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 Xianggyun Industry Co., Ltd.	)	
	)	
Respondents.	)	

REPLY POST HEARING BRIEF

Respondents file this Reply Post-Hearing Brief in response to Complainant's Initial Post-Hearing Brief ("Complainant's Brief" or "C's Br.").

I. The Penalty Policy does not provide an appropriate framework for this action.

Complainant claims that the Mobile Source Civil Penalty Policy ("Penalty Policy") provides an appropriate framework to determine the penalty in this case because EPA penalty guidelines create a framework for uniform application of statutorily prescribed factors and because the Consolidated Rules require …consideration of any civil penalty guidelines issued under the Act. *See* C's Br. at 5-6. But in cases, such as this case, where the unique facts and circumstances demand a departure from the framework of the relevant EPA policy, the Presiding Officer is free to, and should, disregard it. *See In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002); *In re Employers Ins. Of Wausau*, 6 E.A.D. 735, 759 (EAB 1997) (freedom to depart from the framework of a penalty policy preserves an ALJ's discretion to handle individual cases fairly where circumstances indicate that the penalty suggested by a penalty policy is not appropriate). Here, the penalty can only be assessed for violations that harm regulatory scheme, and nothing more, *see* CX028 at EPA-000546-47, whereas the framework provided by the Penalty Policy is largely based on violations that harm the environment from actual or potential emissions. *See* CX022 at EPA-000466 ("…the gravity component under this Penalty Policy for violations involving uncertified

vehicles is calculated to be proportional to the vehicle's engine size because the amount of emissions and potential for excess emissions is proportional to the engine size); *see also* Respondents' Initial Brief ("Rs' Br.") at 9-11. While the Penalty Policy does acknowledge circumstances where violations do not cause harm in the form of excess emissions, in which case, the seriousness of the violation depends on its effect on the regulatory program, the Penalty Policy does not provide a framework for calculating such a penalty. *See* CX022 at EPA-000469, EPA-000476. The only examples provided by the Penalty Policy on violations that harm the regulatory program but do not cause excess emissions, involve emission label violations (*see* CX022 at epa-000465 N.12, epa-000468-9), and the Penalty Policy, itself, states that "[t]he method of calculating the gravity penalty component described in this Penalty Policy is ***not to apply to cases*** that involve violations other than uncertified vehicles or engines, or violations of the tampering or defeat device prohibitions", thereby implicitly excluding certification violations that do not exceed emissions. *See* CX022 at EPA-000476 (emphasis added). For such cases, the Penalty Policy by largely deferring to the Agency's own calculation methods, fails to provide a uniform framework for the assessment of penalties. *See* id.

II. Complainant did not accurately follow the Penalty Policy in its calculations.

Even if reliance on the Penalty Policy had been appropriate, Complainant's proposed penalty would still be incorrect because it follows only those portions of the Penalty Policy that reflects a violation's harm from excess emissions, and ignores instructions pertaining to regulatory harm. *See* C's Br. at 8-11. First, Complainant admits that the horsepower of the vehicle or engine in violation is a measure of the engine's size and correlates to its emissions, and then ignoring the EPA-DOJ waiver, uses horsepower to calculate the base gravity, *see* id. at 10, and, in doing so, also ignores the Penalty Policy, which caps base gravity for non-emission related violations at

$500. *See* CX022 at EPA-000470.[1] Additionally, the Penalty Policy states that in case of violations that harm the regulatory program, but do not cause excess emissions, the importance of the requirement to the regulatory scheme should be considered in determining egregiousness, *see* CX022 at EPA-000469; because egregiousness is the second step in the gravity calculations, s*ee* C's Br. at 10, the Penalty Policy appears to eliminate the first step entirely for said violations. It makes sense to eliminate this step, given that base gravity calculations in the Penalty Policy rely on harm from potential emissions. *See* CX022 at EPA-000466. Here, Complainant incorrectly calculated the base gravity, first, by relying on horsepower, and then, by failing to limit the base gravity to $500. *See* CX213*,* EPA-002808–11 (the base-per-vehicle gravity for counts 2, 9 and 10 is $589.60, count 6 is $552, and counts 5 and 8 is $669.60).

