UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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' Reply in Support of Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction

Respondents TaoTao USA, Inc., TaoTao Group Co. Ltd., and Jinyun County Xiangyuan Industry Co., LTD., (hereafter "Respondents") file this Reply in Support of Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction. Respondents request the Presiding Officer find that Complainant failed to establish that the Environmental Protection Agency ("EPA") had subject matter jurisdiction at the time the Original Complaint, and the subsequent Amended Complaint, was filed. Particularly, the evidence included in the prehearing exchange, comprising of two letters signed by Assistant Section Chief, Karen Dworkin, is legally and factually insufficient to support a waiver of section 205(c) of the Clean Air Act ("CAA"). Ms. Dworkin's letters fail to show that the Attorney General and the EPA Administrator made a joint-***determination*** that this matter, where Complainant seeks $3,295,556.32[1] for the 109,964 violations is ***appropriate*** for administrative penalty assessment. *See* CAA § 205(c) (emphasis added).

INTRODUCTION

[1] In Complainant's Fourth Motion to Supplement the Prehearing Exchange ("Fourth Motion"), Complainant reduced the amount of penalty sought to $3,030,320. *See* Fourth Motion at 6-7.

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A motion challenging subject matter jurisdiction may be brought at any time. Fed. R. Civ. P. 12(h)(3); 40 C.F.R. § 22.20(a).[2] Complainant initiated this administrative action on November 12, 2015, seeking a penalty in excess of the $320,000, and claiming that waiver determination had been made.[3] On January 11, 2016 and February 9, 2016, Respondents' challenged the facts underlying Complainant's jurisdictional allegations.[4] Complainant's obligation to put forward evidence to prove jurisdiction arose at this time. *See In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. 498, 518 n. 40 (EAB 2004); *see also La Reunion Francaise S.A. v. Barnes*, 247 F.3d 1022, 1026 (9th Cir. 2001) ("Plaintiff bears the burden of production after a defendant challenges the facts underlying the jurisdictional allegations."); *Bank One, Tex. v. Montle*, 964 F.2d 48, 50 (1st Cir. 1992) ("Generally, once challenged, the party invoking subject matter jurisdiction * * * has the burden of proving by a preponderance of the evidence the facts supporting jurisdiction.

Complainant did not offer any evidence to support its allegations of jurisdiction until August 25, 2016, when as part of its Initial Prehearing Exchange, Complainant submitted a letter signed by Assistant Section Chief, Karen Dworkin, in which she appears to concur with a January 30, 2015 letter, requesting a waiver of section 205(c) limitation to pursue an administrative action against Taotao USA, Inc., and related entities, in connection with the

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[2] "The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (citations omitted) (jurisdiction upheld); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") (jurisdiction upheld).

[3] *See* Am. Compl. ¶ 18; Am. Compl. ¶ 21.

[4] *See* Respondent Taotao USA, Inc.'s Original Answer and Request for Hearing ¶ 18; Respondent Taotao Group Co. Ltd.'s Original Answer and Request for Hearing Subject to the 12(b)(5) Motion to Quash ¶ 18; Respondent Jinyun County Xiangyuan Industry Co. Ltd.'s Original Answer and Request for Hearing Subject to the 12(b)(5) Motion to Quash ¶ 18.

manufacture and sale of highway motorcycles and recreational in violation of the certification requirements of the Act and implementing regulations. *See* CX026. Complainant also submitted a second letter from Ms. Dworkin, which again refers to a letter requesting a waiver of limitations for additional vehicles, and concurs with said request of waiver "of the limitation on EPA's authority to assess administrative penalties, in order pursue an administrative penalty in this matter for these additional vehicles" (totaling 1681) and "***future violations*** of Section 203(a) of the CAA…" CX028 (emphasis added).

Complainant's failed to submit any evidence showing that a determination on the appropriateness of a larger penalty amount was made by anyone with actual or delegated authority of to waive statutory limitations.

