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 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

The Director of the Air Enforcement Division of the U.S. Environmental Protection Agency's Office of Civil Enforcement ("Complainant") files this 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 ("Response"). In this Response, Complainant opposes the Motion for Accelerated Decision[1] and the Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss")[2] (collectively the "Motions") filed by Respondents Taotao USA, Inc. ("T-USA"), Taotao Group Co., Ltd. ("T-Group"), and Jinyun County Xiangyuan Industry Co., Ltd. ("JCXI") (collectively "Taotao" or "Respondents"). Both Motions rest on flawed interpretations of the Clean Air Act ("CAA" or "the Act") that run counter to the plain language of the Act and its implementing regulations. Additionally, the

[1] Cited as "Mot. Accel. Dec."

[2] Cited as "Mot. Dismiss."

undisputed facts in this matter show that Respondents are liable for the 109,964 violations of section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), alleged in the Amended Complaint.[3]

Complainant also requests permission to supplement its Prehearing Exchange pursuant to 40 C.F.R. § 22.19(f) with two exhibits attached to this Response. The first, marked CX179, is the Declaration of John Warren. The second, marked CX180, is the Declaration of Amelie Isin. Supplementing the record will not cause Respondents undue surprise or prejudice because both Mr. Warren and Ms. Isin are witnesses identified in Complainant's Initial Prehearing Exchange. Their declarations were prepared in response to Respondents' two Motions and pertain to matters that would be subject of each witness's testimony should this matter advance to hearing.

I. Respondents' Motions and the Standards of Review

Respondents filed their Motion to Dismiss and Motion for Accelerated Decision on November 28, 2016. By an order dated December 16, 2016, the deadline for this Response was extended to January 3, 2017.

Under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") a Motion to Dismiss pursuant to 40 C.F.R. § 22.20 is "analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP")." *Bug Bam, Prod., LLC*, FIFRA-09-2009-0013, 2010 EPA ALJ LEXIS 8, *3 (ALJ, Apr. 23, 2010) (citing *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993)). Dismissal is warranted if, taking the

[3] See Complainant's Motion for Partial Accelerated Decision, filed November 28, 2016. The arguments set forth in Complainant's Motion for Partial Accelerated Decision are hereby incorporated into this Response by reference. Complainant's Motion for Partial Accelerated Decision is cited as "Complainant's Mot. Partial Accel. Dec."

allegations in the complaint as true and drawing all inferences in favor of the plaintiff, the plaintiff still "fails to lay out 'direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.'" *Id.* at **3–4 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007)). When evaluating a motion to dismiss a court typically limits its review to the pleadings and any attached documents, "or matters as to which judicial notice may be taken. . . . If additional materials outside the pleadings are considered, the tribunal can exercise its discretion to convert the motion to one seeking summary judgment." *American Acryl, N.A., LLC*, CAA-06-2011-3302, 2011 EPA ALJ LEXIS 9, **5–6 (ALJ, June 2, 2011) (citations omitted); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (complaint must contain sufficient factual matter to state a claim that is plausible on its face).

Accelerated decision is appropriate "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). A motion for accelerated decision under the consolidated rules is analogous to a motion for summary judgement under Rule 56 of the FRCP. *In re Clarksburg Casket, Co.*, 8 E.A.D. 496, 502 (EAB 1999). "A factual dispute is *material* where, under the governing law, it might affect the outcome of the proceeding." *Id.* (quoting *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993)). "A factual dispute is *genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor." *Id.* (quoting *Mayaguez*, 4 E.A.D. at 781). However, if after drawing all reasonable inferences in favor of the non-moving party the evidence "is such that no reasonable decisionmaker could find for the nonmoving party, summary judgment is appropriate." *Id.* (quoting *Mayaguez*, 4 E.A.D. at 781).

II. Background

A. The Clean Air Act's Congressionally-Mandated Certification Program

Title II of the Act directs the EPA to administer a nationwide program to control the emission of air pollution from vehicles and engines. 42 U.S.C. §§ 7521(a), 7525(a)(1), 7547(a). For new vehicles and engines, the Administrator promulgates emissions standards for any pollutant that causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. §§ 7521(a)(1), 7547(a). Vehicles and engines must meet applicable standards for their entire useful life as determined by the Administrator. 42 U.S.C. § 7521(a)(1), (d). The Act enforces emissions standards through a mandatory prototype testing and design certification program administered by the EPA. 42 U.S.C. § 7525(a)(1), 7547(d).

Certification is mandatory[4] because the Act specifically prohibits any manufacturer of new vehicles or engines from selling, offering for sale, introducing, or delivering for introduction into commerce, or any person from importing into the United States, any new vehicle or engine, "unless such vehicle or engine is covered by a certificate of conformity," or from causing[5] any of

[4] Certain vehicles or engines may be exempt from certification for purposes such as research, investigations, studies, demonstrations, or training, or for reasons of national security." 42 U.S.C. § 7522(b)(1); s*ee, e.g.*, 40 C.F.R. §§ 85.1701 to 85.1716 (exemptions). Respondents have not claimed their vehicles are exempt from certification, and the exemptions do not apply.

