

**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.)	

MOTION IN LIMINE TO EXCLUDE EVIDENCE AND TESTIMONY

The Director of the Air Enforcement Division of the U.S. Environmental Protection Agency’s Office of Civil Enforcement (“Complainant”) files this Motion *in Limine* to Exclude Evidence and Testimony. 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”) have identified potential exhibits and testimony that is irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. Complainant requests that the Tribunal exclude this material from the evidentiary hearing in this matter. Respondents oppose this Motion.

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”) at provide that “[t]he 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). Motions *in limine* are appropriate where “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)).

“The admissibility of exhibits is dependent on the context in which they are offered.” *Id.* In this matter, in the Order on Partial Accelerated Decision and Related Motions issued on May 3, 2017 (“May 3rd Order”), the Presiding Officer determined that Respondents are liable for the violations of the Clean Air Act alleged in the Amended Complaint. On May 9, 2017, the Presiding Officer issued the Hearing Notice and Order scheduling an evidentiary hearing to address “[t]he remaining issues in controversy – those related to penalty” Hearing Notice and Order at 1. Respondents, in their Prehearing Exchange and First Motion to Supplement the Prehearing Exchange (“Motion to Supplement”),¹ have identified documents and testimony that

¹ Complainant will file a separate response opposing portions of Respondents’ Motion to Supplement. The deadline for filing non-dispositive prehearing motions is currently June 23, 2017, while the deadline for filing a response to the First Motion to Supplement the Prehearing

are inherently unreliable, or are not relevant to the question of penalty in this matter. These items should therefore be excluded at the evidentiary hearing on penalty.

1. Respondents' Exhibit RX001

Respondents' Exhibit RX001 consists of incomplete and truncated images of documents that were editorialized with commentary from Respondents or their counsel. Exhibit RX001 was self-evidently prepared for the purpose of this proceeding, and appears to be attorney work product. It is inherently argumentative, and "argument is not evidence." *United States v. Alvarez*, 451 F.3d 320, 336 (5th Cir. 2006). It is inherently unreliable, and should be excluded.

2. Respondents' Exhibits RX018 and RX019

Respondents' Exhibit RX018 is described as "Approved COCs for similar vehicles without catalytic converters." Exhibit RX019 is described as "COC applications for similar vehicles without catalytic converters." These materials, which pertain to vehicles not at issue in this matter, are simply not relevant, material, or probative in this matter. Complainant requests that RX018 and RX019 be excluded.

3. Testimony of Larry Doucet

Respondents have identified Mr. Larry Doucet as a potential expert witness who will testify to "the reliability of different catalytic converter testing methods and the degree of 'crucial' importance, of precious metal concentrations in catalytic converters with respect to pollutant emission reductions, performance and efficiencies." Mot. to Supplement at 3. The subject matter of Mr. Doucet's testimony concerns the issue of liability, which has already been resolved by the Presiding Officer's May 3rd Order. Respondents' belated attempt to raise questions about catalytic converter test methodology is a transparent effort to re-litigate the question of whether Respondents' vehicles were manufactured with catalytic converters of the same volume and composition as those described in the relevant applications for certification and approved by the Agency. The attempt to introduce evidence about anticipated "pollutant emission reductions, performance and efficiencies" is an effort to revive Respondents legal theory, rejected by this Tribunal, that liability "turn[s] on whether an engine meets emission standards." May 3rd Order at 29. Mr. Doucet's testimony is not relevant to the determination of an appropriate penalty in this matter, and he should be excluded as a witness.

4. Testimony of Clark Gao and/or Joseph L. Gatsworth

Respondents have identified Mr. Clark Gao and Mr. Joseph L. Gatsworth as potential expert witnesses who may testify regarding "statistical analyses of the results of precious metal

Exchange is July 6, 2017 (15 days and an additional 5 days because the exhibits to the Motion to Supplement were served solely by certified mail, not overnight delivery). See 40 C.F.R. §§ 22.7(c), 22.16(b).

analyses conducted on catalytic converters taken from Respondents' vehicles, and whether the catalytic converters analyzed may be representative of catalytic converters in vehicles across respective engine families relevant to this matter." Mot. to Supplement at 3, 4. In the description of Mr. Gao's testimony, Respondents state that "he will likely be retained to testify if Respondents' Motion for Continuance is granted and/or the Presiding Officer permits testimony on the issue of whether Respondents are liable for 109,964 violations . . ." *Id.* at 3. By their own words, Respondents concede that the testimony of Mr. Gao and Mr. Gatsworth is relevant solely to the question of Respondents' liability for the violations alleged in the Amended Complaint. That question was resolved in the May 3rd Order,² and affirmed in the Presiding Officer's June 15, 2017 Order on Respondents' Motion for Reconsideration or Interlocutory Appeal. Their testimony is not relevant to the remaining issue of penalty, and they should therefore be excluded as witnesses.

5. Testimony of the primary author of the Clean Air Act Mobile Source Penalty Policy

Respondents indicate they intend to call "the primary author of the Penalty Policy as a potential witness" in this matter. Information about the "purpose and legal basis" for a penalty policy "has no tendency to prove a fact that bears on the appropriateness of the proposed penalty." *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 620–23 (EAB 1991). Further, information "pertaining to the penalty policy's *formulation*" is protected by the Agency's deliberative process privilege. *In re John A. Biewer Co.*, 2009 EPA ALJ LEXIS 21, at *8 n.2 (ALJ, Dec. 23, 2009) (citing *Chautauqua*, 3 E.A.D. at 620–23). Respondents do have the right to cross-examine the EPA witness who applied the Penalty Policy in this matter. *Id.* at **33–34. In this matter the proposed penalty was calculated by Amelie Isin using the Penalty Policy, and Respondents will have the opportunity to cross-examine her about her calculations. Examination of the Penalty Policy's "primary author" will not yield relevant or probative information beyond that provided by Ms. Isin. Complainant therefore requests that the Penalty Policy's "primary author" be excluded as a witness.

