UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

COME NOW Respondents Taotao USA, Inc. (Taotao USA), Taotao Group Co., Ltd. (Taotao Group), and Jinyun County Xiangyuan Industry Co. Ltd. ("JCXI") and move to dismiss this matter for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Respondents request that this enforcement action by U.S. Environmental Protection Agency (EPA) be dismissed in its entirety as null and void.

STATEMENT OF FACTS

The Complaint alleges a single cause of action: Respondents Taotao Group and JCXI (hereinafter sometimes collectively referred to as "Original Manufacturers") allegedly manufactured or assembled highway motorcycles and recreational vehicles belonging to ten different engine families for which Respondent Taotao USA holds EPA-granted Certificates of Compliance (COC).[1] EPA contends that because the catalyst active material in each of the inspected vehicles' catalytic converters does not conform to the design specifications described

[1] *See* Complainant's "Amended Complaint" at 7.
[2] *Id.* at 8.
[3] Amended Complaint at 8.
Id.

in the relevant COC applications, those COCs do not cover the vehicles.[2] EPA therefore concludes that Respondents have violated the Clean Air Act.

EPA makes no claim that the alleged difference between the catalyst precious metals concentrations found in the vehicles inspected and what is listed on each of the relevant COC applications has any effect on the environment, nor does it claim that the active material concentration in the inspected vehicles exceeded the acceptable limits, or that such limits even exist. In fact, there are currently no active material concentrations required by the EPA, and there is no allegation in the Complaint that had Respondent Taotao USA's COC applications described the active materials in the exact same quantities and concentration as those that EPA allegedly found in their inspections, EPA would not have granted the relevant COCs.

BACKGROUND

A. Statutory Background - *The Clean Air Act ("CAA")*

On December 17, 1963, Congress passed an Act titled "To improve, strengthen, and accelerate programs for the prevention and abatement of air pollution." Pub. L. No. 88-206, § 14, 77 Stat. 392, 401 (1963) ("1963 Act"). On October 20, 1965, Congress passed an act "[t]o amend the [1963 Act] to require standards for controlling emission of pollutants from certain motor vehicles . . . and for other purposes" ("1965 Act"). Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, § 202(b), 79 Stat. 992, 993 (1965). The 1965 Act introduced the Certificate of Conformity. Clean Air Act § 206, 79 Stat. at 994 (Certification). Upon application by a manufacturer, the Secretary was mandated to require the testing of a new motor vehicle or new motor vehicle engine to determine whether it conformed to regulations. *Id.* at 206(a). For a prototype that was in compliance, the Secretary was required to issue a certificate of conformity

[2] *Id.* at 8.

valid for at least one year. *Id.* To protect the business expectations of the automobile manufacturer, Congress provided that a new motor vehicle or new motor vehicle engine that was in "all material respects" substantially the same construction as the test vehicle or engine, shall be deemed to be in conformity with the regulations. *Id.* at 206(b). In the 1970 amendments, Congress preserved the certification procedure, even though it removed the provision that new vehicles that are substantially the same in "all material respects" as previously certified vehicles shall be deemed to be in compliance. *Compare* § 206(b), 79 Stat. at 994, *with* Pub. L. No. 91-604, § 8, 84 Stat. 1676, 1694–95 (1970).

B. Regulatory Background - *40 C.F.R. § 85.074-30(a)(2) (1976)*

In 1976, EPA promulgated regulations dealing with the Certification procedures and the issuance of certificates of conformity. 40 C.F.R. § 85.074-30(a)(2) (1976). The 1976 version of the regulation included the following language: ... "Each such certificate shall contain the following language: This certificate covers the only those new vehicles which conform in all material respects, to the *design specifications* that applied to those vehicles described in the application for certification..." Relying on the aforementioned regulatory language, in 1977, a district court held that when one or more parts erroneously installed in a vehicle are intimately related to and reasonably may be expected to affect emission controls, such vehicle is not covered by the certificate of conformity although the vehicle may, in fact, meet emission standards. *United States v. Chrysler Corp.,* 437 F. Supp. 94 (D.D.C.1977). However, the regulation which formed the basis of the decision in Chrysler Corp. was deleted in 1977, and replaced by 40 C.F.R. 86.437-78.

