

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

In the Matter of:

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

Respondents.

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

BUSINESS CONFIDENTIALITY ASSERTED

The exhibits submitted with Respondents' Prehearing Exchange contain material claimed to be confidential business information ("CBI") pursuant to 40 C.F.R. § 2.203(b). The material claimed as CBI are Respondent's Exhibits 1 and 3. Exhibit 1 consists of correspondence regarding confirmatory testing on vehicles belonging to an engine family. Exhibit 3 consists of Respondent Taotao USA, Inc's 2014 tax returns. These exhibits are filed under seal.

A complete set of all exhibits, and a set in which the exhibits containing CBI are omitted, are being filed with the Hearing Clerk.

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

**RESPONDENTS TAOTAO USA, INC., TAOTAO GROUP CO., LTD., AND JINYUN
COUNTY XIANGYUAN INDUSTRY CO., LTD.'S JOINT PREHEARING EXCHANGE**

Respondents, Taotao USA, Inc. (“Taotao USA”), Taotao Group Co., Ltd. (“Taotao Group”), and Jinyun County Xiangyuan Industry Co. Ltd. (“JCXI”) by and through its Attorney of Record, William Chu, file this Joint Prehearing Hearing.

A. Potential Witnesses

Respondents may call any or all of the following witnesses at the evidentiary hearing in this matter. Because it is too early to determine which witnesses will be available at the hearing, whether they will be able to travel to Washington, D.C., and whether there will be a need for additional or alternative witnesses, Respondents will supplement this list, upon adequate notice to the Tribunal and to Complainant.

1. Matao Cao, Taotao USA, Inc. Mr. Cao is the president of Taotao USA and may testify to Respondent Taotao USA Inc.’s inability to pay and the likelihood that Taotao USA, Inc. will go out of business if it is ordered to pay the proposed penalty.
2. David Garibyan, Taotao USA, Inc. Mr. Garibyan is an employee of Taotao USA who has been present when certain emission tests were conducted on the subject vehicles. Mr. Garibyan may testify concerning the testing procedures, company practices, and the steps

Respondents have taken, and monies spent, to comply with the Environmental Protection Agency's demands and suggestions in the years preceding the filing of this Complaint, and since.

3. Jackie Wang, Taotao USA, Inc. Mr. Wang is an employee of Taotao USA and may testify regarding the process of importing and exporting vehicles, the tests conducted on the vehicles, the costs of additional tests, the process of ordering catalytic converters, and Respondents' efforts in remedying any effects of the alleged noncompliance.
4. James Xu, Manager, Stanley Marketing and Consulting, LLC. Mr. Xu is the certification consultant and authorized representative for certification purposed for Taotao USA. Mr. Xu prepares the applications for Certificates of Compliance ("COCs") for Taotao USA, the importer of the subject vehicles in this matter. Mr. Xu may testify to the contents of the applications for COCs submitted to the Environmental Protection Agency's Compliance division. Mr. Xu may also testify to his dealings and correspondences with EPA's Compliance division. Additionally, Mr. Xu may be qualified to testify as an expert about the procedure of submitting applications and collecting information for COC applications given that he submits COC applications, similar to those that are the subject matter of this complaint, for various other unrelated manufacturers and importers.
5. Larry Swiencki, Project Manager, California Environmental Engineering ("CEE"), an Environmental Testing Laboratory. Mr. Swiencki may testify about the emissions tests conducted at CEE on the vehicles imported by Taotao USA, and the removal of catalysts and the process of shipping them for further testing; how many such tests were conducted; and the costs of such tests. Additionally, Mr. Swiencki may be qualified to testify as an expert witness to provide an opinion regarding the test results, the impact of

catalysts and catalytic active materials on emission, and the likely reasons for any discrepancies between emissions tests conducted on the same vehicles at different locations and/or different times.

B. Documents and Exhibits

See “Respondents’ Joint Prehearing Exchange Index,” for a list of the exhibits that Respondent may introduce at the hearing. Copies of the exhibits are provided in tandem with this Prehearing Exchange. All other exhibits that Respondents’ intend to introduce as evidence at the hearing at this time that have already been provided by the Complainant, please see Complainants’ Initial Prehearing Exhibits. Respondents will supplement this Exchange, upon adequate notice to the Tribunal and to Complainant, to include additional exhibits as more information regarding the matter is gathered, and need for such additional exhibits is discovered.

