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' PREHEARING BRIEF

Pursuant to the Hearing Order and Notice, Respondents TaoTao USA, Inc., Taotao Group Co. Ltd., and Jinyun County Xiangyuan Industry Co., LTD. respectfully file their prehearing brief.

INTRODUCTION

The evidence at trial will demonstrate that Complainant's proposed penalty, CX193, is excessive, without regard to the law and the facts of this matter, and fails to accurately account for some or all of the statutory penalty assessment factors set forth in the Clean Air Act ("CAA"). *See* CAA § 205(c)(2); 42 U.S.C. § 7524(c)(2). The evidence will establish that Complainant's reliance on the Clean Air Act Mobile Source Penalty Policy ("Penalty Policy") in this matter is inappropriate, and even if said reliance were appropriate, the assessed penalty should only deter Respondents, not punish them excessively. *See* Penalty Policy at 1.[1] In this case, the evidence will

[1] This Penalty Policy applies to violation s of Title 11 of the Clean Air Act (Act) – Emission Standards for Moving Sources, 42 U.S.C. §§ 7521-7590, and regulations promulgated thereunder, that apply to vehicles and engines .1 These provisions require that vehicles and engines be certified by EPA to meet emissions standard s that are specific to each category and size of vehicle or engine. They also include requirements for record-keeping, emissions labeling, reporting of emission control defects, and warranties of vehicle/engine emission related components. The Title II provisions also prohibit tampering with, or installing devices to defeat, the emissions controls of a vehicle or engine.

show, that the violations complained of, occurred because Respondent relied on Complainant and the instructions that were provided to them by Complainant as part of an Administrative Settlement Agreement signed by the parties in 2010. *See* CX067. Complainant caused Respondent to rely upon laboratory test results of the catalytic converters equipped on the subject vehicles, and thereafter sought to punish them for said reliance. *See* CX067 at EPA000814:24; *see also* CX077 at EPA00935-EPA00935; RX012-RX013; RX027. The evidence will further show that not only did Respondents do what Complainant advised them to do, they acted in a reasonable manner, within the confines of technological limitations, and in accordance with the applicable statute and regulations to ensure compliance. *Id.* The evidence will establish that Respondents had no knowledge of the alleged violations until 2014, and did all that they could before and after gaining said knowledge to ensure that the catalytic converters equipped onto the subject vehicles conformed with the catalytic converters described in the respective COC applications. *See* CX069; CX092; CX125-CX133; RX006; RX012-rx013; RX027. For the foregoing reasons, no amount of penalty is reasonable to deter conduct that was inadvertent, unknowing, and incapable of being corrected.

The evidence will also show that Respondents have incurred substantial expenses, prior to the initiation of this administrative action, to comply with all of Complainant's demands in relation to the violations specified in the Amended Complaint. RX007, RX011, RX017, RX026. However, in spite of incurring said expenses, Complainant proceeded with this action, ignoring the efforts and expenses. *See* CX160; CX193. Therefore, if it is determined that deterrence is necessary, then the Presiding Officer should find that the substantial expenses Respondents have incurred prior to and since the initiation of this action be deemed sufficient penalty.

The evidence will show that Complainant's calculation of the economic benefit pursuant to the Penalty Policy, and its reliance on the "rule of thumb" method, is erroneous. *See* Penalty Policy at 10; RX004. Complainant's calculation of the gravity component and egregious multiplier is likewise erroneous because the evidence will show that Respondents did not cause actual or potential harm. CX099-CX122. Additionally, the failure to accurately specify a manufacturer's own catalytic converter standards, especially when the evidence shows that the catalytic converters in both the certified ratios and uncertified ratios passed emissions, is not important to the regulatory scheme. *See* Penalty Policy at 11 and 15. The evidence will show that because studies to date have not provided a reliable method or model for determining what emission rate a given catalytic converter with a specified precious metals ratio will achieve in a given application, reliable results can only be obtained by testing a catalytic converter's performance in a particular application. *See* CX176. Therefore, if a catalytic converter when tested shows that it does not exceed emissions, the precious metal concentrations are not important to the regulatory scheme, especially since the regulations allow the manufacturer to change their production vehicles so long as the changes do not cause the vehicles to exceed emissions. *See* 40 CFR 86.439-78; *see also* RX028-RX029. Because the violations did not cause actual or potential harm, and catalytic converter concentrations are not important to the regulatory scheme, the violations are not serious and therefore a gravity component is not necessary.