[5] Respondents incorrectly state in their Motion to Dismiss that the "Act does not contain language that a manufacturer or importer is prohibited from 'causing any of the foregoing' or 'causing another to import.'" Mot. Dismiss at 10. Respondents overlook the first sentence of section 203(a) of the Act, which states: "The following acts *and the causing thereof* are prohibited . . . ." 42 U.S.C. § 7522(a) (emphasis added).

the foregoing acts.[6] 42 U.S.C. § 7522(a)(1); *see* 42 U.S.C. § 7547(d) (standards for nonroad vehicles shall be enforced in the same manner as standards for motor vehicles).

As explained in Complainant's Motion for Partial Accelerated Decision, the EPA has promulgated regulations governing the certification of the highway motorcycles identified in Counts 1 through 4 at 40 C.F.R. parts 85 and 86, and the nonroad recreational vehicles identified in Counts 5 through 10 at 40 C.F.R. parts 1051, and 1068. For certification, manufacturers must group their vehicles into engine families whose engines are expected to have similar emissions characteristics throughout their useful life. 40 C.F.R. § 86.420-78(a), 1051.230(a). To be classified in the same engine family vehicles or engines must be "identical" or "the same" in

[6] Section 203(a)(1)'s prohibition against vehicles that are not "covered by a" certificate of conformity ("COC"), rather than against vehicles that exceed emissions standards, reflects a deliberate choice made by Congress. When section 203 was first enacted in 1965, it prohibited the sale or importation of motor vehicles or motor vehicle engines not "in conformity with regulations prescribed under section 202," i.e., emissions standards. 89 Pub. L. No. 272 § 203(a)(1), 79 Stat. 992, 992–93 (Oct. 20, 1965). Manufacturers could apply for a determination that a new vehicle or engine complied with applicable standards. *Id.* § 206(a), 79 Stat. at 994. If such vehicle or engine were found to conform to required standards, a COC would be issued on such terms and for such period (not less than one year) as prescribed by the Secretary. *Id.* Any other new vehicle or engine sold by that manufacturer that was "in all material respects substantially the same construction as the test vehicle or engine for which a certificate has been issued" would "be deemed to be in conformity with" emissions standards. *Id.* § 206(b), 79 Stat. at 994. Certification was thus a safe-harbor under the Act, rather than an essential element of compliance.

In 1970, Congress shifted the focus to mandatory certification when it specifically amended section 203(a) to prohibit the sale or importation of any motor vehicle or motor vehicle engine "unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations prescribed" by the EPA. 91 Pub. L. No. 604, § 7(a)(1), 84 Stat. 1676, 1693 (Dec. 31, 1970) (amending § 203(a)(1)) (codified at 42 U.S.C. § 7522(a)(1)). Phrased more simply, it is illegal for any manufacturer to sell or offer to sell any new vehicle, or for any person to import any new vehicle, unless the vehicle or engine is covered by a COC.

specific respects including "the number . . . , location, volume, and composition" of catalytic converters they employ. 40 C.F.R. §§ 86.420-78(a)–(b)(6), 1051.230(a)–(b)(5).

To obtain a COC covering highway motorcycles, a manufacturer must submit an application to EPA identifying and describing the vehicles to be covered by the application, including a "description of their engine, emission control system and fuel system components." 40 C.F.R. §§ 86.416-80(a)(1)–(2)(i). The manufacturer selects a prototype test vehicle, also called an emission data vehicle ("EDV"), to represent the engine family described in the application during pre-certification emissions testing. 40 C.F.R. §§ 86.421-78(a), 86.427-78. All emission test data is included in the application. 40 C.F.R. § 86.431-78(a). If the application and test data demonstrate that the test vehicle meets the requirements of the Act, the EPA will issue a COC that "will cover all vehicles represented by the test vehicle . . . ." 40 C.F.R. § 86.437-78(a)(2).

To obtain a COC covering recreational vehicles, a manufacturer must submit an application to EPA for each engine family being certified. 40 C.F.R. § 1051.201(a). The application must "[d]escribe the engine family's specifications and other basic parameters of the vehicle's design and emission controls," explain how the emission controls operate, and "describe in detail all system components for controlling exhaust emissions," including the part number for each component described. 40 C.F.R. § 1051.205(a)–(b). The manufacturer selects a prototype EDV to represent the engine family during pre-certification emissions testing. 40 C.F.R. § 1051.235(a)–(b). The test data is included in the application. 40 C.F.R. § 1051.205(p). If the application and test data show that the engine family meets all legal requirements, the EPA will issue a COC for the engine family. 40 C.F.R. § 1051.255(a). The COC covers the vehicles

that "conform to the specifications described in the certificate and the associated application for certification." 40 C.F.R. § 1068.103(a).

