UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR CONTINUANCE OF THE HEARING

The Director of the Air Enforcement Division of the U.S. Environmental Protection Agency's Office of Civil Enforcement ("Complainant") files this Response opposing respondents Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd.'s (collectively "Respondents") Motion for Continuance of the Hearing (the "Motion"), filed June 9, 2017. Early in this litigation Respondents evidently made a strategic decision to build their defense on a theory of law rather than fact, and filed a prehearing exchange identifying three exhibits and an expert witness who would testify about vehicle emissions. Their legal theory was rejected, and they were found liable for violations of the Clean Air Act. All that remains is the narrow issue of determining an appropriate penalty for those violations. Now Respondents are trying to re-wind the clock and re-do this case with a new theory of defense.

Complainant opposes Respondents' request to keep the prehearing record open and delay the resolution of this matter by ninety (90) days, and objects to their thinly-veiled effort to seek yet further reconsideration of the Presiding Officer's May 3, 2017 Order on Partial Accelerated Decision and Related Motions ("May 3rd Order"). However, Complainant does not object to

continuing the hearing to the week of August 21, 2017, with corresponding extensions of the deadlines for requesting issuance of subpoenas and submitting optional prehearing briefs.

I. Respondents' Request for Continuance

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") provide that an extension of time may be granted on motion "for good cause shown, and after consideration of prejudice to other parties. 40 C.F.R. § 22.7(b). Respondents have not shown good cause justifying a ninety (90) day extension, and granting such extension would prejudice Complainant.

In the main, Respondents' justification for extending the remaining deadlines in this matter boils down to their assertion that they spent all their available time preparing to try liability rather than penalty. Mot. at 7. This justification strains credulity, not least because Respondents also complain that they need additional time to prepare their defense on liability. Mot. at 8.

Respondents' request for a ninety (90) day delay of the hearing, based on their assertion that they were not given a fair opportunity to prepare their case, is mystifying. Respondents were issued a Notice of Violation in this matter on December 24, 2013, over three and one-half years (3 years 6 months) ago. The initial Complaint for this matter was filed over eighteen (18) months ago. A full year has elapsed since Complainant filed its Motion to Amend the Complaint. Approximately nine (9) months have elapsed since the Parties completed the prehearing information exchange process required by 40 C.F.R. § 22.19(a) and the Prehearing Order dated May 11, 2016, in which each party was to provide its arguments and evidence addressing both liability and penalty. *See* Prehearing Order at 2-3.

Consistent with the Consolidated Rules and the Presiding Officer's Prehearing Order, Complainant identified almost all the witnesses it may call at hearing, including experts Dr. Ronald Heck, Dr. John Warren, and Dr. James Carroll, in its Initial Prehearing Exchange filed on August 25, 2016, together with the majority of its potential exhibits, a summary of its arguments regarding liability, and a detailed explanation of Complainant's penalty calculation.[1] In response, Respondents specifically identified in their Prehearing Exchange that they believed Complainant was misinterpreting the Clean Air Act, and that on penalty they would contest Complainant's application of the Mobile Source Civil Penalty Policy. Respondents' Prehearing Exchange at 3–9.

The Environmental Appeals Board ("EAB") has emphasized the importance of the prehearing exchange in these proceedings:

> [W]e do not regard the prehearing exchange as a procedural nicety. Rather, because federal administrative litigation developed as a truncated alternative to Article III courts that intends expedition and does not allow for the kind of discovery available, for example, under the Federal Rules of Civil Procedure, the prehearing exchange plays a pivotal function -- ensuring identification and exchange of all evidence to be used at hearing and other related information (e.g., identification of witnesses).

In re JHNY, Inc., 12 E.A.D. 372, 382 (EAB 2005). The prehearing exchange provisions allow the parties to assess the merits early in a proceeding and narrow the issues in dispute, either by agreement or through motion practice. More than six (6) months have elapsed since the parties filed their dispositive motions, which Respondents spend most of their current Motion re-litigating. Over a month has elapsed since the Presiding Officer issued the May 3rd Order finding

[1] Respondents complain about the number of Complainant's potential exhibits, Mot. at 8, but do not mention that many of those exhibits were previously provided to Respondents or are Respondents' own documents and information.

Respondents liable for the violations alleged in the Amended Complaint, and the Hearing Notice and Order scheduling a hearing on the issue of penalty.

