Dr. Carroll's testimony and including as an exhibit Dr. Carroll's amended report (CX192A) summarizing Dr. Carroll's opinion).

In light of these disclosures by the Agency, Respondents incurred time and expense to have their counsel travel to Philadelphia to depose Dr. Carroll on August 28, 2017. Mot. at 4. Thus, the addition of Ms. Coad, at this point, has caused them "undue surprise and prejudice." Mot. at 5. Specifically, Respondents complain that they should not be required at this late stage to incur additional costs to prepare for an expert testifying to the same matters as Dr. Carroll. Mot. at 4.

B. <u>The Agency's Response</u>

In its Response, the Agency begins by advising that the only remaining issues in controversy in this matter are those related to the appropriate size of the penalty. Resp. at 2.

Among the factors the Clean Air Act requires this Tribunal consider in deciding upon the penalty is "the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require." Resp. at 2 (quoting 42 U.S.C. § 7524(c)(3)). In undertaking this "ability to pay" assessment, policy and precedent establish that it is appropriate to consider the assets of related entities when the liable party may not have the resources to pay the penalty on its own, as Respondents claim in this case. Resp. at 2 (citing *In re New Waterbury, Ltd.,* 5 E.A.D. 529, 547-50 (EAB 1994); Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action at 8 (Jun. 29, 2015); Respondents' Joint Prehearing Exchange at 1, 8-9.

In response to the claim of untimeliness, Complainant acknowledges that it first learned of certain non-parties related to Respondent Taotao USA during investigations performed before the Complaint was filed in November 2015, in part through Respondents' submission of documents relating to Daction Trading, Inc. ("Daction"). Resp. at 2. However, the Agency represents that the "the legal and economic character" of the relationship between Respondent Taotao USA and Daction remained "opaque." Resp. at 2. It learned a bit more, it claims, in April 2016, as a result of information Respondents provided that Matao Cao, owner of Taotao USA, was "involved with" another company, 2201 Luna Road, LLC., which it discovered in June 2016 was submitting applications to the Agency for certificates of conformity. Resp. at 2. Still, Complainant alleges that "apart from common ownership and commercial mailing addresses, the precise contours of the relationship between Taotao USA, 2201 Luna Road, LLC, and Tao Motor, Inc., were unclear." Resp. at 2-3.

In a letter dated October 13, 2016, Complainant requested that Respondents provide additional documents and information about named related entities and their relationships to Respondents. Resp. at 3 (citing CX 169). On November 7, 2016, Respondents provided a response to the letter in which they denied the non-party entities were closely entwined with Taotao USA, denied having any control over the non-party entities' information, and otherwise refused to provide information about Taotao USA's relationship with the non-party entities. Resp. at 3 (citing CX 170).

On September 6 and 8, 2017, Complainant deposed Respondents' potential witnesses Matao Cao and David Garibyan. Resp. at 3. During his deposition, Mr. Cao explained that Taotao USA shared an office with Daction and would transfer sales to Daction. Resp. at 3 (citing and incorporating Complainant's pending Motion for Additional Discovery on Ability to Pay through Requests for Production ("Discovery Motion") at 4-5). He further testified that 2201 Luna Road, LLC owns a warehouse at 2201 Luna Rd., Carrollton, Texas, that is rented by Tao Motor, Inc. Mr. Cao and Mr. Garibyan also testified about aspects of Taotao USA's relationship with Tao Motor, Inc. beyond their common ownership and address, including information about the lack of competition between the companies, the use of a common manufacturing facility owned by Mr. Cao, non-arm's length sales between the companies, the sharing of warehouses, and the apparent sharing of employees. Resp. at 3 (citing Discovery Motion at 4).

According to Complainant, the deposition testimony of Mr. Cao and Mr. Garibyan "expanded its understanding of the relationship between Taotao USA, Daction, Tao Motor, Inc., 2201 Luna Road, LLC, and potentially other entities," and "provided new evidence of the close links between them that were not previously disclosed." Resp. at 3. Therefore, it promptly reopened its investigation into related entities, "leading to the discovery of, among other things, the lending and purchase transactions jointly involving Taotao USA, Daction and 2201 Luna Road, LLC, that occurred after the Complaint was filed in this matter, and that were not disclosed by Respondents. " Resp. at 3. Complainant notes that it presently has a motion pending for additional discovery related to these matters. Resp. at 3.