C. Location of Hearing

Respondent is not opposed to the Complainants request that the hearing on this matter be held in Washington D.C., provided that Respondents’ witnesses are allowed to appear via video conference or testify in a deposition. Respondent will submit the appropriate requests for such alternate methods for providing testimony.

D. Brief Explanation of Arguments in Support of Respondents Defenses

Respondents have raised the following allegations in support of their defenses.

(1) Complainant has failed to state a claim against which relief can be granted. Specifically, there have been no allegations of Respondents exceeding emission standards under the Clean Air Act (“CAA”).

Complainants Amended Complaint states the following alleged violations of law:

EPA analyzed the precious metal content of catalytic converters taken from highway motorcycles and recreational vehicles representing ten engine families...In each catalytic converter analyzed, the required catalytic active material was either missing or not present in the quantity or concentration described in the relevant applications for COC applications. Because the catalytic converters do not conform to the design specifications described in the relevant applications for COC, the vehicles do not conform in all material aspects to the specifications in the COC applications and are therefore not covered by those COCs.

There have been no allegations that the alleged violations resulted in exceeding emission standards under the CAA.

In Complainants' Initial Prehearing Exchange Complainant has alleged that evidence will show that because vehicles imported "were equipped with catalytic converters in vehicles imported were built differently than the catalytic converters described in the applications for Certificates of Conformity Respondents submitted for the vehicles, the difference was material. Complainant has thereby alleged that any difference in actual catalytic converter active material concentration and an application for COC is "material" because it "reasonably may be affected to effect emission controls." In support of its argument, Complainant has cited to a decision in a 1979 case, which relied on a regulation that has since been deleted.¹

Because Complainant's Amended Complaint does not make any allegations that Respondents have exceeded emission standards under the CAA, the complaint fails to state a claim against which relief can be granted, Respondent cannot be held liable for a CAA violation.

¹ See *United States v. Chrysler Corp.*, 591 F.2d 958, 960 (D.C. Cir. 1979) (relying on 40 C.F.R. § 85.074-30 (a)(2) (1976)); Compare 40 C.F.R. 86.437-78, as amended and 40 C.F.R. 85.074-30 (1976) (repealed in 1977).

(2) The Complaint fails to state a claim against Respondents Taotao Group and JCXI upon which relief can be granted.

Respondents have raised the defense that neither Respondents Taotao Group, nor JCXI is a “person” under the CAA because Taotao Group and JCXI did not import the subject vehicles. The Clean Air Act prohibits “...in case of a person, the importation into the United States, of any new motor vehicle or new motor vehicle engine...unless such vehicle is covered by a certificate of conformity...” CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1). Because the Complaint alleges that Respondent is a “person” under the CAA, and because Respondent JCXI did not import the subject vehicles or engines into the United States, Respondent JCXI is not subject to CAA § 203(a)(1) and 42 U.S.C. § 7522(a)(1).

Furthermore, Respondents Taotao Group and JCXI are not subject to CAA § 203(a)(1) 42 U.S.C. § 7522(a)(1) as neither Taotao Group nor JCXI was the “manufacturer” subject to the Certificate of Conformity requirements under the statute. As stated in Paragraph 24(c) of the Complaint, a “manufacturer” means “any person engaged in the manufacturing or assembling of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, or importing such vehicles or engines for resale...” CAA § 216(1), 42 U.S.C. § 7550(1); 40 C.F.R. § 1051.801. Respondents aver to the definition of “manufacturer” in the statute and deny that every manufacturer, under the plain meaning, must submit a COC application. In fact, Taotao Group and JCXI did not apply for the COCs in this case.

