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

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| **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 LEAVE TO REOPEN THE RECORD

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 Leave to Reopen the Record ("Motion"), which was transmitted to Complainant and filed on November 1, 2017.

After the conclusion of a three-day administrative hearing held on October 17 through October 19, 2017, Respondents now request that this Court reopen the record. Respondents have not shown good cause for their failure to produce the facts and evidence before the conclusion of the hearing, and reopening the record at this time would prejudice Complainant and unduly delay the conclusion of this proceeding. Respondents' motion should be denied.

## I. Legal Standard

Motions to reopen the record are treated as motions to reopen a hearing under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules") that govern this proceeding. *See Carbon Injection Systems, LLC*, 2015

EPA ALJ LEXIS 3, at **10–12 (ALJ, Mar. 17, 2015), *vacated on other grounds by* 2016 EPA App. LEXIS 7 (EAB 2016). Under 40 C.F.R. §22.28(a) when a movant seeks to introduce new evidence, the motion must "(1) [s]tate briefly the nature and purpose of the evidence sought to be adduced, (2) show that the evidence is not cumulative and (3) show good cause why such evidence was not adduced at the hearing." *Id.* "The Rule does not specifically state a standard to be used in granting or denying such motions," and the decision to grant or deny such motions is within the discretion of the court. *Carbon Injection Systems*, 2015 EPA ALJ LEXIS 3, at **10–11. Three factors trial courts consider when exercising their discretion are "1) the probative value of the evidence proffered; 2) the reason why the evidence was not offered earlier in the proceeding; and 3) the likelihood of undue prejudice to the opposing party." *Id.* at *13.

## II. Analysis

Respondents have not identified the evidence they intend to submit or explained why the facts or evidence were not offered earlier in this proceeding. Further, the hearing has concluded and both parties have rested. Allowing Respondents to submit additional evidence at this stage of the proceeding will prejudice Complainant, either by denying Complainant an opportunity to rebut the additional evidence, or by forcing Complainant to expend resources responding to new theories, gathering new evidence, and recalling remote witnesses. *See United States v. Blankenship*, 775 F.2d 735, 741 (6th Cir. 1985) (noting the risk of prejudice in reopening after both parties have rested).

### *A. Respondents Have Not Shown Good Cause Why the Evidence Was Not Adduced at Hearing, Or That the Evidence has Significant Probative Value*

Respondents claim they have "newly discovered facts and evidence" that "will show that certificates for Taotao USA, Inc.'s [certificate of conformity ("COC")] applications are being

withheld on frivolous grounds." Mot. at 1, 3. Specifically, Respondents allege that certain pending 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," even though "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." *Id.* at 3 (emphasis in original). Respondents claim this "newly discovered evidence is essential to the consideration of" their defense of inability to pay. *Id.* at 3.

The issue Respondents raise is not new. Respondents' counsel questioned Complainant's witness, Ms. Amelie Isin, about this topic during her deposition on August 28, 2017, well over a month before the hearing. RX38 (Isin Depo.) at 138–39; 253–54. The next day, August 29, 2017, counsel questioned Complainant's witness, Mr. Cleophas Jackson, at length about the pending applications, the EPA Office of Transportation and Air Quality's ("OTAQ's") concern about adjustable parameters, and whether idle speed adjustment was identified as an adjustable parameter of concern in the 2010 Administrative Settlement Agreement. RX39 (Jackson Dep.) at 17–29, 39–40. Counsel specifically asked:

> Q. Now, the issue on the idle speed screw is still unresolved as far as you're concerned?
>
> . . . .
>
> A. Are you referring to a current application from this manufacturer?
>
> Q. (BY MR. CHU) Yes.
>
> A. As I understand it, the company has taken steps to try to resolve the issue within the last few days.

*Id.* at 39. Respondents' counsel then revisited the issue during the hearing while cross-examining Mr. Jackson:

> Q. So are you currently holding applications that's [sic] been submitted for approval?
>
> . . . .
>
> THE WITNESS: So, to answer your question, no, certificate applications are not being held. We are waiting for responses from the manufacturer.
>
> BY MR. CHU:
> Q. So, to make it clear, there's no retaliatory actions being taken by your department to hold applications that are not in the ordinary course of business. Is that accurate?
>
> A. That is accurate. There's no retaliatory action.

Hearing Transcript at 364–65.

