

**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’ SECOND MOTION *IN LIMINE***

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”) Second Motion *in Limine* (“Motion”), which was transmitted to Complainant and filed on September 22, 2017. In the Motion, Respondents request that the Presiding Officer issue an order excluding the testimony of Complainant’s witness Gail Coad, and “any evidence consisting of the financial records of any parties that are not mentioned in the Amended Complaint.” Mot. at 1.

Ms. Coad was identified in Complainant’s Sixth Motion to Supplement the Prehearing Exchange (“Sixth Supplement”), filed September 15, 2017. Complainant stated that Ms. Coad may “testify about research conducted into properties or companies possibly affiliated with Taotao USA, Inc., or its owner, Matao Cao,” and further may “testify as an expert on the financial condition of Taotao USA, Inc., and other related persons or entities, and about the impact of a penalty on Taotao USA, Inc.’s ability to continue in business.” Sixth Supp. at 3. The Sixth Supplement also added several exhibits pertaining to the ownership, control, or finances of non-parties that appear to be closely entwined with Respondents, and exhibits pertaining to a lending and purchase transaction involving Taotao USA, Inc. (“Taotao USA”) and two of those non-parties.

I. Legal Standard

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (“Consolidated Rules”) provide that the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. 40 C.F.R. § 22.22(a)(1). A motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose. *In re Martex Farms, Inc.*, 2005 EPA ALJ

LEXIS 51, at *2 (ALJ, Sept. 27, 2005) (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)). “Motions in limine are generally disfavored,” and “[i]f evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevance, and prejudice may be resolved in context.” *In re Zaclon, Inc.*, EPA ALJ LEXIS 21, at *11 (ALJ, April 24, 2006) (citing *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400–01 (N.D. Ill. 1993)).

In this matter, the remaining issues in controversy are those related to the appropriate size of the penalty. The Clean Air Act requires the Agency to consider several factors when determining the amount of a civil penalty, including “the effect of the penalty on the violator’s ability to continue in business, and such other matters as justice may require.” 42 U.S.C. § 7524(c)(3). When evaluating a liable party’s ability to pay a penalty, Agency policy and precedent contemplate that it may be appropriate to consider the assets of related entities when the liable party may not have the resources to pay the penalty on its own. *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 547–50 (EAB 1994); Guidance on Evaluating a Violator’s Ability to Pay a Civil Penalty in an Administrative Enforcement Action at 8 (Jun. 29, 2015). Respondents contest their ability to pay the proposed penalty. *See* Respondents’ Joint Prehearing Exchange at 1, 8–9.

II. Potential Witness Gail Coad

Respondents object to the admissibility of Ms. Coad’s potential expert testimony because they believe it will be “unduly repetitious, of little probative value, and will unduly burden Respondents prior to trial” Mot. at 5. Respondents protest that Ms. Coad has been identified as an expert witness who may testify about the issue of Respondents’ ability to pay, but that Complainant already identified another expert, Dr. James Carroll, to address that issue. *Id.* at 1–5. Respondents argue that Ms. Coad’s testimony will be duplicative of Dr. Carroll’s, and that Complainant’s evidence on Respondents’ finances “should be limited to the testimony of Dr. Carroll,” particularly after Respondents expended resources deposing him. *Id.* at 4–5. Respondents claim that the addition of Ms. Coad unduly burdens them with analyzing her background, answering arguments Complainant may present through her testimony, and potentially retaining an expert of their own to rebut her testimony. *Id.* at 5. Respondents further propose that Complainant has been aware of the non-party entities that Ms. Coad researched and may testify about, and therefore could have identified Ms. Coad earlier in this proceeding. *Id.* at 2. Complainant disputes Respondents’ characterization of the course of this proceeding, and the degree of burden Ms. Coad’s testimony may impose on Respondents.

Complainant learned of certain non-parties related to Respondent Taotao USA during investigations performed before the Complaint was filed in November 2015, in part through Respondents’ submission of Daction Trading, Inc.’s (“Daction”) corporate and financial documents. While Complainant was aware that Taotao USA was related to Daction and other entities, the legal and economic character of those relationships was opaque. In April 2016, Respondents’ counsel informed Complainant that Taotao USA’s address had changed to 2201 Luna Rd., Carrollton, Texas. Complainant later learned that Matao Cao, owner of Taotao USA, was involved with a company named 2201 Luna Road, LLC. In June 2016, Complainant learned that a new entity affiliated with Mr. Cao, Tao Motor, Inc., was submitting applications to the Agency for certificates of conformity. In both instances, apart from common ownership and

commercial mailing addresses, the precise contours of the relationship between Taotao USA, 2201 Luna Road, LLC, and Tao Motor, Inc., were unclear.