The EPA issues COCs "upon such terms . . . as [it] may prescribe." 42 U.S.C. § 7525(a)(1). Both the highway motorcycle regulations and nonroad recreational vehicle regulations allow the EPA to issue a COC subject to terms and conditions. 40 C.F.R. §§ 86.437-78(a)(2), 1051.255(a). In this case, each COC the EPA issued to Respondents for the engine families identified in Counts 1 through 10 of the Amended Complaint states: "This Certificate covers only those vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the documentation required" by regulation to be included with a COC application. CX043–CX052. When interpreting similar language, the D.C. Circuit held that a difference is "material" if it "may reasonably be expected to affect emission controls." *United States v. Chrysler Corp.*, 591 F.2d 958, 960 (D.C. Cir. 1979); *see* Complainant's Mot. Partial Accel. Dec. at 31–33 (discussing *Chrysler*).

B. Respondents' Vehicles Were Not Covered by Certificates of Conformity and Were Imported or Introduced into Commerce in Violation of the Clean Air Act

As explained in detail in Complainant's Motion for Partial Accelerated Decision, Respondents manufactured and imported into the United States the 109,964 vehicles identified in the Amended Complaint, and labeled each as belonging to one of ten engine families. Complainant's Mot. Partial Accel. Dec., Attach. A at ii–v. However, each vehicle was equipped with a catalytic converter different from the one described in the COC application for its purported engine family. *Id.* at 26–27. Each vehicle therefore did not belong to the engine family

on its label. *See* 40 C.F.R. §§ 86.420-78(a)–(b)(6), 1051.230(a)–(b)(5) (vehicles must have identical catalytic converters to be in same engine family).

Further, catalytic converters are essential components in a vehicle's emission control system, whose performance depends on the design and content of the catalytic converter, and the specific application to which it is being applied. *See* Complainant's Mot. Partial Accel. Dec. at 9–10, 27–28. Changing the catalytic converter on a vehicle may reasonably be expected to affect the vehicle's emission control system *Id.* at 27. Each vehicle was therefore materially different from the design specifications described in the COC application for its purported engine family, and the vehicle was consequently not covered by the COC issued for the engine family. Because the vehicles were not covered by COCs, they could not lawfully be introduced into United States commerce. 42 U.S.C. § 7522(a)(1); 40 C.F.R. §§ 86.407-78(a), 1068.101(a)(1).

III. Argument

A. The Clean Air Act Prohibits the Sale or Importation of Uncertified Vehicles Regardless of Whether They Meet Emissions Standards

In their Motion to Dismiss, Respondents first argue that there can be no violation of the Act absent an exceedance of the emission standards promulgated under sections 202 and 213 of the Act, 42 U.S.C. §§ 7521 and 7547. Mot. Dismiss at 6–7, 11–14. Respondents' argument is undermined by the plain language of section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), which states:

> The following acts and the causing thereof are prohibited– (1) in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction or delivery for introduction, into commerce, or (in the case of any person . . .), the importation into the United States, of any new motor vehicle or new motor

> vehicle engine . . . unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations prescribed under this part . . . .

42 U.S.C. § 7522(a)(1). By its own terms, section 203(a)(1) does not list exceeding emission standards as an element of a Clean Air Act violation. Rather, the Act prohibits manufacturers from introducing into commerce, or any person from importing, any new vehicle unless the vehicle is covered by a COC issued under regulations promulgated by the EPA. Respondents are mistaken to argue the contrary.[7]

In a variation of their theme, Respondents argue that it would be arbitrary and capricious to find that a COC does not cover a vehicle different from that described in the application unless there is evidence that the difference causes the vehicle to exceed emission standards.[8] Mot.

---

[7] On page 7 of their Motion to Dismiss, Respondents refer to 42 U.S.C. § 7521(a)(4), which bars the use of any emission control device, system, or element of design that "will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function." 42 U.S.C. § 7521(a)(4)(A). This provision does not appear to be relevant to this matter.

[8] On pages 11 to 14 of their Motion to Dismiss, Respondents appear to argue, as they do on pages 6 to 7, that the regulations are or are being applied in a matter that is arbitrary, capricious, or not otherwise in accordance with the Clean Air Act. In making their argument, Respondents cite the U.S. Supreme Court's opinion in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

The *Michigan* case concerned the EPA's decision to promulgate regulations governing the emission of hazardous air pollutants ("HAPs") from fossil fuel-fired electric utility steam generating units, i.e., power plants. *Michigan*, 135 S. Ct. at 2705. Section 112(n)(1)(A) of the Act provides that before issuing regulations governing the emission of HAPs from electric utility steam generating units, the EPA must first conduct a study of the health hazards posed by HAPs emissions from the units and determine whether such regulations are "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). The issue before the Court was whether it was arbitrary and capricious for EPA to determine that it was not required to consider costs when determining whether regulation was "appropriate and necessary" in the first instance, and instead defer consideration of costs to when it promulgated specific emissions standards. *Michigan*, 135 S. Ct. at 2709; *see Michigan*, 135 S. Ct. at 2714–17 (Kagan, J., dissenting). It is not clear how the litigation in *Michigan*, which concerned a narrow question of statutory interpretation in the

Dismiss at 7, 9–11. As explained more fully in part II.A of this Response, and in Complainant's Motion for Partial Accelerated Decision, EPA's regulations and the terms printed on each COC's face both make clear that a COC only covers vehicles that are materially identical to the vehicle described in the application for the COC. A difference is material if it "may reasonably be expected to affect emission controls." *See* Complainant's Mot. Partial Accel. Dec. at 30–33 (quoting *Chrysler Corp.*, 591 F.2d at 960).