Next, Complainant adjusted the base-per-vehicle penalty for egregiousness, categorizing the violations in Counts 9 and 10 as "Major", and applying a 6.5 multiplier, on the ground that there is no information about the emissions from the vehicles in counts 9 and 10. *Id.* at 10-11. At the same time, Complainant admits that there is no allegation in this action, nor evidence, that the violations caused excess emissions, and that an increase in penalty on the basis of excess emissions is not, and cannot be, sought. *See* id. at 11 n.1. Complainant also states that violations are "Moderate" (multiplier of 3.25) if they involve uncertified vehicles, and "the emissions from the vehicles . . . are likely to be similar to emissions from certified vehicles." *Id.* at 10-11. Given that there is no allegation or evidence of excess emissions, and penalty cannot be increased for emissions, Complainant's claim that a lack of information on emissions justifies a two-fold

[1] Although the Penalty Policy places the $500 cap on emission label violations, given that the only examples in the Penalty Policy for violations that harm the regulatory scheme without exceeding emissions are label violations, *see* CX022 at EPA-000465 n. 12, EPA-000468-9, the cap logically extends to other violations that harm the regulatory program without causing excess emissions.

increase in adjusted base gravity then strains logic. What's even more bewildering is that Complainant has previously stipulated that the useful life emission test results submitted with each of the ten COC applications in this case had the same catalytic converters as those on the 109,964 imported vehicles, therefore, there is information on emissions from counts 9 and 10, which shows that these vehicles do not exceed emissions. *See infra* 9-12; *see also* 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") at 14-15 (Jan. 3, 2017). Complainant therefore should have used "Moderate" egregiousness for all counts, if an increase based on potential emissions was permitted. However, because excess emissions cannot be considered and Complainant has failed to show how the harm to the regulatory scheme is egregious, all violations should be characterized as "Minor." *See* Rs' Br. at 12.

Setting aside the EPA-DOJ waiver for a moment, had Complainant simply followed the Penalty Policy by grouping all counts together for scaling purposes, *see* id. at 12-15, capping base-per-vehicle gravity at $500, and categorizing counts 9 and 10 at "Moderate" egregiousness, the gravity component of the proposed penalty would go down from $1,381,850.95 to approximately $693,455.20.[2] *See* CX213 at EPA-002808–11; CX022 at EPA-000467, EPA-000469-72.

Additionally, if Complainant had followed the EPA-DOJ waiver, at least to the extent that it prohibits an assessment for willful and knowing conduct, and removed that portion of the proposed penalty that Complainant admits is attributable to Respondents' willfulness ***and***

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[2] This number does not include adjustments for Counts 9 and 10 to account for inflation using Penalty Policy inflation amendments, but it also does not remove the 66 vehicles that were remediated from the 30% upward adjustment for failure to remediate; the two adjustments should offset each other. If there isn't a complete offset, any difference remaining would be small.

negligence, *see* Tr. at 106, CX213 at EPA-002808–11, Complainant's gravity component would further go down to approximately $594,390.16 (more vehicles would be scaled at 0.0016 and 000.32).

As for the economic benefit portion of the proposed penalty, Complainant admits that "[t]he Penalty Policy states that where violations arise from missing or nonconforming catalysts, as in this case, '***the cost of purchasing and installing the catalytic converter***' is an appropriate measure of the violator's economic benefit, and stipulates that the net present value of the cost of purchasing the certified catalytic converters in $114,338. *See* C's Br. at 6 (emphasis added); CX022 at EPA-000462; Respondents' Exhibit ("RX") 1 at 19, 31 (Addendum). Yet, Complainant seeks an economic benefit of $219,299 on the ground that "additional staffing would be a necessary component for measuring Respondents' economic benefit as the avoided cost of using catalytic converters that conformed to the certified specifications." *See* C's Br. at 6-7 (referring to Jonathan Shefftz report). However, had Respondents used catalytic converters with the certified specifications, there would be no avoided costs, and the economic benefit would be $114,338; not to mention, Mr. Shefftz admits that by adding the additional staffing component to scenarios two through four, he took a "more aggressive approach or a more upwardly-biased approach…" *See* Tr. at 898. On the other hand, Respondents could have simply listed the correct catalytic converter concentrations on the COC applications, and given that the EDVs with the uncertified catalytic converters passed the useful life emissions and the Agency's decision to approve the design specifications could have only been based on those tests, *see infra* 9-12; *see also* 40 CFR § 86.435-78, the only economic benefit would then be the cost of additional staffing alone. *See* RX1 at 1; Tr. at 866-7. Therefore, the facts show that Respondents, by spending $104,961 on additional staffing could have listed the correct specifications and avoided the violations; while the Penalty