In a letter dated October 13, 2016, Complainant requested that Respondents provide additional documents and information about named related entities and their relationships to Respondents. CX169. On November 7, 2016, Respondents provided a response to the letter in which they denied the non-party entities were closely entwined with Taotao USA, denied having any control over the non-party entities' information, and otherwise refused to provide information about Taotao USA's relationship with those non-party entities. CX170.

On June 9, 2017, Respondents filed a motion requesting that the prehearing deadlines and hearing in this matter be continued for ninety days, in part to allow Respondents the opportunity to depose Complainant's witnesses. Respondents' Mot. for Continuance of the Hearing at 8. The continuance was granted in an order dated June 27, 2017, and Respondents subsequently had the opportunity to depose Complainant's witnesses Amelie Isin, Cleophas Jackson, and Dr. James Carroll. Complainant filed an unopposed motion for leave to depose Respondents' witnesses, and did depose potential witnesses Matao Cao and David Garibyan on September 6 and 8, 2017.

As described in pages 2 through 5 of Complainant's pending Motion for Additional Discovery on Ability to Pay through Requests for Production ("Discovery Motion"), which description is incorporated here, during Mr. Cao's deposition he explained that Taotao USA shared an office with Daction and would transfer sales to Daction. *See* Disc. Mot. at 4-5. Mr. Cao further testified that 2201 Luna Road, LLC owns a warehouse at 2201 Luna Rd., Carrollton, Texas, that is rented by Tao Motor, Inc. Mr. Cao and Mr. Garibyan also testified about aspects of Taotao USA's relationship with Tao Motor, Inc. beyond their common ownership and address, including information about the lack of competition between the companies, the use of a common manufacturing facility owned by Mr. Cao, non-arm's length sales between the companies, the sharing of warehouses, and the apparent sharing of employees. *See id.* at 4.

The deposition testimony of Mr. Cao and Mr. Garibyan expanded Complainant's understanding of the relationship between Taotao USA, Daction, Tao Motor, Inc., 2201 Luna Road, LLC, and potentially other entities, and provided new evidence of the close links between them that were not previously disclosed. On the basis of this information, Complainant promptly reopened its investigation into Taotao USA and the related entities, leading to the discovery of, among other things, the lending and purchase transactions jointly involving Taotao USA, Daction, and 2201 Luna Road, LLC, that occurred after the Complaint was filed in this matter, and that were not disclosed by Respondents. In a letter dated September 12, 2017, Complainant again requested that Respondents voluntarily provide information about the financial condition of Taotao USA and other related entities. Respondents refused, leading Complainant to file the pending Discovery Motion.

Ms. Coad's testimony would not be duplicative of Dr. Carroll's, though it may supersede it. Broadly speaking, Dr. Carroll analyzed Taotao USA's financial information from 2012 through 2015, and evaluated Taotao USA's finances in relation to other companies with the same self-reported NAICS code. *See* CX 192. Dr. Carroll also noted that between 2012 and 2015, the total declared value of Taotao USA's imports tracked by United States Customs and Border

Protection exceeded the value of purchases reported on Taotao USA's tax returns by a factor of 2.8 on average. CX194. Dr. Carroll suggested that further investigation would be appropriate. *Id.*

Ms. Coad conducted or oversaw aspects of the reopened investigation into Taotao USA and the related non-party entities, including searches of public records. Information discovered through the reopened investigation was added to the prehearing exchange by Complainant through its Sixth Motion to Supplement the Prehearing Exchange. The newly-discovered information suggests that since 2015, Taotao USA has entered into a series of lending agreements with Daction and 2201 Luna Road, LLC, moved to a new warehouse that was purchased through such lending agreements, and has begun engaging in non-arm's length transactions with Tao Motor, Inc. These developments may have resulted in material changes to Taotao USA's cost structure, affecting the company's ability to pay. Ms. Coad would testify about her investigation into Taotao USA, Mr. Cao, and other related entities, their current financial condition, the relationships between them, how financial information submitted previously by Respondents may not be reflective of Taotao USA's current financial status, and whether and how current financial information of Taotao USA and the other entities affects Respondents' ability to pay. This testimony would not duplicate that of Dr. Carroll.

