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 REPLY IN SUPPORT OF COMPLAINANT'S FIRST MOTION TO SUPPLEMENT THE PREHEARING EXCHANGE

The Director of the Air Enforcement Division of the U.S. Environmental Protection Agency's Office of Civil Enforcement ("Complainant") files this Reply in Support of Complainant's First Motion to Supplement the Prehearing Exchange ("Reply") pursuant to sections 22.16(b) and 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"). Complainant filed its First Motion to Supplement the Prehearing Exchange ("Motion to Supplement") on November 28, 2016. On January 3, 2017, Respondents Taotao USA, Inc. ("T-USA"), Taotao Group Co., Ltd. ("T-Group"), and Jinyun County Xiangyuan Industry Co., Ltd. ("JCXI") (collectively "Taotao" or "Respondents") filed "Respondent's Motion to Complainant's First Motion to Supplement the Prehearing Exchange" ("Opposition") opposing the Motion to Supplement. Complainant requests that the Tribunal grant the Motion to Supplement because doing so will develop the record in this matter and will not unduly prejudice Respondents.

Respondents' Opposition appears to contain two separate objections to the Motion to Supplement. The first is Respondents' objection to the inclusion of additional material in the record. *See* Opposition at 1–2. The second is Respondents' objection to two letters from Complainant to Respondents in which Complainant requested information about financial claims Respondents made in their Joint Prehearing Exchange. *See id.* at 3–5. Complainant will address each objection.

I. Supplementing Complainant's Prehearing Exchange is Appropriate and Will Not Result in Undue Prejudice

Respondents contend that allowing Complainant to supplement the Prehearing Exchange "is unnecessary, burdensome, and untimely since the Complainant is seeking to add Exhibits two years after the commencement of the proceeding[.]" Opposition at 3–4. Respondents also argue that granting the Motion to Supplement "will prejudice Respondent this close to trial since Respondent lacks an opportunity to effectively incorporate, respond to, or challenge the new Exhibits and discovery for the purposes of disputing the EPA's claims." *Id.* at 1. At the outset, Complainant notes that the Administrative Complaint commencing this proceeding was filed on November 12, 2015, approximately one year before Complainant filed the Motion to Supplement, and not two years as Respondents claim. Complainant also notes that a hearing date has not been scheduled in this matter, making it difficult to ascertain the basis for Respondents' claim that they will not have an opportunity to respond to the exhibits proposed with the Motion to Supplement.

Turning to the exhibits, CX170 through CX173 are documents concerning Respondents' ability to pay the proposed penalty. *See* Mot. Supplement at 2–3 (describing documents). With regard to the determination of an administrative penalty, Complainant has the burden of proving that a penalty is appropriate, taking account of all statutory and regulatory penalty factors. *In re*

New Waterbury, Ltd., 5 E.A.D. 529, 538 (EAB 1994). Complainant does not have a separate burden with regard to each factor, rather Complainant "must come forward with evidence to show that it, in fact, considered each factor . . . and that its recommended penalty is supported by its analysis of those factors." *Id.* Once Complainant meets its initial burden, the burden shifts to Respondents to rebut Complainant's case. *Id.*

Complainant's Initial Prehearing Exchange included an explanation of how Complainant calculated the proposed penalty in this matter, taking into account the factors set forth in section 205(c)(2) of the Clean Air Act (the "Act"), 42 U.S.C. § 7524(c)(2), as well as exhibits suggesting that Respondents had the ability to pay the proposed penalty. Complainant's Initial Prehearing Exchange at 8–13. Respondents, in their Joint Prehearing Exchange, claimed that contrary to Complainant's argument, they do not have the ability to pay the proposed penalty. Joint Prehearing Exchange at 8–10. Respondents also claimed for the first time that they did not receive any economic benefit from the violations in this matter. *Id.* at 7. Respondents asserted that they would provide testimonial evidence concerning economic benefit, but did not identify which witness would provide this testimony and did not provide any other evidence to substantiate their claim. *Id.*

In a letter dated October 13, 2016, Complainant requested additional financial information from Respondents concerning their ability to pay the proposed penalty in response to the claims they raised in their Joint Prehearing Exchange. *See* CX169 (letter requesting information). A copy of this letter, together with other documentation concerning Respondents' financial condition, was filed as an exhibit with Complainant's Rebuttal Prehearing Exchange on October 13, 2016.

