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 TO TAKE DEPOSITIONS

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 to Take Depositions (the "Motion"), which was transmitted to Complainant on June 16, 2017, and filed on June 17, 2017. In the Motion, Respondents request leave to depose seventeen potential witnesses in total, on topics pertaining to penalty and the settled issue of liability. Respondents' request is overbroad and does not satisfy the criteria for depositions set forth in 40 C.F.R. § 22.19(e)(3), and should be denied. In the alternative, if Respondents are given leave to depose any potential witness, Complainant requests that the Presiding Officer limit the scope of permissible questions to those relevant to the determination of an appropriate penalty in this matter, and limit the duration of deposition to one (1) day and not exceed three (3) hours.

I. Legal Standard

The Consolidated Rules that govern this proceeding provide that the Presiding Officer may order additional discovery if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
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> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
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> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1). A party seeking to take depositions on oral questions must additionally show that:

> (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
>
> (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

40 C.F.R. § 22.19(e)(3).

II. Respondents' Requests

Respondents request leave to depose each potential witness identified in Complainant's Prehearing Exchange, seventeen witnesses in total.[1] Respondents have not demonstrated that their request to depose some or all of these seventeen individuals is justified. Respondents' request seeks information that is not relevant or probative to the remaining issue of penalty, and

[1] The discovery provisions of the Federal Rules of Civil Procedure require a party to obtain leave of court before taking more than ten depositions. Fed. R. Civ. P. 30(a)(2)(A)(i). In contrast, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or suspension of Permits ("Consolidated Rules") require parties to obtain express leave from the Presiding Officer prior to taking a single deposition.

would impose a significant and unreasonable burden on Complainant. Respondents also have not shown that they cannot obtain the information sought through alternative and less burdensome means, or that relevant information will not be preserved for presentation by a witness at hearing.

Respondents direct a portion of their inquiry towards how the proposed penalty was calculated in this matter, but they primarily focus on matters relevant only to the settled issue of liability and the sworn declarations that were exhibits with regard to Complainant's Second Motion to Supplement the Prehearing Exchange and Combined Response Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision, filed January 3, 2017.[2] Respondents state that they now seek to take depositions in order to obtain "additional information on the contents of each declaration submitted." Mot. at 1. Motions on liability were resolved and Respondents' liability was established, by Chief Judge Biro's May 3, 2017 Order on Partial Accelerated Decision and Related Motions ("May 3rd Order") and June 15, 2017 Order on Respondents' Motion for Reconsideration or Interlocutory Appeal ("June 15th Order").

Turning the Consolidated Rules on their head, Respondents contend that, "given the likelihood that some . . . witnesses will not be present to testify at the hearing now that the hearing has been limited to the issue of penalties," Respondents need to depose witnesses about their declarations or other information relevant to liability because "there is substantial reason to believe" the information "may otherwise not be preserved for presentation by a witness at the hearing." Mot. at 6. Essentially, Respondents argue they need to take depositions to obtain

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[2] Respondents' Motion refers to the Declaration of Dr. Ronald M. Heck as introduced in "Complainant's second motion to supplemental [sic] the prehearing exchange." Mot. at 3. This is a mistake. Dr. Heck's Declaration. Exhibit 176, was included in Complainant's First Motion to Supplement the Prehearing Exchange, filed on November 28, 2016, in conjunction with Complainant's Motion for Partial Accelerated Decision.

information that is not relevant in a hearing on penalty precisely because it is no longer relevant. To the extent Respondents are seeking information that is no longer relevant, i.e. information to challenge the finding of liability in this matter, their requests should be denied.

Respondents also have not shown that the requested depositions will not unreasonably burden Complainant. The potential witnesses that Respondents seek to depose are located in California, Colorado, Michigan, New Jersey, Pennsylvania, and the District of Columbia.[3] Respondents propose taking of depositions of "the potential witnesses via video conference, which would minimize the burden to Respondents." If this refers to video or audio-visual as a method of recording of testimony, minimizing the burden is hardly the case at all. Aside from the logistical problems involved, there is considerable expense in using video as a method of recording as opposed to alternative means. Even if Respondents' proposal entails video conferencing in order to view people in respective locations, not as a method of recording, that raises issues as to which secure video conference technology does Respondent intend to use and whether it is compatible with the EPA's secured information technology environment, and whether that technology is available to Complainant's potential witnesses. Coordinating seventeen geographically scattered witnesses' access to Respondents' video conference medium will likely pose a significant burden on Complainant. Further, assuming depositions can be performed via video conference, Complainant's counsel will likely still need to travel to the potential witnesses to prepare them and defend their depositions. The expense and loss of Agency personnel time would be significant, and unreasonable because the majority of the

[3] Sam King, Nathan Dancher, and Peter Husby are located in California. Jennifer Suggs and Benjamin Burns are located in Colorado. Cleophas Jackson, Emily Chen, and Stan Culross are located in Michigan. Dr. James Carroll and Dr. Ronald Heck are located in New Jersey. Amelie Isin is located in Pennsylvania. The remaining potential witnesses are located in or around the District of Columbia.

witnesses Respondents wish to depose do not have information relevant to the proposed penalty in this matter.