6. Testimony of Granta Nakayama

Respondents have named Mr. Granta Nakayama as a potential occurrence and/or expert witness who may "testify regarding the Clean Air Act Mobile Source Penalty Policy, the appropriateness of its application in the present matter, and whether Complainant has properly applied the Penalty Policy to calculate the proposed penalty assessment." Mot. to Supplement at 4. Respondents identify Mr. Nakayama as the "Assistant Administrator Office of Enforcement

² Respondents' attempt to re-open the question of whether the catalytic converters tested at Complainant's direction were representative of the catalytic converters used on their imported vehicles is inconsistent with their prior statements asserting that their vehicles were manufactured with catalytic converters that came from a common source and conformed to one another. *See* Respondents' Mot. to Dismiss for Failure to State a Claim at 8–9; May 3rd Order at 30–31.

and Compliance Assurance,” and an author of the Penalty Policy. Mr. Nakayama was the Assistant Administrator for the EPA’s Office of Enforcement and Compliance Assurance from 2005 to 2009. In that capacity, he signed the January 16, 2009 memorandum transmitting the final Mobile Source Civil Penalty Policy to EPA’s Mobile Source Enforcement Personnel. Mr. Nakayama has been in private practice since leaving the EPA, and is currently a partner with the law firm of King & Spalding.

As previously described, information about the “purpose and legal basis” for a penalty policy “has no tendency to prove a fact that bears on the appropriateness of the proposed penalty.” *Chautauqua*, 3 E.A.D. at 620–23. To the extent Respondents seek to have Mr. Nakayama testify about the development of the Penalty Policy or the “appropriateness of its application in the present matter,” such information would go toward legal or policy arguments with no probative factual value to the question of whether the penalty proposed in this matter is appropriate. *Id.* Such testimony would also implicate deliberative information concerning the policy discussions, decision-making process, and mental impressions Mr. Nakayama held as a high-level EPA official. Finally, to the extent Mr. Nakayama would be called in his capacity as a former high-level EPA official, Respondents have not shown “extraordinary circumstances that would overcome a presumption against having . . . a high level EPA official[] testify at hearing.” *In re 1836 Realty Corp.*, 1999 EPA ALJ LEXIS 113, at **4–5 (ALJ, April 8, 1999). Complainant requests that Mr. Nakayama therefore be excluded as a witness.

7. Testimony of Jacqueline Robles Werner

Respondents have named Ms. Jacqueline Robles Werner as a witness who may “testify regarding the Penalty Policy and whether Complainant accurately calculated its proposed penalty in accordance with the Penalty Policy.” Mot. to Supplement at 4–5. Respondents state that “[u]pon information and belief, it appears that Ms. Werner either co-authored the Penalty Policy or substantially assisted in its development.” *Id.* The January 16, 2009 memorandum transmitting the final Penalty Policy to the EPA’s Mobile Source Enforcement Personnel identifies Ms. Werner as a point of contact for questions about the Penalty Policy. At that time, Ms. Werner, an EPA attorney, was Chief of the Mobile Source Enforcement Branch within the Air Enforcement Division of the EPA’s Office of Civil Enforcement. Ms. Werner is currently the Associate Director of the Air Enforcement Division. The Complainant in this matter is the Director of the Air Enforcement Division.

To the extent Respondents seek to call Ms. Werner as an author of the penalty policy, her testimony would be irrelevant and non-probative for the reasons already articulated in this Motion. *See Chautauqua*, 3 E.A.D. at 620–23; *John A. Biewer Co.*, 2009 EPA ALJ LEXIS 21, at *8 n.2. In addition, the examination of Ms. Werner would impermissibly implicate privileged information. As Associate Director of the Air Enforcement Division, Ms. Werner assists Complainant in all matters pertaining to civil enforcement of the Clean Air Act, including supervisory responsibility over Complainant’s counsel in this matter. Any examination of Ms. Werner about the accuracy of Complainant’s proposed penalty calculation would necessarily call for the disclosure of privileged attorney mental impressions, attorney-client communications, and

internal deliberative information. To the extent Ms. Werner could testify about the penalty calculation in this matter, such testimony would be duplicative of that provided by Ms. Isin. Complainant therefore requests that Ms. Werner be excluded as a witness.

Conclusion

For the reasons stated above, Complainant requests that this Tribunal issue an order excluding the foregoing documents and witnesses from this matter.

Respectfully Submitted,

6/23/17

Date



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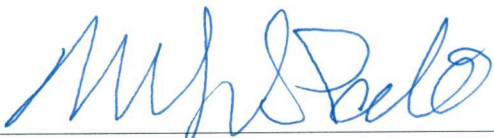
CERTIFICATE OF SERVICE

I certify that the foregoing Motion *In Limine* To Exclude Evidence and Testimony (“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 this Motion 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. I further certify that three copies of the foregoing Motion were sent this day by certified mail, return receipt requested, for service on Respondents’ counsel at the address listed below:

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6/23/17
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