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.	)	

RESPONSE TO RESPONDENTS' MOTION FOR RECONSIDERATION OF THE ORDERS ON RESPONDENTS' MOTION IN LIMINE AND RESPONDENTS' MOTION TO TAKE DEPOSITIONS

On July 28, 2017, respondents in this matter, Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao Group"), and Jinyun County Xiangyuan Industry Co., Ltd. ("Jinyun") (collectively "Respondents") filed a Motion for Reconsideration of the Orders on Respondents' Motion in Limine and Respondents' Motion to Take Depositions ("Motion"). The Director of the Air Enforcement Division of the U.S. Environmental Protection Agency's Office of Civil Enforcement ("Complainant") now files this Response opposing Respondents' Motion. Respondents have not identified any error in either the Order on Respondents' Motion in Limine or the Order on Respondents' Motion to Take Depositions that warrant reconsideration. In addition, the Motion is an untimely, unjustified effort to request reconsideration of the May 3, 2017 Order on Partial Accelerated Decision and Related Motions, which has already been the subject of a previous request for reconsideration. The Motion is an objectionable and frivolous attempt to raise new grievances with the Tribunal's liability determination, and should be denied.

I. Background

On June 17, 2017, Respondents filed a Motion to Take Depositions pursuant to 40 C.F.R. § 22.19(e) requesting leave to depose each potential witness identified in Complainant's Prehearing Exchange. As part of the request, Respondents stated they sought to depose witnesses Amelie Isin, Dr. John Warren, and Dr. Ronald Heck about sworn declarations Complainant had previously filed in support of Complainant's Motion for Partial Accelerated Decision (Complainant's "AD Motion"), and in response to Respondents' dispositive motions. Respondents' Mot. to Take Depos. at 1–4. On July 7, 2017, the Tribunal issued an order partially granting Respondents' Motion to Take Depositions ("Deposition Order"). The Presiding Officer denied Respondents' request to depose Dr. Warren and Dr. Heck because Complainant had stated that their testimony was only relevant to liability, and neither would be called at the penalty hearing. Depo. Order at 4–5. The Presiding Officer granted Respondents' request to depose Ms. Isin "on matters related to the calculation of the proposed penalty and the application

of the Agency's penalty policy," and "on matters related to which the Agency seeks to qualify her as an expert, including the bases of her opinions." *Id.* at 2.

On June 23, 2017, Respondents filed a Motion in Limine to Exclude Testimony and Evidence of Ronald M. Heck, John Warren, Amelie Isin, and Dr. James Carroll ("Motion in Limine"). Respondents argued that the expert testimony of Ms. Isin should be excluded due to alleged deficiencies in her background and testimony fatal to her qualification as an expert. Mot. in Lim. at 3–6. Respondents sought to exclude the testimony, and strike the declarations, of Dr. Heck and Dr. Warren for similar reasons. *Id.* at 6–11. The Tribunal denied Respondents' Motion in Limine in an order dated July 18, 2017 ("Order on Motion in Limine"). The Presiding Officer held that the requests to exclude evidence and testimony from Dr. Heck and Dr. Warren were moot, and that the request to exclude Ms. Isin was premature because Respondents would have the opportunity to depose her prior to the hearing. Order on Mot. in Lim. at 1.

On July 28, 2017, Respondents filed the present Motion for Reconsideration of the Orders on Respondents' Motion in Limine and Respondents' Motion to Take Depositions.[1]

II. Legal Standard

The Consolidated Rules of Practice that govern this proceeding do not expressly provide for reconsideration of interlocutory orders. *In re Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5, at **71–72 (ALJ, Mar. 24, 2009); *see* 40 C.F.R. § 22.32 (motion to reconsider a final order). When such motions are considered, they are "subject to the same standard of review as that for orders of the" EAB. *Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5, at **71–72. A Motion to reconsider an order must be filed within 10 days after service of the order. 40 C.F.R. § 22.32; *see* 40 C.F.R. § 29(a) (motion for interlocutory review must be filed within 10 days of service of the order). "Reconsideration is generally reserved for cases in which the [Presiding Officer] is shown to have made a demonstrable error, such as a mistake of law or fact." *Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5, at *73 (quoting *In re Hawaii Elec. Light Co., Inc.*, PSD Appeal Nos. 97-15 through 97-22, 8 E.A.D. 66, slip op. at 6 (EAB, March 3, 1999) (Order Denying Motion for Reconsideration and Lifting Stay)). A motion for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." *In re Pyramid Chem. Co.*, Docket No. RCRA-HQ-2003-0001, 2004 EPA App. LEXIS 50, at *2 (EAB, Nov. 8, 2004) (Order Denying Motion for Reconsideration).