In their Motion, Respondents claim, without explanation, that the information sought cannot reasonably be obtained by alternative methods of discovery. Mot. at 2, 6. For the evidentiary hearing, however, the only issue that remains is the narrow one of penalty, and Complainant has provided substantial information in its Prehearing Exchange, Rebuttal Prehearing Exchange, and proposed exhibits in the Third Motion to Supplement the Prehearing Exchange concerning the proposed penalty, how the penalty was calculated and reasons supporting the calculation. Respondents have not identified with specificity what additional information they seek, or why they can only obtain that information through depositions on oral questions as opposed to alternative methods of discovery, in accordance with what the consolidated rules expressly require.

Complainant objects to Respondents' request to depose particular potential witnesses more specifically as follows:

1. **Dr. John Warren; Dr. Ronald Heck; Mario Jorquera; Andy Loll, Colin Wang; Sam King; Brent Ruminski; Cassidy Owen; Nathan Dancher; Peter Husby; Jennifer Suggs; and Benjamin Burns.**

Potential expert witnesses Dr. John Warren and Dr. Ronald Heck, and potential fact witnesses Mario Jorquera, Andy Loll, Colin Wang, Sam King, Brent Ruminski, Cassidy Owen, Nathan Dancher, Peter Husby, Jennifer Suggs, and Benjamin Burns, all were identified in Complainant's Initial Prehearing Exchange. All have information that pertains solely to the issue of liability in this matter. Because all questions of liability have been answered, Complainant will not call these witnesses to testify at the penalty hearing, and will not rely on their testimony

to support the proposed penalty in this matter.[4] Respondents' request to depose these potential witnesses should be denied because the information sought has no probative value to the determination of an appropriate penalty, and therefore, the burden of taking their depositions is not justified.

2. Stan Culross.

In its Initial Prehearing Exchange, Complainant identified Mr. Stan Culross as the Emission Lab Manager at Lotus Engineering, Inc. ("Lotus"), and a potential fact witness who oversaw and reviewed emissions tests performed on a vehicle from Respondents' engine family ETAOC.049MC2 pursuant to a confirmatory test order issued by the EPA's OTAQ. In fact, tests were conducted on two vehicles from that engine family at Lotus. Respondents state that "[b]ecause all other vehicles belonging to the engine family passed emissions at CEE and the only vehicle that allegedly exceeded emissions was tested by Lotus," and "that CO emissions of the vehicle reported by Lotus are nearly three times higher than the CO emissions of similar vehicles tested at CEE," they "have reason to believe that the test at Lotus was not properly

[4] Complainant's decision not to call Dr. Warren and Dr. Heck at the penalty hearing is premised on the assumption that such hearing will be limited to the issue of penalty only and that Complainant's Motion *in Limine* to Exclude Evidence and Testimony, filed June 23, 2017, will be granted with respect to Respondents' proposed witnesses Larry Doucet, Clark Gao, and Joseph L. Gatsworth, as such witnesses were proposed by Respondents apparently for the sole purpose of reviving the issue of liability at the penalty hearing. See Compl. Mot. *in Limine* at 2-3. If Mr. Doucet, Mr. Gao, and/or Mr. Gatsworth are allowed to testify at the penalty hearing, or if the issues settled by this Tribunal's Order on Accelerated Decision on Liability are allowed to be revived to become topics at the penalty hearing, Complainant wishes to reserve its right to call Dr. Warren and/or Dr. Heck as rebuttal witnesses at the penalty hearing. That being said, if Dr. Warren and/or Dr. Heck are to be called as witnesses at the penalty hearing in response to Respondents' liability witnesses being allowed to testify, depositions of Dr. Warren and/or Dr. Heck still would not be appropriate, as such witnesses would be called to testify solely on issues raised by Respondents' witnesses at hearing and Respondents would have the ability to cross-examine Dr. Warren and/or Dr. Heck if called.

conducted" and that "Mr. Culross is the only witness who can shed light on these factual issues." Mot. at 6.