Exhibits CX170 through CX173 provided with the Motion to Supplement are documents Respondents provided to Complainant in response to Complainant's letter of October 13, 2016. Exhibit CX170 contains responses and objections to the request, and exhibits CX171 through CX173 contain information concerning Respondents' finances. Complainant proposes to supplement its Prehearing Exchange with these documents in the interest of transparency and so the documents are available for the Tribunal's consideration. Adding these documents will not cause Respondents undue surprise or prejudice because these are Respondents' own documents, and they are relevant to Respondents' claim of inability to pay.

In a second letter, dated November 21, 2016, Complainant requested information from Respondents that would allow Complainant to evaluate Respondents claim that they received no economic benefit from the violations in this matter and determine whether the proposed penalty should be reduced. *See* CX174 (requesting information regarding economic benefit). Complainant requests permission to add this letter to its Prehearing Exchange in the interest of transparency before the Tribunal, and because it is relevant to Respondents' claim concerning economic benefit.

Exhibits CX175 through CX178 pertain to Complainant's Motion for Partial Accelerated Decision, filed November 28, 2016. Complainant marked these documents as exhibits and provided them with the Motion to Supplement instead of including them as attachments to the Motion for Partial Accelerated Decision with the goal of maintaining an organized record. In connection with the Motion for Partial Accelerated Decision, on December 15, 2016 Respondents filed an "Unopposed Motion to Extend Deadlines for Respondents' and Complainant's Responsive Filings" ("Motion for Extension") requesting a two-week extension of the deadline to file their response, which was granted. Respondents stated that the extension

was necessary because Respondents' counsel had been busy working on numerous other legal matters. Mot. for Extension at 2. Respondents did not state that they required additional time to evaluate exhibits CX175 through CX178, or make any other mention of those exhibits and the burdens they might impose.

Exhibit CX176 is a declaration from Dr. Ronald M. Heck, an expert witness identified in Complainant's Initial Prehearing Exchange. *See* Complainant's Initial Prehearing Exchange at 5 (identifying Dr. Heck as an expert witness expected to testify as an expert on catalytic converter design and "about how alterations in precious metal content may impact the efficacy and longevity of catalytic converters"). Complainant does not seek to add a new expert witness to its witness list, contrary to Respondents' assertion in their Opposition. *See* Opposition at 4–5 ("[Complainant] is once again requesting to supplement information related to a new, expert witness . . . ."). Exhibit CX175 consists of excerpts from a treatise on catalytic converter technology coauthored by Dr. Heck, which provides relevant technical information. Both exhibits CX175 and CX176 respond to Respondents' claim that differences between the catalytic converters described in their applications for certificates of conformity ("COCs") and the catalytic converters equipped on their vehicles were de minimis. *See* Joint Prehearing Exchange at 6–7 (arguing that any deviation was minimal and not sufficient to give rise to violation).

Exhibits CX177 and CX178 are excerpts from the Federal Register provided in response to Respondents' argument that Complainant is relying on regulations that have been superseded. *See* Joint Prehearing Exchange at 4 ("Complainant has cited to a decision in a 1979 case, which relied on a regulation that has since been deleted."). The Federal Register notices excerpted in CX177 and CX178 directly pertain to the superseded regulations identified by Respondents.

Respondents are not unduly prejudiced by the material they themselves referenced in their Joint Prehearing Exchange.