Complainant has alleged in its Initial Prehearing Exchange that because Taotao USA imports vehicles manufactured by Taotao Group and JCXI, Taotao Group and JCXI are “manufacturers” pursuant to 42 U.S.C. § 7550(1). Complainant’s argument is flawed because as mentioned above, the only violation in the Amended Complaint is that the active materials of the

catalytic converters in the tested vehicles did not match the active materials stated in the COC applications, and Taotao USA filed the COC applications, not Taotao Group or JCXI. Furthermore, Taotao Group and JCXI are not even listed as the manufacturers of the catalytic converters in the aforementioned COC applications. Each COC application referenced in the Amended Complaint lists the catalytic converter manufacturer as Nanjing Enserver Technology Co., Ltd, or Beijing ENTE Century Environmental Technology Co., Ltd., Chinese manufacturing companies. Given that Taotao Group and JCXI (1) did not apply for the COC, (2) did not import the subject vehicles, and (3) did not manufacture the catalytic converters, upon which the entire complaint is premised upon, Complainant's allegations against Taotao Group and JCXI fail to state a claim against Taotao Group and JCXI for which relief may be granted.

(3) Complainant has not alleged any facts showing that Respondent's conduct was a cause in fact of any release of excess emissions from mobile sources as set forth in Paragraph 23 of the complaint, including hydrocarbons, oxides of nitrogen, and carbon monoxide, nor has Respondent caused any impact to any regulatory scheme.

In Complainant's Initial Prehearing Exchange, Complainant has alleged that only Counts 1 and 2 produced emissions in excess of CAA standards testing and that EPA does not have information about emissions from Counts 9 and 10. Therefore, Complainant has admitted that vehicles belonging to the engine families described in Counts 3 through 8 did not exceed CAA emission standards.

Respondents submit that proposed testimony and evidence will demonstrate that Respondents are not liable for exceeding the emissions standards of CAA. In the event that any catalysts active material was either missing or not present in the quantity or concentration described in the relevant COC applications for the 10 Engine Families, as asserted in the

Complaint, such deviations from the COC applications were *de minimis* in their contribution to any potential emission of excess pollutants and were therefore insufficient as a matter of law under the due process and equal protection rights guaranteed by the United States Constitution and pursuant to the *de minimis* doctrine to give rise to any liability.

E. Information relevant to the assessment of a penalty

Complainant has calculated the economic benefit using the “rule of thumb” method provided under the penalty policy. *See* Clean Air Act Mobile Source Civil Penalty Policy (“Penalty Policy”). The use of the rule of thumb in calculating the economic benefit is not appropriate in this case. First, the Penalty Policy that complainant has relied upon specifically states that the use of the “Rule of Thumb” method is inappropriate and should not be used when a hearing is likely on the amount of the penalty; or the defendant identifies economic benefit factors that are unique to the case. Because Respondents have not benefitted from the purchase of the catalytic converter that had active materials in concentrations that were different from the active material concentrations listed in the relevant COC applications, the economic benefit should be calculated as 0. Respondents had no reason to import catalyst converters in different quantities than what were listed on the COC application because no specific concentration is generally required.

Respondents will provide testimony that even if the Court finds that there was some economic benefit achieved by importing vehicles with catalytic converters in which the active materials were either missing or not in the concentration specified in the COC applications, the benefit was *de minimis* and certainly did not amount to \$15 per vehicle or engine.

Second, Respondents affirmatively state that certification violations are generally not of “major” egregiousness. The Mobile Source penalty policy itself states that “violations should be

classified as "Major" if vehicles or engines are uncertified and there is no information about the emissions from these vehicles or engines, or test data of the uncertified engines shows the engines to exceed emissions standards." Respondent argue that information about emissions from these vehicles and test data is available, and should be analyzed in any penalty policy analysis, if any analysis is performed.

Next, the upward adjustment of the vehicles by 30% is not appropriate. As stated above, there is no evidence of any violations of the emission standards of CAA, therefore, there is no basis for a gravity component and no basis for an upward adjustment for failure to remediate vehicles. Given that the violations alleged against Respondents are not violations that Respondents intentionally committed, if any such violations even existed, there is no benefit from scaling the penalties upwards. *See* Penalty Policy at 9 ("the Penalty Policy is intended to provide incentives for companies to remedy violations involving uncertified vehicles or engines in order to prevent the actual excess emissions that would result from their use." Because there was no actual excess in emissions, the use of the Penalty Policy against Respondents is against the Penalty Policy's intended purpose.