A motion for reconsideration is not "an opportunity to reargue the case in a more convincing fashion. . . . A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5, at *73 (quoting *Hawaii Elec. Light Co., Inc.*, 8 E.A.D. 66, slip op. at 6) (internal quotations omitted). A "motion for reconsideration cannot be employed as a vehicle to

[1] Respondents did not contact Complainant prior to filing this Motion to determine whether Complainant opposed the relief requested therein, in contravention of the Prehearing Order's consultation requirement. Prehearing Order, at 6 (May 11, 2016).

introduce new evidence that could have been adduced earlier; nor can such a motion serve as the occasion to tender a new legal theory for the first time." *In re Pyramid Chem. Co.*, 2004 EPA App. LEXIS 50, at *3 (citing *In re Hawaii Elec. Light Co.*, PSD Appeal Nos. 01-24 through 01-29, 2002 EPA App. LEXIS 44, at *5 (EAB, Jan. 29, 2002) (Order Denying Motion for Reconsideration)).

III. Respondents Have Not Identified Any Error in the Order on Respondents' Motion in Limine or Order on Respondents' Motion to Take Depositions

Respondents' Motion does not identify any matter they allege was erroneously decided in either the Order on Motion in Limine or the Deposition Order. They have not met their burden of showing that the Presiding Officer made a demonstrable error in either order, and are not entitled to reconsideration. The Motion should therefore be denied.

IV. Respondents' Motion to Reconsider the Order on Respondents' Motion to Take Depositions is Untimely

A motion to reconsider an order must be filed within 10 days of service of the order. 40 C.F.R. § 22.32. The Tribunal served the Deposition Order on the parties on July 7, 2017. A motion to reconsider that order should have been filed no later than July 17, 2017. The current Motion was not filed until July 28, 2017, a full 21 days after the Deposition Order was served and 11 days after the deadline to request reconsideration. Respondents have not explained why the motion was late, or requested leave to file out of time.

The delay is not trivial, particularly when coupled with Respondents complete failure to identify any error in either the Deposition Order or the Order on Motion in Limine. Late filings and frivolous filings interfere with the fair and efficient adjudication of this matter by undermining the integrity of the Consolidated Rules, eroding the Presiding Officer's authority to resolve disputes, and fostering uncertainty about what issues the parties must prepare to address at trial. Each late filing, and each baseless request for reconsideration, requires both the Tribunal and Complainant to expend resources relitigating settled issues, causing undue delay and prejudice. The Motion should be denied for being late as well as unsupported.

V. Respondents' Motion is Yet Another Request to Reconsider the Order on Partial Accelerated Decision and Related Motions Issued May 3, 2017

Though the Motion is nominally submitted as a request for reconsideration of the Order on Respondents' Motion in Limine and the Deposition Order, Respondents only refer to the two orders once, on the Motion's first page, in a sentence requesting leave to reopen the question of liability in this matter. Mot. at 1. Instead of addressing the discovery orders, Respondents instead devote the entire motion to attacking Complainant's Motion for Partial Accelerated Decision (Complainant's "AD Motion") and the Tribunal's May 3, 2017 Order on Partial Accelerated Decision and Related Motions (the "Liability Order"). Respondents write that the Motion "is not intended to *merely* 'take a third bite at the apple to challenge liablity,' . . . but to request the

opportunity to show that Complainant's AD Motion relied on unreliable and inadmissible evidence." Mot. at 1 (emphasis added). They request the opportunity to depose Complainant's liability witnesses for the express purpose of challenging the May 3rd Liability Order, or in the alternative, that the Liability Order simply be set aside and the issue of liability reopened for hearing.[2] *Id.* at 9–10.

When viewed as a motion to reconsider the May 3rd Liability Order, the present Motion is grossly improper. Respondents already filed a Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal ("First Motion for Reconsideration") on May 15, 2017, when any request for reconsideration of the Liability Order was due. That motion was denied on June 15, 2017, over a month before the present Motion was filed. The present Motion is both untimely and contemptuous of the Presiding Officer's ruling.