The record shows that Respondents were aware of, and concerned about, the pending applications prior to and during the hearing, and further show that Respondents had documents relevant to the issue in the form of correspondence between themselves and OTAQ. RX39 (Jackson Dep.) at 17–18. Despite this, Respondents did not offer any documents or testimony to address the applications or their impact on Respondents' ability to pay at the hearing. Now Respondents claim this issue is "critical" to their defense and allege to have "newly discovered" facts and evidence. Respondents have not, however, identified what the "newly discovered" evidence is, explained why it could not have been obtained prior to the hearing through the exercise of reasonable diligence, or explained why they did not offer the "new" evidence or any other evidence on this issue during the hearing. Respondents also have not explained what probative value the "newly discovered" evidence would have given that Respondents had already

asked the witnesses about whether idle speed is an adjustable parameter during the depositions taken over a month prior to the hearing.

### *B. The Relief Sought, if Granted, would be Prejudicial and Result in Undue Delay*

Granting Respondents' request for leave to reopen the record will prejudice Complainant and/or unduly delay the resolution of this proceeding indefinitely. It is unclear if Respondents seek to offer documents, testimony, or both. However, substantively, Respondents are asking this Tribunal to take up at least two new complex questions: (1) Whether OTAQ's actions regarding certain pending COC applications are arbitrary, capricious, or contrary to law; and (2) If OTAQ's actions are improper, the impact of those actions on Respondents' future ability to pay a penalty.

The second question would require, among other things, fact-finding and expert analysis of Respondents' complete finances and business structure. The first question is outside the scope of the Consolidated Rules and may require a separate parallel proceeding. *See* 40 C.F.R. § 22.1(a). Applicants who are denied a COC may request a hearing to challenge the denial. 40 C.F.R. §§ 86.443-78, 1051.255(f), 1051.820. Such proceedings are governed by the procedural rules set forth in the vehicle and engine regulations at 40 C.F.R. Part 1068, Subpart G, rather than 40 C.F.R. Part 22. *See* 40 C.F.R. §§ 1068.601–1068.650.

Given the potential complexity of the issues Respondents seek to raise, Complainant will likely be prejudiced if not afforded the opportunity to cross-examine any new witnesses on the new facts and evidence offered. *Dairyland Power Coop. v. United States*, 103 Fed. Cl. 640, 643 (Fed. Cl. 2012) ("[T]he non-moving party is prejudiced if it lacks the opportunity to cross-examine the proponent of the new evidence."). To avoid prejudice, Complainant would potentially require time to respond to the facts and evidence, conduct discovery, and recall

experts who already testified at the hearing. Reopening the hearing would significantly delay the issuance of this Tribunal's decision and would require additional expenses to recall the witnesses who are located remotely. *See Blinzer v. Marriot Int'l*, 81 F.3d 1148, 1160 (1st Cir. 1996) (prospect of prolonging trial is material to consideration of motion to reopen).

**Conclusion**

Respondents have not explained why the facts or evidence they now seek to introduce were not offered earlier in this proceeding, what new information the evidence would provide beyond what was already known to Respondents prior to the hearing, or what probative value the evidence would have with regard to their ability to pay. Further, allowing Respondents to submit additional evidence at this stage of the proceeding will prejudice Complainant and unduly delay the resolution of this proceeding. Therefore, Complainant respectfully requests that the Tribunal deny Respondent's Motion.

Respectfully Submitted,

11/16/17
Date

Robert J Klepp

Robert Klepp, Attorney Adviser
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., NW
William J. Clinton Federal Building
Room 3119C, Mail Code 2242A
Washington, DC 20460
(202) 564-5805
klepp.robert@epa.gov

11/16/2017
Date

Edward Kulschinsky, Attorney Adviser
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

11/16/2017
Date

Mark Palermo, Attorney Adviser
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., NW
William J. Clinton Federal Building
Room 3119C, Mail Code 2242A
Washington, DC 20460
(202) 564-8894
palermo.mark@epa.gov

**CERTIFICATE OF SERVICE**

I certify that the foregoing Response to Respondents' Motion for Leave to Reopen the Record ("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 an electronic copy of the foregoing Response was sent this day by e-mail to the following e-mail addresses for service on Respondents' counsel: William Chu at wmchulaw@aol.com; and Salina Tariq at stariq.wmchulaw@gmail.com.

11/16/2017
Date

Edward Kulschinsky, Attorney Adviser
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