Policy suggests that the economic benefit in this case should be $114,338. *See* RX1 at 1, 14; CX022 at EPA-000462. Complainant cannot seek an economic benefit that is not supported by the facts, nor prescribed by the Penalty Policy, simply because it's a possible economic benefit provided by an expert. Had Complainant accurately calculated the economic benefit component pursuant to the Penalty Policy, the total proposed penalty would go from $1,601,149.95 to either $699,351.16 or 708,728.16.[3]

Finally, because Taotao Group Co., Ltd ("Taotao Group") and Jinyun County Xiangyuan Industry Co., Ltd ("JCXI") neither manufactured the vehicles that were the subject of the 2010 ASA, *see* Tr. at 813, nor were they parties to that agreement; *see* id; CX067 at EPA-000808-46, and as OEM manufacturers in China, could not have remediated the vehicles once they had been imported, Complainant should not have arbitrarily assessed the failure to remediate and history of non-compliance portion of the penalty against them. Had Complainant limited the assessment of said portions to Taotao USA Inc. ("Taotao USA"), Taotao Group would be jointly liable for approximately $75,999.73, and JCXI for approximately $305,109.76, of the gravity component.

However, as mentioned above, even the reduced penalty, resulting from an accurate calculation of the Penalty Policy framework, would still be inappropriate because Complainant cannot assess a penalty based on harm from excess emissions. *See* CX028 at EPA-000546-47; C's Br. at 11 n.1. Therefore, because the penalty cannot be increased on the basis of excess emissions, it makes no sense to calculate the penalty by relying on methods provided to calculate harm from potential emissions. *See* C's Br. at 7-11. It is important to note that the Penalty Policy only provides the method for calculating potential harm from excess emissions because "the amount of excess emissions attributable to the violation(s)- may not be known with certainty." *See* CX022 at EPA-

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[3] Adding the economic benefit to the gravity component calculated on pages 4-5.

000466. The calculations for potential harm, in the Penalty Policy, are not provided to distinguish between situations where there are actual excess emissions, and situations where there are no emission-related violations; rather calculations of potential harm are provided as an alternative to determining actual emissions "because precise quantification would require emissions testing of the uncertified engines which is time-consuming, resource-intensive, and may not be possible if the subject engines are not in EPA's or the violator's possession." *Id.* Potential harm is therefore calculated when the violations do cause excess emissions, but there is no evidence, or reliable evidence, of said excess emissions. There is no such thing as potential harm in the absence of excess emissions, only potential harm in the absence of ***evidence*** of excess emissions. *Id.*

Contradicting its own claim that penalty was not increased on the basis of excess emissions (C's Br. at 11, n.1), Complainant admits that violations for which the proposed penalty is assessed [purportedly] caused harm to the Act's certification program ***and*** created the potential for environmental harm in the form of excess emissions of pollutants. *See* C's Br. at 8 (emphasis added). On one hand, Complainant argues that the proposed penalty calculation fits within the bounds of the DOJ waiver because the chosen egregiousness multiplier is not based on excess emissions, *see* id. at 11, n. 11, while on the other hand, Complainant justifies the substantial gravity component of the proposed penalty on the grounds that Respondents' violations caused actual or potential emissions which harmed, or could have harmed, human health and the environment. *Id.* at 7-8. Complainant therefore fails to understand the difference between harm to the program and harm to the environment, a distinction that is clearly understood and drawn by the DOJ in granting the waiver, as well as in the Penalty Policy. *See* CX028 at EPA-000546–47; CX022 at EPA-000465.