Now, five (5) weeks before the scheduled hearing, Respondents claim they need more time to: (i) depose Complainant's expert witnesses on the content of declarations filed approximately six (6) months ago in support of Complainant's Motion for Partial Accelerated Decision, which was granted by the May 3rd Order and affirmed by Presiding Officer's Order on Respondents' Motion for Reconsideration or Interlocutory Appeal ("Order on Reconsideration") dated June 15, 2017; (ii) review those declarations and "retain rebuttal witnesses [to] sufficiently challenge the declarations;" and (iii) prepare their defenses regarding the penalty determination in this matter. Mot. at 7–8.

Respondents have had more than adequate opportunity to identify the documents and witnesses they require for their defense. Indeed, part of their basis for requesting additional time appears mooted by Respondents' First Motion to Supplement the Prehearing Exchange ("First Supplement"), filed on June 16, 2017. In the First Supplement, Respondents identify twenty-two (22) new exhibits and seven (7) new witnesses, three (3) of whom are belatedly identified as experts on matters pertaining to liability. Indeed, Respondents' First Supplement looks to Complainant what one would reasonably expect to see in an initial prehearing exchange, which in this case was due September 23, 2016. Respondents fail to provide any credible reason why it took them until the last possible day to submit the vast majority of their prehearing exchange exhibits and witness information, rather than in 2016 as originally ordered, let alone why they need additional months of time to further expand their prehearing exchange.

Respondents have also not explained why it is appropriate to delay this proceeding to allow them time to engage in the type of wide-ranging discovery the Consolidated Rules are

designed to prevent. The only remaining issue is the narrow one of penalty. Respondents state in their Motion that they need time to depose Complainant's experts about the content of their declarations. Their request for additional time to take depositions about declarations filed several months ago in support of a motion that has been granted and affirmed after reconsideration, and to develop evidence to challenge those declarations and the settled issue of liability more broadly, should be rejected as frivolous and moot. However, this does not end the inquiry. It must be noted that on June 16, 2017, Respondents filed a Motion to Take Depositions of seventeen (17) potential witnesses scattered all across the country.[2] Mot. to Take Depos. at 2–6.

Respondents are attempting to turn the Consolidated Rules on their head. Rather than identify the documents and witnesses supporting their defense early in the proceeding, they waited until the last moment to share them with Complainant and the Tribunal. Rather than narrow the issues over the course of the proceeding, they seek to expand the disputes as they go, even to the point of ignoring two judicial orders confirming their liability. Respondents ask for ninety (90) days, but in truth they want to turn the clock back to September 23, 2016, when their original prehearing exchange was due.[3] Granting Respondents' request to keep the prehearing exchange record open and allow for additional discovery and motion practice, on issues of both liability and penalty, would set this proceeding back by, literally, months. Discovery and motions beget more discovery and motions, in turn generating more requests by Respondents for

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[2] Most of these potential witnesses would have given testimony relevant only to liability, and will not be called by Complainant at a hearing on penalty. If the issue of liability is resurrected for hearing as Respondents wish, Complainant acknowledges that the complexity of the hearing would increase exponentially and that additional preparation time (though not necessarily additional discovery) would be appropriate and necessary.

[3] Respondents' Prehearing Exchange was originally due July 22, 2016. Prehearing Order at 3. That due date was extended twice, to September 23, 2016. *See* Order on Mot. for Leave to Amend the Complaint and Extend Prehearing Deadlines (July 5, 2016); Order on Mot. to Extend Prehearing Exchange Deadlines (Sept. 12, 2016).

additional extensions. Complainant may then require additional time to adequately and fairly respond to new information, which would cause additional delay. This is not how the administrative hearing process is supposed to work under the Consolidated Rules – there must be an end to case preparation and a clear path set for resolution of the proceeding.

As the Presiding Officer recently observed, this matter has been pending for over eighteen (18) months, Order on Reconsideration at 13, and in truth much longer than that. Allowing Respondents to "take a mulligan" and re-run the prehearing exchange process would upend the usual adjudicative process and lead to considerable prejudice to not only the Complainant, but to the truth-finding function of the penalty hearing itself, as the intervening time would lead to the "potential loss of witnesses" and "the inevitable fading of witnesses' memories." *See Isochem North America, LLC*, 2008 EPA ALJ LEXIS 4, **11–12 (EPA ALJ, Feb. 7, 2008). Complainant has expended significant resources to steadily prepare its case in accordance with the Consolidated Rules, initially on the case as a whole and more recently for the penalty hearing. Respondents have shown no justification for opening up a multi-month, potentially chaotic torrent of new discovery and motion practice on the eve of hearing.

