UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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' RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

COME NOW Respondents Taotao USA, Inc. (Taotao USA), Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co. Ltd. ("JCXI") and submit this Response to Complainant's Motion for Partial Accelerated Decision pursuant to 40 C.F.R. § 22.16(b). Respondents request the Presiding Officer to deny Complainant's Motion for Partial Accelerated Decision because there remain genuine issues of material facts regarding Respondents' liability.

BACKGROUND

A. Statutory Background - *The Clean Air Act ("CAA")*

On December 17, 1963, Congress passed an Act titled "To improve, strengthen, and accelerate programs for the prevention and abatement of air pollution." Pub. L. No. 88-206, § 14, 77 Stat. 392, 401 (1963) ("1963 Act"). On October 20, 1965, Congress passed an act "[t]o amend the [1963 Act] to require standards for controlling emission of pollutants from certain motor vehicles . . . and for other purposes" ("1965 Act"). Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, § 202(b), 79 Stat. 992, 993 (1965). The 1965 Act introduced the Certificate of Conformity. Clean Air Act § 206, 79 Stat. at 994 (Certification). Upon application

by a manufacturer, the Secretary was mandated to require the testing of a new motor vehicle or new motor vehicle engine to determine whether it conformed to regulations. *Id.* at 206(a). For a prototype that was in compliance, the Secretary was required to issue a certificate of conformity valid for at least one year. *Id.* To protect the business expectations of the automobile manufacturer, Congress provided that a new motor vehicle or new motor vehicle engine that was in "all material respects" substantially the same construction as the test vehicle or engine, shall be deemed to be in conformity with the regulations. *Id.* at 206(b). In the 1970 amendments, Congress preserved the certification procedure, even though it removed the provision that new vehicles that are substantially the same in "all material respects" as previously certified vehicles shall be deemed to be in compliance. *Compare* § 206(b), 79 Stat. at 994, *with* Pub. L. No. 91-604, § 8, 84 Stat. 1676, 1694–95 (1970).

B. Regulatory Background - *40 C.F.R. § 85.074-30(a)(2) (1976)*

In 1976, EPA promulgated regulations dealing with the Certification procedures and the issuance of certificates of conformity. 40 C.F.R. § 85.074-30(a)(2) (1976). The 1976 version of the regulation included the following language: ". . . Each such certificate shall contain the following language: This certificate covers the only those new vehicles which conform in all material respects, to the *design specifications* that applied to those vehicles described in the application for certification. . . ." Relying on the aforementioned regulatory language, in 1977, a district court held that when one or more parts erroneously installed in a vehicle are intimately related to and reasonably may be expected to affect emission controls, such vehicle is not covered by the certificate of conformity although the vehicle may, in fact, meet emission standards. *United States v. Chrysler Corp.,* 437 F. Supp. 94 (D.D.C.1977). However, the

regulation which formed the basis of the decision in Chrysler Corp. was deleted in 1977, and replaced by 40 C.F.R. 86.437-78.

In 1982, the regulation was amended and the language stating that the COC covers only those vehicles which conform in all material respects to the "design specifications described in the application for certification" was deleted. *Compare* 1981 40 C.F.R. 86.437 to 1982 40 C.F.R. 86.437 (1982); see 46 FR 50464 October 13, 1981. Additionally, in the 1982, the certification regulations now allowed manufacturers to make running changes without prior EPA approval. 46 FR 50464 ("[t]his rule change will allow manufacturers to add vehicles to a certified engine family and to implement running changes without prior EPA approval. The manufacturer will be responsible for determining that all vehicles still comply with emission standards following implementation of any running change. The manufacturer's determination may be based on either an engineering evaluation of the change and/or emission test data…")

ARGUMENT

I. Complainant has failed to identify any legal basis that may be referred to in order to determine if Respondents are liable as a Matter of "Law"

Complainant misconstrues the law pertaining to the certification of vehicles and fails to establish that Respondents alleged conduct qualifies as a violation of any applicable statute or regulation. Because Respondent has failed to even identify any unambiguous or recognized legal basis for finding Respondents liable, the filing of a motion that requests the presiding officer to find that Complainant has established liability as a matter of law is highly presumptuous and lacks the legal standard of a motion for an accelerated decision.

