UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

Respondents' Response to Complainant's Motion *in Limine* to Exclude Evidence and Testimony

Respondents, TaoTao USA, Inc., TaoTao Group Co. Ltd., and Jinyun County Xiangyuan Industry Co., LTD., file this response opposing Complainant's Motion *in Limine* To Exclude Evidence and Testimony (the "Motion"). In the Motion, Complainant requests that that the Presiding Officer issue an Order excluding (1) Respondents' exhibits RX001, RX018 and RX019; (2) and the expert testimonies of Respondents' witnesses Larry Doucet, Clark Gao and/or Joseph L. Gatsworth; and (3) testimony of the primary author of the Clean Air Act Mobile Source Penalty Policy, Granta Nakayama, and Jacqueline Robles Werner. Complainant erroneously argues that the exhibits and witness testimonies are inherently unreliable or are not relevant to the question of penalty in this matter. *See* the Motion at 1-2.

The 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)(l). Motions in limine are generally disfavored, and if evidence is not clearly inadmissible. evidentiary rulings must be deferred until trial so question s of foundation, relevance, and prejudice may be resolved in context. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400-01 (N.D. III. 1993)).

I. Respondents' Exhibits RX001, RX019 and RX019 are not clearly inadmissible.

Complainant seeks to exclude Respondents' exhibits RX00, RX018 and RX019 on the grounds that RX001 is inherently unreliable and RX018 and RX019 are irrelevant. However, Complainant has failed to show that the three exhibits are clearly inadmissible.

1. Respondents' Exhibit RX001

Respondents' exhibit RX001 is a record of communications between Respondents and the Agency pertaining to the confirmatory testing of vehicles belonging to engine family ETAOC.049MC2 (Count 1). Nearly all the authors and recipients of said communications have been identified as potential witnesses.

In its proposed penalty calculations, Complainant has applied the major egregiousness multiplier to vehicles belonging to engine families mentioned in count 1 and 2 of the Amended Complaint, alleging that said vehicles exceed emission standards. *See* Complainant's Rebuttal Prehearing Exchange at 8-9. Complainant has based its conclusion on emission tests conducted at Lotus Engineering, Inc. ("Lotus"). *See* Complainant's Exhibits CX136-CX139. Respondents' exhibit RX001 consists of letters and emails between Respondent Taotao USA and the Agency explaining why the tests at Lotus are inaccurate. As mentioned above, the record was maintained by Respondents as a part of regular business operations, and is not attorney work product. The "commentary" Complainant refers to in its Motion are mere markings used by Respondent Taotao USA, Inc. to easily identify its records. Regardless, all letters and emails included in RX001 are equally available to Complainant and in its possession. However, if the Presiding Officer finds that the markings for efficiency of recordkeeping appear argumentative, then Respondents request that only the markings be excluded from evidence, and nothing more.

Finally, exhibit RX001 is relevant to the issue of assessing a penalty because it shows Respondents' cooperation, lack of negligence, as well as Complainant's erroneous penalty calculations.

2. Respondents' Exhibit RX018 and RX019

Complainant claims that RX018 and RX019 contain materials pertaining to vehicles not at issue in this matter and are therefore irrelevant. Motion at 2. Complainant's foregoing claim ignores that the hearing in this matter is for the assessment of a penalty, whereby Complainant's have proposed a penalty pursuant to the Clean Air Act Mobile Source Penalty Policy ("Penalty Policy") which largely relies on the economic benefit gained by Respondents because of the violations. Additionally, the Penalty Policy prescribes penalty adjustments for remedial actions, gravity of the violation and violator's willfulness. *See* Penalty Policy at 14 ("In general, penalties should be smaller for violators that take effective steps to promptly remedy any violation upon discovery of the noncompliance."). RX018 and RX019 include COC applications and certificates issued to Respondent Taotao USA, Inc. for vehicles which are nearly identical in all aspects to the vehicles identified in the Amended Complaint, except that these vehicles operate without any catalytic converters. RX019 and RX019 therefore submitted to show: (1) Respondents did not economically benefit from equipping their vehicles with catalytic converters with different precious metal compositions than those listed on their applications because the vehicles would have passed emission standards, and would have been approved for certification, even without any catalytic converter; (2) Respondents' conduct was not willful or negligent because once Respondents were notified by the Agency and made aware that their catalytic converters suppliers may not be building their converters in accordance with the stated specifications, Respondents began building vehicles without catalytic converters to ensure that their applications would not

have to rely on their suppliers honesty/engineering practices; and (3) the vehicles manufactured/imported by Respondents would have passed emissions with or without catalytic converters therefore the violations were not egregious and the environment was not harmed. *See* Penalty Policy at