Complainant opposes any extension of the date to file supplements to the prehearing exchange or additional non-dispositive motions, as Respondents have not articulated a plausible good-cause basis for seeking such extension under the Consolidated Rules, nor have they convincingly shown they will be unduly prejudiced if the deadlines are not extended.[4] With respect to the hearing date, Complainant observes that there are several motions pending before the Tribunal, some of which may not be fully briefed until July 13, 2017, mere days before the

[4] If the Presiding Officer does grant Respondents an extension of time to conduct discovery and engage in further motion practice, Complainant respectfully requests equal opportunity to conduct discovery and file motions as appropriate.

hearing. Complainant believes a short extension of the hearing date would be prudent, to allow the pending motions to be resolved before the hearing begins. Complainant proposes that the hearing be scheduled for the week of August 21, 2017, with corresponding extensions of the dates for requesting subpoenas and for filing optional prehearing briefs, or that a status conference be held to determine another mutually acceptable hearing date.

II. Respondents' Collateral Attack on the Presiding Officer's Order on Partial Accelerated Decision and Related Motions

Having failed to convincingly persuade the Presiding Officer to buy their erroneous interpretation of the Clean Air Act and the regulations applicable to this case, Respondents, by this Motion, seek to have a third bite at the apple to challenge liability -- this time by challenging the declarations filed months ago in support of Complainant's Motion for Partial Accelerated Decision on liability. More than six (6) months after Complainant filed its Motion for Partial Accelerated Decision, one (1) month after the Presiding Officer ruled on the Motion for Partial Accelerated Decision, and three (3) weeks after Respondents filed their Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal ("Motion for Reconsideration") of that ruling, Respondents for the first time claim to have been prejudiced by Complainant's use of declarations to support its motion. Worse yet, they do so under the cover of a Motion for Continuance filed contemporaneously with their Reply in Support of Reconsideration, as a novel way to mount yet another attack on this Tribunal's May 3rd Order. It's a desperate play and it shouldn't be allowed.

Respondents complain they were prejudiced by Complainant's use of declarations to support its Motion for Accelerated Decision, because they were denied the opportunity to depose the potential witnesses about the content of those declarations or find expert witnesses to rebut the declarations. What is surprising about Respondents' contention is:

(a) after all this time, Respondents only just filed a motion on June 16, 2017, seeking discovery concerning the declarations pursuant to 40 C.F.R. § 22.19(e);

(b) Respondents did not challenge the initial declaration filed in support of Complainant's Motion for Accelerated Decision in their response to that motion, or offer their own evidence in rebuttal;

(c) Respondents did not, in their reply, challenge the declarations filed with Complainant's Second Motion to Supplement the Prehearing Exchange and Combined Response Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision ("Combined Response"), in support of Complainant's opposition to Respondents' dispositive motions;

(d) Respondents did not raise any challenge or objection to the declaration filed with Complainant's Reply in Support of Complainant's Motion for Partial Accelerated Decision for the sole purpose of rebutting new arguments Respondents had raised in their opposition;

(e) Respondents never attempted to rebut the declarations by providing their own evidence in their responsive filings; and

(f) Respondents did not identify the declarations as a source of error in their Motion for Reconsideration.

Respondents are not *pro se*. They have been represented by counsel for the entirety of this proceeding. It is baffling that they would now claim to have been unduly prejudiced by Complainant's use of declarations from previously-identified witnesses in the course of dispositive motion practice.

The Consolidated Rules provide that "[t]he Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, *without further hearing or upon such limited additional evidence, such as affidavits*, as [s]he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a) (emphasis added). Moreover, the Consolidated Rules allow for a motion, a response, a reply "limited to issues raised in the response," and additional responsive filings as allowed by order, and further specify that "[t]he response *or reply* shall be accompanied by any

affidavit, certificate, other evidence, or legal memorandum relied upon." 40 C.F.R. § 22.16(a)–(b) (emphasis added). A movant is thus expressly allowed, after receiving a response to the motion, to submit a reply accompanied by an affidavit or other evidence. *See In re Dr. Daniel J. McGowan*, 2016 EPA ALJ LEXIS 120, at **8–9 (ALJ, July 25, 2016) (Order on Motion for Accelerated Decision, Motions to Strike, and Motion to Supplement).