A. Complainant misconstrues the law and relies on an arbitrary application of statutory authority.

The Complaint filed against Respondents states that Respondents have violated the Clean Air Act ("CAA") by manufacturing for sale or introduction into commerce, or by importing into the United States, new motor vehicles that are not covered by an EPA-issued Certificate of Compliance ("COC").[1] Complainant contends that even though Respondent Taotao USA had EPA-issued COCs for each of the vehicles, belonging to ten different engine families, that were imported into the United States, said imported vehicles were uncertified because the active material concentrations of the catalytic converters installed on the vehicles purportedly did not match the active material concentrations specified on corresponding COC applications. In support of this contention Complainant points to certain regulations and concludes that COC will cover only those vehicles that conform in all material respects to the vehicle specifications described in the COC application.[2] If the EPA determines that the engine family described in a COC application meets the Clean Air Act's requirements, i.e. prescribed emission standards, it issues a COC covering the vehicles and engines belonging to that engine family. *See* 42 U.S.C. § 7525(a)(1). Whereas no specific concentration of precious metals is mandated by a statute or a regulation, nor is the presence of a catalytic converter a Clean Air Act requirement, Complainant contends that a vehicle must conform in all material respects to the "design" specifications described in COC application for its engine family, regardless of whether the test vehicle, and subsequent imported vehicles pass emission tests.[3]

There is no current regulation that requires that a vehicle must conform to the "design specifications" described in the COC, in fact the current regulation pertaining to the certification of highway motorcycles only states that once issued, "the certificate will cover all vehicles

[1] Amended Complaint ¶ 38
[2] Complainant's Motion for Partial Accelerated Decision ("Motion") at 6.
[3] *Id.* at 8.

represented by the test vehicle." 40 C.F.R. § 86.437-78. Only when a vehicle is produced prior to the effective date of the COC, such vehicle may also be covered if certain conditions are met, one of which is that the vehicle "conform in all material respects to the vehicles or engines described in the application for the certificate of conformity." 40 C.F.R. § 85.2305(b)(1). Therefore, there is no requirement that a highway motorcycle produced after the effective date of its corresponding COC must conform in all material respects to the vehicles described in the application for COC.

Accordingly the Presiding officer should find that all the highway motorcycles imported into the United States by Taotao USA were covered by an EPA-issued COC so long as the vehicles belonging to a given engine family were represented by the test vehicle for that engine family.[4] There is no allegation, nor any evidence to support an allegation that the test vehicle which passed the emissions test consisted of a catalytic converter with a different set of precious metal concentrations than those installed onto all other vehicles belonging to the same engine family as the tested vehicle. In the absence of said evidence, especially given that subsequent port-importation emission tests on the vehicles generated similar results,[5] i.e. passed the emission standards, Complainant has failed to demonstrate how post import catalytic convertor tests show that a vehicle's catalytic convertor precious metal concentration did not conform to the catalytic converter precious metal concentration installed on the test vehicle, especially since no statute or regulation requires the testing of catalytic convertor on a test vehicle in order to obtain a COC.

[4] A COC application must include data from emissions testing performed on a prototype vehicle that represents the engine family, showing that vehicles in the engine family will comply with applicable emissions standards for their useful life. The prototype ("test vehicle" or "EDV") represents the "worst case scenario.

[5] *See* Motion at 18; see also CX099–CX122.

In case of off-road vehicles, Complainant points to the following regulation to support its argument that certificates cover only those non-road engines or equipment that "conform to the specifications described in the certificate and the associated application for certification. *See* 40 C.F.R. 1068.103(a). But EPA regulations also acknowledge that in certain circumstances, non-road vehicles that are not identical may still be grouped into the same engine family if the manufacturer can show that "their emission characteristics during the useful life will be similar. in an engine family are identical in terms of their design is immaterial, as long as the vehicles conform in all material respects in terms of their emission characteristic.

The only conformance required for a vehicle to be covered by a COC is conformance with the engine family's emissions, and not the design of the emission controls.

B. Complainant has failed to prove as a matter of law that Respondents' vehicles were "materially" different from those covered by their COCs.