To the extent Respondents are arguing that the regulations governing how vehicle and engine manufacturers certify their products are arbitrary, capricious, or not consistent with EPA's statutory authority, their challenge is untimely and in the wrong forum. Challenges to regulations promulgated under the Act must be filed with the United States District Court of Appeals for the District of Columbia within sixty days of the date the regulations are published in the Federal Register. 42 U.S.C. § 7607(b)(1). Further, "'challenges to rulemaking are rarely entertained in an administrative enforcement proceeding . . . and review of a regulation will not be granted absent the most compelling circumstances.'"[9] *In re Woodkiln Inc.*, 7 E.A.D. 254, 270 n.16 (EAB 1997) (quoting *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994)). Respondents have not identified any extraordinary or compelling circumstances to overcome the presumption of non-reviewability.

---

context of a legislative rulemaking for stationary sources of air pollution, is relevant to this action for enforcement brought under the Act's provisions for mobile sources of air pollution.

Leaving Respondents' reliance on *Michigan* aside, the substance of Respondents' argument is addressed in part III.A of this Response.

[9] As an example of a compelling circumstance, the Board described a situation where a regulation had been held invalid by a federal court, but not yet repealed. *In re Echevarria*, 5 E.A.D. 626, 635 n.13 (EAB 1994). No similar circumstance is present here.

Even if Respondents could obtain the type of review they seek, it would not help their position. Respondents cite section 206(a)(1) of the Act, 42 U.S.C. § 7525(a)(1). This section tasks the EPA with administering a certification program to ensure that new vehicles and engines conform to the emissions standards set under section 202 of the Act, 42 U.S.C. § 7521. Section 206(b) authorizes the EPA to test vehicles and engines being manufactured after certification to ensure they continue to conform, and section 206(d) directs the EPA to issue regulations establishing "methods and procedures for making tests under" the section. 42 U.S.C. § 7525(b)(1), (d). On this authority the EPA has "established regulatory requirements that motor vehicle manufacturers must follow in order to obtain a certificate of conformity." 46 Fed. Reg. 50464, 50464 (Oct. 13, 1981) (included in the record as CX178 at EPA-002420). Regulations that require manufacturers applying for a COC to truthfully and accurately describe the vehicles the COC will cover, and the EDV chosen to represent them, are patently reasonable. Such regulations ensure the EPA acts on reliable information, and safeguard the integrity of the certification program. They further ensure that COCs are issued on the basis of accurate data representing the hundreds or thousands of mass-produced vehicles the COC will cover.

Likewise, it is self-evidently *unreasonable* for a manufacturer to claim that a COC covers a vehicle different from the vehicles for which the COC was issued. If a manufacturer needs to change their production vehicles to be different from those described in the COC application, the regulations provide a process for amending the application. 40 C.F.R. §§ 86.438-78, 86.439-78, 1051.225. The manufacturer must notify the EPA in advance of the change, and the EPA may order submission of emissions test data to show that the modified vehicles will continue to meet

emissions standards. 40 C.F.R. §§ 86.439-78(c)(1), 1051.225(c). [10] When a manufacturer claims that a COC covers a vehicle different from the vehicle described in the COC application without going through the amendment process, there is no assurance that the different vehicle conforms to emissions standards.

Complainant alleged in the Amended Complaint that Respondents have manufactured and introduced into commerce or imported into the United States 109,964 vehicles that are not covered by COC in violation of section 203(a)(1) of the Act, because the vehicles do not conform in all material respects to the design specifications in the COC application. *See* Amd. Compl. at ¶¶ 40–134. Complainant has stated a viable legal theory and a valid claim. *See Bug Bam, Prod., LLC*, FIFRA-09-2009-0013, 2010 EPA ALJ LEXIS 8, at **3–4.

