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 FOR ISSUANCE OF SUBPOENAS

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 for Issuance of Subpoenas (the "Motion"), which was transmitted to Complainant and filed on June 23, 2017. In the Motion, Respondents request the Presiding Officer issue subpoenas to six individuals to compel their testimony at the penalty hearing in this matter: Granta Nakayama; Jacqueline Robles Werner; Amelie Isin; Cleophas Jackson; Emily Chen; and Byron Bunker. Respondents' request does not satisfy the criteria for issuance of subpoenas set forth in 40 C.F.R. § 22.21(b), and should be denied.

I. Legal Standard

The Clean Air Act (the "Act") authorizes the EPA Administrator or his delegee to issue subpoenas for the attendance and testimony of witnesses or the production of relevant information in connection with an administrative enforcement proceeding under the Act. 42 U.S.C. § 7607(a). The Consolidated Rules that govern this proceeding provide that the

Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena at a hearing, if authorized under the applicable Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced. 40 C.F.R. § 22.21(b).

II. Respondents' Subpoena Requests

Respondents fail to show grounds and necessity for issuance of subpoenas for any of the individuals identified in their motion, and further fail to show the materiality or relevance of the evidence to be adduced through such individuals to justify such subpoenas. The Motion's failure is specified as follows:

A. *Amelie Isin.*

Respondents in their Motion simply state that Ms. Isin is listed by Complainant as the witness who may testify about the calculation of the proposed civil penalty in this matter. *See* Mot. at 1. Complainant intends to call Ms. Isin at the penalty hearing, and Respondents will have opportunity to cross-examine her. Thus, there is no need for the Presiding Officer to issue a subpoena to compel her attendance.

B. *Granta Nakayama and Jacqueline Robles Werner.*

Respondents state in their Motion that "Mr. Nakayama and Ms. Werner appear to be the authors of the Clean Air Act Mobile Source Penalty Policy ("Penalty Policy"), which Complainant has relied on in calculating its proposed penalty assessment." Mot. at 1. They acknowledge that Complainant has listed Ms. Isin as the witness who may testify about the calculation of the proposed civil penalty in this matter. Mot. at 1. However, they then argue that they "must have the opportunity to question the actual authors of the Penalty Policy to ensure that Ms. Isin's calculations adequately apply all of the factors of the Penalty Policy, and whether

the calculations of the proposed penalty as well as the application of the Penalty Policy is appropriate." Mot. at 1-2.

Complainant already has requested through motion that this Tribunal exclude Mr. Nakayama and Ms. Werner from testifying in this matter. *See* Complainant's Motion *in Limine* to Exclude Evidence and Testimony, at 3-5 (filed June 23, 2017). Complainant incorporates and renews its objections made in its June 23, 2017 motion in this response to Respondents' Motion.

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as evidence: (a) "[that] has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The Advisory Committee's note adds that "[p]roblems of relevancy call for an answer to the question of whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence." The Environmental Appeals Board has stated that "probative value" denotes the tendency of a piece of information to prove a fact that is of consequence in the case. *See In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 622 (EAB 1991) (*quoting* McCormick on Evidence § 185, at 542 (3rd Ed. 1984)) ("[E]vidence that affects the probability that a fact is as a party claims it to be has probative force.").

Respondents' Motion provides no reason why testimony from Mr. Nakayama and Ms. Werner is necessary to adduce whether Complainant's penalty calculation "adequately applying all of the factors of the Penalty Policy or whether "the calculations of the proposed penalty as well as the application of the Penalty Policy is appropriate." Mot. at 2. Testimony from Mr. Nakayama or Ms. Werner would not have any probative value to prove a fact that bears on the appropriateness of the proposed penalty. Respondents fail to identify what personal knowledge a former Assistant Administrator and an Associate Director from EPA management would have

about this matter that would be material or probative to justify the burden imposed on these individuals by compelling their presence at the hearing. *See In re 1836 Realty Corp.*, 1999 EPA ALJ LEXIS 113 at **3-7 (ALJ, Apr. 8, 1999) (motion *in limine* granted to exclude EPA Regional Administrator as a witness for Respondent given lack of demonstration such Agency management official had personal knowledge of the facts to warrant calling him as a witness); *see also* Fed. R. Evid. 602.

Respondents rely on *In re John A. Biewer Co.*, 2009 EPA ALJ LEXIS 19 (ALJ, Dec. 23, 2009), as authority for the proposition that they must have an opportunity to question the primary author of the Penalty Policy. Their reliance is misplaced. In *John A. Biewer*, the issue the presiding officer addressed, in ruling against the complainant's motion for accelerated decision on penalty, was whether the respondent in that case was entitled to an evidentiary hearing on the appropriateness of a proposed penalty. The motion was denied based on the material facts in dispute and the right to cross-examine EPA's penalty witness. The presiding officer in *John A. Biewer* stated "that a respondent has a right to cross-examine the author *who applied the penalty policy to a particular alleged violation.*" *Id.* at *50.

In the case at hand, Complainant does intend to call Ms. Isin, the lead investigator in the matter, to testify at the penalty hearing concerning the calculation of the proposed penalty and she will be subject to cross-examination by counsel for Respondents. The Penalty Policy goes into lengthy explanation as to each factor to be considered when calculating a penalty under such Policy and how each factor is to be applied. The Presiding Officer will clearly be able to determine for herself whether every factor of the Penalty Policy was adequately applied by Complainant in its proposed penalty calculation.