The Complaint alleges that Respondents' submitted applications for certificates of compliance ("COC") for vehicles belonging to ten different engine families, some of which were carry-over applications, and the precious metal content did not exactly match the precious metal content in each the COC applications based on subsequent tests.[6] Complainant has now filed a Motion for Partial Accelerated Decision ("Complainant's Motion" or "Motion") alleging that no genuine issues of material facts remain as to Respondents' collective liability. In support of its Motion, Complainant has submitted certain post-import catalytic converter test results that seem to show only that the tests performed on certain vehicles belonging to ten different engine families after the vehicles were imported, and in most cases driven to accumulate significant

[6] *See* Motion at 8-9.

mileage, and after the converters were removed and stored for long periods of time,[7] did not match the active material concentrations specified in the vehicles' COC applications. *See* Complainant's Motion for Partial Accelerated Decision at 13-23. Complainant's reliance on said subsequent laboratory testing ignores that the precious metal concentrations specified on Respondent Taotao USA's COC applications were based on new catalytic converters, with 0 mileage and further ignores that the catalytic converters subsequently tested were the same catalytic converters represented by the prototype, i.e. EDV tested for emissions which represented the engine family. Additionally, even though Complainant acknowledges that different catalytic converter tests conducted at different laboratories on the same or similar vehicles have yielded results with different active material concentrations, therefore the tests are not entirely reliable and some variance may be reasonably expected. *Compare* catalytic converter test result by ERG (Attachment B of Complainant's Motion) to catalytic converter test results by SGS (Complainant's Motion at 20).

Furthermore, the laboratory test results provided by Complainant in support of its Motion themselves state that the differences in active material concentrations are within the acceptable range,[8] thereby admitting that there is some degree of differences in active material concentrations are often expected and accepted, supporting the conclusion that Respondents had no way of providing exact active material concentrations which would be consistently found in all subsequent laboratory tests. Finally, not only has Complainant failed to allege that the purported differences between precious metal concentrations in catalytic converters installed on

[7] *See* Complainant's Motion at 13-14 (stating that on March 27, 2012, EPA inspectors inspected a shipment of motorcycles that were labeled as belonging to engine family CTAOC.049MC1, who then examined the vehicle (VIN -9276) and removed the vehicle's catalytic converter. ERG analyzed the catalytic converter taken from VIN -9276 on June 12, 2013, over a year later).
[8] *See* ERG (CX063, CX066, CX089, CX125, CX127, CX129, CX131-133, CX144, CX147, and CX152.

the vehicles and those specified in the COC applications had any effect on the vehicles' emissions, Complainant now states that an imported vehicle need not even exceed emissions so long as the vehicle imported does not conform to the design specifications described in the COC application covering the vehicle. Complainant makes this argument even though it forced Respondents to conduct multiple post COC emission tests not only on vehicles belonging to each of the ten engine families, but multiple vehicles belonging to the same engine family, costing Respondents hundreds of thousands of dollars. *See* Respondent's Exhibit A. Then even though the vehicles passed emission tests conducted at an EPA-approved laboratory, Complainant ordered Respondents to conduct additional emission tests at a different EPA-approved laboratory under different testing procedures and circumstances desperately trying to find an emission related violation regardless of the costs incurred by Respondents, and without regard to the limited benefit from causing vehicles to undergo tests even after they have already reached their full useful lifecycle. As if that wasn't enough, Complainants made Respondents further pay for costly and time consuming catalytic converter tests, even though the vehicles had already passed the relevant emissions standards, and therefore there could be no reasonable expectation that the precious metal concentration of a catalytic converter on a vehicle that has already passed emission testing would affect emission control. *See* Complainant's Motion for Partial Accelerated Decision at 18-19 ("CEE conducted emissions testing on the twenty-four selected vehicles between May and October 2014… Of the twenty-four vehicles sent to CEE, twenty-three had their catalytic converters sent to SGS for analysis"). Because the vehicles that allegedly contain active material concentrations that do not conform to the concentrations specified in their COC applications had passed emission tests, just like the EDV representing the engine family, the vehicles conformed in all material respects to the EDV tested for emission.

II. Respondents' Defenses do not misconstrue the Clean Air Act.

Complainant in its Motion has alleged that Respondents' following defenses misconstrue the Clean Air Act and therefore fail as a matter of law: (1) Taotao Group and JCXI are not "manufacturers" for the purpose of the Clean Air Act violations alleged in the Complaint; and (2) a vehicle is covered by its COC if there is emission related violation.

A. Complainant has failed to establish as a matter of law that Taotao Group and JCXI are liable for violating the Clean Air Act as a matter of law.

In its Motion, Complainant alleges that "[n]othing in the definition of "manufacturer" limits the scope of the term to persons who apply for COCs, or to vehicle component suppliers.[9] Complainant is incorrect. A COC applicant can only be a "US manufacturer or US importer/distributor." *See* Complainant's exhibit CX014. Complainant seems to be confusing the definition of "manufacturer" as it applies to the Clean Air Act's record keeping provisions and the definition of "manufacturer" as it applies to a COC applicant's liability for allegedly failing to provide accurate design specifications.