Respondents essentially repeat the arguments concerning the Act's interpretation from their Motion to Dismiss in their Motion for Accelerated Decision. Mot. Accel. Dec. at 4–5. For the reasons already provided, these arguments lack merit. Respondents additionally argue that "Complainant's contention that differences in a catalytic converter's active material content and concentration in and of itself is a violation . . . fails as a matter of law." *Id.* at 5. This is a strawman argument. Complainant has not made this argument, and does not do so now. The EPA has not prescribed specific standards for the content of catalytic converters. However,

[10] Page 4 of Respondents' Motion to Dismiss refers to the regulations that allow running changes to production line vehicles without prior EPA approval. Respondents neglect to explain that manufacturers must notify the EPA of any change prior to implementation, and that the notification "shall include a full description of the addition or change and any supporting documentation" for the manufacturer's determination that the new or changed vehicle will continue to satisfy emissions standards. 40 C.F.R. §§ 86.439-78(a)(2), 1051.225(b)(1)–(3). Respondents also neglect to explain that the EPA may order additional testing before approving the change, and that the EPA may require the manufacturer to recall any vehicles affected by the change if approval is ultimately denied. 40 C.F.R. §§ 86.439-78(d), 1051.225(e).

Respondents committed themselves to standards for catalytic converters when they submitted applications to the EPA stating that they would manufacture their vehicles using catalytic converters with specific physical and chemical characteristics. Respondents failed to meet the standards they set for themselves. The vehicles are therefore not covered by the COCs the EPA issued, and consequently were imported or introduced into commerce in violation of the Act.

B. Respondents' Vehicles Were Manufactured with Different Catalytic Converters from Those Described, and Therefore Are Not Covered by COCs

The second principal argument in Respondents' Motion to Dismiss is that Complainant has misapplied the law and that Respondents' vehicles are in fact covered by the COCs. Mot. Dismiss at 7–9. Respondents repeat this argument on page 6 of their Motion for Accelerated Decision. Respondents note that current regulation 40 C.F.R. § 86.437(a)(2)(iii) provides that a COC "will cover all vehicles represented by the test vehicle" (the prototype EDV) used to gather emissions data for certification, and contend that Complainant has not alleged that Respondents used catalytic converters in the EDVs materially different from those found on the vehicles inspected. Mot. Dismiss at 7–8; Mot. Accel. Dec. at 6. Respondents then state that the prototype EDVs used to obtain the emissions data included in each COC application were equipped with catalytic converters identical to those on Respondents' production vehicles, including the vehicles inspected by EPA. Mot. Dismiss at 9. Respondents argue that under 40 C.F.R. § 86.437-78(a)(2)(iii), their vehicles are therefore covered by COCs because they conformed to, and were represented by, the EDVs used for certification. *Id.*

In their own words, Respondents state:

> Each COC application relevant to this matter lists a third party manufacturing company as the manufacturer of each catalytic

> converter in question. These catalytic converters were purchased [from] a third party manufacturer in China, in the same condition as the catalytic converter that was placed on the test vehicle, which was then tested for emissions pursuant to the certification procedure. Complainant has not alleged that Respondents used a catalytic converter in the test vehicle, which was materially different from the one that was later inspected by EPA. . . .
>
> Given that there is no allegation that the tested vehicle, i.e. EDV did not contain the same active material concentration in the catalytic converters later tested, and *because the EDV that passed the emissions standards contained a catalytic converter which conformed to the catalytic converter on imported vehicles,* there has been no violation . . . .

Mot. Dismiss at 9 (emphasis added).

With these statements, Respondents admit that the EDVs Respondents used to certify each engine family contained catalytic converters which conformed to the catalytic converters equipped on "imported vehicles." Respondents are referring to the "imported vehicles" identified in the Amended Complaint. The record shows the imported vehicles are equipped with catalytic converters that do not conform to the specifications provided in the corresponding COC applications.[11] The factual admission excerpted above is material to Respondents' defense because if Respondents are correct, it may form the basis for a complete defense to Counts 1 through 4. This admission also specifically cuts against Respondents' interest in this case

[11] Respondents' factual admission contradicts statements Respondents made to the EPA in their COC applications affirming that all vehicles were equipped with catalytic converters matching the specifications provided in the applications. *See, e.g.,* CX001 at EPA-000004−05, EPA-000011 (stating that vehicles will be materially identical to description in application, and describing catalytic converters to be used). Complainant notes that the submission of false or incomplete information in a COC application may be grounds for suspending, revoking, or voiding the COC *ab initio*. 40 C.F.R. §§ 86.442-78(a)(1)−(c), 1051.255(c)(2)−(e). Respondents have apparently made false statements about the composition of their vehicles' catalytic converters in their COC applications or in their Motion to Dismiss.

because it is an admission that the inspected vehicles represent all the vehicles identified in the Amended Complaint.

Given the potential import of Respondents' stipulation, Complainant requests that the Tribunal treat it as a judicial admission removing the factual matter from controversy.[12] *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (formal concessions made by a party or its counsel may bind the party and withdraw a fact from contention); *see Masson v. New Yorker Magazine*, 501 U.S. 496, 512 (1991) (statement made against interest are credible "because we assume 'that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true'") (quoting Advisory Committee's Notes on Fed. Rule Evid. 804(b)(3), 28 U. S. C. App., p. 789).