Ms. Coad conducted or oversaw aspects of the reopened investigation into Taotao USA and the related non-party entities, including searches of public records, the Agency claims. Information discovered through the reopened investigation was added to the prehearing exchange by Complainant through its Sixth Motion to Supplement the Prehearing Exchange. Resp. at 4. The newly-discovered information suggests that since 2015, Taotao USA has entered into a series of lending agreements with Daction and 2201 Luna Road, LLC, moved to a new warehouse that was purchased through such lending agreements, and has begun engaging in non-arm's length transactions with Tao Motor, Inc. Resp. at 4. These developments may have resulted in material changes to Taotao USA's cost structure, affecting the company's ability to pay. Ms. Coad would testify about her investigation into Taotao USA, Mr. Cao, and other related entities, their current financial condition, the relationships between them, how financial information submitted previously by Respondents may not be reflective of Taotao USA's current financial status, and whether and how current financial information of Taotao USA and the other entities affects Respondents' ability to pay. Resp. at 4.

Secondly, the Agency denies Respondents' claim that Ms. Coad's testimony will be duplicative of Dr. Carroll's testimony while acknowledging that "it may supersede it." Resp. at 4. In that regard it notes that Dr. Carroll only analyzed Taotao USA's financial information from 2012 through 2015, and only evaluated Taotao USA's finances in relation to other companies with the same self-reported NAICS code. Resp. at 4 (citing CX 192). Ms. Coad's testimony, on the other hand, covers financial information relative to Respondent since 2015. Resp. at 4.

In addition, in regard to the burden of adding Ms. Coad as a witness, Complainant states that "the subject of her testimony will predominantly be Respondents' own financial information or the information of companies closely related to Respondents through close financial transactions or common control." Resp. at 4. It notes further that Respondents have already retained an expert witness, Jonathan Shefftz, who "may be" qualified to challenge or rebut Ms. Coad's testimony. Resp. at 4. Moreover, in an effort to ameliorate the burden, Complainant asserts that it has offered to make Ms. Coad available to be deposed by Respondents prior to the hearing in this matter, and offered October 6, 2017, for that purpose. Resp. at 4. Finally, it suggests Respondents' concerns over obtaining a timely transcript of the deposition may be addressed through the use of "expedited service, daily copy, or a same-day rough draft." Resp. at 4.

C. Discussion

With respect to the admission of evidence at hearing, "[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*).

More generally, however, this Tribunal is required to "conduct a fair and impartial proceeding," and to "avoid delay." 40 C.F.R. § 22.4(c). In doing so, the Tribunal is authorized to admit or exclude evidence and to undertake "all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice." *Id.*

Respondents' complaints regarding the late timing of the addition of a new expert witness are valid. This matter has been pending since November 2015, almost two years. It appears the Agency knew from the start both about Respondents' claim of inability to pay and about their potentially related companies. It received more information in April 2016, and was told by Respondents in October 2016, that they would not be voluntarily providing information on the related entities. Nevertheless, Complainant waited until *September 2017*, as the hearing date of October 17, 2017 was fast approaching, to finally depose Respondents' witnesses, and as a result only then realized the need for additional evidence, including Ms. Coad's expertise.

This Tribunal understands that this new evidence may relate to Respondents' finances, albeit indirectly as it pertains to other companies. It further understands that Respondents' presently identified financial expert witness may or may not be able to respond to this new testimonial and documentary evidence, in terms of familiarity and being available to prepare. Consequently, in the opinion of this Tribunal, it would simply not be fair to require the Respondents at this late date to initiate efforts to prepare to defend against a new expert witness's testimony. Requiring such efforts would also undermine the efficiency of this proceeding, as it would most likely lead to a necessary postponement of the hearing in a case that has already been pending too long.[2] Thus, I will not permit Ms. Coad to testify at the hearing, nor may any reports she prepared be introduced into evidence.

[2] Consistent with the Government Performance Review Act, this Tribunal has a stated goal of completing its cases on average within 18 months of receipt.

EVIDENCE REGARDING NON-PARTIES

A. Respondents' Motion

Respondents' Motion further seeks to exclude from entry into the record "various exhibits containing personal and confidential information on the financial condition of third-parties: Daction Trading, Inc.; Tao Motor, Inc.; 2201 Luna Road, LLC.; EagleATVParts.com; and any other non-party." Mot. at 5. In support, they argue that "[u]ntil Complainant can first establish that the proposed penalty is adequate, and then show that these other entities are related to Respondents, said evidence is irrelevant, of little probative value, and prejudicial." Mot. at 5.