In their Motion, Respondents argue that the Presiding Officer erred in considering the evidence against them and finding that Complainant had met its burden of proof regarding liability. To remedy the alleged error, Respondents request that the Presiding Officer reopen the issue of liability for discovery and trial. Respondents attempt to justify their untimely request on the meritless claim that they were denied a fair opportunity to respond to evidence supporting Complainant's AD Motion. Notably, Respondents do not provide any cogent explanation for why these arguments were not raised before the Liability Order was issued or in the First Motion for Reconsideration of that order.

The arguments in the current Motion essentially re-hash arguments first presented in Respondents' Motion for Continuance of the Hearing, filed June 9, 2017. *See* Mot. at 1 (citing pages 1 through 7 of Respondents' Motion for Continuance of the Hearing). The arguments were procedurally offensive and substantively wrong then, and they have not improved with age. *See* Order on Respondents. Mot. for Continuance of the Hearing at 1–2 (noting that most of Respondents' motion presented argument that were inappropriate, not credible, and designed to cause delay).

A. Respondents' request to reconsider or vacate the May 3, 2017 Order on Partial Accelerated Decision and Related Motions is unjustified and untimely

In their Motion, Respondents present a selective procedural history that overlooks or minimizes Respondents' many opportunities to challenge the evidence against them. A clear look at the history of this proceeding reveals the hollowness of Respondents' claim of surprise and prejudice. Respondents had a full and fair opportunity to challenge the evidence against them.

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[2] Respondents provide two law review articles in support of their argument, but do not explain their relevance. Mot. at 9.

Complainant filed its Initial Prehearing Exchange on August 25, 2016, identifying each of Complainant's potential expert witnesses, summarizing their expected testimony, and providing extensive documentation supporting the allegations in the Amended Complaint. Respondents filed their Joint Prehearing Exchange on October 28, 2016, in which they did not identify any witnesses or documents to rebut the evidence of liability against them. Instead, Respondents advanced three legal arguments claiming Complainant was misreading the Act and that Complainant's factual allegations could not give rise to liability as a matter of law.

Complainant filed its First Motion to Supplement the Prehearing Exchange ("First Motion to Supplement") adding a declaration from expert witness Dr. Ronald Heck, and the AD Motion, on November 28, 2016. Respondents filed an unopposed motion requesting to extend the deadline for filing their opposition briefs to accommodate counsel's workload; Respondents did not refer to the declaration or cite it as a basis for extending the deadlines. Respondents' Unopposed Mot. to Ext. Deadlines for Respondents' and Complainant's Resp. Filings at 2.

On January 3, 2017, Respondents filed an opposition to the First Motion to Supplement objecting that the addition of Dr. Heck as a new expert witness would prejudice them by requiring "taxing analysis and rebuttal." Respondents' Resp. to Complainant's First Mot. to Supplement at 4–5. Respondents filed a separate opposition to the AD Motion arguing in part that differences in catalytic converter composition were not "material" because variations in the catalytic converter test results suggested the tests "are not entirely reliable and that some variance may be reasonably expected," and further arguing that the precious metal composition of tested catalytic converters may have been altered by mileage accumulation or storage conditions. Respondents' Resp. to Complainant's AD Mot. for Accel. Dec. at 6–7. Respondents did not offer any evidence to support their arguments. Respondents also did not object to Complainant's citation to Dr. Heck's declaration in the AD Motion.

On January 13, 2017, Complainant filed a reply in support of its First Motion to Supplement noting that Dr. Heck had been identified in Complainant's Initial Prehearing Exchange and was therefore not a new expert witness, contrary to Respondents' claim. Complainant also filed a reply in support of the AD Motion, in which Complainant addressed Respondents' arguments about the reliability of the catalytic converter test results and offered a second declaration from Dr. Heck to rebut Respondents' claims that mileage accumulation or storage conditions might have affected the precious metal content of the catalytic converters. Complainant's Reply in Supp. of Complainant's Mot. for Partial Accel. Dec. at 4–6; *See* 40 C.F.R. § 22.16(b) (reply shall be limited to issues raised in the response and be accompanied by any affidavit or other evidence relied upon). Respondents did not seek to file a surreply or otherwise act to affirmatively oppose Complainant's citation to the second declaration of Dr. Heck.