The Tribunal could hear this matter only if Complainant had satisfied the statutory requirements prior to initiating this administrative action. *See Morrison v. Nat'l Australia Bank Ltd.,* 547 F.3d 167 (2d Cir. 2008), aff'd 130 S. Ct. 2869 (2010) (quoting *Arar v. Ashcroft*, 532 F.3d 157, 168 (2d Cir.2008)); *see* also *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961) (citation and internal quotation omitted) ("The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in good faith."). In the Complaint, Complainant sought the maximum civil penalty authorized by the Clean Air Act.[5]

Because the Tribunal cannot rule on the merits of this case if it lacks the statutory or constitutional or power to adjudicate it, the Presiding Officer had to determine jurisdiction as a

[5] Complainant reserved it's right to the maximum civil penalty authorized by the CAA, claiming that the maximum penalty for each of the alleged 109,964 violations was $37,500. *See* Am. Compl. ¶ 138-9.

threshold matter before determining liability, or otherwise ruling on the merits of this Complaint. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007).

On May 3, 2017, in a footnote of the Order on Partial Accelerated Decision and Related Motions ("May Order" the Presiding Officer, stated that "[i]n this case, the Attorney General agreed the Agency could seek a penalty of more than $320,000. *See* May Order at 18, n.25.

ARGUMENT

Complainant has failed to prove its jurisdictional allegations because (1) Complainant's exhibit CX026 is not legally and factually sufficient in proving a waiver of section 205(c) of the CAA; (2) Complainant's exhibit CX028 only covers an additional 1681 violations, not the additional 45,587 included in the Amended Complaint; (3) the delegation of authority directive attached to Complainant's Response as Attachment G, only shows that the Assistant Chief of the Environment Enforcement has the delegated authority to approve or deny the commencement of a proceeding for the assessment of an administrative penalty of greater than $200,000 if the EPA Administrator submits an application so long as the proposed action will not adversely influence the disposition of claims totaling more than the amounts designated in preceding sections, i.e. $1 million; and (4) Complainant has failed to show that the Director of AED made any determination, that the director of OCE concurred with any such determination, and the affected Regional Administrators or their designees were notified when the Director of AED exercised the delegated authority. Accordingly, the Presiding Officer should find that Complainant has failed to prove its jurisdictional allegations.

1. The evidence submitted to prove jurisdiction to initiate this action is legally and factually insufficient in establishing subject matter jurisdiction.

In its Response to Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Complainant attached four additional letters, three from the Complainant and an

additional letter from Ms. Dworkin, to support its jurisdictional allegations. Complainant asserts that the three letters from the Complainant, the three concurring letters from Ms. Dworkin, the signed Complaint and the Amended Complaint document that a valid determination was made to waive the limit on the Administrator's authority to assess an administrative penalty against Respondents in this action. *See* Complainant's Response at 6. But Complainant never submitted the three letters from Complainant and the additional letter from Ms. Dworkin in its Prehearing Exchange. Because those letters were not a part of the prehearing exchange when the Tribunal made rulings on the merits of this Complaint, nor were they included in Complainant's Motion Requesting Official Notice, Complainant cannot now rely upon them to establish jurisdiction. *Julie's Limousine & Coachworks, Inc.,* 2004 EPA ALJ LEXIS 134, *9 (ALJ, August 26, 2004); 40 CFR § 22.19(g). Complainant has offered no good cause for its failure to submit Mr. Brooks' letters as part of its prehearing exchange.[6] *Id.*

The Clean Air Act limits EPA's authority to seek administrative penalties is limited to actions where the maximum amount of penalty sought does not exceed $200,000.[7] CAA § 205(c)(1), 42 U.S.C. § 7524. To overcome the jurisdictional limitations of the Act, Complainant must prove, by a preponderance of the evidence, that the Administrator and the Attorney General jointly determined that a matter involving a larger penalty amount is appropriate for administrative penalty assessment. *Id.*; *In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. at

[6] Complainant seems to incorrectly suggest that it did not have the obligation to put forward evidence to prove jurisdiction until Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction. Complainant's Response at 5. Complainant's foregoing suggestion lacks merit because Complainant's foregoing obligation arose once Respondents challenged the facts underlying Complainant's jurisdictional allegations in their Answers to the Original Complaint and subsequent Answers to the Amended Complaint. *See supra* at 4.

