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' 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") Motion *in Limine* to Exclude Testimony and Evidence of Amelie Isin, Ronald M. Heck, John Warren, and Dr. James J. Carroll (the "Motion"), which was transmitted to Complainant and filed on June 23, 2017. In the Motion, Respondents request that the Presiding Officer issue an Order excluding the expert testimonies of Complainant's expert witnesses Amelie Isin, Dr. John Warren, Dr. Ronald M. Heck, and Dr. James J. Carroll. Respondents' request fails to demonstrate that a prehearing order excluding expert testimony from these witnesses is justified or appropriate under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules") and applicable case law.

I. Legal Standard

The Consolidated Rules that govern this proceeding 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 if 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 Liphatech, Inc.*, 2011 EPA Admin. Enforce. LEXIS 31306 (June 6, 2011) at *22 (ALJ June 6, 2011) (quoting *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400-01 (N.D. Ill. 1993)).

II. Respondents' Requests to Exclude the Expert Testimonies of Complainant's Expert Witnesses Amelie Isin, Dr. John Warren, Dr. Ronald M. Heck, and Dr. James J. Carroll

Respondents seek to exclude the expert testimony of Complainant's witnesses Amelie Isin, Dr. John Warren, Dr. Ronald M. Heck, and Dr. James J. Carroll. These are addressed individually below.

A. Daubert Challenges

The Motion mainly relies upon citation to Rule 702 of the Federal Rules of Evidence and the U.S. Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Respondents attempt in their Motion to argue that any expert testimony from the above-referenced witnesses should be barred per *Daubert* on reliability grounds, notwithstanding the fact that Complainant has had no opportunity to fully qualify these witnesses at hearing, nor was

required to qualify them as experts prior to hearing under the Consolidated Rules and this Tribunal's prehearing orders.

Although administrative law judges refer to the Federal Rules of Evidence and *Daubert* for guidance, "FRE 702 and *Daubert* are not controlling principles in agency hearings, which are not bound by the strict rules governing jury trials." *In re Mr. C.W. Smith, Mr. Grady Smith, & Smith's Lake Corp. ("Smith")*, 2004 EPA ALJ LEXIS 128 at **163-64 (ALJ July 15, 2004) (quoting *Solutia, Inc.*, 2001 EPA App. LEXIS 19 n.22 (EAB 2001)). Moreover, this Tribunal has recognized that, even if administrative law judges looked to *Daubert* for guidance:

> the Supreme Court stated that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular testimony is reliable . . . [and] should consider the specific factors identified in *Daubert* only where they are reasonable measures of expert testimony" because those factors may not be pertinent, "depending on the nature of the issue, the expert's particular expertise and the subject of his testimony."

Id. at **164-65 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)). However, the Presiding Officer has noted both procedural and substantive limitations on *Daubert's* applicability. In *Liphatech*, whether the *Daubert* test applied could not be determined before the hearing, and the question was deferred until the hearing where Complainant was free to raise the issue again. *See Liphatech, Inc.*, at *26 (citing *Smith*, 2004 EPA ALJ LEXIS 128 at *165). The Presiding Officer further noted that *Daubert* factors may not be pertinent in certain cases where they are not reasonable measures of the proffered expert testimony. *Id.*

B. Witnesses

1. Amelie Isin

Complainant's prehearing exchange narrative describes Ms. Isin as the lead investigator in this matter and states that, in addition to her factual testimony, "Ms. Isin may be qualified to

testify as an expert in EPA's mobile source enforcement program; penalty calculation under the EPA's Clean Air Act Mobile Source Civil Penalty Policy; and catalytic converter analysis."[1] Complainant's Initial Prehearing Exchange at 4.