Although the Respondents attempt to evade liability when they insist that the catalytic converters on the inspected vehicles (and all imported vehicles) match the catalytic converters on the corresponding EDVs, their attempt fails. Governing law directs that whether a vehicle is covered by a COC is determined by whether the vehicle conforms to the specifications in the application for that COC—not whether the vehicle conforms to the EDV. Respondents' legal argument that there is COC coverage based on the newly admitted facts therefore falls flat. A COC may be issued based upon terms deemed necessary to assure the vehicles will meet the requirements of the Act. 40 C.F.R. §§ 86.437-78(a)(2)(ii), 1051.255(a). The COCs for each of

[12] The Texas Disciplinary Rules of Professional Conduct prohibit Respondents' counsel from knowingly making a false statement of material fact to this Tribunal. Tex. Disciplinary Rules Prof'l Conduct R. 3.03(a)(1), 4.01(a) (available at https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=27271) (last visited December 20, 2016). Complainant infers that, at minimum, Respondents' counsel has a good-faith basis for believing these facts to be true.

the engine families identified in the Amended Complaint state on their face that they cover "only those vehicles which conform, in all material respects, to the design specifications . . . described in the documentation required" for certification. *See* CX043–CX052. The Tribunal therefore does not need to reach the regulations in order to find that Respondents' vehicles are not covered by the COCs.

Turning to the regulations, Respondents base their defense on 40 C.F.R. § 86.437(a)(2)(iii), which applies only to the highway motorcycles identified in Counts 1 through 4 of the Amended Complaint.[13] *See* 40 C.F.R. § 86.401-2006 (subpart applies to gasoline-fueled highway motorcycles). Respondents' argument ignores the context in which the regulation is situated. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (interpretation of statutory language depends on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). As described in part II.A of this Response, the regulations governing the certification of highway motorcycles require a COC application to include a detailed description of "the vehicles covered by the application," including the prototype vehicle to be used for the EDV. 40 C.F.R. §§ 86.416-80(a)(1)–(2)(i), 86.421-78(a), 86.427-78. Vehicles in an engine family must be equipped with identical catalytic converters, absent explicit EPA approval to the contrary. 40 C.F.R. § 86.420-78(a)–(b)(6).

While 40 C.F.R. § 86.437(a)(2)(iii) does state that a COC issued on the basis of test data will cover all vehicles represented by the test vehicle, the regulations also require the test vehicle to be accurately described in the application. Hence, elsewhere it says that EPA enforcement

[13] The nonroad vehicles identified in Counts 5 through 10 of the Amended Complaint are regulated under 40 C.F.R. parts 1051 and 1068.

officers must be admitted to manufacturing facilities to allow the EPA "to determine whether or not production motorcycles conform in all material respects to the design specifications . . . described in the application for certification," 40 C.F.R. § 86.441-78(c), or that vehicles produced before a COC is issued may be covered if they "conform in all material respects to the vehicles . . . described in the application for the certificate of conformity." 40 C.F.R. § 85.2305(b)(1).

By Respondents' own admission, their vehicles, including their EDVs and imports, were equipped with catalytic converters different from those described in the relevant COC applications. Both by regulation and by the terms of the COC itself, each COC only covers vehicles that are materially identical to the vehicles described in the COC application. Respondents' vehicles are therefore not covered by the COCs.

C. Evidence in the Record, Including Respondents' Own Statements, Shows That All 109,964 Vehicles Identified in the Complaint Were Manufactured with Catalytic Converters Different from Those Described

In their Motion for Accelerated Decision, Respondents argue there is no evidence that all 109,964 vehicles identified in the Amended Complaint were equipped with catalytic converters different from those described in the relevant COC applications. Mot. Accel. Dec. at 6–7. Complainant disagrees. In their Motion to Dismiss, Respondents state that their imported vehicles, including the vehicles inspected by the EPA, were equipped with catalytic converters that were in the same condition as those on the EDVs used for certification. Mot. Dismiss at 9. Respondents explain that they manufactured their vehicles using common catalytic converters purchased from a third-party supplier, and that the catalytic converters used on the imported

vehicles and the EDVs conformed to each other. *Id.* This is consistent with statements Respondents made in their COC applications.

In each COC application, Respondents describe how the vehicles in the engine family will be identical in all material respects to the vehicles described, be assembled at a factory in China from uniform parts, and be shipped to the United States in their finished, unaltered condition. *See e.g.*, CX001 at EPA-000005 (representative application). Each application describes the engine family's emissions-related parts. *See, e.g.*, *id.* at EPA-000011. This includes a description of the engine family's catalytic converter, identifying the catalytic converter's manufacturer, part number, type, configuration, location, physical dimensions, substrate composition, precious metals loading, and precious metals ratio. *See, e.g.*, *id.*

The COC applications represent that the vehicles will be mass produced using parts that are identical, at least insofar as they are made by the same third-party manufacturer to the same specifications, ensuring the uniformity on which the certification program depends. This is consistent with Respondents' description of their manufacturing process in their Motion to Dismiss, where they describe how their vehicles were equipped with identical catalytic converters provided by their third-party supplier. Mot. Dismiss at 9. From this, one would reasonably expect that most or all of Respondents' production vehicles were equipped with catalytic converters matching the descriptions in the COC applications.