At the outset, Complainant notes that the relevant Lotus test reports were provided with Complainant's Initial Prehearing Exchange as exhibits CX136 and CX138. Further, Respondents' own exhibits submitted with their First Motion to Supplement their Prehearing Exchange show that the vehicle of interest, VIN L9NTEACT7E1000882, exceeded the emission standard for CO when tested by Respondents at CEE on September 26, 2014, and again at Tovatt Engineering on October 1, 2014. *See* RX009; RX010 (showing weighted CO in excess of 12 grams/kilometer standard). Based on this record, where Respondents' evidence is in agreement with the results in the Lotus test report, it is hardly clear that there is a factual dispute about which Mr. Culross can provide probative evidence. In addition, Complainant notes that on information and belief, Respondents' witness and employee David Garibyan was present during the emissions test conducted on vehicle with VIN L9NTEACT7E1000882, at Lotus on September 16, 2014. *See* RX001 at 12–16 (showing that David Garibyan inspected the test unit and adjusted the idle speed to resolve a stalling issue).

Mr. Culross is not an Agency employee, and time spent being deposed may represent a loss of wages or other income. Given that Respondents have the Lotus test reports, and that their own evidence shows the vehicle in question exceeded the standard for CO at the end of its useful life, the burden a deposition would impose on Mr. Culross outweighs any benefit Respondents will gain from deposing him. Respondents also have not shown that there is no less burdensome method of obtaining the information they believe Mr. Culross uniquely possesses. Complainant therefore requests that Respondents' request to depose Mr. Culross be denied.

3. Cleophas Jackson and Emily Chen

Respondents request leave to depose Mr. Cleophas Jackson to obtain "additional information on Mr. Jackson's anticipated testimony to properly prepare their defense and evaluate his qualifications as a potential expert." Mot. at 3.

In its Initial Prehearing Exchange, Complainant identified Mr. Jackson as the Center Director of the Gasoline Engine Compliance Center in the EPA's Office of Transportation and Air Quality, and explained "Mr. Jackson directs the operations of the EPA office that receives and reviews applications for EPA Certificates of Conformity ("COCs") submitted for gasoline-powered vehicles like those at issue in this matter." Complainant's Initial Prehearing Exchange at 4. Complainant explained that Mr. Jackson may "testify as a fact witness about Respondents' COC applications, annual production reports, and about the confirmatory test orders his office issued to Respondents," and may further be "qualified to testify as an expert about the EPA's Clean Air Act vehicle and engine regulatory program, and about emissions testing." *Id.* More particularly, Mr. Jackson is expected to testify about the role emissions data plays in determining whether an application for a COC will be granted, and how the submission of false or inaccurate information in an application harms the EPA's vehicle and engine certification program. Mr. Jackson may also confirm that his office did issue confirmatory test orders to Respondent Taotao USA in 2014 and 2015, and that one or more of Respondents' vehicles failed confirmatory emissions testing performed at Lotus. Mr. Jackson may also testify about communications he and his staff have had with Respondents' representatives, including Matao Cao, about Respondents and closely-related entities, Respondents' relationship to other entities, and observations he and his staff made during a facility visit and audit of Respondents' manufacturing facility in China. Mr. Jackson's resume was provided with Complainant's Initial Prehearing Exchange as CX156,

and his revised resume was submitted as proposed Exhibit 156A in Complainant's Third Motion to Supplement the Prehearing Exchange.

Respondents have not identified with any particularity what additional information they seek to obtain from Mr. Jackson in advance of hearing, or why Mr. Jackson's resume is not sufficient to allow them to evaluate his qualifications as an expert in the EPA's certification program or vehicle emissions testing. To the extent Respondents do know what information they seek, they have not explained why they cannot obtain it through alternative and less burdensome means. Mr. Jackson is expected to testify at the penalty hearing and Respondents will have the opportunity to cross-examine him at that time. Respondents have not shown why there is a basis under the Consolidated Rules to depose him, and Complainant requests that Respondents' request to take Mr. Jackson's deposition be denied.

Respondents request leave to depose Ms. Emily Chen to obtain "additional information on Ms. Chen's anticipated testimony to properly prepare their defense." Mot. at 2. Complainant identified Ms. Chen as a potential fact witness who might testify about Respondents' Certificates of Conformity ("COC") applications and about confirmatory test orders the EPA's Office of Transportation and Air Quality ("OTAQ") issued to Respondents in 2014 and 2015. As with potential witness Mr. Jackson, Respondents have not identified with any particularity what additional information they seek to obtain from Mr. Chen in advance of hearing. To the extent Respondents do know what information they seek, they have not explained why they cannot obtain it through alternative and less burdensome means. Respondents have not shown why there is a basis under the Consolidated Rules to depose her, and Complainant requests that Respondents' request to take Mr. Chen's deposition be denied.