Complainant has applied a $15 rule of thumb method of calculating the economic benefit to109,964 vehicles, asserting that the rule of thumb is appropriate for use when actual economic benefit is not available. *See* Complainant's Rebuttal Prehearing Exchange at 5. On one hand Complainant claims that rule of thumb calculation is appropriate only because evidence pertaining to actual economic benefit is unavailable, and on the other hand Complainant seeks to exclude evidence of said benefit. The Penalty Policy clearly states that economic benefit includes any benefit to the violator from business transactions but for the illegal conduct and/or the competitive advantage the violator obtained in the marketplace. *See* Penalty Policy at 7. Respondents' exhibits RX018 and RX019 show that Respondents would have conducted the same business transactions with or without a catalytic converter and therefore had no competitive advantage.

II. Respondents' expert witness testimonies are relevant.

Complainant in its Motion seeks to exclude the expert testimony of Larry Doucet and/or Clark Gao and/or Joseph L. Gatsworth on the grounds that the proposed testimony is not relevant to penalty assessment.

1. The testimony of Larry Doucet is relevant to penalty assessment.

Complainant incorrectly assumes that Mr. Doucet's testimony is not relevant to the determination of an appropriate penalty in the matter. *See* Motion at 2. Complainant repeatedly ignores that even though the issue of liability has been decided, the Penalty Policy that Complainant has relied upon in its penalty calculations requires more than just a determination of

liability, but rather a determination on the degree of culpability and the harm caused. *See generally* Penalty Policy. Whereas much of the evidence Complainant seeks to exclude may be relevant to liability, it is submitted by Respondents to address the Penalty Policy and Complainant's penalty calculations, not to escape liability. Mr. Doucet's proposed testimony on the reliability of different catalytic converter test methods is relevant to various penalty factors described in the Penalty Policy. Complainant seeks to recover an excessive amount of penalty from Respondents by adding a substantial gravity component to its proposed penalty calculations. Complainant has further substantially adjusted its proposed penalty upwards to account for egregiousness, willfulness and negligence. *See* CX160. Mr. Doucet's testimony will show that Respondents were not willful or negligent because the test methods used by their Chinese suppliers differed from methods employed by Complainant. The Presiding Officer's order on the issue of liability makes clear that impossibility is not a defense to a violation of the Clean Air Act because the statute requires strict compliance. *See* Order on Motion for Reconsideration or Interlocutory Appeal at 7. However, impossibility is a defense to Complainant's proposed penalty calculations. *See* Penalty Policy at 14, 23.

2. Clark Gao/Joseph L. Gatsworth is relevant to the outcome of this matter.

The testimony of either Mr. Gao or Mr. Gatsworth is relevant to the outcome of this matter. First, although Complainant continues to argue that Respondents are liable for 109,964 violations largely because of the declarations of Complainant's witness, Dr. John Warren.[1] Yet,

[1] It is important to note that Complainant continues to point to Respondents' Motion to Dismiss for Failure to State a Claim to make the argument that because Respondents "admitted" that their catalytic converters came from a common source and conformed to each other, all vehicles had identical converters. *See* Motion at 3 n.2. Respondents have already made clear that Complainant's argument relies on a fallacy and misstates Respondents' statements - just because Respondents purchased catalytic converters from the same supplier, who claimed that the converters had certain compositions does not mean that the converters were in fact identical. *See* Respondents' Reply to

Respondents never had the opportunity to exclude Mr. Warren's testimony on the grounds that it was scientifically inaccurate and/or unreliable. *See* Respondents' Motion *in Limine* to Exclude Testimony and Evidence of Ronald M. Heck, John Warren, Amelie Isin, and Dr. James J. Carroll at 9-11; *see also* Order on Partial Accelerated Decision and Related Motions at 3 ("…Respondents will still have the ability at or prior hearing to object to specific exhibits on admissibility grounds.") Therefore, the testimony of Mr. Gao or Mr. Gatsworth may be necessary to refute Mr. Warren's declaration. *See* Complainant's Exhibit CX179. Additionally, Respondents intend to admit the testimony of their aforementioned witnesses as an offer of proof. *See* Fed. R. Evid. 103(a)(2).