Complainant has stated that it will make Ms. Coad available to be deposed by Respondents prior to the hearing in this matter, and offered October 6, 2017, for that purpose. Concerns over obtaining a timely transcript of the deposition may be addressed through the use expedited service, daily copy, or a same-day rough draft. The burden of responding to Ms. Coad's proposed testimony should not cause Respondents severe hardship. The subject of her testimony will predominantly be Respondents' own financial information or the information of companies closely related to Respondents through close financial transactions or common control. The legal issue of whether it is appropriate for the Agency to consider the finances of closely-related companies when evaluating a respondent's ability to pay is not particularly complex. Further, Respondents have already retained an expert witness, Jonathan Shefftz, who may be qualified to challenge or rebut Ms. Coad's testimony.

Both the fact and expert testimony of Ms. Coad will not be unduly repetitious, will be of significant probative value regarding Respondents' claim regarding their ability to pay, and will not unduly burden Respondents' ability to present their defense. Respondents have not shown that Ms. Coad's testimony will not be admissible for any purpose, and their request to exclude her testimony from the hearing should be denied.¹

III. Evidence Regarding the Finances of Non-Parties

In addition to requesting the exclusion of Ms. Coad's testimony, Respondents request that the Presiding Officer exclude any testimony and evidence regarding Daction, Tao Motor, Inc., 2201 Luna Road, LLC, EagleATVParts.com, "and any other non-party." Mot. at 5. Respondents argue that "[u]ntil Complainant can first establish that the proposed penalty is adequate, and then

¹ In the alternative, if the Presiding Officer does exclude the expert testimony of Ms. Coad, Complainant requests that Ms. Coad still be permitted to provide fact testimony about her investigation and the documents it uncovered.

other entities are related to Respondents, said evidence is irrelevant, of little probative value, and prejudicial.” *Id.*

Respondents’ argument appears to concede that testimony and evidence of non-parties may be admissible for some purpose, namely, if Complainant can show the other entities are related to Respondents. As set forth in the Discovery Motion, Complainant proposes that Taotao USA, Daction, and 2201 Luna Road, LLC’s combined effort to obtain financing for the purchase of a warehouse now used by all three entities plus Tao Motor, Inc., provides substantial evidence showing that the entities are related. Disc. Mot. at 2–3. The deposition testimony of Mr. Cao and Mr. Garibyan provide further evidence of the close relationship between Taotao USA, Tao Motor, Inc., and other entities, as do multiple documents in the public record. *Id.* at 3–5.


Updated information about the finances of Taotao USA, including information relating to the financing and purchase of 2201 Luna Rd., Carrollton, Texas, is relevant to Respondents’ claimed inability to pay. Similarly, current information about Taotao USA’s owner, Matao Cao, and closely related entities, including Daction, 2201 Luna Road, LLC, and Tao Motor, Inc., may be relevant to Respondents’ ability to pay under Agency precedent. Respondents have not shown that testimony and evidence regarding non-parties will not be admissible for any purpose, and their request should be denied.

Conclusion

Respondents have not shown that Ms. Coad’s expert testimony, or any testimony and evidence regarding non-parties, will not be admissible for any purpose under 40 C.F.R. § 22.22(a)(1). Further, Respondents have not shown that allowing Ms. Coad to testify at the hearing will impose an undue burden on them, or necessarily result in the presentation of duplicative or irrelevant evidence. Therefore, Complainant respectfully requests that the Motion be denied.

Respectfully Submitted,

9/27/2017
Date

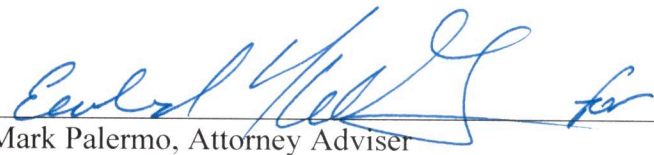

Robert Klepp, Attorney Adviser
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., NW
William J. Clinton Federal Building
Room 3119C, Mail Code 2242A
Washington, DC 20460
(202) 564-5805
klepp.robert@epa.gov

9/27/2017
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

9/27/2017
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' Second Motion *in Limine* 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; Salina Tariq at stariq.wmchulaw@gmail.com; and David Paulson at dpaulson@gmail.com.

9/27/2017
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