B. The Agency's Response

In Response, Complainant asserts that it does intend to show that the other named entities are related to Respondents. Resp. at 5. Specifically, relying upon the testimony of Mr. Cao and Mr. Garibyan, as well as documentary evidence, it intends to demonstrate the close relationship between Respondent Taotao USA, Tao Motor, Inc., and other entities, and in particular that Respondent Taotao USA, Daction, and 2201 Luna Road, LLC combined to obtain financing for the purchase of a warehouse now used by all three entities plus Tao Motor, Inc. Resp. at 5 (citing Discovery Motion at 2- 3). The Agency reiterates that such information is relevant to Respondents' ability to pay under Agency precedent and that Respondents have not shown that testimony and evidence regarding non-parties will not be admissible for any purpose. Resp. at 5.

C. Discussion

The language used in Respondents' Motion suggesting they believe the Agency has the initial burden to "establish that the proposed penalty is adequate" suggests some confusion with regard to the parties' relative burdens of proof on ability to pay. For clarification, it is noted that the Environmental Appeals Board (EAB) in *New Waterbury Ltd*., 5 E.A.D. 529 (EAB 1994), outlined those respective burdens, stating:

> Where ability to pay is at issue going into a hearing, the [Agency] will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The [Agency] need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the [Agency] as part of its burden of proof in demonstrating the 'appropriateness' of the penalty must respond either with the introduction of additional evidence to rebut the

> respondent's claim or through cross-examination it must discredit the respondent's contentions.

5 E.A.D. at 542-543 (italics in original).

Subsequently, the EAB clarified that *New Waterbury* established that:

> the [Agency] has the initial burden of production to establish that the penalty is appropriate and as part of that burden, that a respondent generally has the ability to pay the proposed penalty. The burden of production then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect. If a respondent satisfies its burden of production, the [Agency] must rebut respondent's contentions through rigorous cross-examination or through the introduction of additional information.

Chempace Corporation, 9 E.A.D. 119 (E.P.A. May 18, 2000) (footnotes omitted). Further, as Complainant notes, the EAB in *New Waterbury* advised that in proving the appropriateness of a penalty and providing evidence of ability to pay, the Agency, consistent with its Penalty Policies, may look to the assets of entities related to the Respondent.[3] *New Waterbury*, 5 E.A.D. at 547 (citing Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59770, 59775, n.5 (Sept. 10, 1980)).

Finally, it is important to note that case law establishes that even if Respondent proves inability to pay, such inability is only a mitigating consideration in determining the penalty and does not preclude assessment of any penalty. As the EAB stated in *New Waterbury*, "[a] successful demonstration of inability to pay a proposed penalty would not automatically justify the non-assessment of a penalty." 5 E.A.D. at 540. Thus, even with inability to pay, the penalty may be reduced, but may not be completely eliminated. For example, in *Commercial Cartage Company*, 7 E.A.D. 784 (E.P.A. July 30, 1998), the EAB reduced the penalty for two violations of the Clean Air Act by 75 percent, despite the fact that the violations were "serious," because the respondent's unrebutted evidence showed it was no longer in business and had debts of approximately $500,000 at the time of the hearing. Noting that the respondent had not established that it was unable to pay any penalty, and that it may have had residual funds to pay a

[3] The Penalty Policies applicable here have been submitted and identified by Complainant as CX 22, Clean Air Act Mobile Source Civil Penalty Policy - Vehicle and Engine Certification Requirements (Jan. 16, 2009); CX 23, Clean Air Act Mobile Source Civil Penalty Policy - Vehicle and Engine Certification Requirements (Dec. 6, 2013); CX 24, Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Jul 27, 2016); CX 25, Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action (Jun. 29, 2015). CX 25 permits the Agency to consider the assets of related corporate entities in making ability to pay determinations. CX 25 at 8.

penalty or could decide to resume operations in the future, the EAB reduced the $10,500 penalty to $2,625.

As such, if the Agency can make out a prima facie case that Daction Trading, Inc., Tao Motor, Inc., 2201 Luna Road, LLC., EagleATVParts.com, and/or any other non-party is an entity related to one or more of the Respondents, then it may use evidence related to the financial circumstances of such entity or entities to fulfill its burden of proof with regard to ability to pay. Complainant states that is what it intends to do. As such, at this point, Respondents have not shown that the "various exhibits containing personal and confidential information on the financial condition of third-parties" will not be admissible for any purpose. Thus, it is not appropriate to allow their exclusion at this time.

CONCLUSION

Based upon the foregoing, Respondents' Second Motion in Limine is **GRANTED** as to the testimony of Gail Coad and any reports prepared by Ms. Coad. Respondents' Second Motion in Limine is **DENIED** with regard to proposed evidence on the financial condition of third-parties including Daction Trading, Inc., Tao Motor, Inc., 2201 Luna Road, LLC., and EagleATVParts.com.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: October 2, 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' Second Motion in Limine,** dated October 2, 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: October 2, 2017
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