In support of its Motion, Complainant has referred to the following exhibits: CX019 at EPA-000439 (nonroad enforcement alert addressing importer and manufacturer responsibility); CX020 at EPA-000444 (enforcement alert addressing importer and manufacturer obligations); CX021 at EPA-000447–48 (enforcement alert addressing obligations of importers and manufacturers, including foreign manufacturers).[10] However, CX019 only states that the CAA prohibits the manufacture or importation …unless the engines are certified by EPA as meeting emission standards display appropriate emission labels." *See* CX019 AT EPA-000439. The remaining enforcement alerts contain similar language. *See for example* CX020 at EPA-00043

[9] *See* Complainant's Motion for Partial Accelerated Decision at 29.
[10] The Enforcement alerts are merely EPA alerts and therefore are not binding law.

("Manufacturers of motorcycles are required to provide an emissions warranty to the consumer") and EPA-00044 ("When EPA or CBP determines that imported motorcycles do not meet the EPA emissions certification requirements…EPA then contacts the **importer** to address the Clean Air Act violations…"). Because the exhibits provided in support of Complainant's Motion only require that a manufacturer provide emissions warranty or that manufacturers may be held liable if the vehicles are not certified as meeting emission standards, it is clear that "manufacturer" as defined in the applicable statute only includes manufacturers who manufacture vehicles that fail emission standards and are not liable for ensuring that all design specifications in a COC application are exact. Furthermore, even if a manufacturer could be held liable for delivering for to a US importer vehicles that pass emission standards but fail to meet a particular design specification, that manufacturer for the purpose of this proceeding would be one of the two catalytic converter manufacturers listed in each of the ten engine family's COC applications.[11]

B. Complainant's contention that a vehicle that conforms to applicable emission standards, may still not be covered by its COC is unfounded in law or fact.

Complainant's Motion for Partial Accelerated Decision, like its Complaint against Respondents in the present case, is entirely premised upon the holding of a single district court decision made nearly fifty years ago.[12] *United States v. Chrysler Corp*., 437 F. Supp. 94 (D.D.C. 1977). Complainant provides only the example of Chrysler Corp. in making the argument that a vehicle may conform to the applicable emission standards and still not be covered by a COC if it is materially different from the specifications described in the COC application.[13] However, the

[11] *See* CX001-CX010 (catalytic converter manufacturers are listed as either Nanjing Enserver Technology Co., Ltd, or Beijing ENTE Century Environmental Technology Co., Ltd., Chinese Catalytic converter manufacturing companies).
[12] *See* Complainant's Motion for Partial Accelerated Decision at 30.
[13] *Id.*

Chrysler decision was based on the language of a regulation,[14] which has since been deleted and the language of the successor regulation specifically eliminates the requirement that a Certificate of Compliance contain the language that the COC "covers only those new motor vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the application for certification." Compare 1981 40 C.F.R. 86.43 7 to 1982 40 C.F.R. 86.437 (1982); see 46 FR 50464 October 13, 1981.

Complainant argues that even though the regulation has been superseded, the statutory language has not changed, nor have the policies favoring presale certification. This argument fails because the Chrysler Corp. decision specifically stated that "the language of the regulation and applicable statutes, taken together explicitly commands that each vehicle conform to design specifications." *United States v. Chrysler Corp.*, 591 F.2d 958, 960 (D.C. Cir. 1979). Because the decision was clearly based on the language of the regulation, and not the applicable statutes alone, which say nothing about nonconformity by vehicles that pass emission standards, the holding clearly does not apply to all future cases, especially those with completely different facts.

