

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

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

**Respondents’ Motion for Leave to Reopen the Record**

Respondents, TaoTao USA, Inc., Taotao Group Co. Ltd., and Jinyun County Xiangyuan Industry Co., LTD., file this Motion to Reopen the Record, and respectfully request leave to file a motion to reopen the record to allow Respondents to submit newly discovered facts and evidence that is crucial to their defense of an inability to pay. Complaint is opposed to this motion.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, the Supreme Court compared a motion to reopen to submit additional proof to a motion to amend pleadings pursuant to rule 15 of the Federal Rules of Civil Procedure. *See* 401 U.S. 321, 331-32 (1971); *see also Swartz v. New York Central R. Co.*, 323 F.2d 713, 714 (CA7 1963); *Locklin v. Switzer Bros.*, 299 F.2d 160, 169-170 (CA9 1961); *Gas Ridge, Inc. v. Suburban Agricultural Properties, Inc.*, 150 F.2d 363, 366, rehearing denied, 150 F.2d 1020 (CA5 1945); 6A J. Moore, Federal Practice para. 59.04 (2d ed. 1966). It is settled that the grant of leave to amend the pleadings pursuant to Rule 15 (a) is within the discretion of the trial court. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (dictum).

The reopening of a case is a matter within the sound discretion of the Court. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. at 331 (noting that “a motion to reopen to submit additional proof is addressed to the [court’s] sound discretion”). The Court considers such a motion in light of all the surrounding circumstances and grants or denies it in the interest of fairness and

substantial justice.” *Skehan v. Bd. of Trs. of Bloomsburg State Coll.*, 590 F.2d 470, 478 (3d Cir. 1978). In determining whether to reopen a case, courts consider whether a party has shown diligence. *See, e.g., Reconstruction Fin. Corp. v. Commercial Union of America Corp.*, 123 F. Supp. 748, 749 (S.D.N.Y. 1954) (“Where a party has not shown diligence in procuring a witness, the reopening of the case may be denied.”). The Court also considers the timing of the motion, the nature of the additional testimony [or as in this case, additional evidence], and the potential for prejudice in granting or denying the motion. *Joseph v. Terminix Intern. Co.*, 17 F.3d 1282, 1285 (10th Cir. 1994).

Here, Respondents have exercised diligence and the motion is filed well before the time typically allowed by the Consolidated Rules of Practice. *See* 40 C.F.R. § 22.28(a) (“[a] motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought.”). Section 22.28(a) further provides:

“Where the movant seeks to introduce new evidence, the motion shall: State briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Headquarters or Regional Hearing Clerk, as appropriate.” *Id.*

Here Respondents seek to introduce evidence showing that EPA’s Gasoline Engine Compliance Center is not approving Taotao USA, Inc.’s COC applications, or unnecessarily withholding approvals, on grounds that have no legal/regulatory support. Said arbitrary, if not retaliatory, delays are significantly impacting Respondents’ ability to pay. Respondents’ ability to pay was at issue in the hearing before the Presiding Officer on October 17-19, 2017.

The evidence will show that certificates for Taotao USA, Inc.'s COC applications are being withheld on frivolous grounds. These approval of said applications are delayed under the guise that the COC applications show that idle speed can be adjusted but does not list idle *speed* as an adjustable parameter. Yet, idle *speed* adjustment screws are not emission related parts nor are they adjustable parameters listed in the guidance provided to Taotao USA, in 2010 as part of the Administrative Settlement Agreement. *See* Respondents' Exhibit 36, *Amelie Isin's Deposition*, at 138-39; *see also* Complainant's Exhibit CX067.

Because Respondents raised the defense of an inability to pay and, at the hearing, the parties presented evidence for the Presiding Officer to consider ability to pay as a factor in assessing the penalty, the newly discovered evidence is essential to the consideration of said factor. *See* Clean Air § 205(c)(2), 42 U.S.C. § 7524(c)(2) ("In determining the amount of any civil penalty assessed under this subsection, the Administrator shall take into account... the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require."). Complainant will not be prejudiced by the introduction of the new evidence because it is the agency itself that is causing the change in Respondents' ability to pay. Further the prejudice to Respondents in denying the motion far outweighs any prejudice that Complainant may suffer. Therefore, Respondents pray that in the interest of fairness and substantial justice, the Presiding Officer grant this motion and permit Respondents to introduce the above-mentioned newly discovered evidence of Respondents ability to pay.

Respectfully Submitted,



Date: 11/01/2017

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing motion 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 motion 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.



Date: 11/01/2017

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William Chu