Complainant is under the misguided impression that the EPA-DOJ waiver permits penalty assessment for violations that cause potential excess emissions (or potentially harm the

environment from excess emissions), so long as the penalty is not based on actual excess emissions. *See* C's Br. at 8-9, 11, n. 1. By doing so, Complainant considers only some of the language in the DOJ waiver, while ignoring the rest. *See* CX028 at EPA-000546-47; *see also* Order Denying Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction at 19 n. 21; Tr. at 138. The DOJ waiver clearly says that the waiver is limited to violations "that harm the regulatory scheme, but that do not cause excess emissions." *See* CX028 at EPA-000546. The DOJ waiver further explains that the violations that are not covered by the waiver are those that "go beyond ***mere*** harm to the regulatory scheme." *Id.* at EPA-000546-7 (emphasis added). The use of the word "mere" clearly shows that the scope of the DOJ waiver is limited to only harm to the regulatory program, i.e. the certification program. It cannot include harm from anything that does not constitute harm to the regulatory scheme. Stated differently, Complainant cannot assess a penalty, or increase the penalty, on the basis that the violations cause, or potentially cause, harm from excess emissions, and that the violations were a result of willful or knowing conduct. *Id.*

Complainant is attempting to unilaterally expand the scope of the waiver by insinuating that "harm to the regulatory scheme" inherently includes harm to human health or to the environment from excess emissions because the function of the regulatory program is to protect human health and the environment. *See* C's Br. at 8. But under that logic, the conditions set in the EPA-DOJ waiver, and in turn the statutory waiver requirements, would be rendered meaningless because Complainant could, as it has, calculate the penalty in this case for harm from excess emissions, as an extension to harm to the regulatory scheme, and disregard the very basis of the DOJ's determination to waive CAA limitations. Perhaps, foreseeing such a possible blatant disregard of the DOJ's conditions on this administrative action, the EPA-DOJ waiver, not only includes the word "mere", but goes further and broadly prohibits harm from excess emissions,

without drawing a distinction between actual and potential emissions. *See* CX028 at EPA-000546-7 (limiting the waiver to violations that "harm the regulatory scheme, but that do not cause [actual or potential] excess emissions.").[4]

III. Complainant Failed to Establish the Violations' Harm to the Regulatory Scheme

The only claim, Complainant asserts, on whether Respondents violations caused the harm to the regulatory program is that Respondents circumvented the pre-import, presale certification process by importing 109,964 with untested useful life emissions. *See* C's Br. at 9-10. The foregoing argument fails for at least three reasons: One, Respondents were not required to test all 109,964 vehicles, but rather only the emission data vehicles (EDVs) representative of those imported vehicles. *See* Tr. at 320-1 (expert testimony that useful life tests are required for new applications and end of useful life results are required for re-certifications); *see also* 40 CFR §§ 86.427-78, 1051.235. These above-mentioned EDV tests and results are the only useful life tests required by the pre-import, pre-sale, certification program; subsequent post-certification emission tests are conducted at low hour/mileage. *See* Tr. at 76-77 ("we perform confirmatory testing at a low-hour test point…we perform production testing again at a low-hour test point"). Two, Respondents in fact test the EDVs representative of the 109,964 vehicles, the results of which were submitted to the agency with each COC application. *See* CX001 at EPA-000025-35; CX002 at EPA-000065-78; CX003 at EPA-000104-14; CX004 at EPA-000136-49; CX005 at EPA-000177-85; CX006 at EPA-000213-18; CX007 at EPA-000245-50; CX008 at EPA-000278-86; CX009 at EPA-000314-9; CX010 at EPA-000347-62; *see also* Tr. at 321. And three, the EDVs tested for useful life emissions contained catalytic converters that conformed to the catalytic converters on

[4] The EPA-DOJ waiver could have simply prohibited penalty assessment for violations that do not cause *actual* excess emissions, thereby leaving the assessment for potential excess emissions open to interpretation, but it did not.

the 109,964 imported vehicles. *See* Combined Response at 14-15; Order on Partial Accelerated Decision and Related Motions ("AD Order") at 30-31 (May 3, 2017).