In *United States v. Chrysler Corp.*, the Environmental Protection Agency ("EPA") had brought a similar action against Chrysler Corp. because Chrysler had manufactured and introduced into commerce vehicles equipped with distributors, carburetors, exhaust gas circulation values, and/or orifice spark advance controls different from those described in its COC application for the vehicles. *Chrysler Corp.* 437 F. Supp. at 95-96. Even though the differences between multiple parts of a vehicle's emission controls introduced into commerce

[14] *See* 40 C.F.R. § 85.074-30(a)(2) (1976); see also *United States v. Chrysler Corp.,* 591 F.2d 958, 960 (D.C. Cir. 1979) ("The language of the regulation and applicable statutes, taken together, explicitly commands that each vehicle conform to design specifications").

and those described in the relevant COC applications were significantly greater than those alleged against Respondents in the present case, EPA only assessed a penalty on thirty-seven vehicles that were found to be equipped with different emission related parts. *Id.* at 97. In Chrysler Corp. the court found that a number of vehicles of Chrysler's RG engine family at its Hamtramck, Michigan plant were improperly assembled with nonconforming parts. *Id.* at 96. Even though Chrysler Corp. manufactured and delivered into commerce from its Hamtramck Plant 99,884 vehicles belonging to the RG engine family, EPA only alleged thirty-seven violations against Chrysler Corp. that included only the vehicles EPA or CARB inspected. *Id.* at 96-97.

In the present case, EPA uncovered that thirty-five catalytic converters equipped in Respondents' on-highway and off-highway motorcycles were allegedly comprised of different precious metal concentrations and no other emission control parts violations were found.[15] However, unlike Chrysler Corp., EPA here seeks to recover penalties for all 109,964 vehicles introduced into commerce.[16]

Complainant has attached as exhibit CX177, Motor Vehicle Certification Procedures, 39 Fed. Reg. 7545, 7545-48, 7551-53 (Fen. 27, 1994). In this exhibit, the federal register in regards to Certification states that any revocation or suspension of certification under the section shall "…Extend no further than to forbid the introduction into commerce of vehicles previously covered by the certification which are still in the hands of the manufacturer, except in cases of such fraud or other misconduct as makes the certification invalid ab initio." *See* Complainant's Exhibit CX177 at EPA-009417. Because there is no allegation that Respondents conducted any fraud or other misconduct that makes the certificate invalid ab initio, Complainant can only

[15] *See* Motion at 23.
[16] *See* Amended Complaint ¶ 38.

suspend the certification of vehicles in the ten engine families are still in the hands of the manufacturer, and not those vehicles that have been sold to ultimate purchasers.

Complainant then argues that even though the regulation no longer contains the "design specification language, the face of the COC continues to contain the same or similar language. This argument lacks merit and is without any legal support because a certificate of compliance, in and of itself is not a regulation, and therefore the language contained therein is not binding law. Further, Complainant's continual use of the same language on COCs after the requirement was specifically deleted from applicable regulations serves no legal purpose in an administrative proceeding.

Finally, because Complainant argues that on appeal of Chrysler Corp., the Circuit Court affirmed the decision stating that "clear language of the statutes, the regulations, and the policies favoring presale certification together supported the District Court's decision. *See United States v. Chrysler Corp.,* 591 F.2d 958, 960-61, (D.C. Cir. 1979). Complainant contends that adoption of Respondent' approach would allow manufacturers and importers to sell vehicles in any untested, uncertified configuration unless the EPA could prove that the vehicles exceed emissions standards. Complainant again is misconstruing Respondents' "approach" to try and fit it into the Chrysler holding.

In Chrysler Corp., the presale certification policy was identified whereby the Court held that the clear congressional intent was that vehicles pass emission tests before they may be sold to the public. In Chrysler Corp. different emission control parts were actually assembled at the Chrysler plant; the control parts were clearly different than the ones specified in the COC application because Chrysler had built both California vehicles and non-California vehicles and during assembly California parts were installed in non-California vehicles, therefore, the test

vehicle tested for emissions to obtain a COC was built with Non-California parts, whereas the vehicles introduced into commerce contained California parts. *See Id.* at 960 n.3.

Unlike the clear erroneous assembly of emission control parts in Chrysler Corp., in the present proceeding, the facts are completely distinguishable. Here there is only one catalytic converter specification, the one that was installed on the test vehicle that was tested for emissions. The catalytic converter representative of each of the ten engine families was ordered from one of two Chinese Catalyst manufacturing companies. *See* Complainant's Exhibit CX001-010. The specifications were provided by said catalytic converter manufacturers and included in the COC application. *See* Complainant's Exhibit CX073.[17] Catalytic converters purchased from the same manufacturer with the same specifications were installed on the test vehicle and all other vehicles belonging to the same engine family. As evidenced by Complainant's exhibit CX176 the only way to determine the emission rate of a given catalytic converter with a specified precious metal's ratio is to test the converter's performance, which is exactly what Respondents' did. Complainant's Exhibit CX176 ¶ EPA-002409:20. It is Complainant's position that each catalytic converter must be tested for active material concentrations prior to submitting an application for certification. Such an approach will do exactly what the Chrysler Corp. decision was aiming to avoid, it would make the statutory policies behind the enactment more difficult to fulfill. *See Chrysler Corp.* 591 F.2d at 960.