It appears that Respondents are seeking testimony from Mr. Nakayama and Ms. Werner to make legal or policy argument with respect to the Penalty Policy. Such testimony has no significant probative value as evidence relevant to penalty determination. *See Chautauqua,* 3 E.A.D. at 622-23 (denial of request for discovery on complainant for information on purpose and legal basis concerning an Agency penalty policy). Further, as attorney management officials of an EPA law enforcement office who participated in approving Agency adoption of the Penalty Policy, any testimony from these individuals would be rife with deliberative process and other privilege issues. *See id.* at 626 (predecisional Agency documents concerning development of an Agency penalty policy protected from disclosure by deliberative process privilege).[1] Finally, if Respondents are seeking to compel these individuals to provide their personal opinions concerning Complainant's application of the Penalty Policy in calculating the proposed penalty, Respondents fail to explain how such opinions could be admissible as evidence. *See* Fed. R. Evid. 701 (opinion testimony by lay witness).

C. *Cleophas Jackson* and *Emily Chen.*

At the outset Complainant notes that Respondents have not specifically identified either Mr. Jackson or Ms. Chen as potential witnesses in their prehearing exchange, and they have not provided a summary in their prehearing exchange of these individuals' expected testimony if called by Respondents. Such is the threshold requirement for admissibility of evidence under the Consolidated Rules. *See* 40 C.F.R. § 22.19(a)(1). This Tribunal has further ordered that any supplements to a Party's prehearing exchange shall be filed with an accompanying motion to

[1] It should be noted that Ms. Werner, as an Associate Director of the Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is within Complainant's management chain supervising the litigation efforts of Complainant's counsel in this case. It would be extremely awkward, not to mention likely counterproductive to Respondents' defense, to compel counsels' manager to testify as a witness against Complainant.

supplement the prehearing exchange, which Respondents have failed to do with these two individuals. *See* Hearing Notice at 1-2 (May 9, 2017) and Order on Respondents' Motion for Continuance of the Hearing at 2 (June 27, 2017).

Notwithstanding the failure to properly seek by way of motion to supplement their prehearing exchange, Respondents in their Motion state that "Mr. Jackson and Ms. Chen have first-hand knowledge regarding Respondents' various efforts to achieve compliance and remedy harm, if any" and further state that their "testimony is crucial to the calculation of penalties." Mot. at 2. Yet, Respondents appear to be well stocked to address these issues with their own witnesses, as Respondents have identified in their initial prehearing exchange their own company officials that they state are expected to testify regarding, for example, efforts taken and money spent to achieve compliance (David Garibyan, Taotao USA, Inc.), and remedying any effects of noncompliance (Jackie Wang, Taotao USA, Inc.). *See* Respondents' Revised Joint Prehearing Exchange at 1-2. Respondents also provided proposed evidentiary exhibits that Respondents contend evidence Respondents' steps to achieve compliance. *See* Respondents' First Motion to Supplement Prehearing Exchange at 6.

Respondents fail to articulate any plausible reason why compelling the presence of Mr. Jackson or Ms. Chen at hearing is "crucial" to Respondents' showing of its efforts to achieve compliance and remedy harm when they already plan to have two witnesses testify at hearing and provide documentary evidence on these subjects. Further, Respondents fail to explain why they think adducing Mr. Jackson's or Ms. Chen's particular testimony at hearing would be relevant or material to whatever points concerning efforts to achieve compliance or remedy harm that Respondents want to make at hearing.

D. *Byron Bunker.*

Respondents seek to subpoena Byron Bunker, Director of the Compliance Division, Office of Transportation and Air Quality, as "a rebuttal witness," without further justification. Mot. at 2. No party has identified Mr. Bunker as a potential witness in their prehearing exchanges. As with Mr. Jackson and Ms. Chen, if Respondents propose to call Mr. Bunker, they have failed to properly seek by way of motion to supplement their prehearing exchange with his name and a summary of his anticipated testimony in accordance with the Consolidated Rules and this Tribunal's Orders. Further, as a high-ranking EPA management official, any testimony Respondents wish to elicit from Mr. Bunker likely lacks relevance or materiality, and is likely precluded on the basis of privilege. *See* 1836 Realty Corp. at **4-5 (there needs to be "extraordinary circumstances that would overcome a presumption against having…a high level EPA official [] testify at hearing").

Conclusion

Respondents' Motion does not satisfy the criteria under the Consolidated Rules for this Tribunal to take the extraordinary measure of issuing administrative subpoenas to the six individuals identified in their Motion. For each individual, Respondent has not made a "showing of the grounds and necessity" for a subpoena, and "the materiality and relevancy of the evidence to be adduced" from eliciting testimony from each individual through subpoena. 40 C.F.R. § 22.21(b). In addition, for Agency personnel not within the Washington D.C. area who are not otherwise expected to testify at the penalty hearing, a subpoena to testify will impose significant burdens on both the Agency and the individuals who will have to travel to attend the hearing. A subpoena issued to Mr. Nakayama, who currently does not work with the Agency and is engaged in his own private life and work, would be particularly burdensome to Mr. Nakayama, and no

justification is made in the Motion showing that the importance of eliciting testimony at hearing outweighs the burden imposed. For these reasons, Complainant respectfully requests that the Motion be denied in its entirety

Respectfully Submitted,

7/10/17
Date

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CERTIFICATE OF SERVICE

I certify that the foregoing Response to Respondents' Motion for Issuance of Subpoenas in the Matter of Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System.

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

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I certify that an electronic copy of the foregoing Response was sent this day by e-mail to the following e-mail addresses for service on Respondents' counsel: William Chu at wmchulaw@aol.com; Salina Tariq at stariq.wmchulaw@gmail.com; and David Paulson at dpaulson@gmail.com.

7/10/17
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