Additionally, even if there was a potential for harm by excess emissions, the basis for such potential harm was obliterated when the Agency demanded that Respondents test the uncertified vehicles for emissions at a laboratory that is approved by the Agency, pursuant to a test plan that is provided, or approved, by the agency, costing Respondents to spend well over $200,000.00.

The evidence will show that Complainant's erroneously increased the proposed penalty: by 30% for failure to remediate, by 20% for negligence, and by 20% for history of noncompliance. Respondents did remediate as much as possible given that the notice of violation was sent, and knowledge of violation was gained, years after the vehicles had already been imported and sold. Respondents were not negligent because they did what a reasonable manufacturer would, within the confines of available technology, and tested the catalytic converter for accurate concentrations for each engine family prior to importing the vehicles, and tested a vehicle from each engine family with those catalytic converters for emissions prior to and after importing the subject vehicles. Respondents had no way of knowing that somewhere along the line, the catalytic converters would stop matching the given concentrations. *See* RX012-RX013, RX027, CX069, and CX077. Finally, Respondents do not have a history of noncompliance because the "noncompliance" Complainant relies on to increase the penalty by 20% has nothing to do with the sort of violation that is alleged in the Amended Complaint. *See* CX067.

ANALYSIS

All vehicles identified in the Amended Complaint were equipped with catalytic converters manufactured by Nanjing Enserver Technology Co. Ltd[2] ("Nanjing Enserver") or Beijing ENTE Century Environmental Technology Co., Ltd[3] ("Beijing ENTE"). In total there were five different types of catalytic converters, in terms of their design, that were purchased and installed on all the vehicles belonging to the ten engine families: two purchased from Nanjing Enserver and three from Beijing ENTE. For purposes of this brief, Respondents will identify the five catalytic converter models, or "design standards," as follows:

[2] *See* CX001-CX003; i.e. vehicles identified in counts 1 to 3.
[3] *See* CX004-CX010; i.e. vehicles identified in counts 4 to 10.

1. N-35X70X100 - described in the COC applications for engine families ETAOC.049MC2 (counts 1) and DTAOC.049MC2 (count 3).[4]
2. N-35X100X200 – described in the COC application for engine family DTAOC.150MC2 (count 2).[5]
3. B-35X70X100 – described in the COC application for engine family CTAOC.049MC1 (count 4).[6]
4. B-35/50/100 – described in the COC applications for engine families ETAOX0.12A1T (count 5), DTAOX.124AAA (count 7), and DTAOX0.12A1T (count 8).[7]
5. B-35X100X100 – described in the COC applications for engine families DTAOX0.15G2T (count 6), FTAOX0.15G2T (count 9), GTAOX0.15G2T (count 10).[8]

The foregoing five catalytic converter models, or designs, were the only ones Respondents' ordered and purchased from Nanjing Enserver and Beijing ENTE, their catalytic converter suppliers.

Except for the COC application for engine family DTAOC.049MC2, all remaining nine engine families are carry-over applications, meaning that no significant changes have been made to those engine families in succeeding years and therefore the test data from the previous model years is used to represent the new model years. *See* Certification Guidance for Engines Regulated Under: 40 CFR Part 86 (On-Highway Heavy-Duty Engines) and 40 CFR Part 89 (Nonroad Engines). Therefore, by approving the carry-over applications, the agency has permitted Respondents to use the test data from the emission data vehicle ("EDV") tested in 2013 for

[4] *Compare* CX001 at EPA-000011 and CX003 at EPA-000090.
[5] *See* CX002 at EPA-000047.
[6] *See* CX004 at EPA-000126.
[7] *Compare* CX005 at EPA-000162, CX007 at EPA-000231, and CX008 at EPA-000263.
[8] *Compare* CX006 at EPA-000198, CX009 at EPA-000299, and CX010 at EPA000332.

DTAOC.049MC2, as the test data and EDV for the carry-over COC application for ETAOC.049MC2. The only difference between the two engine families is the first letter of the engine family, which represents the model year. Similarly, the test data of DTAOX0.12A1T, model year 2013, is the same as the test data for ETAOX0.12A1T, model year 2014, both of which rely on the EDV tested for an earlier model year in 2010. *Compare* CX005 at EPA000181-182 and CX008 at EPA000282-283. The same applies for engine families DTAOX0.15G2T (2013), FTAOX0.15G2T (2015) and GTAOX0.15G2T (2016) all of which rely on the test data of the original engine family, ATAOX0.15G2T (2010).