Respondents argue that at this stage of the proceeding, in advance of the hearing, Ms. Isin's testimony should be stricken and not admitted because it is insufficient in light of *Daubert*. Mot. at 5. Respondents assert that Ms. Isin lacks the skills, training, and experience to testify as an expert witness on matters involving "economics (or economic damages), economic penalties based on the gravity component, the financial history of Respondent." Mot. at 4. They assert that Ms. Isin fails to meet the guidelines of FRE 702 because she identified herself as an engineer in her resume and did not specify she had a background and training in economics. *Id.*

Complainant indicated in its prehearing exchange that Ms. Isin may provide factual testimony in her capacity as the lead investigator in this matter, and also expert testimony on areas of EPA's mobile source enforcement program and penalty calculation under the Penalty Policy. Expert testimony would be based on Ms. Isin's extensive experience in mobile source enforcement since April 2007, from which Complainant clearly can qualify Ms. Isin as an expert with specialized knowledge and experience in these areas. *See Smith*, 2004 EPA ALJ LEXIS 128 at *164. "FRE 702 allows testimony by an expert witness if [her] specialized knowledge will

[1] Respondents' Motion states that Complainant designated Ms. Isin as an expert who can provide relevant expert testimony on twelve topic areas: (1) engine sampling; (2) selection of engine samples; (3) inspection of vehicles and process used; (4) oversight of inspections; (5) calculation of penalties; (6) gravity component of civil penalty assessments; (7) economic benefit obtained; (8) financial history; (9) overall penalty calculation; (10) history of compliance; (11) "willful negligence" [sic]; and (12) analysis of catalytic converters. Mot. at 3-4. Much of this list seems to come out of thin air, and bears little relation to the short list of topics Complainant actually identified in its Prehearing Exchange. *Compare* Mot. at 3-4 *with* Complainant's Initial Prehearing Exchange at 4. Further, Respondents' topic areas (1), (2), (3), (4), and (12) relate to liability and are not involved in the remaining issues in controversy regarding penalty.

assist the trier of fact to understand the evidence or determine a fact in issue, where [she] is 'qualified as an expert by knowledge, skill, experience, training *or* education.'" *Id.* (quoting Fed. R. Evid. 702) (emphasis added); *see also* CX155 (resume of Amelie Isin). Complainant expects that most or all of Ms. Isin's testimony will be factual. However, Complainant will be able to qualify Ms. Isin as an expert in these areas by laying a foundation at hearing if necessary. *See In re Service Oil, Inc.*, 2006 EPA ALJ LEXIS 16 at **12-13 (ALJ Apr. 12, 2006) (no basis to rule on admissibility of testimony and report where complainant had not yet laid foundation and respondent had not provided any specific challenges to reliability). Further, the full extent of Ms. Isin's potential testimony is not encapsulated in the filings to date, making any determination that Ms. Isin's testimony is "inadmissible for any purpose" premature. *See Liphatech* at *27 (premature to exclude expert testimony where full extent of testimony not set forth in filings).

The Motion further attacks Ms. Isin's methodology for sampling vehicles for testing, claiming such methodology is unreliable and lacks substantive peer-reviews and established testing parameters. Ms. Isin's testimony in this area would be primarily factual, and thus not meaningfully reviewable under the *Daubert* principles. Moreover, this area was relevant to the issue of liability which has been resolved through accelerated decision and thus is not an appropriate matter to be addressed in the penalty hearing.

2. Dr. Ronald Heck and Dr. John Warren

Complainant has previously stated that Dr. Heck and Dr. Warren have information that pertains solely to the issue of liability, and consequently will not be called to testify at the penalty hearing. Complainant's Resp. to Respondents' Mot. to Take Depos. at 5-6. Respondents' Motion to exclude the testimony of Dr. Heck and Dr. Warren from the penalty hearing is therefore moot, and should be denied as such.