In 1982, the regulation was amended and the language stating that the COC covers only those vehicles which conform in all material respects to the "design specifications described in

the application for certification" was deleted. *Compare* 1981 40 C.F.R. 86.437 to 1982 40 C.F.R. 86.437 (1982); see 46 FR 50464 October 13, 1981. Additionally, in the 1982, the certification regulations now allowed manufacturers to make running changes without prior EPA approval. 46 FR 50464 ("[t]his rule change will allow manufacturers to add vehicles to a certified engine family and to implement running changes without prior EPA approval. The manufacturer will be responsible for determining that all vehicles still comply with emission standards following implementation of any running change. The manufacturer's determination may be based on either an engineering evaluation of the change and/or emission test data...")

ARGUMENT

The Clean Air Act provisions that EPA has relied upon in bringing this action against Respondents do not support the allegations in its Complaint. *See* CAA § 206, 42 U.S.C. §7525. Therefore, the Complaint fails to state a claim upon which relief can be granted. Specifically, there have been no allegations of Respondents exceeding emission standards under the Clean Air Act ("CAA").

Additionally, the Complaint fails to state a claim against Respondents Taotao Group and JCXI, the original manufacturers. Specifically, Taotao Group and JCXI are not subject to CAA § 203(a)(1) 42 U.S.C. § 7522(a)(1) as neither of these Respondents was the "manufacturer" subject to the Certificate of Conformity requirements under the statute. As stated in Paragraph 31, Taotao USA holds the relevant EPA-issued COCs that form the basis of the Complaint. Therefore, Taotao USA Inc., not Respondent JCXI, was the "manufacturer or importer" for the purposes of Certificate of Conformity requirements.

Standard of Review

The Consolidated Rules of Practice, which govern this proceeding are set out in 40 CFR Part 22 (Rules). Those Rules look to the Federal Rules of Civil Procedure for guidance and in the context of this proceeding, Fed. R. Civ. P. 12(b)(6) requires that, if EPA has failed to state a claim, for which relief may be granted, Respondents should be granted the relief they seek. Here, Respondents seek dismissal, with prejudice and without leave to amend.

In resolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations, including mixed questions of law and fact, as true and draw all reasonable inferences therefrom in the complainant's favor. Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 165, 357 U.S. App. D.C. 35 (D.C. Cir. 2003); Browning v. Clinton, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). However, the Supreme Court has established that, "[t]o survive a motion to dismiss, a complaint must ... state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citation omitted) (internal quotation marks omitted). In other words, the moving party must show that the complainant can prove no facts entitling it to relief. In re: Argonics, Inc., CW A 6-1631-99 (2003), 2003 EPA RJO LEXIS 11,8 (EPA RJO 2003)(citations omitted). See also D.C. Oil, Inc. v. ExxonMobil Oil Corp., 746 F. Supp. 2d 152, 155-156 (D.D.C. 2010). Simply put, for the reasons set out below, and in this instance, EPA has failed to state a claim upon which relief can be granted.

Complainant's Failure to State a Claim

EPA is seeking civil penalties from Respondents under the Clean Air Act for alleged violations of the 42 U.S.C. 7522, even though the Complaint contains no allegation that Respondents have violated EPA's emission standards. Furthermore, Respondents Taotao Group and JCXI are not subject to the Clean Air Act, specifically the provision concerning the

introduction of new motor vehicles into the United States that are not covered by an EPA-issued COC.

A. The Complaint does not allege that Respondents have violated EPA's emission standards therefore EPA does not have the authority to bring this action.

Complainant's Amended Complaint states that Respondents have violated the Clean Air Act ("CAA") by manufacturing for sale or introduction into commerce, or by importing into the United States, new motor vehicles that are not covered by an EPA-issued COC.[3] In support of its claim that the vehicles imported were not covered by Respondent Taotao USA's EPA-issued COCs, EPA has put forth the argument that any difference between a catalytic convertor's active material concentration in a vehicle that was tested by the EPA and the concentration described in the vehicle's COC application is grounds for holding both the original manufacturer, whether it manufactured the catalytic converter or not, and the importer liable for a violation of CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1). EPA contends that simply because a vehicle does not conform to the exact design specifications described in the COC application covering such vehicle, it is as if the vehicle is not covered by any COC, and therefore, the original manufacturer of the vehicle, not the manufacturer of the nonconforming part, and the importer are subject to a civil penalty of up to $37,500 per vehicle pursuant to CAA § 205(a), 42 U.S.C. § 7524(a).[4]

The Clean Air Act provisions that EPA has relied upon in bringing this action against Respondents do not support the aforementioned allegations. *See* CAA § 206, 42 U.S.C. §7525. Therefore, the Complaint fails to state a claim upon which relief can be granted. Specifically, there have been no allegations of Respondents exceeding emission standards under the Clean Air Act ("CAA").