The evidence will show that catalytic converters belonging to the either each of the ten engine families or their predecessor engine families were tested by third-party laboratories located in either China or Canada. Respondents' catalytic converter "design standards" specified in each of the ten engine families were a product of those tests. Just as the Presiding Officer has found that all 109,964 vehicles were uncertified because the manufacturing process for said vehicles was the same, the Presiding Officer should likewise find that Respondents reliance on the aforementioned test results as being indicative of the catalytic converters purchased by Nanjing Enserver and Beijing ENTE was justified.

I. Complainant's Proposed Penalty is egregious and inappropriate.

Complainant has proposed a total penalty of $3,030,320.95.[9] The penalty exceeds the maximum penalty permitted in an administrative action in the Clean Air Act, and the maximum penalty identified in the Penalty Policy. *See* CAA § 205(c)(1); *see also* Penalty Policy at 2.

The Penalty Policy involves several calculations based on various considerations. These include, calculating: (1) the preliminary deterrence amount, which includes (a) the economic

[9] CX193 at EPA-002590.

benefit component and (b) the gravity component; (2) the initial penalty target figure, which includes adjustments for (a) degree of willfulness and/or negligence, (b) degree of cooperation/noncooperation and (c) history of noncompliance; (3) the violator's ability to pay; (4) the litigation risks and other unique factors; and (5) the necessary adjustments to the initial penalty target figure. In spite of all these different sections, and instructions on when and how to make the necessary calculations, Complainant has entirely ignored several sections of the Penalty Policy, and the sections Complainant has considered, have been incorrectly calculated in ComplaInant's propsed penalty determination: CX193.

The Preliminary Deterrence Amount

A. Economic Benefit

Complainant has relied on the rule of thumb method to calculate the economic benefit component. *See* Penalty Policy at 8-9; *see also* CX193. However, the use of the rule of thumb method is inappropriate in this matter. *See* Penalty Policy at 10.[10]

The evidence will show that the economic benefit in this case is not $15 per violation, as calculated in Complainant's proposed penalty policy. *See* CX193. Whereas Complainant has requested an assessment of an economic benefit in the amount of nearly $1.65 million, the economic benefit, if any, calculated in accordance with the Penalty Policy, pursuant to the factors unique to this case, would be as low as $105,000 or as high as $221,000. *See* RX004. The report prepared by Respondents' expert witness, Jonathan Shefftz, and his expert opinion at the hearing, will show that Complainant has grossly miscalculated the economic benefit component of the

[10] Pursuant to the Penalty Policy, "use of the rule of thumb method is typically inappropriate for use in situations where a detailed analysis of the economic benefit of noncompliance is needed to support or defend the Agency's position. Accordingly, the rule of thumb method generally should not be used in any of the following circumstances…a hearing is likely on the amount of the penalty… The defendant identifies economic benefit factors that are unique to the case…"

preliminary deterrence amount. The evidence, including the testimony of Jonathan Shefftz, will also show that there is no Beyond BEN Benefit or BBB, in this matter. Therefore, the economic benefit for all 109,964 violations based on several considerations falls somewhere between $105,000 to $221,000.

B. Gravity

Pursuant to the Penalty Policy, a gravity component is added to the economic benefit to reflect the seriousness of the offense. Whether or not an offense is serious depends on two factors: (1) Actual or Potential Harm; and (2) Importance to the Regulatory Scheme. Penalty Policy at 11.

(i) *Actual or Potential Harm*. This factor focuses on whether (and to what extent) the activity of the violator actually resulted in, or was likely to result in, the emission of a pollutant in violation of the standards specified for the particular vehicles or engines at issue. *Id.* Determining whether there was actual or potential involves two considerations: Number of violative engines and the amount of excess emissions attributable to the violation(s). *Id.* at 12. The first consideration is easy, in this case Complainant has alleged 109,954 violations. However, according to the Penalty Policy, the second consideration may not be known with certainty, "because precise quantification would require *emissions testing of the uncertified engine*." *Id.* (emphasis added). The evidence will show that unlike cases where information on emissions of uncertified engine is unavailable prior to the initiation of the administrative action, or unreliable because they are conducted by the violator on its own, subsequent to the initiation of the enforcement action, here the emission testing of uncertified vehicles was conducted prior to the initiation of the enforcement action, and was ordered by the agency, to be conducted at a laboratory pre-approved by the agency, and through a test plan preapproved by the agency. *See* CX099-CX122. Because reliable emission testing of

uncertified vehicles revealed that the vehicles did not exceed emissions, and the test results were available to, and ordered by the agency, prior to the initiation of the enforcement action, there was no need for Complainant to estimate potential emissions, by utilizing the "objective" manner of provided by the Penalty Policy, which involves the following considerations: engine size; emission control devices that are missing or defective; and the effectiveness of actions taken to remedy or mitigate the violation. *See* Penalty Policy at 12.