Separate from their opposition to Complainant's AD Motion, on November 18, 2016, Respondents had filed their own Motion for Accelerated Decision and Motion to Dismiss for Failure to State a Claim in which they challenged the sufficiency of the legal theories and evidence against them. Respondents argued in relevant part that the Complainant's evidence

could not support a finding that all 109,964 vehicles identified in the Amended Complaint were in violation of the Act. Respondents' Mot. for Accel. Dec. at 7. In response, Complainant filed a Second Motion to Supplement the Prehearing Exchange ("Second Motion to Supplement") and Combined Response Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision ("Combined Response"). The Second Motion to Supplement added two exhibits—a declaration from potential expert witness Dr. John Warren and a declaration from potential witness Amelie Isin—to rebut arguments in Respondents' motions. In the Combined Response, Complainant argued that the evidence in the record, including Respondents' own statements, demonstrated there was no genuine dispute of material fact that Respondents were liable for the violations alleged, and the Tribunal should deny Respondents' motions and grant Complainant's AD Motion. Comb. Resp. at 23; *see* 40 C.F.R. § 22.20(a) (Presiding Officer may render accelerated decision in favor a party at any time); *see also* Fed. R. Civ. P. 56(f) (court may grant summary judgment for nonmoving party or on grounds not raised by any party).

Respondents did not file an objection to Complainant's Second Motion to Supplement. *See* Order on Respondents' Mot. for Reconsideration or Interlocutory App. at 11. On January 13, 2017, Respondents did file a Reply to the Combined Response in which they referred to the declaration of Dr. Warren, but did not object to its inclusion in the record, challenge Dr. Warren's qualifications, or challenge the declaration's content. *See* Reply to Comb. Resp. at 14. In sum, Respondents had two opportunities to oppose or respond to Dr. Warren's and Ms. Isin's declarations, and both times Respondents failed to do so.

At no point between November 28, 2016, when the motions were filed, and May 3, 2017, when the Tribunal ruled on those motions, did Respondents claim they were unduly surprised or prejudiced by the declaration from Dr. Warren, declaration from Ms. Isin, or the second declaration from Dr. Heck. At no point did Respondents challenge the substance of the declarations, or request additional time to respond to the substance of the declarations. At no point did Respondents challenge the reliability of the evidence against them under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or request the opportunity to depose Complainant's witnesses in defense against accelerated decision. At no point did Respondents offer any evidence or witness to rebut the evidence against them or raise an affirmative defense against liability.

This Tribunal issued the Liability Order on May 3, 2017. The Presiding Officer rejected Respondents' arguments concerning the reliability of the catalytic converter test results, finding that their arguments were rooted in speculation whereas Complainant had presented sufficient support to accept their validity. Liability Order at 23–24. The Presiding Officer found there were no facts in genuine dispute with regard to liability, and ruled in favor of Complainant. *Id.* at 3, 21, 23–24, 30–31. On May 15, 2017, Respondents filed their First Motion for Reconsideration in which they argued the Presiding Officer committed error by shifting the burden of proof from Complainant to Respondents, and by finding that all 109,964 vehicles were uncertified in violation of the Act. First. Mot. for Reconsideration at 6, 15. Respondents did not claim that they had been unduly surprised or prejudiced by the declarations from Complainant's witnesses, that

the Presiding Officer had not adequately ensured that the evidence in record was reliable, or that the Presiding Officer had erred in considering the declarations or test results. On June 15, 2017, the Tribunal rejected Respondents' arguments, denied their request for reconsideration, and denied their request to recommend this matter for interlocutory review. Order on Respondents' Mot. for Reconsideration or Interlocutory App. at 8, 11, 13. Respondents then had the opportunity to file a motion for review directly with the Environmental Appeals Board, but did not do so. *See* 40 C.F.R § 22.29(c).

It was not until Respondents filed their Motion for Continuance of the Hearing on June 9, 2017, that they first claimed to have been to be surprised. The source of their surprise was the Presiding Officer's ruling on Complainant's AD Motion, which they claimed denied them a fair opportunity to respond to the evidence against them. Respondents' Mot. for Cont. of the Hearing at 6–7. Later, Respondents challenged the reliability of the evidence under *Daubert* for the first time in their Motion in Limine, filed June 23, 2017. Respondents now claim they have been unduly prejudiced in their ability to challenge Complainant's evidence, but they do not provide any plausible reason they could not have raised these issues or provided rebuttal evidence in their prehearing exchange, their dispositive motions, their replies in support of their dispositive motions, their responses to Complainant's motions, in a surreply to Complainant's replies, in a discovery motion filed any time prior to the Liability Order, or in their First Motion for Reconsideration of the Liability Order. It is too late to raise them now. *See Macsenti v. Becker*, 237 F.3d 1223, 1231–34 (10th Cir. 2001) (holding that trial courts have discretion to deny untimely *Daubert* motions); *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001) (stating that *Daubert* contemplates a "gatekeeping" function rather than "a 'gotcha' junction," and untimely motions may only be warranted in rare circumstances).