[7] The statutory maximum penalty level has adjusted over time pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990. In this matter, Complainant has determined the statutory maximum to be $320,000. Am. Compl. ¶ 21.

518 n. 40. Once Respondents challenged Complainant's jurisdictional allegations, Complainant was obligated to present competent evidence of a valid-joint determination of the jurisdictional limitation made by the appropriate officials. *In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. at 518 n. 40. The only evidence introduced to support Complainant's assertion that the EPA had jurisdiction to initiate this administrative action is a letter dated March 17, 2017, signed by Karen Dworkin, the Assistant Section Chief of the Environmental Enforcement Section of the Environment and Natural Resources Division of the Department of Justice (the "First Letter"). CX026. In support of adding an additional 45,587 additional violations to this action, Complainant submitted another letter dated June 2, 2016, also signed by Ms. Dworkin (the "Second Letter").

The First Letter appears to concur to a request for a waiver of limitations, purportedly made in a letter dated January 30, 2015 by Phillip A. Brooks, the Director of the Air Enforcement Division, who is the Complainant in this matter. The January 30, 2015 letter from Mr. Brooks was not submitted in the prehearing exchange, or at any time thereafter, until Complainant filed its Response to Respondents Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Complainant's Response"). *See* Attachment H of Complainant's Response. Because Mr. Brooks' letter was not in evidence at the time the Presiding Officer issued orders on the merits of this Complaint, including an order granting Complainant's Motion Requesting Official Notice of the waiver of limitations, the letter is inadmissible as proof of a valid joint determination. *Julie's Limousine & Coachworks, Inc.,* 2004 EPA ALJ LEXIS at *9; 40 C.F.R. §§ 22.19(a)(1), (g), 22.22(a). Complainant has offered no good cause for its failure to submit Mr. Brooks' letters as part of its prehearing exchange. *Id.* Additionally, the letters were not in evidence prior to the Presiding Officer's rulings on the merit of this case.

However, even if the letter had been submitted as part of Complainant's Initial Prehearing Exchange, it would not show that the EPA Administrator, or someone with delegated authority, made a determination that this matter was appropriate for administrative penalty assessment because the memorandum that is referred to Mr. Brooks' letter is wholly redacted, and because the letter states that based on the memorandum, the "EPA believes that the assessment of an administrative penalty in excess of the statutory threshold would be appropriate for administrative penalty assessment…" the memorandum is essential to determine who made the initial determination, and if Mr. Brooks ever concurred with said EPA's determination.

2. The evidence submitted to prove jurisdiction over the additional vehicles, in excess of the 1681 recreational vehicles, is legally and factually insufficient.

In response to Respondents' argument that the Second Letter only waives limitations to seeks administrative penalties for the additional 1681 vehicles, and any ***future*** violations. The Second Letter fails to show that Ms. Dworkin concurred in the request to waive limitation to seek administrative penalties for additional vehicles that were currently in violation of Section 203(a) of the CAA. *See* Respondents' Motion at 6-7; *see also* CX028.