[3] Amended Complaint at 8.
[4] *Id.*

The testing and certification process described in the Clean Air Act, authorizes the Administrator to test, or require to be tested in such manner as he deems appropriate, any new motor vehicle or new motor vehicle engine submitted by a manufacturer to determine whether such vehicle or engine conforms with the regulations prescribed under section 7521 of this title. *Id.* If such vehicle or engine conforms to such regulations, the Administrator shall issue a certificate of conformity upon such terms, and for such period (not in excess of one year), as he may prescribe. *Id.* A certificate of conformity may be issued under this section only if the Administrator determines that the manufacturer (or in the case of a vehicle or engine for import, any person) has established to the satisfaction of the Administrator that any emission control device, system, or element of design installed on, or incorporated in, such vehicle or engine conforms to applicable requirements of section 7521(a)(4) of this title.

A COC therefore issued when an Administrator, here the EPA, determines that a vehicle or engine conforms to the emission standards for new motor vehicles or new motor vehicle engines, i.e. the requirements of section 7521(a)(4). Therefore, EPA's contention that a COC is invalid, i.e. it does not apply to a vehicle, merely because the design specifications of the vehicle do not exactly match the application, even when such differences do not cause the vehicle to exceed EPA's emission standards, is clearly arbitrary and capricious.

B. Complainant's allegations against Respondents rely on an outdated regulation or an incorrect application of a current regulation.

In the Amended Complaint, Complainant's allegations against Respondent are premised upon the argument that "Because the catalytic converters do not conform to the design specifications described in the relevant applications for COCs, the vehicles do not conform in all

material respects to the specifications in the COC applications and are therefore not covered by those COCs.[5]

Complainant has made the argument, or fallacy, that because a former regulation, contained the language, which has since been deleted, that a certificate covers the only those new vehicles which conform in all material respects, to the *design specifications* that applied to those vehicles described in the application for certification, then the current regulation which only requires that vehicles or engines produced prior to the effective date of a certificate of conformity, may also be covered by the certificate if the vehicles or engines conform in all material respects to the vehicles or engines described in the application for the certificate of conformity. *See supra* 3-4, "Regulatory Background."

The requirement that vehicles covered by a COC must conform in all material respects to the "design specifications" described in the application for certification was deleted from the regulations pertaining to certification of motor vehicles in 1982. *See* 40 C.F.R. 86.437-78(a)(2)(iii). Under the current regulation, a certificate of compliance covers "all vehicles represented by the test vehicle and will certify compliance with no more than one set of applicable standards. *Id.* There are no provisions in the applicable regulations that state (1) that a highway vehicle must conform in material respects to the design specifications, and (2) that the vehicle must conform to the application for certification. *Id.* The only regulation that mentions conformity to the application, not the test vehicle, is 40 C.F.R. 85.2304(b)(1) which refers to vehicles produced prior to the effective date of a certificate of conformity. Therefore, whether or not the inspected vehicles referred to in the Amended Complaint had catalytic converters with

[5] *Id.* at 6-9 (citing 40 C.F.R. §§ 85.2305(b)(1), 86.437(a)(2)(iii), b(4), and 1068.103).

the same active material content and concentration as that listed in the application for certification is not the test to determine noncompliance.

Each COC application relevant to this matter lists a third party manufacturing company as the manufacturer of each catalytic converter in question. These catalytic converters were purchased by a third party manufacturer in China, in the same condition as the catalytic converter that was placed on the test vehicle, which was then tested for emissions pursuant to the certification procedure. Complainant has not alleged that Respondents used a catalytic converter in the test vehicle, which was materially different from the one that was later inspected by EPA. *See generally* "Amended Complaint. Instead, Complainant has alleged only that the catalytic converter inspected by EPA did not conform to the active material specifications described in the relevant COC applications.

Given that there is no allegation that the tested vehicle, i.e. EDV did not contain the same active material concentration in the catalytic converters later tested, and because the EDV that passed the emissions standards contained a catalytic converter which conformed to the catalytic converter on imported vehicles, there has been no violation of any applicable statutes or regulations. Accordingly, Respondents manufactured, or imported, new motor vehicles which were in fact covered by EPA-issued COCs.