Complainant now, for the first time, argues that that Respondents' vehicles were not covered by "certificates of conformity because they were built using untested catalytic converters different from those described in COC applications submitted to the EPA." *See* C's Br. at 8.[5] However, this is the precise argument that Complainant removed from controversy, during the liability stage, by stipulating that the catalytic converters that were tested for certification, conformed to the catalytic converters on the imported vehicles. *See* Respondents' Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss") at 9 (Nov. 28, 2016) (asserting that each catalytic converter relevant to this matter, including the one tested for emissions pursuant to the [pre-import] certification procedure, was the same, and that Complainant does not allege that the catalytic converters that were tested and passed [useful life] emission tests are not the same as the catalytic converters in the imported vehicles); *see also* Combined Response at 14-15 (requesting the Presiding Officer treat Respondents' claim that the tested catalytic converters for each engine family were the same as the catalytic converters on the respective imported vehicle as a judicial admission and remove the factual matter from controversy.). Because Complainant established liability for all 109,964 vehicles based on a stipulation that the EDVs that passed

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[5] Although Complainant points to page 31 of the AD Order in support of its position that Respondents are liable because they imported "untested catalytic converters," the AD Order, on the contrary, states that liability was established on the ground that none of the imported vehicles conform to their COC applications." *See* AD Order at 31. In fact, liability was established in spite of the fact that catalytic converters tested for useful life emissions conformed to the catalytic converters on the imported vehicles. *See* AD Order at 29 (the issue is "whether the catalyst levels in Respondents' vehicles matched what was claimed on their COC applications, not whether they matched the catalyst levels of their emissions-data vehicles… because liability does not turn on whether an engine meets emissions standards, the performance of the emissions-data vehicles is not relevant to whether an engine family conforms to the description the manufacturer provided the Agency."

[useful life] emission tests contained catalytic converters that conformed to the catalytic converters on the 109,964 imported vehicles, *see* AD Order at 30, Complainant is estopped from now taking an inconsistent position simply because Complainant's interests have changed at this stage of the proceedings. *See Allapattah Servs., Inc. v. EXXON Corp.,* 372 F.Supp. 2d 1344, 1367 (S.D. Fla. 2005) (citing *New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)) (the doctrine of judicial estoppel is used to prevent "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") ("[W]here a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). Although it has been held that respondents raising the affirmative defense of estoppel against an agency must establish that the Complainant participated in some type of affirmative misconduct (*see In re BWX Tech., Inc.*, 9 E.A.D. 61, 80 (EAB 2000); *In re Wego Chemical & Mineral Corp*., 4 E.A.D. 513, 521-22 (EAB 1993)), here Respondents are not raising judicial estoppel as an affirmative defense to liability or the assessment of penalty, instead Respondents are simply requesting that Complainant not be allowed to benefit from one position at the liability phase and thereafter assume a contrary position in the penalty assessment phase in the same proceedings. *See New Hampshire v. Maine,* 532 U.S. at 749.[6]

In attempts to justify a significant gravity penalty, Complainant also briefly points to Mr. Jackson's testimony on possible concerns he had with palladium-only converters and their

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[6] Given that Complainant's inconsistent misconduct occurred during the same proceeding, it was not something that could have been raised as an affirmative defense, nor could estoppel be raised in Respondents' Brief because Complainant raised the inconsistent position for the first time in its Post-Hearing Brief; regardless, taking inconsistent positions solely because of a change in interest is clearly affirmative misconduct.