Substantively, in the guise of seeking to exclude Dr. Heck and Dr. Warren's prospective testimony, Respondents again attempt to raise untimely and unsupported arguments against their prior declarations. To do so, Respondents mischaracterize the content of the declarations, and offer speculation about what each witness might say if given the opportunity to testify at hearing. Dr. Heck and Dr. Warren's resumes provide extensive information concerning their specialized knowledge and experience concerning catalytic converter technology and statistical analysis, respectively. CX 158; CX 157. Further, the extent of Dr. Heck and Dr. Warren's potential testimony is not fully encapsulated in the existing record. Respondents have not shown that their testimony would be inadmissible for any purpose should they be called to testify. However, this is beside the point. Complainant does not intend to call Dr. Heck or Dr. Warren to testify at the penalty hearing, and Respondents' Motion with regard to these witnesses should be denied as moot. [2]

3. Dr. James J. Carroll

Respondents treat Dr. Carroll's report (CX192) as the complete encapsulation of his expected testimony, which was never intended. A motion *in limine* to exclude a witness based solely on a report submitted into the prehearing exchange is not appropriate. *See Liphatech* at *27 (holding it premature to conclude that testimony could not be admitted for any purpose where filings did not embody full extent of potential testimony).

With regard to the report, Respondents take certain disclaimer language contained in the report's cover letter out of context to argue that the report is internally contradictory or inherently unreliable. Mot. at 12-14. Specifically, the cover letter to the report states:

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[2] Complainant would add, however, that it may still call Dr. Heck and/or Dr. Warren as a rebuttal witnesses based on the disposition of other pending motions.

> This report does not constitute an "audit," "review or compilation of financial statements," or other activity defined by professional standards. This report does not express an "opinion concerning the fairness of financial statements" as representing the financial position of an individual or organization.

CX192 at EPA-002576. Respondents claim that the report is "essentially" an "audit, review, or compilation of financial statements" (Mot. at 13), without offering definitions for those terms or support for the claim that Dr. Carroll's analysis and testimony constitutes one of the defined activities. Respondents go further, claiming that Dr. Carroll's analysis does "not conform[] to the professional standards required by a CPA." *Id.* This is simply a mischaracterization of the cover letter's plain language.

Respondents also claim that Dr. Carroll's analysis, as outlined by the report, is "nothing more than a subjective opinion that cannot be reasonably assessed for reliability" because it is based on Dr. Carroll's experience. *Id.* Dr. Carroll's resume reflects that he holds an MBA in finance and a PhD in business administration, and is a Certified Public Accountant, a Certified Management Accountant, a Certified Fraud Examiner, a Certified Financial Manager, is Certified in Financial Forensics, and is a Chartered Global Management Accountant. CX159 at EPA-002071. Dr. Carroll has extensive experience teaching in the field of accounting at the secondary and post-secondary level, managing corporate accounting departments, providing expert financial analysis in litigation, and providing financial consulting to new or distressed businesses. *Id.* at EPA-002071 to EPA-002092. Dr. Carroll's education and experience are factors that will allow Complainant to qualify Dr. Carroll as an expert at the penalty hearing, enabling him to provide an expert opinion. Respondents' contention that Dr. Carroll cannot provide an opinion based on his experience is misplaced.

Contrary to Respondents' claim, the report is based on more than Dr. Carroll's experience and opinion. The report identifies the fundamentals of ratio analysis, the data published by the Risk Management Association ("RMA"), the role RMA data plays in ratio analysis, and how Dr. Carroll used ratio analysis and RMA data to analyze the financial data in Respondents federal tax returns. CX192. At the penalty hearing, Dr. Carroll may testify about his background and experience, the methods he employed in his analysis, and how he applied those methods to the facts of this case, and Respondents will have the opportunity to cross-examine him about the reliability of his analysis. Respondents have not at this time shown that Dr. Carroll's testimony is inadmissible for any purpose, and their Motion to exclude his testimony should be denied.

Conclusion

Respondents have not shown that Complainant's witnesses should be precluded from providing any expert testimony at hearing, because Respondents have not shown that Complainant's witnesses' potential expert testimony is not admissible for any purpose under 40 C.F.R. § 22.22(a)(1). Therefore, Complainant respectfully requests that the Motion be denied.

Respectfully Submitted,

7/10/17
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CERTIFICATE OF SERVICE

I certify that the foregoing Response to Respondents' 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 three copies of the foregoing Response were placed in the mail this day for delivery by certified mail, return receipt requested, for service on Respondents' counsel at the address listed below:

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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.

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