[17] The email clearly states that the only way to obtain catalytic converter concentrations were through the catalytic converter manufacturers. Therefore, EPA's allegation is not that Respondents tested representative vehicles with different concentrations that those equipped on the vehicles imported into the United States, but rather that Respondents should be held liable for violating the CAA because they relied on the catalytic converter manufacturer representations and purported testing which caused them to merely list incorrect specifications in their COC applications.

III. Complainant's reference to a 2010 Administrative settlement agreement is improper and serves no legal purpose in the current proceeding.

According to the Consolidated Rules of Practice, a Presiding Officer shall not admit evidence that would be excluded under Federal Rules of Evidence. *See* 40 C.F.R. § 22.20. ("The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible."). The introduction of the 2010 Administrative Settlement Agreement ("ASA") and any arguments relying on the ASA should therefore be excluded from the proceeding. The ASA was entered into because EPA alleged that Respondents had imported ATVs equipped with adjustable carburetors that allowed a user to adjust the engine's air-fuel ratio. The current proceeding has no such allegations. Complainant alleges that under the ASA, Respondents committed to employing a compliance plan that required catalyst testing. First, the compliance plan was unduly burdensome and subjected Respondents to undergo unnecessary tests that are neither required by statute nor regulation. Second, the compliance plan was only meant to last five years; and (3) the five-year testing of active material concentrations pursuant to the compliance plan was unnecessary and overly costly given that such testing has nothing to do with adjustable carburetors that Respondents have already replaced. *See generally* Complainant's Motion. Therefore, not only is Complainant's attempt to rely on the administrative settlement to prove liability explicitly prohibited the Consolidated Rules of Practice, it is by also forbidden by Federal Rules of Evidence as inadmissible hearsay and is clearly irrelevant. Accordingly, Respondents request that evidence of the ASA and any statements made by Complainant in relying on the ASA be disregarded.

Not only is Complainant's use of the Administrative Settlement Agreement highly prejudicial to Respondents, Complainant's statement that "[a]fter execution of the ASA, T-USA did not provide EPA with the results of emissions tests or catalytic converter analyses as required under the compliance plan" is not true. *See* Complainant's Exhibit CX076 at EPA-000893 and CX080. Respondent Taotao USA provided Complainant with catalytic converter analyses for

Conclusion: Complainant has failed to provide reliable evidence to show that the vehicles inspected did not conform to the corresponding EDV and/or COC application

IV. The Material facts specified in Attachment A of Complainant's Motion are in Reasonable Dispute

For the foregoing reasons, Complainant's request for accelerated decision as to the "material facts" specified in Attachment A of its Motion should be denied. The facts specified in Attachment A are all reasonably disputed, particularly paragraph 24 to 107 of Attachment A are genuinely disputed.

CONCLUSION

Complainant's Motion alleges that it is entitled to an accelerated decision holding Respondents liable for introducing into commerce certain vehicles that were imported after COC applications and emissions tests was submitted and COCs was issued, but are now deemed "uncertified" because certain post importation catalytic converter tests revealed that the active material concentrations did not exactly match the COC applications. The Motion not only presumes that any difference in active material concentrations. i.e. "design specifications" renders a vehicle covered by a COC, an "uncertified" vehicle whether or not the difference has any effect on emissions, it goes further and presumes that a showing of a variance between active material concentrations specified in an engine family's COC and those specified in a laboratory

test can only mean that all vehicles imported under said engine family's COC differed from that engine family's prototype initially tested for emissions.