C. Respondents Taotao Group and JCXI, who are neither the manufacturers, nor the importers, are not subject to the Clean Air Act.

The Amended Complaint, under the section, "Governing Law", states: "The Clean Air Act prohibits manufacturers of new motor vehicles or new motor vehicle engines from selling offering for sale, introducing into commerce, or delivering for introduction into commerce, or causing any of the foregoing, or in the case of any person, from importing or causing another to

import a new motor vehicle into the United States unless that new motor vehicle is covered by an EPA-issued COC."

The foregoing statement in Complainant's Amended Complaint is inaccurate. The Clean Air Act does not contain the language that a manufacturer or importer is prohibited from "causing any of the foregoing" or "causing another to import." *Compare* Complainant's Amended Complaint ¶ 25(g) with Clean Air Act § 203(a)(1), 42 U.S.C. § 7522(a)(1).

The only violation of the Clean Air Act alleged in the Amended Complaint is that the active materials concentration of the catalytic converters in the inspected vehicles did not match the active materials concentration stated in the COC application. Taotao Group and JCXI did not submit the relevant COC applications, Taotao USA did. Therefore, the Complaint fails to state a claim against Respondents Taotao Group and JCXI, the original manufacturers. Specifically, Taotao Group and JCXI are not subject to CAA § 203(a)(1) 42 U.S.C. § 7522(a)(1) as neither of these Respondents was the "manufacturer" subject to the Certificate of Conformity requirements under the statute. As stated in Paragraph 31, Taotao USA holds the relevant EPA-issued COCs that form the basis of the Complaint. Therefore, Taotao USA Inc., not Respondent JCXI, was the "manufacturer or importer" for the purposes of Certificate of Conformity requirements. Taotao Group and JXCI neither submitted the applications for the relevant COCs, nor did they actually manufacture the component of the vehicle that allegedly "does not conform to the design specifications described in each COC application." All Taotao Group and JXCI did was manufacture the original vehicles, not the catalytic converters.

The Clean Air Act does not prohibit the production of vehicles or engines without a certificate of conformity. *See* 40 C.F.R. § 85.2305.

Respondents Taotao Group and JCXI did not apply for the COC in this case. The importer or "manufacturer" under the statute, Taotao USA, Inc., applied for the COCs and the COC's themselves were issued to Taotao USA, Inc. as the "U.S. Manufacturer or Importer." Had EPA, or Congress, intended for a manufacturer to apply for a COC in addition to an importer, I would have made that a requirement under a regulation, or statute.

Furthermore, Taotao Group and JCXI are not even listed as the manufacturers of the catalytic converters in the aforementioned COC applications. Each COC application referenced in the Amended Complaint lists the catalytic converter manufacturer as Nanjing Enserver Technology Co., Ltd, or Beijing ENTE Century Environmental Technology Co., Ltd., Chinese manufacturing companies.

Given that Taotao Group and JCXI (I) did not apply for the COC, (2) did not import the subject vehicles, (3) did not manufacture the catalytic converters, upon which the entire complaint is premised, and (4) CAA does not prohibit the production of vehicles or engines with a COC, Complainant has failed to state a claim against Taotao Group and JCXI for which relief may be granted.

Accordingly, Respondents Taotao Group and JCXI should not be subject to the jurisdiction of this court and the regulations asserted herein.

D. Burdensome Penalties Under the Clean Air Act Lack Conformity with Congressional Intent and Fall Outside the Purview of Agency Authority when Tested Against the Backdrop of Articles I and III of the U.S. Constitution

The intention of the Environmental Protection Agency's decision to fine Respondents a penalty of over 3 million dollars relies on a dormant interpretation of The Clean Air Act that the U.S. Supreme Court has already deconstructed and that remains under further scrutiny as the executive branch undergoes a transition that's expected to result in a more literal and less

ambiguous interpretation of the Clean Air Act and the EPA's enforcement of penalties. *See generally* Trump Can Ax the Clean Power Plan by Executive Order, WSJ.com, http://www.wsj.com/articles/trump-can-ax-the-clean-power-plan-by-executive-order-1479679923 (last visit Nov. 23, 2016).