Complainant, in response, asserts that Ms. Dworkin's Second Letter, CX028, consists of a valid-joint determination to waive limitations to pursue administrative penalties for "newly-discovered" violations, not "future violations." Complainant's position is in direct conflict with the clear language of Ms. Dworkin's Second Letter. In the letter, Ms. Dworkin refers to a letter dated May 6, 2016, requesting a waiver and states:

> "This letter sought a waiver to pursue administrative penalty assessment action against Taotao USA, Inc., and related entities, for additional recreational vehicles (now totaling

1681) that have been found to violate the certification requirements of the Act and its implementing regulations. I concur with your

request for a waiver pursuant to Section 205(c) of the Clean Air Act (CAA), 42 U.S.C. § 7524(c), of the limitation on EPA's authority to assess administrative penalties, in order to

pursue an administrative penalty in this matter for these additional vehicles. In addition, you sought a waiver for certain potential additional violations that may occur in the future. I concur with your waiver request for future violations of Section 203(a) of the CAA, 42 U.S.C. § 7522(a), as long as such violations are substantially similar to those covered under the waivers already issued to date, and do not cause the total number of waived vehicles in the matter to exceed 125,000. (This includes both any vehicles that are included in your administrative complaint and vehicles that are not pled in the complaint but that EPA seeks to resolve in its administrative penalty assessment action."

CX.028. The foregoing letter does not use the phrase "newly-discovered violations." The letter clearly refers to a request for waiver of certain potential additional violations that may occur ***in the future***, and then concurs with the request for ***future violations***. Complainant's arguments are therefore misleading because newly-discovered violations is not the same as violations that may occur in the future. The use of "may occur" instead of "may be discovered" clearly shows that Ms. Dworkin did not concur to the additional violations alleged in the Amended Complaint, except for 1681 additional violations of recreational vehicles.

3. The Assistant Chief of EES only has the authority waive limitations for matters involving a penalty of less than a $1,000,000.

Attachment G of authority directive attached to Complainant's Response as Attachment G, only shows that the Assistant Chief of the Environment Enforcement has the delegated authority to approve or deny the commencement of a proceeding for the assessment of an

administrative penalty upon application of the EPA Administrator. Exhibits CX026 and CX028 failed to show that the EPA Administrator made any such application. The prehearing exchange only contains Ms. Dworkin's letters which merely refer to requests made in certain letters by Mr. Brooks, and does not include any evidence of an application made by the EPA Administrator, or even Mr. Brooks. Because Complainant is barred from introducing Mr. Brooks' letters at this stage of the proceedings, without good cause, those letters cannot be viewed as the required EPA Administrator Applications. Even if Complainant had good cause, introducing the letters at this point to establish jurisdiction would mean that the Presiding Officer did not have jurisdiction to make rulings on the merits of the case until Complainant presented sufficient evidence to establish jurisdiction.

Additionally, in order for the Assistant Chief of EES to exercise the delegated authority described in Attachment G, the matter must not exceed the amounts designated in the Delegation Directive, and the authority to accept offers in compromise delegated to AAG by 28 CFR § 0.160(a). Because Complainant sought the maximum amounts permitted in the CAA, alleging that the maximum penalty for each of the thousands of violations was $37,500, the Assistant Section Chief did not have delegated authority to concur or deny he commencement of this administrative action. *See* Attachment G at 8.

4. Complainant has failed to establish a valid determination by the EPA Administrator or someone with delegated authority.

The Delegation of Authority documents included in Complainant's Response show that the Director of AED may have the delegated authority to make a waiver of the jurisdictional limitation of section 205(c), if the Director of OCE concurs with the determination, and the affected Regional Administrator is notified when the delegated authority is exercised. The

prehearing exchange record wholly fails to show that (1) the Director of AED made the determination; (2) the Director of OCE concurred in the determination; and (3) the Regional Administrator was notified.

CONCLUSION

For the foregoing reasons, Respondents prays that the Presiding Officer grant their Motion to Dismiss for Lack of Subject Matter Jurisdiction, dismiss this action in its entirety, and grant them such other relief to which they are entitled.

Respectfully Submitted,

08/28/17
Date

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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument 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 a copy of the foregoing Motion was sent this day via electronic mail for service on Complainant's counsel.

08/28/17
Date

William Chu