B. Respondents' request to reconsider or vacate the May 3, 2017 Order on Partial Accelerated Decision and Related Motions is inappropriate and prejudicial

Since May 3, 2017, the Presiding Officer has repeatedly stated that all questions of liability have been resolved and only questions of penalty remain. *See* Liability Order (May 3, 2017) (granting Complainant's AD Motion); Hearing Notice and Order, at 1 (May 9, 2017) (identifying remaining issues in controversy as "those related to penalty"); Order on Respondents' Mot. for Reconsideration or Interlocutory App. at 11 (June 15, 2017) ("[T]his Tribunal has again considered the merits of Respondents' arguments and still finds them lacking."); Order on Respondents' Mot. for Continuance of the Hearing at 2 (June 27, 2017) (stating that "all questions of liability have been answered"); Order on Respondents' Mot. to Take Depos, at 2, 4, 6 (July 7, 2017) (denying leave to depose witnesses "on issues of liability that this Tribunal has already determined"). Despite these clear statements from the Presiding Officer, Respondents have continually attempted to introduce new theories to reopen the question of liability. *See* Respondents' Mot. for Continuance of the Hearing at 1–7 (June 9, 2017) (claiming undue surprise and assigning error to Presiding Officer's consideration of Complainant's declarations); Respondents' Mot. to Take Depos. at 2–4 (June 16, 2017) (requesting to depose Dr. Heck, Dr. Warren, and Ms. Isin on the content of their declarations);

Respondents' First Mot. to Supp. the Prehearing Exchange at 2–4 (June 16, 2017) (adding expert witnesses to contest liability); Respondents' Resp. to Complainant's Mot. in Lim. at 6 (July 17, 2017) (arguing Respondents' expert statisticians are relevant to challenge the declaration of Dr. Warren); Respondents' Mot. in Lim. to Exclude Testimony and Evid. of Ronald M. Heck, John Warren, Amelie Isin, and Dr. James J. Carroll at 4–11 (June 23, 2017) (seeking to exclude testimony and declarations from Dr. Heck, Dr. Warren, and Ms. Isin, undermining the Liability Order).

Respondents cannot be allowed to endlessly revisit the issue of liability, raising new arguments that could have been presented in the first instance. Litigation is not an iterative process whereby Respondents are allowed to continually re-argue a decisive question until they are satisfied with the outcome. *See In re Pyramid Chem. Co.*, 2004 EPA App. LEXIS 50, at *3 (reconsideration is not an opportunity to produce new legal theories or evidence that could have been provided earlier). Respondents' refusal to acknowledge the finality of the Presiding Officer's decision evinces a lack of respect for the Tribunal, and diminishes the integrity of this proceeding by implying that the Consolidate Rules of Procedure don't matter. The persistent effort to reopen liability prejudices the orderly adjudication of this matter by requiring the parties and the Tribunal to expend resources relitigating a settled issue, and by confusing the matters to be resolved at hearing. Complainant requests that the Tribunal deny the present Motion, issue an order barring Respondents from presenting testimony or evidence pertaining to liability at the penalty hearing, and take any other action the Tribunal deems appropriate to maintain order and promote the efficient, fair, and impartial adjudication of this proceeding.

Conclusion

For the reasons stated above, Complainant requests that this Tribunal deny Respondents' Motion, and find the arguments therein waived or resolved against Respondents on the merits. Complainant further requests that this Tribunal issue an order excluding testimony or other evidence pertaining to liability from being introduced at the penalty hearing, and take any other action the Tribunal deems appropriate to maintain order and promote the efficient, fair, and impartial adjudication of this proceeding.

Respectfully Submitted,

8/14/17
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CERTIFICATE OF SERVICE

I certify that the foregoing Response to Respondents' Motion for Reconsideration of the Orders on Respondents' Motion in Limine and Respondents Motion to Take Depositions ("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 an electronic copy of this 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.

8/14/2017
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