In recent years, the EPA has relied on Article II of the U.S. Constitution and Executive orders to interpret ambiguous language in the Clean Air Act in a manner described by active observers as an intrusion "on areas it was never meant to regulate" and a violation of "the constitutional bar on commandeering the states to carry out federal policy." *Id.*

The consensus among Article III Courts, which inevitably have the task of reviewing the administrative branch for areas of overreach, is that the EPA has strayed far from its mandated task under the Clean Air Act to regulate the emission of hazardous air pollutants. The U.S. Supreme Court has even struck down EPA attempts to tax businesses with onerous fines when the underlying violation is not clearly outlined, defined, or enumerated in the Clean Air Act itself.

The U.S. Supreme Court in *Michigan et. al. v. Environmental Protection Agency, et. al.,* determined that the federal agency interpreted provisions of the Clean Air Act, 42 U.S.C. § 7412, "unreasonably when it deemed cost irrelevant to the decision to regulate power plants." *Michigan et al. v. Environmental Protection Agency et al, No. 14-16,* slip op. at 1-2 (U.S. Supreme Court October 2014).

The overriding opinion in the Supreme Court's decision was that the EPA could not choose to avoid all cost considerations or cost-benefit analysis equations when administering orders, issuing compliance requirements, and drafting resolutions under the umbrella of the Clean Air Act. Id. at 6. The Supreme Court further promulgated in its Michigan opinion that the

cost burden on U.S. businesses when issuing EPA directives still matters against the deferential standard established for the EPA under the Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. opinion. Id. (citing Utility Air Regulatory Group. v. EPA, 573 U.S., slip op., at 16, (U.S. Supreme Court 2014).

The Supreme Court even held, "Even under this deferential standard, however, 'agencies must operate within the bounds of reasonable interpretation.'" *Id. at 6.*

The question of reasonable interpretation remains undecided and is influx with the transition from one administration to another, but the Supreme Court has already created clear lines of demarcation between what the EPA has the right to do under the mandates of Congressional authority and what is being done in a capricious manner when the Article III Courts and Congress are disengaged from the process.

The Supreme Court in its one-year old *Michigan v. EPA* opinion further eroded the EPA's insistence that its standard of traveling far beyond the original purpose of controlling emission standards is all encompassing and unlimited by cost burdens or constitutional considerations.

As the EPA threatens a burdensome fine on Respondents for a design mechanism despite the units conforming to overall emission standards, the Court's *Michigan v. EPA* decision highlights the reality of the EPA's limitations. Justice Clarence Thomas identified the EPA's ceiling quite clearly in his concurring opinion in the *Michigan* case: "agencies interpreting ambiguous statues typically are not engaged in acts of interpretation at all." *Id.* at 3 (Thomas, C., concurring opinion). (5-4 decision).

The reality is "they are engaged in the 'formulation of policy.'" *Id.* (Thomas citing *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984)).

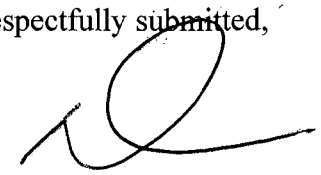
And while these attempts to fill in the blanks with policy may somewhat escape Article III judicial review, Thomas notes that the EPA still "runs headlong into the teeth of Article I's (power), which vests all legislative powers herein granted in Congress.'" *Id.* (citing Const., Art. I. § 1).

The EPA's use of Respondents unique design to warrant penalties—despite the product's compliance with emission standards overall—mirrors the Supreme Court's growing concern with allowing regulatory agencies the unbridled power to fill in the blanks without the help of Congress. In other words, if Congress has not had its say, the capriciousness of issuing onerous penalties pursuant to stipulations that have not been specifically mentioned within the Clean Air Act is a direct violation of both Congressional intent and the boundaries that Article III Courts have constructed to ensure Article I Administrative agencies are not emboldened to violate or circumvent the policymaking powers enumerated to Congress by the U.S. Constitution.

PRAYER

WHEREFORE, Respondents prays that the Complaint be dismissed with prejudice in whole or in part, and for such other relief, at law or in equity, to which Respondents are justly entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on November 28, 2016 the foregoing Motion to Dismiss was filed and served on the Presiding Officer electronically through the Office of Administrative Law Judges (OALJ) e-filing system. I certify that a copy of the foregoing Motion was sent by mail on November 28, 2016 to opposing counsel as follows:

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