Complainant's position therefore ignores that the differences in active material concentrations in post import vehicles could be caused by any number of reasons,[18] which Respondents have no control over, for example, the use of different testing procedures, the testing of vehicle during different stages of the its useful life, and the act of removing the catalytic converter from a vehicle's muffler, could reasonably contribute to the alleged differences in active material concentrations between a new catalytic converter before it is installed in a vehicle and the same catalytic converter once it has been installed and used, often up to the vehicle's full useful life.[19]

The active metal contents and concentrations specified in each of the COC applications or those present in the catalytic converter installed onto each prototype were contents and concentrations of a new catalytic converter while the precious metal concentrations provided by the Complainant in its Motion were calculated after the catalytic converter had been installed onto, and later removed from, the tested vehicle and in most instances the catalytic convertors were removed from the tested vehicle after the vehicle had accumulated mileage (usually up to its full useful life). Because the active material concentrations depicted in the test results provided by the Complainant were calculated using different procedures and under completely

[18] *Compare* catalytic converter test result by ERG (Attachment B of Complainant's Motion) and catalytic converter test results by SGS (Complainant's Motion at 20) with Complainant's Exhibit CX077. The catalytic converter's precious metal content in engine family CTAOC.049MC1, model CY50 shows concentrations as Pt(5911);Pd(7268);Rd(1471). This test was conducted in 2012, the same year the test vehicle underwent emission tests for the COC application for vehicles in that engine family. However, ERG subsequent tests on the same engine family's vehicles yield a precious metal concentration of approximately Pt(<10); Pd(5653); Rd(73) and SGS subsequent post-useful life/post-removal tests yield a result of approximately Pt(<10); Pd(4639); Rd(<10).

different circumstances than those employed by Respondent Taotao USA in its COC applications, Complainant has failed to prove that Respondents are liable for violating 42 U.S.C. § 7522(1) as a matter of law.

The differences in active material concentrations found in subsequent laboratory test results and those described in Respondent Taotao USA's COC applications fail to prove (1) that Respondents sold or imported vehicles that contained active material concentrations that did not materially conform to the COC application or the prototype (EDV) tested for emission; (2) whether it is reasonable to conclude that the installation of a catalytic converter on a prototype vehicle with certain precious metal concentrations that differ from the concentrations described in the vehicle's COC application will affect emissions, where the difference is within acceptable limits of expected variances and the prototype itself passes emission tests necessary to obtain a COC; and (3) whether a non-US manufacturer can be held liable for violating the Clean Air Act simply by providing vehicles to a US importer that conform to US emission standards and after the Importer has acquired a COC which facially covers the vehicles simply because the US Importer wrote down certain catalyst active material concentrations in its COC applications which were provided by a third party catalytic converters manufacturer.

PRAYER

WHEREFORE, Respondents prays that Complainant's Motion for Accelerated Decision be DENIED in whole or in part, and for such other relief, at law or in equity, to which Respondents are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on January 3, 2016 the foregoing Motion to Dismiss was filed and served on the Presiding Officer electronically through the Office of Administrative Law Judges (OALJ) e-filing system. I certify that a copy of the foregoing Motion was served by electronic mail on the same day to opposing counsel and a copy was also mailed as follows:

Ed Kulschinsky
Robert Klepp
Air Enforcement Division
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., NW
William J. Clinton Federal Building
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/s/Salina Tariq
Salina Tariq

EXHIBIT A

Date	Inv#	Amount	Check#
03/07/14	1403101	$6,100.00	10100
05/15/14	1403102	$2,500.00	10166
06/09/14	1403103	$6,037.50	10180
06/12/14	1403104	$6,037.50	10184
06/25/14	1403105	$8,250.00	10195
06/25/14	1403106	$6,100.00	10197
06/25/14	1403107	$5,437.50	10196
07/02/14	1403109	$11,062.50	10203
07/09/14	1403108	$20,000.00	10216
07/22/14	1403110	$9,000.00	10222
07/30/14	1403113	$8,375.00	10231
08/06/14	1403112	$9,250.00	10230
09/08/14	1403114	$14,505.00	10257
09/08/14	1403115	$4,625.00	10256
09/23/14	1403116	$9,250.00	10276
10/16/14	1403117	$4,625.00	10292
10/23/14	1403118	$4,625.00	10302
11/25/14	1403120	$3,750.00	10327
11/25/14	1403119	$6,575.00	10328
11/25/14	1403121	$17,950.00	10329
12/15/14	CA02010- NOV14	$3,993.30	10344
10/20/14	CA03074-SEP14	$6,041.25	10297
09/23/14	CA02321-SEP14	$6,154.65	10275
08/20/14	CA02302- JULY14	$10,318.50	10244
08/20/14	CA02303- JULY14	$8,254.80	10245
08/20/14	CA02956- JUN14	$12,382.20	10246
12/05/14	51606	$10,000.00	10339
12/19/14	51606	$16,700.00	10348
11/11/14		$492.00	10315
09/08/14		$300.00	10271
		$238,691.70	

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