F. Detailed narrative explaining that the proposed penalty should be reduced or eliminated

Complainant has stated in its Initial Prehearing Exchange that it has determined that Respondents' have the ability to pay based on (1) Taotao Group's website that "boasts of global sales and revenues exceeding \$100 million" and (2) an interview with Matao Cao regarding Taotao's sales financial condition and market share. Neither of the two documents relied upon, and submitted as exhibits, can be used to determine a company's ability to pay.

First, Taotao Group's website that Complainant has admitted was used as basis for its determination of an ability to pay, clearly states that it has a revenue of \$100 million, not profits.

Taotao Group is only one of the Respondents in the Complaint, which as demonstrated above, is not even subject to the CAA for which the complaint has been filed. Furthermore, a foreign website is not an accurate reflection of each Respondent's ability to pay, nor is it credible evidence. In fact, Respondents have previously provided Complainant with credible evidence consisting of tax returns, financial statements, et cetera, which Complainant has chosen to ignore.

Second, the interview by Matao Cao regarding Taotao Group's financial condition is an "interview" posted on Dealernews.com. The interview does not reflect Taotao Groups's financial condition, neither is the interviewee is not in the best source of information regarding Taotao Group's financial condition. Again, credible evidence of each Respondent's inability to pay was provided to Complainant, which was ignored in its assessment of penalties.

Respondent Taotao USA will supplement this Prehearing Exchange and provide 2015 tax returns as evidence of inability to pay once the tax returns become available.

Respectfully submitted,



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COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned certifies that on October 28, 2016 the foregoing Respondents' Joint Prehearing Exchange, together with Respondents' Proposed Exhibits that do not contain CBI, were filed electronically using the EPA Office of Administrative Law Judges' E-Filing System. In addition, the original and one copy of Respondents' Joint Prehearing Exchange, a full set of Respondents' Proposed Exhibits, and one set of Respondent's Proposed Exhibits from which exhibits containing CBI have been omitted, were sent the same day via certified mail, return receipt requested, to the Headquarters Hearing Clerk in the EPA Office of the Headquarters Hearing Clerk at the address listed below:

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W., Mail Code 1900R,
Washington, D.C. 20460

The undersigned certifies that a copy of Respondents' Joint Prehearing Exchange, together with a full set of Respondents' Proposed Exhibits were sent this day via certified mail, return receipt requested, for service on counsel for Complainant at the address listed below:

Ed Kulschinsky, Esq.
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., NW
William J. Clinton Federal Building
Room 1142C, Mail Code 2242A
Washington, DC 20460
(202) 564-4133
Kulschinsky.edward@epa.gov


Salina Tariq

RESPONDENTS' JOINT PREHEARING EXCHANGE INDEX

<i>Exhibit No.</i>	<i>CBI OR PII</i>	<i>Title</i>	<i>Pages</i>
1	CBI	Confirmatory Testing & Correspondence on engine family FTAOC.049MC2	00001-00032
2		Email from Larry Swiencki	00033
3	CBI	Taotao USA, Inc.'s 2014 Tax Returns	00034 - 00080



10/21/2015

William Chu, Attorney
4455 LBJ Freeway, Suite 909
Dallas, TX. 75244

Re: TaoTao vehicle audit

Dear Mr. Chu,

In 2014 California Environmental Engineering (CEE) conducted testing on twenty four vehicles for TaoTao US. This audit was ordered by the USEPA. The audit consisted of both on road scooters and off road vehicles. CEE ran durability mileage and conducted CVS75FTP tests per the audit order. All the tests were conducted according to the Code of Federal Regulations (CFR 40 Part 86). The test data was compiled and each test vehicle had a final report written which included pictures of each vehicle. CEE only conducted the emissions tests requested. CEE did not analyze the catalytic converters or remove anything from the test units. A TaoTao employee removed the catalysts and tagged them. CEE then boxed up the catalysts and shipped them to a laboratory in Canada for analysis.

If you have any questions please feel free to contact me.

Sincerely

A handwritten signature in black ink that reads 'Larry Swiencki'. The signature is written in a cursive style with a large initial 'L'.

Larry Swiencki
Project Manager
CEE