durability at higher mileage and service hours. *See* C's Br. at 9; Tr. at 136. The concerns are irrelevant because Respondents' catalytic converters were not palladium-only converters. *See* AD Order at 15-16 (34 out of the 35 catalytic converters tested for content, contained some quantities of platinum and/or rhodium). In fact, even some of the certified design specifications in the COC applications, which Mr. Jackson and his department approved, were primarily palladium catalytic converters, containing very small amounts of platinum, and no rhodium. *See* CX001 at EPA-000011; CX002 at EPA-000047; CX003 at EPA-000090. Finally, Complainant, relying on Mr. Jackson's testimony, claims that the program relies on accurate information ***and*** test data. *See* C's Br. at 8 (emphasis added); Tr. 74-75, 115 (the department evaluates a manufacturer's catalytic converter design specifications based on whether it believes that the "technology will meet performance requirements" and in doing so looks at the "control strategy and the fueling strategy for the engine and compare[s] that to the catalyst," in addition to the engine out emissions). Again, when it comes to a catalytic converter, for which the agency has no specific standards, these statements are incorrect, and inconsistent with Complainant's position, and evidence, at the liability stage. *See* Complainant's Motion for Partial Accelerated Decision ("AD Motion") at 28 (Nov. 28, 2016) ("Catalytic technology and design is a complex field of chemical engineering[7]…[t]he only way to understand how a catalytic converter design will perform in a given application is to test the catalytic converter in that application to the end of its useful life." *See* AD Motion at 28 (Nov. 28, 2016) (quoting the expert opinion of the Agency's witness on catalytic converters, Dr. Ronald M. Heck). As discussed above, such useful life tests were conducted and the results were submitted to Mr. Jackson's office with each COC application. *See*

[7] Mr. Jackson does not have a chemical engineering background, CX156A at EPA-002050A, does not have any knowledge of the manufacturing and design process, Tr. at 32, 175, and his entire catalytic converter knowledge is based on one course, (Tr. at 31, 33).

supra 9-12; Combined Response at 14-15 (referring to the EDV's tested during the precertification phase, not the vehicles tested at low-hour/mileage pursuant to the 2014 test order).

For the foregoing reasons, Complainant cannot succeed in its inconsistent position that the 109,964 vehicles remained untested for useful emissions, nor attack the reliability of the 2014 low-hour emission tests conducted on counts 1-8, on the ground that the "…deterioration factors [were] derived from full-useful life testing conducted on vehicles other than those identified in the Amended Complaint. *See* C's Br. at 9. Therefore, Complainant has failed to establish that Respondents' violations harmed the regulatory scheme, and failed to bring forth a credible argument in support of the proposed penalty, that is not based on violations that cause potential excess emissions. *See* id. at 7-9; CX028 at EPA-000546–47.

V. Complainant Failed to Establish an Ability to Pay

Because the proposed penalty is clearly inappropriate and excessive, *see* CAA § 205(c)(1), *see also* CX028 at EPA-000546-47, Respondents' ability to pay the proposed penalty is inconsequential. Regardless, the proposed penalty is also inappropriate because the evidence shows that Respondents do not have the ability to pay it.

Respondents presented evidence showing that Taotao USA does not in fact have an ability to pay, pursuant to EPA's own Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action ("ATP Guidance"), and Taotao Group and JCXI were facing such financial difficulties that they had asked Taotao USA for assistance with their pre-existing debts. *See* RX001 at 33; Tr. at 878-9 (EPA's ABEL model was designed precisely for someone like Respondent Taotao USA); CX025 at EPA-000524-5; *see also* CX216 at 42-43, 104 (neither Taotao Group nor JCXI have an ability to pay, or loan funds to pay, the proposed penalty). To rebut the claim, Complainant argues that substantial evidence shows that Taotao Group and