Complainant does not see how Respondents can claim foul play with respect to the declarations. In keeping with the Consolidated Rules, Complainant identified expert witnesses in its Initial Prehearing Exchange filed on August 25, 2016, and then filed a declaration from an identified witness in conjunction with its Motion for Partial Accelerated Decision, filed November 28, 2016. During that interval, Respondents did not identify rebuttal expert witnesses in their defense, nor did they request additional discovery of Complainant's witnesses through either formal or informal means.

Also on November 28, 2016, Respondents cross-filed their own Motion for Accelerated Decision and Motion to Dismiss for Failure to State a Claim. Complainant's Combined Response to those motions, filed January 3, 2017, included declarations from two previously-identified witnesses to rebut Respondents' claims that the undisputed facts required judgment in their favor. *See* Fed. R. Civ. P. 56(f) (court may grant summary judgment for a non-movant). Finally, on January 13, 2017, Complainant offered a declaration from a previously-identified witness with its reply in support of its Motion for Partial Accelerated Decision to address new arguments Respondents had raised in their responsive filing. During the extensive and lengthy briefing, at no time did Respondents request to stay the briefing schedule for the purpose of responding to the declarations from Complainant's witnesses, or obtaining discovery of Complainant's

witnesses on the topic of the declarations.[5] *See* Fed. R. Civ. P. 56(d) (court may allow time for non-moving party to obtain declarations, affidavits, or discovery for its opposition). Nor did Respondents raise this issue in their Motion for Reconsideration filed May 15, 2017.

Respondents appear to argue that the ordinary principles of motion practice should not apply here because Complainant, in an attempt to maintain a clean and complete prehearing record, offered three of the declarations through motions to supplement filed contemporaneously with the Motion for Partial Accelerated Decision and the Combined Response, rather than as attachments. Respondents state they "reasonably believed that the Presiding Officer would first make a decision on Complainant's motions to supplement the prehearing exchange, allowing Respondents an opportunity, if the supplementary evidence was permitted, to adequately analyze and challenge said additional exhibits, particularly the expert declarations." Mot. at 7. Respondents made no hint of this belief while briefing the dispositive motions, nor did they raise it in their Motion for Reconsideration. There is nothing in the Consolidated Rules nor in any of the Presiding Officer's orders suggesting that Respondents could reasonably expect to get extra time and additional responses in which to address the evidence offered against them during the accelerated decision briefing, and that they need not worry about preparing a defense against liability until the motions to supplement were ruled on.

Respondents were not unduly prejudiced by Complainant's reference to declarations while briefing the dispositive motions, and to the extent she did so, the Presiding Officer did not

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[5] Respondents did oppose Complainant's First Motion to Supplement, but did so on the basis of their claim that Complainant had identified a new expert witness, and Respondents lacked time to respond to the exhibits prior to trial. Respondents' Mot. to Complainant's First Mot. to Supplement the Prehearing Exchange at 4–5. Complainant *had not* identified a new witness, and no trial date had been set at that time. Respondents made no reference to the pending Motion for Partial Accelerated Decision in their opposition.

err in considering the declarations in her May 3rd Order. Complainant objects to Respondents' untimely and baseless claims concerning the declarations submitted by Complainant, particularly insofar as they appear in this Motion for Continuance of the Hearing as a basis for extending the time in which to conduct discovery and file additional motions on the settled issue of liability.

Conclusion

For the foregoing reasons, Complainant requests that the Presiding Office deny Respondents' Motion to continue the hearing and all prehearing deadlines by ninety (90) days. Complainant requests the Presiding Officer instead continue the hearing date approximately one (1) month to the week of August 21, 2017, or as near as is convenient to the Tribunal's and the Parties' schedules, and extend only the prehearing deadlines for requesting subpoenas and filing prehearing briefs.

Respectfully Submitted,

June 26/2017
Date

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CERTIFICATE OF SERVICE

I certify that the foregoing Response to Respondents' Motion for Continuance of the Hearing 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 three copies of the foregoing Response were sent this day by certified mail, return receipt requested, for service on Respondents' counsel at the address listed below:

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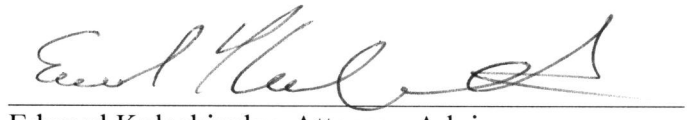
I certify that an electronic copy of the foregoing Notice was sent this day by e-mail to the following e-mail addresses for service on Respondents' counsel: William Chu at wmchulaw@aol.com; Salina Tariq at stariq.wmchulaw@gmail.com; and David Paulson at dpaulson@gmail.com.

6/26/2017
Date



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