(ii) *Importance to the Regulatory Scheme.* The Penalty Policy provides that "[e]ven in the absence of harm in the form of excess emissions, the gravity component of the penalty should reflect the seriousness of the violation in terms of its effect on the regulatory program." *Id.* at 15. The evidence will show that the violations alleged in the Amended Complaint are not of the sort typically indicative of being important to the regulatory scheme, e.g. noncompliance with the emission labeling requirements. *Id.* Catalytic converter concentrations are not part of emission labeling requirements. Furthermore, the agency has not set any standards for catalytic converters. Therefore, the only standards that Respondents did not meet, pursuant to the Amended Complaint, are the standards they set for themselves, or those provided to them by the catalytic converter suppliers, and the laboratories that conducted the tests on each of the five different types of catalytic converters. *See* RX008, RX012, RX013, and RX027. Finally, the evidence will show that the regulation that required that all vehicles belonging to an engine family be identical in all material respects to the ***design*** specifications provided in the COC application was deleted in 1976, therefore, showing that perhaps the design specifications that are not specified in the ECI label are not important to the regulatory scheme.

Because the evidence at the hearing will show that there is no actual or potential harm, and the "illegal" conduct is not of the sort that is important to the regulatory scheme, the violation is not a "serious" violation and the gravity component should not be included.

C. Egregiousness

Even if the gravity component was applied because of the "importance to the regulatory scheme" the egregiousness multiplier for all 10 counts should be 1, i.e. minor. *See* Penalty Policy at 13-14. The evidence will show that according to the Penalty Policy the "major" and "moderate" levels of egregiousness are reserved for violations where there are actual or potential violations of emissions standards and other standards. *Id*.[11] Because the agency does not have any catalytic converter standards, and there is no actual or potential harm in this case, the egregiousness level is "minor, and the multiplier is 1.

Initial Penalty Target Figure

Although Complainant has increased the penalty amount to the maximum adjustment permitted for degree of willfulness and negligence, the evidence will show that Respondents were not willfull or negligent because they tested each of the five types of catalytic converters purchased by their suppliers, and acted in a reasonable manner. The evidence will show that Respondents had no way of knowing that the catalytic converters did not match the catalytic converters specified in their COC applications.

Additionally, the evidence will show that Complainant has increased the penalty by 20% for history of non-compliance even though the previous violation was completely different from

[11] "…engines or vehicles that are labeled as legal for sale in the United States, but that in fact do not meet applicable emissions and other standards, should be considered a more egregious violation (Moderate or Major, depending on the facts of the particular case)."

the present violation, the previous violation occurred approximately seven to eight years ago, the previous violations were resolved via an administrative settlement agreement ("ASA"), and the previous violations were entirely remedied pursuant to the ASA.

Finally, Complainant failed to adjust the penalty amount downwards to reflect Respondents cooperation. The evidence will show that Respondents have conducted various catalytic converter tests in China and Canada; spent hundreds and thousands of dollars in emission tests; hired an environmental engineer recommended by the agency; upon discovering the violations, submitted COC applications for vehicles that no longer contain catalytic converters but are otherwise identical to some or all of the vehicles identified in the Amended Complaint; and paid penalties for conducting catalytic converter tests after importing certain vehicles, which Complainant seeks to penalize once again in this action. In spite of all of Respondents' cooperation, Complainant has not decreased the proposed penalty amount to reflect the cooperation.

Ability to Pay

The evidence will show that Respondent Taotao USA, has an ability to pay $700,000 at the most. *See* CX004.

CONCLUSION

The evidence will show that Complainant's proposed penalty is grossly inappropriate. Complainant has failed to consider several factors mandated by the Clean Air Act. Therefore, the Presiding Officer should ignore the proposed penalty identified in Complainant's prehearing exchange as CX193, and assess a penalty that takes into consideration the unique facts of this matter.

Respectfully Submitted,

09/14/2017
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 instrument was sent this day via electronic mail to the following e-mail addresses for service on Complainant's counsel: Edward Kulschinsky at Kulschinsky.Edward@epa.gov, Robert Klepp at Klepp.Robert@epa.gov, and Mark Palermo at Palermo.Mark@epa.gov.

Respectfully Submitted,

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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 instrument was sent this day via electronic mail to the following e-mail addresses for service on Complainant's counsel: Edward Kulschinsky at Kulschinsky.Edward@epa.gov, Robert Klepp at Klepp.Robert@epa.gov, and Mark Palermo at Palermo.Mark@epa.gov.

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09/29/2017
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