II. Complainant's Letters Requesting Information Pertaining to Respondents' Financial Condition Are Not Discovery Requests and Are Consistent with 40 C.F.R. § 22.19(e)

As described in part I of this Reply, Complainant sent Respondents two letters in response to claims Respondents' made in their Joint Prehearing Exchange about their ability to pay the proposed penalty and the economic benefit they obtained through their noncompliance. The first letter, dated October 13, 2016, requests additional financial information from Respondents concerning their ability to pay the proposed penalty, and was filed with Complainant's Rebuttal Prehearing Exchange as exhibit CX169. The second, dated November 21, 2016, requests information that would allow Complainant to evaluate Respondents claim that they received no economic benefit from the violations, and was filed with the Motion to Supplement as exhibit CX174.

Respondents appear to argue that these two letters are impermissible discovery requests propounded in violation of the procedural requirements set forth in 40 C.F.R. § 22.19(e), which directs that additional discovery can only be obtained by order of the Presiding Officer. *See* Opposition at 3–4 (quoting 40 C.F.R. § 22.19(e)(1)–(2) and arguing that Complainant is in violation of § 22.19(e)). While Respondents don't explicitly say so, they appear to be requesting that the Tribunal quash the letters. *See* Opposition at 6 (requesting that the Tribunal deny all discovery requested).

Section 22.19(e), titled "Other discovery," provides that a party seeking additional discovery must file a motion requesting the Tribunal's approval. 40 C.F.R. § 22.19(e)(1). However, 40 C.F.R. § 22.19(e)(5) provides that § 22.19(e) does not limit "EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative

subpoenas, or otherwise obtain information." 40 C.F.R. § 22.19(e)(5). The letters dated October 13, 2016, and November 21, 2016, are an attempt "to otherwise obtain information" by requesting that Respondents voluntarily provide documentation in support of their claims.

Complainant has met its initial burden of showing that the proposed penalty is appropriate, taking into account the statutory factors set forth in 42 U.S.C. § 7524(c)(2).[1] The burden is on Respondents to come forward with probative evidence supporting their claims that they cannot pay the proposed penalty and that they did not obtain any economic benefit through their noncompliance. *See New Waterbury, Ltd.*, 5 E.A.D. at 538–39 (describing respondent's burden regarding penalty). Complainant sent the letters in an effort to obtain from Respondents documentation that Complainant believes would be necessary to evaluate Respondents' penalty claims and determine whether the penalty request should be reduced.

Complainant did not seek to obtain this information through discovery, and did not invoke the information gathering authority afforded by section 208 of the Act, 42 U.S.C. § 7542, because Complainant does not intend to compel Respondents to produce the information requested. Respondents have the burden of proving their claims. Complainant filed the letters with the Tribunal as exhibits in the interest of transparency. The letters are not discovery requests, and are consistent with 40 C.F.R. § 22.19(e).

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[1] *See* Complainant's Initial Prehearing Exchange at 8–13 (explanation of proposed penalty calculation); Complainant's Rebuttal Prehearing Exchange at 5–10 (addressing arguments raised in Respondents' Joint Prehearing Exchange concerning the penalty calculation); 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 at 21–23 (addressing economic benefit); *New Waterbury, Ltd.*, 5 E.A.D. at 538 (describing Agency's burden regarding penalty).

Conclusion

The exhibits submitted with Complainant's Motion to Supplement are all responsive to arguments Respondents advanced in their Joint Prehearing Exchange. Granting the Motion to Supplement will not cause Respondents undue prejudice because no hearing date has been scheduled, and Respondents therefore have time to incorporate, respond to, or challenge the exhibits before hearing. Complainant therefore requests that the Tribunal grant its Motion to Supplement.

Respectfully Submitted,

1/13/2017
Date

for

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CERTIFICATE OF SERVICE

I certify that the original and two copies of the foregoing Complainant's Reply in Support of Complainant's First Motion to Supplement the Prehearing Exchange ("Reply") in the Matter of Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065 was filed this day by hand delivery to the Headquarters Hearing Clerk in the EPA Office of the Headquarters Hearing Clerk at the address listed below:

U.S. Environmental Protection Agency
Office of the Headquarters Hearing Clerk
1300 Pennsylvania Ave., NW, MC-1900R
Ronald Reagan Building, Room M1200
Washington, DC 20004

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

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1/13/2017
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