Complainant tested catalytic converters taken from thirty-five of Respondents' vehicles; none met the precious metals ratio descriptions in the COC applications. *See* Complainant's Mot. Partial Accel. Dec., Attach. B. Complainant's expert, Dr. John Warren, holds a Ph.D. in statistics and has been employed by the EPA as a statistician for over thirty years. CX179 at EPA-002428.

Dr. Warren analyzed the results of Complainant's testing using the binomial probability distribution, which assumes that a test can have only two outcomes, success or failure. *Id.* at EPA-002429–30. Dr. Warren defined a success here as a test showing that the catalytic converter contained precious metals in the ratio described in an applicable COC application, and a failure as any result showing otherwise. *Id.* at EPA-002430. Based on the string of thirty-five failures in thirty-five tests, Dr. Warren calculated that at a 95% confidence interval, the probability of a successful outcome for any vehicle from an engine family identified in the Amended Complaint would be between 0 and 0.100, i.e., not more than 10%. *Id.* at EPA-002431. This shows that a catalytic converter taken from any vehicle identified in the Amended Complaint will not be the catalytic converter described in the COC application. CX179 at EPA-002431–32.

The catalytic converters EPA tested came from vehicles manufactured in 2012, 2013, 2015, and 2016.[14] Six were taken from vehicles randomly selected from entries inspected at the port.[15] Another six were taken from vehicles randomly selected during an inspection at Respondents' warehouse in November 2013.[16] Twenty-three were randomly selected for testing in response to EPA's Request for Information dated February 6, 2014, which specifically

[14] CX061 at EPA-000663; CX064 at EPA-000725; CX087 at EPA-001004–14; CX100 at EPA-001263; CX102 at EPA-001309l; CX104 at EPA-001353; CX106 at EPA-001396; CX110 at EPA-001479; CX112 at EPA-001520; CX114 at EPA-001560; CX116 at EPA-001601; CX118 at EPA-001640; CX122 at EPA-001715; CX141 at EPA-001925; CX145 at EPA-001934; CX149 at EPA-001960.

[15] CX061 at EPA-000663; CX064 at EPA-000725; CX081 at EPA-000991; CX084–CX086; CX141 at EPA-001918–19; CX145 at EPA-001934; CX149 at EPA-001960; CX180 at EPA-002435–36.

[16] CX087 at EPA-001004–14; CX088 at EPA-001070; CX089 at EPA-001088–99; CX180 at EPA-002436–37.

directed Respondents to test "representative and randomly selected vehicles" from the engine families identified in Counts 1 through 8.[17]

Every vehicle had a catalytic converter different from the certified design. It is very unlikely that was the result of chance. CX179 at EPA-002431. Respondents themselves have provided the explanation. They manufactured the vehicles in each engine family using catalytic converters provided by a third party that were materially identical to each other, Mot. Dismiss at 9, but were different from what Respondents' described in their applications.

There is no genuine dispute that record evidence shows all 109,964 vehicles identified in the Amended Complaint were manufactured with catalytic converters different from the catalytic converters described in the relevant COC applications. Respondents' Motion for Accelerated Decision should be denied on this point, and Complainant's Motion for Partial Accelerated Decision should be granted.

D. T-Group and JCXI are manufacturers subject to the Clean Air Act.

Respondents state that T-Group and JCXI did "manufacture the original vehicles." This constitutes an admission of a material element of the Complaint. Respondents argue, however, that they are nonetheless not "manufacturers" subject to section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), because they did not apply for COCs or import the vehicles identified in the Amended Complaint. Mot. Dismiss at 9–10. Respondents also note that there is no prohibition against the *production* of vehicle or engines without a certificate of conformity, and that neither

[17] CX094 at EPA-001120, EPA-001126; CX096 at EPA-001218–19, EPA-001225–26; CX098 at EPA-001230; CX180 at EPA-002437–38.

T-Group nor JCXI manufactured the catalytic converters equipped on their vehicles. *Id.* at 10–11.

As explained on pages 29 and 30 of Complainant's Motion for Partial Accelerated Decision, Respondents' argument is inconsistent with the plain language of the Act. In brief, the Act defines a "manufacturer" as "any person engaged in the *manufacturing or assembling of new motor vehicles* . . . ." 42 U.S.C. § 7550(1); *see also* 40 C.F.R. ¶ 1051.801. By their own admission, Respondents T-Group and JCXI are "manufacturers" within the meaning of the Act. *See* Mot. Dismiss at 10 ("All Taotao Group and JXCI [sic] did was manufacture the original vehicles . . . ."). T-Group and JCXI introduced the vehicles into United States commerce by delivering them to T-USA, its appointed agent, for distribution.[18] Because the vehicles were not covered by COCs, T-Group and JCXI violated section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1). Whether T-Group and JCXI applied for the COCs,[19] manufactured the catalytic converters, or themselves imported the vehicles, is irrelevant. Respondents' Motion to Dismiss the claims against T-Group and JCXI should be denied.