Finally, although Complainant argues that Respondents have been found liable for 109,964 violations, said determination still does not mean that all vehicles belonging to engine families mentioned in count 1 and 2 of the Amended Complaint exceeded emissions based on two emission tests on a vehicle belonging to count 1 conducted at Lotus, and one emission test on a vehicle belonging to count 2 at California Environmental Engineering ("CEE"). *See* Complainant's Rebuttal Prehearing Exchange at 8-9, *see also* Complainant's Exhibits CX136 and CX108. Count 1 alleges that 17,665 vehicles were uncertified even though only three of the 17,665 vehicles were tested for catalytic converter compositions, and two of those vehicles were tested for emissions at CEE under the agency's approved test plan, both of which passed emission standards. An additional vehicle was then tested twice at Lotus, showing that the vehicle exceeded emissions. The vehicle was then again tested at Tovatt Engineering, showing that Lotus results were

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Complainant's Combined Response to Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision at 13-14. There is no evidence in the record that the suppliers made all the converters at the same time, using the same materials, in fact Complainant itself has submitted evidence that catalytic converters taken from vehicles belonging to the same engine family were not identical. *See* Complainant's Motion for Partial Accelerated Decision at 16, 20.

inaccurate. Yet of the five tests on three vehicles, Complainant relies on the two tests at Lotus, ignores the remaining tests, and applies the major egregiousness multiplier to all 17,665 vehicles in its penalty calculations. *See* Complainant's Rebuttal Exchange at 8-9. The testimony by qualified statisticians such as Mr. Gao or Mr. Gatsworth will show the reliability of isolating two tests out of at least four and using them as a representative of 17,665 vehicles.

III. Testimonies of the primary author of the Penalty Policy, Granta Nakayama and/or Jacqueline Robles Werner should not be excluded.

Complainant has chosen to apply EPA's Clean Air Act Mobile Source Civil Penalty Policy in calculating the proposed penalty to be assessed against Respondents, even though the Penalty Policy clearly states that it is intended to be used only to calculate settlement amounts for cases that are settled through administrative settlement agreements. *See* Penalty Policy at 3; Complainant's Rebuttal Prehearing Exchange at 5; Complainant's Exhibit CX160. The Penalty Policy further states that the rule of thumb calculation of economic benefits is inappropriate for use in situations where a detailed analysis of the economic benefit of noncompliance is needed to support or defend the agency's position, and the rule of thumb method generally should not be used when a hearing is likely on the amount of penalty. Penalty Policy at 10. Finally, the Penalty Policy states that the gravity component is applied to achieve deterrence and should reflect the seriousness of the violation. *Id.* at 11. Seriousness of the violation has two components: actual or potential harm; and importance of regulatory scheme. The actual/potential harm component is calculated to be proportional to the engine size, however, penalty for actual/potential harm is assessed only when there is at least a potential of excess emissions. *Id.* at 12. However, even though evidence clearly shows that vehicles identified in counts 3-8 do not exceed emissions, Complainant has applied the base per vehicle gravity penalty to all ten counts. Complainant ignores the Penalty

Policy where convenient and applies the Penalty Policy calculations to increase the penalty amount disregarding certain statutory penalty factors and applying factors not relevant to the case.

> [A] respondent must have meaningful opportunity to test the application of such a policy in each case. Merely presenting the Agency's rationale and the attendant mathematical calculation may well leave a respondent without a real opportunity to test the Agency's fealty to the policy's requirements.

In re John A. Biewer Co. of Ohio, Inc., et al, 2009 EPA ALJ LEXIS 19, at *50 (ALJ Dec. 23, 2009). Accordingly, in order to apply the Penalty Policy, Complainant's must present the authors of the Penalty Policy for testimony for a determination of whether the Penalty Policy is appropriate in this matter, and whether Ms. Isin has correctly calculated the various components of the Penalty Policy in her calculations of the proposed penalty policy. Given the clear language of the Penalty Policy, Respondents reasonably dispute that Ms. Isin's calculations. It appears that Ms. Isin has deviated from the Penalty Policy in her calculations. Ms. Isin cannot testify on the appropriateness of the Penalty Policy, the accuracy of the gravity component, and at the same time support her own mathematical calculations. She is not the author of the Penalty Policy, a document containing complicated mathematical calculations that can only be sufficiently explained and presented by its author(s). The author must explain the workings of the Penalty Policy and the language it employs, before Ms. Isin's calculations can be properly assessed. Therefore, Complainant's argument that the "primary author" will not yield relevant or probative information beyond that provided by Ms. Isin is incorrect.

Complainant's remaining arguments that (1) Mr. Nakayama's testimony would have no probative factual value to the question of whether the proposed penalty is appropriate, and (2) Ms. Werner is currently the Director of the Air Enforcement Division and therefore cannot testify have

no support in law or fact. As explained above it is imperative for Respondents to cross-examine at least one author of the Penalty Policy for Complainant to rely upon it in its penalty calculations. Finally, Respondents should be permitted to present the proposed witness testimony as an offer of proof.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Tribunal deny Complainant's Motion *in Limine* to Exclude Evidence and Testimony.

Respectfully Submitted,

07/17/17
Date

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CERTIFICATE OF SERVICE

This is to certify that the foregoing response 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 Response was sent this day via certified mail for service on Complainant's counsel as follow:

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