4. Dr. James Carroll

Complainant previously identified Dr. James Carroll as a potential expert witness who would testify regarding the effect of the proposed penalty on Respondents' ability to continue in business "and other matters concerning Respondents' finances and accounting." Respondents' Initial Prehearing Exchange at 6. Complainant explained that "Dr. Carroll holds an MBA in Finance from Rutgers University, and a Doctorate in Business Administration from Nova Southeastern University," and is "a Certified Public Accountant, Certified Management Accountant, Certified Fraud Examiner, Certified Financial Manager, a Chartered Global Management Accountant, and is Certified in Financial Forensics." *Id.* Complainant has provided Dr. Carroll's resume as CX159.

Respondents state that they "seek information regarding Dr. Carroll's determination that Respondents have an ability to continue in business, the calculation models employed, and the information relied upon," and claim they "cannot successfully challenge the witness and his proposed testimony without this information." Mot. at 4. On the same day that Respondents filed their Motion, Complainant filed a motion to supplement the Prehearing Exchange with an expert report prepared by Dr. Carroll, marked as CX192.[5] The report provides the information Respondents seek regarding Dr. Carroll's analysis and opinion. Respondents will have the opportunity to cross-examine Dr. Carroll at the penalty hearing in this matter. Complainant requests that Respondents' request to depose Dr. Carroll in advance of the hearing be denied.

[5] On June 23, 2017, Respondents filed a Motion *in Limine* seeking, among other things, to exclude Dr. Carroll's testimony and report. Respondents' Motion *in Limine* to Exclude Testimony and Evidence of Ronald M. Heck, John Warren, Amelie Isin, and Dr. James J. Carroll at 11–12.

5. Amelie Isin

Respondents request permission to depose potential witness Amelie Isin to discover information about "vehicle examinations conducted on subject vehicles, removal and subsequent delivery of catalytic converters for testing," the "sampling method employed in this matter," and "catalytic converter analysis." Mot. at 2. These topics pertain to liability, which has already been resolved in this matter. Complainant requests that Respondents request to depose Ms. Isin on these topics be denied.

Respondents also request leave to depose Ms. Isin about additional information they believe she has about Respondents' defense of "fair notice" and degree of cooperation, because the "information is crucial to proper penalty calculation and Respondents' position that the proposed penalty is inappropriate and fails to account for all necessary penalty factors." *Id.* Respondents also seek information about Ms. Isin's qualifications to testify as an expert about the penalty calculation or other topics. *Id.* The Presiding Officer has already ruled that Respondents' claim that they lacked fair notice of what the law required "is not credible." June 15th Order at 8. With regard to the penalty calculation, Complainant has already provided in its Initial Prehearing Exchange, Rebuttal Prehearing Exchange, and various exhibits (see, e.g., CX160 through CX163, CX171, CX192), a robust explanation of how the proposed penalty was calculated. Complainant has also provided a copy of Ms. Isin's resume as CX155. Further, Respondents will have the opportunity to examine Ms. Isin during the penalty hearing.

Respondents have not explained why the information provided to date is not sufficient to allow them to prepare their defense, or identified with particularity what additional information

they hope to obtain through Ms. Isin's deposition. Complainant therefore requests that Respondents' request for leave to depose Ms. Isin be denied.

Conclusion

Respondents' Motion is another example where Respondents strain credulity and seem intent to cause delay. The Presiding Officer recently found there is reason to postpone the hearing, i.e., to ensure availability of witnesses and to allow Respondents additional time to develop a more complete understanding of the case and how the penalty was calculated. The continuance must not be taken by Respondents as a green light to stray off the clear path set for resolution of the proceeding with depositions on resolved matters and where there are alternative less burdensome means of case preparation. For the foregoing reasons, Complainant requests that the Presiding Office deny Respondents' Motion to Take Depositions. If the Presiding Officer does grant Respondents leave to depose witnesses, then Complainant request that the number of witnesses be limited and specified, and that the method of recording the testimony also be limited and specified as audio-stenographic means, as opposed to video or audio-visual as a method of recording of testimony, thereby avoiding the undue burden and expense associated with the latter. In addition, Complainant requests that the depositions be in person, or alternatively that conference medium, to the extent used, be limited to teleconference only. Further, Complainant requests that the scope of the deposition exclude matters pertaining to liability and be limited to matters relevant to the determination of an appropriate penalty in this matter, and be limited in duration to one (1) day and not exceed three (3) hours.

Respectfully Submitted,

7/3/17
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CERTIFICATE OF SERVICE

I certify that the foregoing Response to Respondents' Motion to Take Depositions 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 sent this day 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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