E. Any Finding Concerning Economic Benefit Would Be Premature and Inappropriate

In their Motion for Accelerated Decision, Respondents argue there is no evidence they obtained an economic benefit from their violations. Respondents' Mot. Accel. Dec. at 7–8.

[18] CX001 at EPA-000018; CX002 at EPA-000056; CX003 at EPA-000097; CX004 at EPA-000133; CX005 at EPA-000171; CX006 at EPA-000207; CX007 at EPA-000239; CX008 at EPA-000272; CX009 at EPA-000308; CX010 at EPA-000341.

[19] T-Group and JCXI did apply for the COCs jointly with T-USA. CX001 at EPA-000006; CX002 at EPA-000042; CX003 at EPA-000085; CX004 at EPA-000121; CX005 at EPA-000156; CX006 at EPA-000192; CX007 at EPA-000225; CX008 at EPA-000257; CX009 at EPA-000293; CX010 at EPA-000326.

Respondents therefore request a finding that they did not receive *any* economic benefit as a matter of law. *Id.* A ruling on economic benefit would be premature because on November 21, 2016, Complainant sent Respondents a letter requesting information and documentation that would allow Complainant to assess Respondents' claim that any economic benefit they received was *de minimis*. CX174; Respondents' Joint Prehearing Exchange at 7.

A ruling on economic benefit would be inappropriate because it is Respondents who bear the burden of establishing that they received no economic benefit as a result of their noncompliance. Under the Consolidated Rules, Complainant "bears the burden of proof on the appropriateness of the overall civil penalty," but "does not bear a separate burden with regard to each of the statutory factors." *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 320 (EAB, 2000) (citing *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994)). Complainant "must show that it considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors." *Id.* The burden then shifts to the respondent, who must come forward with evidence to rebut the Complainant's analysis. *Id.*

Here Complainant calculated the proposed penalty using the EPA's Clean Air Act Mobile Source Civil Penalty Policy ("Penalty Policy"), using the Penalty Policy's rule of thumb method to account for Respondents' economic benefit. Complainant's Initial Prehearing Exchange at 9–10. Complainant used the rule of thumb method because information about Respondents' actual economic benefit is predominantly in Respondents possession or control. Complainant's Rebuttal Prehearing Exchange at 5–6. Further, the rule of thumb method is generally appropriate for cases involving missing emission controls, and likely yields a conservative estimate of the actual economic benefit. *Id.* at 5–7.

Because Complainant did consider economic benefit when calculating the proposed penalty, the burden is on Respondents to come forward with credible evidence supporting their claim that they received no benefit from the violations. Respondents' Motion for Accelerated Decision on the issue of economic benefit should therefore be denied.

Conclusion

Complainant requests that its motion to supplement the record with the Declarations of John Warren and Amelie Isin, attached to this Response as exhibits CX179 and CX180, be granted.

The EPA's certification regulations are consistent with the Act, as is the manner in which they are being applied. When manufacturers apply for a COC, those regulations require the application to describe the vehicles that will be covered. A COC does not cover vehicles manufactured with emissions controls different from those described in the application. The Act prohibits manufacturers from introducing into commerce, and any person from importing, any new vehicle not covered by a COC. Complainant has stated a cognizable claim under the Act, and requests that Respondents' Motion to Dismiss be denied.

Evidence in the record and facts disclosed in Respondents' Motion to Dismiss show that Respondents did manufacture and introduce into commerce or import 109,964 vehicles that were not covered by COCs, in violation of section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1). Respondents have not come forward with credible evidence showing that they did not receive an economic benefit from these violations. Complainant requests that Respondents' Motions to Dismiss and Motion for Accelerated Decision both be denied, and Complainant's pending motion for Partial Accelerated Decision be granted.

Respectfully Submitted,

12/22/16
Date

Robert G. Klepp, Attorney Adviser
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., N.W.
William J. Clinton Federal Building
Room 1111A, Mail Code 2242A
Washington, DC 20460
(202) 564-5805
klepp.robert@epa.gov

12/22/16
Date

Edward Kulschinsky, Attorney Adviser
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., NW
William J. Clinton Federal Building
Room 1142C, Mail Code 2242A
Washington, DC 20460
p. (202) 564-4133
kulschinsky.edward@epa.gov

CERTIFICATE OF SERVICE

I certify that the original and two copies of the foregoing 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 ("Response") 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 Motion were sent this day by certified mail, return receipt requested, for service on Respondents' counsel at the address listed below:

William Chu, Esq.
The Law Offices of William Chu
4455 LBJ Freeway, Suite 909
Dallas, TX 75244

1/3/2017
Date

Edward Kulschinsky, Attorney Adviser
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., NW
William J. Clinton Federal Building
Room 1142C, Mail Code 2242A
Washington, DC 20460
p. (202) 564-4133
f. (202) 564-0069
kulschinsky.edward@epa.gov