JCXI have an ability to pay. *See* C's Br. at 16; CX216 at 42-43, 104. The "substantial evidence" Complainant refers to consists of Taotao Group's company profile on alibaba.com, and a slideshow presentation that only shows that Taotao Group manufactures vehicles, chainsaws, garden tools and doors, and says nothing about its finances. *See* id. (citing CX168 at EPA-002295–2303; CX191 at EPA-002520–2573). The non-financial, statements on a foreign website, which Complainant refers to as a sort of Chinese Amazon (*see* Tr. at 639), fails to even satisfy the low threshold of showing a reasonable inference of financial ability. *See New Waterbury, Ltd.,*5 E.A.D. 529, 542 (EAB 1994). Allowing an inference of general financial ability to pay a $1.6 million penalty be drawn from such unreliable and flawed evidence will render the statutory factors meaningless. *See* CAA § 205(c)(2), 42 U.S.C. § 7524(c)(1). Complainant cannot rely on an inference of a fact that is not supported by any evidence in the record (*see New Waterbury, Ltd.,*5 E.A.D at 544), and reliance on information on the web, not knowing what it is based on and whom it was written by clearly cannot be given any weight. *See* Tr. 646-7. Additionally, the unreliable evidence only shows that Taotao Group may have the ability to pay the proposed penalty assessed against it, it does not even suggest that Taotao Group can pay the entire $1.6 million proposed penalty, nor loan it to Taotao USA or JCXI. *See* CX168 at EPA-002295–2303; CX191 at EPA-002520–2573, *see also* CX213 at EPA-002811 (The prosed penalty assessed against Taotao Group is $225,473.50). Complainant also misleads the Tribunal by claiming that Respondent's expert testified that based on the limited information about Taotao Group and JCXI available to him, it appeared one company could pay all or part of the $3.295 Million. *See* C's Br. at 16-17, *but cf.* Tr. at 876-7 (Mr. Shefftz' testifying that he does not have an expert opinion on Taotao Group's and JCXI's ability to pay because the entities' financial documents lack basic information required to conduct an

expert analysis). Without an expert opinion, Mr. Shefftz' personal views or the results of a model that is unfit to calculate an ability to pay of foreign corporations, are entirely irrelevant. *See* id.

Recognizing that Respondents do not have the assets to pay the proposed penalty, instead of following its own guidance and lowering the proposed penalty accordingly, *see* CX025 at EPA-000526, Complainant seeks to rope in other companies, while wholly failing to show the purportedly related entities have any obligation to finance Respondents debts, or that these related entities have assets that can be used to fund Respondents' debts. *See* C's Br. at at 2-5, 16-18. The evidence Complainant does set forth blatantly disregards the ATP Guideline, *see* CX025 at EPA-000527, and Complainant posits no circumstances that could justify a departure. *See e.g.* CX206 at EPA-002655-2716 (2201 Luna Rd was purchased with two existing loans); CX199 at EPA-002622-31; *cf.* C's Br. at 3 (Matao Cao does not own Daction); CX CX207 at EPA-002737–39 (Tao Motor, Inc. is a related entity); *cf.* C's Br. at 2-3, 16-18 (no information or inference as to Tao Motor's ability to pay Respondents debt is provided); C's Br. at 18 (Matao Cao's "million dollar home purchase"); CX209 at EPA-002763, EPA-0002782, EPA-0002786 (the home was purchased in 2016 with a $1,170,000 loan at 3.89% interest, and has an estimated market of $1,595,170 in 2017); *see also* CX025 at EPA-000527 (directing the litigation team that real estate may be considered when the market value is much higher than the mortgage balance because only then would there be a possibility for opening an equity line credit or obtaining additional debt secured by the real estate).

For the foregoing reasons, Respondents request that the Tribunal find that Complainant's proposed penalty is unreasonable because it is not calculated pursuant to the Penalty Policy, does not consider all statutory factors, including an ability to pay, and exceeds the scope of the Act and the EPA-DOJ waiver.

Respectfully Submitted,

Date: 01/19/2018

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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument in the Matter of Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System.

I certify that a copy of the foregoing instrument was sent this day via electronic mail to the following e-mail addresses for service on Complainant's counsel: Edward Kulschinsky at Kulschinsky.Edward@epa.gov, Robert Klepp at Klepp.Robert@epa.gov, and Mark Palermo at Palermo.Mark@epa.gov.

Respectfully Submitted,

Date:01/19/2018

William Chu